No. _____

In the
Supreme Court of the United States

STERLING ATKINS, JR.,
Petitioner.
v.
JEREMY BEAN, Warden, et. al.,
Respondent.

On Petition for Writ of Certiorari to the
Ninth Circuit Court of Appeals

APPENDICES

CAPITAL CASE

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APPENDIX A

Atkins v. Bean

United States Court of Appeals for the Ninth Circuit

June 26, 2024, Argued and Submitted, Seattle, Washington; December 2, 2024, Filed

No. 20-99008

Reporter
122 F.4th 760 *; 2024 U.S. App. LEXIS 30332 **; 2024 WL 4926797

STERLING ATKINS, Petitioner-Appellant, v. JEREMY BEAN, Warden; STATE OF NEVADA ATTORNEY GENERAL'S OFFICE, Respondents-Appellees.

Subsequent History: Stay granted by *Atkins v. Bean, 2024 U.S. App. LEXIS 30363 (9th Cir., Dec. 2, 2024)*

Rehearing denied by, En banc, Rehearing denied by *Atkins v. Bean, 2025 U.S. App. LEXIS 4527 (9th Cir., Feb. 26, 2025)*

Prior History: [**1] Appeal from the United States District Court for the District of Nevada. D.C. No. 2:02-cv-01348-JCM-BNW. James C. Mahan, District Judge, Presiding.

Atkins v. Gittere, 2020 U.S. Dist. LEXIS 121991, 2020 WL 3893628 (D. Nev., July 10, 2020)

Summary:

SUMMARY*

Habeas Corpus / Death Penalty

The panel affirmed the district court's denial of Sterling Atkins's habeas corpus petition challenging his Nevada conviction for murder, conspiracy to commit murder, and first-degree kidnapping; and his death sentence.

On the first certified issue, the panel held that the Nevada Supreme Court reasonably denied Atkins's claim that trial counsel was ineffective at the penalty phase for failing to investigate and present additional mitigating and social history evidence. The record before the state court did not show what investigation did occur, or how that investigation was deficient, and because the new evidence presented in the federal proceeding was largely cumulative it does not establish prejudice. Atkins's related claim that trial counsel failed to adequately prepare a psychological expert was not properly exhausted in state court, and is now procedurally defaulted. Atkins cannot meet the *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), standard to excuse his default as he did not show prejudice from state postconviction counsel's failure to raise [**2] the claim that trial counsel was ineffective. Given that Atkins showed, at most, only one possible failing by counsel, there is no cumulative prejudice to consider.

On the second certified issue, the panel held that Atkins failed to exhaust his challenge to the jury instruction addressing the possibility of parole and did not show cause to excuse that default.

Because he did not show that the outcome on two uncertified issues are debatable among jurists of reason, the panel denied Atkins's request to expand the certificate of appealability.

Counsel: A. Richard Ellis (argued), A. Richard Ellis Atty. at Law, Mill Valley, California, for Petitioner-Appellant.

Heather D. Procter (argued), Chief Deputy Attorney General; Aaron D. Ford, Attorney General; Nevada Office of the Attorney General, Carson City, Nevada; Jaimie Stilz, Deputy Attorney General, Nevada Office of the Attorney General, Las Vegas, Nevada; for Respondents-Appellees.

Judges: Before: Ronald M. Gould, Consuelo M. Callahan, and Jennifer Sung, Circuit Judges.

Opinion by: Consuelo M. Callahan

Opinion

[*765] CALLAHAN, Circuit Judge:

On the night of January 15, 1994, Petitioner Sterling Atkins, his brother Shawn [*766] Atkins,[1] and their friend Anthony Doyle drove Ebony Mason to an isolated [**3] desert area outside of Las Vegas where they beat and strangled her to death. A Nevada jury found Atkins guilty of murder,

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

[1] To avoid confusion, we refer to Shawn Atkins by his first name.

conspiracy to commit murder, first-degree kidnapping, and sexual assault, and sentenced him to death. *Atkins v. Gittere, No. 02-cv-01348, 2020 U.S. Dist. LEXIS 121991, 2020 WL 3893628, at *2 (D. Nev. July 10, 2020)*. The Nevada Supreme Court affirmed all counts with the exception of reversing Atkins's conviction for sexual assault. After seeking and being denied state postconviction relief, Atkins brought his federal habeas petition under *28 U.S.C. § 2254* in the United States District Court for the District of Nevada. He now appeals the district court's denial of his *28 U.S.C. § 2254* habeas petition, raising two certified issues and requesting to expand the certificate of appealability on two additional issues.

We affirm the district court's denial of Atkins's petition. On the first certified issue, Atkins's claim that trial counsel was ineffective at the penalty phase for failing to investigate and present additional mitigating and social history evidence was reasonably denied by the Nevada Supreme Court. His related claim that trial counsel failed to adequately prepare the psychological expert was not properly exhausted in state court. Atkins cannot meet the *Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012)*, standard to excuse his default as he has not **[**4]** shown prejudice from state postconviction counsel's failure to raise the claim that trial counsel was ineffective. On the second certified issue, Atkins failed to exhaust his challenge to the jury instruction addressing the possibility of parole and has not shown cause to excuse that default. Finally, because he has not shown that the outcome on the uncertified issues "are debatable among jurists of reason," *Lambright v. Stewart, 220 F.3d 1022, 1025 (9th Cir. 2000)*, we deny Atkins's request to expand the certificate of appealability.

I.

A.

On January 15, 1994, Atkins was at his home with Shawn, Doyle, and Mason. *Atkins, 2020 U.S. Dist. LEXIS 121991, 2020 WL 3893628, at *1*. According to a voluntary statement Shawn gave to the FBI, Mason agreed to accompany the men to Doyle's apartment, where she had consensual sex with Atkins and Shawn but refused Doyle. *Id.* The three men agreed to drive Mason to downtown Las Vegas. At some point, they stopped at a gas station where Mason tried to make a call, but she returned to the truck after Atkins talked to her. The men then drove her to an isolated desert area where Doyle told Mason she had to walk home. As Mason got out of the car, Doyle hit her. He then stripped off her clothes and raped her as Shawn and Atkins watched. Doyle and Atkins then beat and kicked Mason **[**5]** until she died.

The next day, Mason's body was found. There was a four-inch twig protruding from her rectum. She had nine broken ribs as well as multiple areas of external bruising and lacerations, and a ligature mark around her neck. Her body had patterned contusions consistent with footwear impressions, and her head had severe lacerations as well as underlying hemorrhage. The medical examiner found she "died from asphyxia due to strangulation and/or from blunt trauma to the head."

The police investigation identified Doyle, Atkins, and Shawn as the three suspects. Atkins and Doyle were arrested in Las Vegas, and Shawn was later arrested in **[*767]** Ohio. The State of Nevada charged the three men with one count each of murder, conspiracy to commit murder, robbery,[2] first-degree kidnapping, and sexual assault, and filed notice of its intent to seek the death penalty.[3]

B.

Atkins was initially represented by lead counsel Anthony Sgro. Co-counsel Laura Melia participated in a preliminary hearing in May 1994 but then stopped working on Atkins's case in June of 1994. Attorney Kent Kozal took her place as co-counsel. According to his declaration, Kozal was a recent law school graduate, "had never **[**6]** tried a jury trial, much less a capital case," "was not qualified under *Nevada Supreme Court Rule 250* to serve on a capital case," and had a minimal role in the trial.[4]

On March 10, 1995—ten days before the start of Atkins's trial—Sgro was unable to continue in his representation of Atkins due to a scheduling conflict with another case. Despite the late date, he filed a motion to withdraw and allow substitution of attorneys, noting that he had contacted Melia and she had indicated her willingness to return to represent Atkins and proceed to trial as scheduled. The court approved

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[2] The robbery count was later dismissed against all three men. *Atkins, 2020 U.S. Dist. LEXIS 121991, 2020 WL 3893628, at *1*.

[3] In a separate trial, Doyle was convicted of the same crimes as Atkins and likewise sentenced to death. *See Doyle v. State, 112 Nev. 879, 921 P.2d 901, 905 (Nev. 1996)*. Shawn entered into a plea bargain, pleading guilty to first-degree murder and kidnapping and was sentenced to life with the possibility of parole. *Atkins, 2020 U.S. Dist. LEXIS 121991, 2020 WL 3893628, at *2*. As part of his plea deal, Shawn agreed to testify at Atkins's trial, and was the State's only eyewitness. *Id.*

[4] These facts related to Melia and Kozal are taken in part from declarations submitted by the two attorneys as part of Atkins's federal habeas petition. We reference them for background purposes only.

the substitution of Melia as lead counsel on March 14, 1995.

C.

Atkins's trial commenced on March 20, 1995. The State presented testimony from ten police officers, the coroner, and nine lay witnesses. Atkins presented no evidence. During closing, defense counsel argued that although Atkins was present when the crimes were committed, he did not participate in their commission. Counsel attacked the credibility of the State's witnesses, noting many of the lay witnesses had been impeached and admitted to lying to protect Doyle. The jury found Atkins guilty of murder, conspiracy to commit murder, first-degree kidnapping, and sexual assault. *Atkins, 2020 U.S. Dist. LEXIS 121991, 2020 WL 3893628, at *2*.[5]

During **[**7]** the penalty phase of Atkins's trial, which commenced on April 26, 1995, the State presented testimony from Mason's parents on the impact of her murder. The State also presented testimony establishing that, when he murdered Mason, Atkins was on parole for a prior offense where he pled guilty to assault with a deadly weapon.

As mitigation evidence, Atkins presented testimony from his father Sterling Atkins, Sr.[6] Sterling, Sr. admitted to daily substance abuse in front of his children, as well as a turbulent relationship with Atkins's mother that frequently included physical violence. He also acknowledged **[*768]** physically abusing his children, describing being charged for child abuse after burning Shawn's and Atkins's hands on a stove. That charge led to the children being removed from the home and temporarily living in foster care. While maintaining that he did the best he could, Sterling, Sr. testified that he did not know how to raise Atkins, that he was not a good role model, and that Atkins did not grow up in a healthy environment.

Atkins's half-sister Stephanie Normand also testified, confirming Atkins's unstable family life during childhood. She stated that both parents were alcoholics, **[**8]** frequently arguing with each other and the children. She confirmed the incident where Sterling, Sr. burned Atkins's and Shawn's hands, leading to their placement in foster care. She further stated that Sterling, Sr. tended to single Atkins out, and would use wood 2x4s, belts, or any object he could find to beat Atkins. Once when Normand tried to intervene, Sterling, Sr. turned and punched her in the mouth. She also remembered her father making Atkins and Shawn stand in a corner overnight with their hands against the wall. Regarding their mother, Normand related that her substance abuse problems were so bad that Normand would have to pick her up and put her to bed. According to Normand, neither parent was a good role model.

The defense next called a former associate warden for the Nevada Department of Corrections, Jack Hardin. Hardin described the living conditions and inmate daily life at Ely State Prison, the maximum-security facility used to house Nevada's first-degree murder convicts. In his opinion, it would be traumatic to be sentenced to spend the rest of one's life at Ely State Prison. During cross-examination, the prosecutor elicited testimony from Hardin about the possibility **[**9]** of a pardon or commutation. In response to a question whether the pardons board could commute a sentence from life without the possibility of parole to life with the possibility of parole, Hardin responded it could.

Finally, the defense called Dr. Philip Colosimo, a clinical psychologist. He testified that he had performed three psychological tests on Atkins and met with him a total of six times. Dr. Colosimo determined that Atkins suffered from schizoaffective disorder, meaning "he has signs and symptoms of schizophrenia, disorganized thinking, bizarre mentation, and affective problems." Dr. Colosimo also identified depressive and paranoid thoughts "that the world is out to get him or hurt him." In addition, Dr. Colosimo identified antisocial personality characteristics in Atkins, sometimes referred to as sociopathy or psychopathic behaviors. Dr. Colosimo testified that Atkins showed narcissistic personality characteristics in that he took care of his own needs and was not concerned with the needs of others.

Dr. Colosimo recounted how Atkins reported that he had sustained a head injury "at an adolescent age where he was beaten very heavily in a fight." Dr. Colosimo opined that the head **[**10]** injury may have caused a thought disorder, although he acknowledged during cross-examination that he had not conducted any medical or physiological tests to determine whether Atkins suffered from organic defects. Dr. Colosimo also explained that children who grow up in unsteady environments often engage in impulsive behaviors and violence. Furthermore, the abuse that Atkins suffered "most certainly had a great impact on [Atkins's] ability to think and reason, process information and to be able to learn." As to Atkins's mental functioning, Dr. Colosimo noted that Atkins's reading was at a third-grade level, spelling was at a second-grade level, arithmetic was at a **[*769]** second-grade

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[5] The sexual assault conviction was later overturned by the Nevada Supreme Court for reasons not relevant to this petition. *Atkins v. State, 112 Nev. 1122, 923 P.2d 1119, 1129 (Nev. 1996)*.

[6] To avoid confusion, we refer to Sterling Atkins, Sr. as "Sterling, Sr."

level, and that Atkins had a history of low academic achievement and an IQ score well below average. According to Dr. Colosimo, these indicated pronounced learning disabilities as well as attention deficit disorder.

Dr. Colosimo testified that while Atkins was often anxious, impulsive, and unable to comply with the law, he appeared more relaxed while incarcerated as the prison provided him with clear boundaries. Atkins reported hearing voices but remarked the voices were quieter when he was incarcerated. Dr. Colosimo **[**11]** determined that Atkins's impulsive anger and violent behaviors would not likely manifest in a structured prison environment.

On cross-examination, Dr. Colosimo acknowledged that his conclusions were based solely on his interviews and psychological testing, and that he had not reviewed any evidence regarding the facts or circumstances of the charged crimes. Additionally, he concluded that based on the test results and Atkins's version of the facts (including Atkins's denial of any wrongdoing), Atkins was competent at the time of the crimes.

Atkins gave an unsworn allocution statement in which he apologized to the Mason family, accepted the jury verdict, and asked the jury to consider a life sentence.

During closing, the State raised six alleged aggravating circumstances,[7] disputed the potential mitigating circumstances, and asked the jury to return a verdict of death. In arguing against a life sentence with the possibility of parole, the State reminded the jury that Atkins had killed Mason while on parole. Defense counsel argued that life without possibility of parole was sufficient punishment, reminding the jury of the abysmal conditions of Ely State Prison and explaining that life without **[**12]** the possibility of parole meant that Atkins would spend the rest of his life in an extremely limited and controlled environment. Counsel additionally referenced Atkins's abusive childhood. The State in rebuttal argued that Atkins's childhood abuse and personality disorders were not enough to offset the aggravating factors in Mason's murder. Additionally, the State noted that the State Board of Pardons could change a sentence of life without parole to a sentence of life with the possibility of parole.

The jury returned a verdict the next day, finding all six aggravating circumstances had been established beyond a reasonable doubt. Determining that the aggravating circumstances outweighed any mitigating factors, the jury sentenced Atkins to death.

D.

Atkins appealed, and the Nevada Supreme Court affirmed all counts with the exception of reversing Atkins's conviction for sexual assault. *Atkins, 923 P.2d at 1121-29*. The United States Supreme Court denied Atkins's petition for a writ of certiorari. *Atkins v. Nevada, 520 U.S. 1126, 117 S. Ct. 1267, 137 L. Ed. 2d 346 (1997)*. He then filed a state postconviction **[*770]** petition, which was denied by a Nevada trial court in 2001. That denial was affirmed by the Nevada Supreme Court in 2002. *Atkins v. State, 118 Nev. 1081, 106 P.3d 1203 (Nev. 2002)*.

In 2002, Atkins filed his *28 U.S.C. § 2254* petition for writ of habeas corpus **[**13]** in federal district court. After multiple amended petitions and a stay while he returned to state court to exhaust certain claims, the district court reopened federal proceedings in 2015. In 2016, Atkins filed the operative fourth amended petition.[8] In 2017, the district court dismissed several claims on procedural grounds, and in 2020, denied the remaining claims and entered judgment. *Atkins v. Filson, No. 02-cv-01348, 2017 U.S. Dist. LEXIS 162528, 2017 WL 4349216 (D. Nev. Sept. 28, 2017)*; *Atkins, 2020 U.S. Dist. LEXIS 121991, 2020 WL 3893628*.

This appeal followed.

II.

We review *de novo* a district court's denial of a habeas petition as well as its dismissal for procedural default. *See Gulbrandson v. Ryan, 738 F.3d 976, 986 (9th Cir. 2013)*; *Fields v. Calderon, 125 F.3d 757, 759-60 (9th Cir. 1997)*.

Because Atkins's original federal petition was filed after April 24, 1996, our review is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See*

[7] The jury found the following six aggravating circumstances: (1) the murder was committed by a person under sentence of imprisonment; (2) the murder was committed while the person was engaged in the commission of or an attempt to commit a sexual assault; (3) the murder was committed while the person was engaged in the commission of or an attempt to commit a first-degree kidnapping; (4) the murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody; (5) the murder involved torture, depravity of mind or the mutilation of the victim; and (6) the murder was committed by a person who was previously convicted of a felony involving the use or threat of violence to the person of another.

[8] All references in this opinion to the federal petition are to this operative fourth amended petition unless specified otherwise.

Lambert v. Blodgett, 393 F.3d 943, 965 (9th Cir. 2004). Under AEDPA, we may not grant habeas relief with respect to any claim adjudicated on the merits in state court unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *28 U.S.C. § 2254(d)*.

We review the last reasoned state court decision, here the decision **[**14]** from the Nevada Supreme Court. *See Wilson v. Sellers, 584 U.S. 122, 125, 138 S. Ct. 1188, 200 L. Ed. 2d 530 (2018)*. To show the state court decision was contrary to, or an unreasonable application of, clearly established law under *28 U.S.C. § 2254(d)(1)*, Atkins must show that "there was no reasonable basis for the [Nevada Supreme Court's] decision." *Cullen v. Pinholster, 563 U.S. 170, 188, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011)* (internal quotation marks omitted). Under this deferential standard, even if "'fairminded jurists could disagree' on the correctness of the state court's decision," we defer to the state court's determination. *Harrington v. Richter, 562 U.S. 86, 101, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)* (quoting *Yarborough v. Alvarado, 541 U.S. 652, 664, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004)*).

Under *§ 2254(d)(2)*, "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen, 558 U.S. 290, 301, 130 S. Ct. 841, 175 L. Ed. 2d 738 (2010)*. Although "'[r]easonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice to supersede the [state] court's . . . determination.'" *Id.* (quoting *Rice v. Collins, 546 U.S. 333, 341-42, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006)*).

We first discuss the issues on which the district court granted a certificate of appealability before moving to Atkins's request **[*771]** to expand the certificate of appealability to two additional claims.

III.

The district court granted a certificate of appealability on two issues: First, Atkins's arguments of ineffective assistance of trial counsel at **[**15]** the penalty phase, and second, his claim of instructional error regarding the possibility of commutation.

A.

Atkins's basis for ineffective assistance of trial counsel at the penalty phase includes three sub-claims: (1) that trial counsel failed to investigate and present additional mitigating social history evidence; (2) that trial counsel were ineffective in their preparation and presentation of Dr. Colosimo; and (3) cumulative prejudice from counsel's deficient performance. We address each in turn and we affirm.

i.

To begin, we find that Atkins exhausted his claim regarding the alleged failure of trial counsel to investigate and present mitigating social history evidence, and that the Nevada Supreme Court reasonably denied the claim.

Under AEDPA, Atkins cannot obtain relief unless he has "exhausted the remedies available in the courts of the State." *28 U.S.C. § 2254(b)(1)(A)*. To exhaust, a petitioner must "fairly present his federal claims to the highest state court available." *Davis v. Silva, 511 F.3d 1005, 1008 (9th Cir. 2008)* (internal quotations and alteration omitted). "Fair presentation requires that the petitioner describe in the state proceedings both the operative facts and the federal legal theory on which his claim is based so that the state courts **[**16]** have a fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim." *Id. at 1009* (quotations omitted); *see Robinson v. Schriro, 595 F.3d 1086, 1101 (9th Cir. 2010)*. "A claim has not been fairly presented in state court if new factual allegations either fundamentally alter the legal claim already considered by the state courts, or place the case in a significantly different and stronger evidentiary posture than it was when the state courts considered it." *Dickens v. Ryan, 740 F.3d 1302, 1318 (9th Cir. 2014)* (en banc) (internal quotations and citations omitted). If the claim is fundamentally altered and state procedural rules would bar the petitioner from bringing the developed claim in state court, the claim is technically exhausted and deemed to be procedurally defaulted. *See id. at 1317-18*; *Coleman v. Thompson, 501 U.S. 722, 731-32, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)* ("Just as in those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance."). Such defaults may be excused if the petitioner can demonstrate cause for the default and resulting prejudice. *Murray v. Carrier, 477 U.S. 478, 496, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)*.

In his postconviction petition in state court, Atkins raised a claim that trial **[**17]** counsel was ineffective at the penalty phase for failing to conduct an adequate investigation to

discover mitigating evidence. He argued that given the timing of counsel Melia's withdrawal after the preliminary hearings and later reappointment to the case less than two weeks before trial, along with the inexperience of second-chair counsel Kozal, they could not have conducted a proper investigation. Atkins argues that additional investigation would have resulted in counsel presenting as mitigation **[*772]** witnesses his brother Shawn, his mother, an uncle, and his foster parents. These witnesses, according to Atkins, would have corroborated and added to the testimony from Sterling, Sr. about the emotional and physical abuse Atkins suffered during his childhood.

However, Atkins did not present any evidence to the state court in support of his claim, but instead relied on the trial record. The Nevada Supreme Court rejected his claim, noting that counsel presented evidence of Atkins's abusive childhood through testimony by Sterling, Sr. and Normand, and that Atkins "failed to explain how additional testimony would have altered the outcome at trial."

In his federal petition, Atkins again argued that **[**18]** counsel failed to prepare adequate mitigating social history evidence, asserting that "[o]ther family members and relatives could have told a very much more compelling story." He again asserted that Melia's reappointment so close to the trial date and Kozal's relative inexperience in capital cases made it "impossible for [them] to have conducted an adequate investigation" or made strategic decisions to forego certain avenues of mitigation. And, for the first time, Atkins provided declarations from both Melia and Kozal, as well as their state bar admission records. He also provided declarations from his brother Shawn, his aunt, his great aunt, and Doyle's girlfriend. Atkins argues these witnesses would have presented additional testimony regarding his family's intergenerational history of violence; details of his parents' abuse of the children and each other; various family members' addictions to gambling, alcohol, and drugs; times his family lived in shelters or were homeless; his poor school performance, child-like mentality, and emotional instability; Doyle's violence toward his girlfriend; and one witness's plea deal with the police to testify against Doyle and possibly Atkins.

[19]** The district court concluded the ineffective assistance of counsel claim was exhausted and not "fundamentally alter[ed]" from that presented to the state court. *Atkins, 2020 U.S. Dist. LEXIS 121991, 2020 WL 3893628, at *29*. Applying AEDPA review, the district court then determined that the Nevada Supreme Court's denial was not contrary to or an unreasonable application of *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*. *Id.* In the alternative, the district court held that if the claim was fundamentally altered and therefore not exhausted, Atkins had not shown the ineffectiveness of postconviction counsel necessary for waiver of procedural default. *See Martinez, 566 U.S. at 17*. The district court stated that neither trial counsel's failure to present the new evidence in the penalty phase nor postconviction counsel's failure to present the new evidence in support of the underlying ineffective assistance of counsel claim was prejudicial. *Atkins, 2020 U.S. Dist. LEXIS 121991, 2020 WL 3893628, at *30*.

We agree with the district court that Atkins properly exhausted this claim in state court. The legal basis for Atkins's claim in his habeas petition is the same as that raised in state court—ineffective assistance of counsel for failure to properly investigate and present mitigating evidence during the penalty phase. Although he proffered new factual allegations and evidence in the district court in the form of the state bar records, declarations from counsel, and declarations from additional social history mitigation witnesses, we cannot say that these "place the case in a significantly different and stronger evidentiary posture." *Dickens, 740 F.3d at 1318*.

In *Williams v. Filson*, for example, we found that expert evidence presented for the first time in federal court that corroborated **[*773]** allegations raised in the state petition regarding the nature of the victim's wounds did not transform it into a new and unexhausted claim. *908 F.3d 546, 574-75 (9th Cir. 2018)*. Additionally, in that case, evidence presented in federal court that counsel's office was understaffed only expanded on **[**20]** the allegation made in state court that counsel was inexperienced and overworked but did not "alter the substance" of what was presented in state court. *Id. at 573*. Therefore, it did not transform the federal claim into a new, unexhausted claim. *Id.*

Similarly here, the evidence raised in federal court[9] corroborates the specific allegations raised in Atkins's state postconviction petition, arguably expanding and substantiating his argument that counsel failed to perform a proper investigation into mitigating social history evidence. The declarations and witnesses presented in federal court supported the claim previously raised and did not set forth conditions or allegations that were not raised in state court. *Compare with Dickens, 740 F.3d at 1319*. Rather, the new evidence bolsters Atkins's original state court claim that

[9] We review this newly presented evidence solely for the purpose of evaluating the possible procedural default of Atkins's claim, i.e., whether the claim is fundamentally altered in federal court. We acknowledge that review of the merits of Atkins's argument is generally limited to the record before the state court. *28 U.S.C. § 2254(d)*; *see Shoop v. Twyford, 596 U.S. 811, 818-19, 142 S. Ct. 2037, 213 L. Ed. 2d 318 (2022)*; *see also Shinn v. Ramirez, 596 U.S. 366, 382, 142 S. Ct. 1718, 212 L. Ed. 2d 713 (2022)*.

Kozal's inexperience and Melia's late return to the team resulted in inadequate investigation of mitigating evidence and witnesses. *See Filson, 908 F.3d at 573-75* (explaining that evidence that substantiated and corroborated the state court claim did not transform it into a new claim); *Sivak v. Hardison, 658 F.3d 898, 908 (9th Cir. 2011)* ("[A]s long as the ultimate question for disposition has remained the same in state and federal court, . . . variations in the legal theory or **[**21]** factual allegations urged in its support are entirely legitimate." (internal quotation marks and citation omitted)).

Because Atkins's claim was exhausted, our review is governed by *28 U.S.C. § 2254(d)*, and we are limited to considering evidence that was presented to the state court. *See Shoop v. Twyford, 596 U.S. 811, 818-20, 142 S. Ct. 2037, 213 L. Ed. 2d 318 (2022)*. In determining if trial counsel was ineffective, we evaluate (1) whether counsel's performance was deficient, and (2) whether that deficient performance prejudiced the defense. *Strickland, 466 U.S. at 687*. We apply a strong presumption that counsel's performance was within the wide range of reasonable professional assistance, and will find a performance deficient only if it "fell below an objective standard of reasonableness . . . under prevailing professional norms." *Id. at 688*. To demonstrate prejudice, Atkins must show a reasonable probability—i.e., a probability sufficient to undermine confidence in the outcome—"that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id. at 694*.

The Nevada Supreme Court determined that counsel's performance was neither deficient nor prejudicial and thus was "not contrary to, [and did not involve] an unreasonable application of" *Strickland*. *See 28 U.S.C. § 2254(d)(1)*. Although there is documentation **[**22]** of hours billed by counsel, the record does not include much additional information to show what avenues of investigation counsel followed, how much investigation was performed, or what information was uncovered. Neither **[*774]** does the record reveal what, if any, avenues counsel failed to pursue. This lack of evidence is fatal to Atkins's claim. The burden to demonstrate that counsel performed deficiently falls on Atkins, and "the absence of evidence cannot overcome the strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *Burt v. Titlow, 571 U.S. 12, 23, 134 S. Ct. 10, 187 L. Ed. 2d 348 (2013)* (internal quotation marks and citations omitted).

Furthermore, even if Atkins could show deficient performance by counsel, he has not shown prejudice. Kozal's inexperience alone, even combined with the timing of Melia's re-appointment, is insufficient to demonstrate a *Strickland* violation. *Woods v. Sinclair, 764 F.3d 1109, 1132 (9th Cir. 2014)* ("[Petitioner] must point to specific acts or omissions that may have resulted from counsel's inexperience and other professional obligations."). The state court record did not include declarations from the potential witnesses, and so did not contain any showing of what additional mitigating evidence counsel could have presented. Atkins **[**23]** cannot demonstrate that the Nevada Supreme Court's denial of this claim was unreasonable because there was no additional mitigating evidence for the Nevada Supreme Court to evaluate. *See Wiggins v. Smith, 539 U.S. 510, 534, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)* ("In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence.").

Even assuming without deciding that we could consider the new evidence submitted by Atkins, the outcome remains the same. None of Atkins's proffered new evidence, including the declarations from counsel, address what investigation counsel undertook regarding Atkins's background or social history. Furthermore, the testimony presented during the penalty phase demonstrates that counsel did investigate, discover, and present evidence that Atkins had an abusive childhood, grew up in a dysfunctional environment, and likely has a learning disability and impaired thinking. Atkins has not shown deficient performance by counsel.

Moreover, because the evidence presented in the new witnesses' declarations is largely cumulative of the mitigation evidence presented at trial through Sterling, Sr., Normand, and Dr. Colosimo, Atkins cannot show prejudice from any deficient performance that may have **[**24]** occurred. Simply presenting the jury more detailed evidence about the family abuse, Atkins's parents' alcoholism, his poor performance in school, and his emotional instability is unlikely to add to the weight of mitigating evidence already in the record. *See Moormann v. Ryan, 628 F.3d 1102, 1113 (9th Cir. 2010)* (finding no prejudice because of the "cumulative nature of the new evidence"). Any limited new information regarding the family's generational history of violence, the parents' addictions, periods of homelessness, or the influence of street gangs on Atkins's behavior has questionable mitigating value. While "defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse," *Boyde v. California, 494 U.S. 370, 382, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990)* (internal citations omitted), the jury "might have concluded that [Atkins] was simply beyond rehabilitation." *Pinholster, 563 U.S. at 201*. Therefore, even considering the new evidence, Atkins has not demonstrated that trial counsel's failure to present additional background and social history was either due to deficient performance or prejudicial. The Nevada Supreme Court's rejection of this claim was reasonable.

[*775] Finally, to the extent Atkins argues the Nevada Supreme [**25] Court's conclusion was based on an unreasonable factual finding under § 2254(d)(2), the evidence proffered by Atkins was largely cumulative of the evidence presented during trial. Also, Atkins incorrectly references a district court finding (and not a finding by the Nevada Supreme Court) and improperly relies on the new evidence submitted in federal court. *See* Twyford, 596 U.S. at 819 ("Review of factual determinations under § 2254(d)(2) is expressly limited to the evidence presented in the State court proceeding." (internal quotation marks and citation omitted)).

Atkins has not shown how trial counsel acted deficiently regarding preparation of social history evidence, or that prejudice resulted. Thus, he has failed to show that the Nevada Supreme Court's denial of this claim was "contrary to, or involved an unreasonable application of, clearly established" federal law, or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).[10]

ii.

For his second claim of ineffective assistance of counsel, Atkins argues that trial counsel failed to properly prepare and present Dr. Colosimo during the penalty phase. Atkins asserts that, as a result, Dr. Colosimo offered harmful testimony [**26] equivalent to that of a prosecution witness such that the testimony itself satisfies Strickland's prejudice prong. We find that Atkins failed to exhaust this claim in state court and cannot meet the requirements of Martinez to excuse the default. We therefore affirm the district court's denial.

In his state postconviction proceedings, Atkins claimed that counsel was ineffective for failing to investigate and present psychological evidence at the guilt phase of trial. He criticized counsel's failure to move for a competency hearing until the middle of jury selection, despite knowing that Atkins had potential mental health issues. Atkins argued that counsel should have requested a competency hearing earlier in the proceedings. Additionally, he asserted that counsel should have either raised a mental incapacity defense or argued that his mental health state was inconsistent with premeditated first-degree murder.

The Nevada Supreme Court affirmed the lower court's ruling that whether and when to raise competency issues was a strategy determination and noted that "Atkins [had] not indicated what material evidence would have been discovered through additional investigation into his mental status, or [**27] how that evidence would have affected the outcome of trial." The court further observed that Dr. Colosimo had testified that Atkins was competent at the time he committed the crimes. Regarding the argument that counsel failed to timely move for a competency hearing and then acted deficiently by withdrawing the motion, the Nevada Supreme Court determined the argument was without merit because Atkins established neither that he was incompetent nor that a competency hearing was required.

In contrast to his argument in state court related to the guilt phase of trial, in his federal petition, Atkins argued that counsel was ineffective for failing to adequately prepare and present Dr. Colosimo for the *penalty* phase. Atkins asserted that counsel's failure, in part, was that Kozal—an [*776] inexperienced new lawyer—was Dr. Colosimo's primary contact and only contacted him a few weeks prior to trial. The district court characterized the state court claim as a failure by counsel "to adequately investigate, consult, or produce and offer psychological evidence at the trial," and concluded that Atkins had exhausted the claim in state court. Atkins, 2020 U.S. Dist. LEXIS 121991, 2020 WL 3893628, at *30. The district court then concluded that the Nevada Supreme Court's [**28] denial was reasonable under AEDPA because the record showed counsel had investigated and used psychological evidence and Atkins had not shown what new evidence could have been discovered. Additionally, the district court found the Nevada Supreme Court reasonably determined Atkins failed to show prejudice because Dr. Colosimo's testimony, when considered as a whole, helped rather than harmed the defense in the penalty phase. 2020 U.S. Dist. LEXIS 121991, [WL] at *31. In the alternative, the district court determined that if the claim was procedurally defaulted, and accordingly it could consider the new evidence, Atkins did not demonstrate the cause and prejudice necessary under *Martinez* to excuse the default. *Id.*

We hold that the district court erred in finding this claim to be exhausted. Atkins did not fairly present to the state court a claim related to Dr. Colosimo's preparation for the penalty phase; rather, his state claim related to the use of Dr. Colosimo in the guilt phase. Additionally, Atkins did not allege in state court that Dr. Colosimo's penalty phase testimony was prejudicial or identify which portions of his testimony were problematic. Thus, the claim has been "fundamentally altered" such that the Nevada Supreme [**29] Court did not have a fair opportunity to consider the claim, and it is therefore unexhausted and

[10] Because we find that the claim was exhausted in state court, we do not address the parties' alternative arguments under Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012).

procedurally defaulted. *Dickens, 740 F.3d at 1319*.[11]

Under *Martinez*, ineffective assistance of postconviction counsel may serve as valid cause to overcome the procedural default of a claim of ineffective assistance of trial counsel. The petitioner must satisfy four factors. First, the state postconviction proceeding must be the initial review proceeding in respect to the ineffective assistance of counsel claim. *Trevino v. Thaler, 569 U.S. 413, 423, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013)*. Second, the state law must either require the claim to be raised in the first postconviction proceeding or make "it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." *Id. at 423, 429*. Third, a petitioner must show "cause" by demonstrating that postconviction counsel was ineffective for failing to raise the underlying ineffective assistance of trial counsel claim. *Clabourne v. Ryan, 745 F.3d 362, 377 (9th Cir. 2014)*. In other words, a petitioner must show that postconviction counsel's performance was deficient and such deficiency was prejudicial. *Id.* To find that postconviction counsel's deficient performance was prejudicial, "[we] must also find a reasonable **[**30]** probability that the trial-level [ineffective assistance of counsel] claim would have succeeded had it been raised." *Runningeagle v. Ryan, 825 F.3d 970, 982 (9th [*777] Cir. 2016)*. "If the [trial-level claim] lacks merit, then [postconviction] counsel would not have been deficient for failing to raise it." *Atwood v. Ryan, 870 F.3d 1033, 1060 (9th Cir. 2017)*. Fourth—in an analysis that somewhat overlaps with the third factor—a petitioner must show prejudice by "demonstrat[ing] that the underlying [ineffective assistance of counsel] claim is a substantial one, which is to say that [the petitioner] must demonstrate the claim has some merit." *Martinez, 566 U.S. at 14* (citing *Miller-El v. Cockrell, 537 U.S. 322, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)*).

The first two factors are not in dispute here. *See Rodney v. Filson, 916 F.3d 1254, 1260 (9th Cir. 2019)* (noting that Nevada requires ineffective assistance of counsel claims to be raised in the first postconviction proceeding). Atkins on appeal has not argued cause and prejudice under *Martinez* to excuse the procedural default. But even assuming we might excuse that failure, Atkins is not entitled to relief under *Martinez* because he has not shown he was prejudiced by trial counsel's performance. Thus, there is no substantial likelihood of a different result had postconviction counsel raised the underlying trial counsel claim.

Atkins first argues that his trial counsel failed to timely obtain a mental **[**31]** health expert. While some cases have found counsel may be ineffective for failing to timely obtain mitigation evidence for a penalty phase proceeding, *see, e.g., Williams v. Taylor, 529 U.S. 362, 395, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*, the record here indicates that counsel knew of Atkins's potential mental health issues and took appropriate steps to seek a mental health expert as mitigation evidence. Approximately six months before trial, Atkins's original counsel filed a motion to allow an expert to perform a psychiatric examination on Atkins, and the court eventually granted that motion. Two weeks before trial (on the same day Atkins's original counsel withdrew), that expert informed counsel he was unavailable to perform the evaluations. Six days later, counsel filed (and the court granted) authorization to substitute Dr. Colosimo as the expert. Dr. Colosimo conducted interviews before, during, and after the guilt phase of trial. At least two reports were available for counsel during the guilt phase of trial. Based on this record, Atkins has not rebutted the presumption that counsel's investigation into mental health mitigation fell within the wide range of reasonable professional assistance. *See Strickland, 466 U.S. at 689-90*; *cf., Taylor, 529 U.S. at 395-96* (finding counsel's performance deficient when **[**32]** they did not begin preparing for the penalty phase until a week before trial and unreasonably curtailed their investigation into mitigating evidence).

Atkins next argues that trial counsel failed to adequately prepare Dr. Colosimo to testify which resulted in harmful testimony. Dr. Colosimo stated that trial counsel did not provide any police reports or witness statements, and that he did not review any documents related to the case or the underlying facts or circumstances. Dr. Colosimo instead relied only on Atkins's statements to him and the results of the tests he performed. At the penalty phase of a trial, "[r]egardless of whether a defense expert requests specific information relevant to a defendant's background, it is defense counsel's duty to seek out such evidence and bring it to the attention of the experts." *Hovey v. Ayers, 458 F.3d 892, 925 (9th Cir. 2006)* (internal quotation marks omitted). This includes facts pertinent to the crimes, which trial counsel here failed to provide Dr. Colosimo.

[*778] While that failure perhaps raises questions as to the thoroughness of trial counsel in their preparation of Dr.

[11] Atkins argues that the State waived a non-exhaustion defense by failing to raise it in district court. Under AEDPA, however, the State's failure to raise such a defense does not constitute waiver. *See Banks v. Dretke, 540 U.S. 668, 705, 124 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004)* ("AEDPA forbids a finding that exhaustion has been waived unless the State expressly waives the requirement."); *28 U.S.C. § 2254(b)(3)* ("A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.").

Colosimo, Atkins has not shown that it was prejudicial. Atkins argues that Dr. Colosimo provided negative testimony related [**33] to his mental health that made him seem impulsive, delusional, paranoid, and selfish. Atkins claims that this, in turn, made him seem unlikely to socialize or otherwise adjust to life in prison and seem more likely to commit future violent acts. According to Atkins, Dr. Colosimo failed to link his condition to his childhood problems, and instead suggested Atkins had high potential for recidivism. Additionally, Atkins claims that Dr. Colosimo's statement that he had not seen any reports or documents related to the case detracted from his credibility. Finally, Atkins points to Dr. Colosimo's statements that Atkins was competent at the time of the crime and that he showed no remorse for Mason's murder.

As discussed above, mitigating evidence like Dr. Colosimo's testimony can present a double-edged sword as it can yield both helpful and harmful inferences. *See* Pinholster, 563 U.S. at 201. Atkins argues that Dr. Colosimo's testimony was so harmful, he would have been better off had Dr. Colosimo not testified at all. However, in looking at the totality of the mitigating and aggravating evidence presented at the penalty phase, we cannot say that the omission of Dr. Colosimo's testimony would have affected the outcome [**34] of the proceeding. Although Atkins portrays it as primarily harmful, Dr. Colosimo's testimony also supported helpful inferences. For instance, the testimony explained Atkins's behavior, and connected his diagnoses to his childhood. Dr. Colosimo also concluded that prison would provide a controlled and stable environment where Atkins could likely conform his behavior. Furthermore, his allegedly harmful testimony regarding Atkins's lack of a moral structure, mental health concerns, and the possibility of recidivism is similar to testimony whose *omission* we have found to support a finding of ineffective assistance of counsel. *See, e.g.*, Douglas v. Woodford, 316 F.3d 1079, 1090-91 (9th Cir. 2003) (finding counsel was ineffective for failing to present evidence that the defendant suffered from "serious and outstanding mental illness" including severe paranoia, pre-existing neurological deficit, and chaotic thought process); Ainsworth v. Woodford, 268 F.3d 868, 879 (9th Cir. 2001) (finding prejudicial counsel's failure to present defendant's "disadvantaged background and the emotional and mental problems" defendant faced). It follows that including this type of evidence here does not itself show prejudice.

The potential harm is also not as great as Atkins suggests. The aggravating factors were significant. [**35] The jury was aware of the brutal circumstances surrounding Mason's death—which included attempted kidnapping, avoidance of lawful arrest, sexual assault, and mutilation of the victim—and of Atkins's prior conviction for assault with a deadly weapon. *See* Stankewitz v. Wong, 698 F.3d 1163, 1174 (9th Cir. 2012) ("To the extent additional evidence of the violent emotional outbursts that are part of Stankewitz's history would have had an aggravating impact, it would have been marginal relative to the evidence of antisocial behavior already before the jury."). Balanced against the aggravating factors, the jury considered the mitigating evidence regarding the abuse Atkins suffered as a child, that his parents were violent alcoholics, and that he had been placed in foster care. Dr. Colosimo's testimony appears unlikely to have substantially affected the relative weights of the aggravating and mitigating evidence. *See* Thornell v. Jones, 602 U.S. 154, 171-72, 144 S. Ct. 1302, 218 L. Ed. 2d 626 (2024) [*779] (noting the analysis "requires an evaluation of the strength of all the evidence and a comparison of the weight of aggravating and mitigating factors").

Thus, Atkins has not met the requirements of *Martinez* to excuse his procedural default because he fails to establish a reasonable probability that the underlying claim of ineffective [**36] assistance of trial counsel would have succeeded had it been raised. *See* Runningeagle, 825 F.3d at 982; Atwood, 870 F.3d at 1060.[12] We affirm the district court's denial of this procedurally defaulted claim.

iii.

Atkins's final argument as to ineffective assistance of counsel in the penalty phase is that, under a cumulative analysis, he was prejudiced by counsel's conduct as a whole. "The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007) (internal citation omitted). Here, however, Atkins has not shown the accumulation of multiple errors. Even accepting that Dr. Colosimo could have been better prepared before testifying at the penalty phase, Atkins did not show deficient performance in counsel's investigation or presentation of mitigating social history evidence.

* * * *

To summarize our disposition of this first certified issue,

[12] We note that even if the claim had been properly exhausted, *de novo* analysis suggests that the Nevada Supreme Court's denial of the claim was reasonable under AEDPA. *See* Berghuis v. Thompkins, 560 U.S. 370, 389, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010) (recognizing that where a claim fails under *de novo* review, denial of the claim by the state court must necessarily be reasonable under AEDPA's more deferential standard of review).

Atkins's claim that trial counsel was ineffective for failing to investigate and present additional mitigating social history evidence during the penalty phase was reasonably denied by the Nevada Supreme Court. The record before the state court did not show what investigation **[**37]** did occur, or how that investigation was deficient, and because the new evidence presented in the federal proceeding was largely cumulative it does not establish prejudice. His claim that trial counsel failed to adequately prepare Dr. Colosimo before testifying was not exhausted in state court, is now procedurally defaulted, and he cannot meet the *Martinez* standard to excuse his default. Given that Atkins has shown, at most, only one possible failing by counsel, there is no cumulative prejudice to consider. We affirm the district court.

B.

In the second certified issue, Atkins argues that the trial court erred in allowing the jury to speculate that he could be paroled or granted clemency if he received a sentence of life without parole. He contends the so-called *Petrocelli* instruction[13] **[*780]** was both misleading and inaccurate and that the prosecutor impermissibly invited the jury to speculate about the possibility of parole. *See Petrocelli v. State, 101 Nev. 46, 692 P.2d 503, 511 (Nev. 1985)* (setting forth a uniform clemency instruction), *superseded in part by statute as stated in Thomas v. State, 120 Nev. 37, 83 P.3d 818, 823 (Nev. 2004)*. He also asserts that his state court appellate counsel was ineffective for failing to raise this claim on direct appeal. We find that this jury instruction claim was unexhausted in state **[**38]** court and is now procedurally barred. Moreover, Atkins has not shown cause to excuse that default. He similarly failed to exhaust the related claim of ineffective assistance of appellate counsel.

Although Atkins presents these as separate subclaims in his federal petition, because they are intertwined, we summarize the Nevada Supreme Court's handling of them together. In his first state postconviction petition, Atkins raised a broad claim **[**39]** of ineffective assistance by the attorney who handled his direct appeal in state court. He specifically argued that state appellate counsel was ineffective for failing to raise a prosecutorial misconduct claim related to the prosecutor's cross-examination of former Associate Warden Jack Hardin. Atkins argued that the prosecutor elicited testimony from Hardin that incorrectly stated the State Board of Pardons could issue a pardon or commute his sentence. According to Atkins, this presented an unacceptable risk that the jury might have improperly imposed the death sentence based on concern for his possible future release from prison. The Nevada Supreme Court concluded this claim was without merit, stating that Atkins failed to identify why the prosecutor's statements were improper and that Hardin's testimony was not a misstatement of the authority of the Board of Pardons. It therefore concluded that state appellate counsel was not ineffective for failing to raise the issue.

In his federal petition Atkins raised a different challenge, arguing that the *Petrocelli* instruction regarding the power of the Board of Pardons was irrelevant and misleading given that *Nevada Revised Statute § 213.1099(4)* prohibited the State Parole Board from **[**40]** paroling certain prisoners.[14] Furthermore, he argued that the prosecutor compounded the error by inviting the jury during the penalty phase closing argument to speculate as to the possibility that a life without parole sentence could be reduced or modified (we refer to these two together as the "*Petrocelli* instruction claim"). In his associated ineffective assistance of appellate counsel claim, Atkins generally asserted that if any court found any record-based claims were not raised on direct appeal, it was because appellate counsel was ineffective.

The district court ruled that the *Petrocelli* instruction claim had not been raised on direct appeal in state court and therefore was not exhausted. *Atkins, 2020 U.S. Dist. LEXIS 121991, 2020 WL 3893628 at *46, *48*. The district court further determined that Atkins failed to demonstrate cause and prejudice to overcome the procedural default. *2020 U.S. Dist. LEXIS 121991, [WL] at *48*. We agree. Regarding the ineffective assistance of appellate counsel claim, the district

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[13] The jury was instructed:

Life imprisonment with the possibility of parole is a sentence of life imprisonment which provides that a defendant would be eligible for parole after a period of ten years. This does not mean that he would be paroled after ten years, but only that he would be eligible after that period of time.

Life imprisonment without the possibility of parole means exactly what it says, that a defendant shall not be eligible for parole.

If you sentence a defendant to death, you must assume that the sentence will be carried out.

Although under certain circumstances and conditions the State Board of Pardons Commissioners has the power to modify sentences, you are instructed that you may not speculate as to whether the sentence you impose may be changed at a later date.

[14] *Nevada Revised Statute § 213.1099(4)* prohibits the Parole Board from releasing on parole a "prisoner whose sentence to death or to life without possibility of parole has been commuted to a lesser penalty unless [it] finds that the prisoner has served at least 20 consecutive years in the state prison" and the prisoner "does not have a history of . . . [f]ailure in parole, probation, work release or similar programs."

court found the Nevada Supreme Court's denial to be reasonable under AEDPA. *2020 U.S. Dist. LEXIS 121991, [WL] at *46-48*. While the district court may have misconstrued the Nevada Supreme Court's ruling, we affirm because **[*781]** this ineffective assistance of counsel claim is unexhausted and procedurally defaulted.

i.

We agree with the district court **[**41]** that the *Petrocelli* instruction claim is unexhausted. Atkins never presented a challenge to the *Petrocelli* instruction in state court, and the Nevada Supreme Court ruling accordingly did not address such a claim. *See Cook v. Schriro, 538 F.3d 1000, 1025 (9th Cir. 2008)* ("We may not consider any federal-law challenge to a state-court decision unless the federal claim was either addressed by or properly presented to the state court that rendered the decision we have been asked to review." (internal quotation marks and citation omitted)). Atkins's argument that the Nevada Supreme Court considered the underlying substantive jury instruction claim when it denied the related broad ineffective assistance of appellate counsel claim is without merit because a fairly-presented ineffective assistance claim does not on its own exhaust an underlying substantive claim. *See Rose v. Palmateer, 395 F.3d 1108, 1112 (9th Cir. 2005)* ("While admittedly related, they are distinct claims with separate elements of proof, and each claim should have been separately and specifically presented to the state courts."). Furthermore, the Nevada Supreme Court expressly stated, "To the extent that Atkins raises independent constitutional claims, they are waived because they were not raised on direct appeal."

The *Petrocelli* instruction claim would now **[**42]** be considered technically exhausted but procedurally defaulted because if raised in state court, it would be dismissed under Nevada's procedural rules for failure to raise it on direct appeal, untimeliness, and laches. *See Nev. Rev. Stat. §§ 34.810, 34.726, 34.800*. Atkins argues that even if unexhausted, it is not procedurally defaulted because the procedural bar in *Nevada Revised Statute § 34.810*—which requires a petition to be dismissed when its claims could have been raised on direct appeal—is inadequate to bar federal review. He cites to *Valerio v. Crawford, 306 F.3d 742 (9th Cir. 2002)* (en banc), which supports his argument that "Nevada's procedural rules barring petitioners from raising constitutional claims that could have been raised previously are not adequate to bar federal review in capital cases." *Id. at 778*. However, as argued by the State, and not contested by Atkins, Nevada's other procedural rules are sufficient to bar federal review. *See Loveland v. Hatcher, 231 F.3d 640, 642-43 (9th Cir. 2000)* (affirming that Nevada's statute of limitations bar is adequate); *Moran v. McDaniel, 80 F.3d 1261, 1269-70 (9th Cir. 1996)* (finding that Nevada's laches bar is adequate). Thus, because Nevada's procedural rules are adequate bars to federal review, the *Petrocelli* instruction claim is procedurally defaulted.

In an alternative attempt to excuse the default, Atkins argues he was unable to bring the claim earlier because it relies **[**43]** on *Sechrest v. Ignacio, 549 F.3d 789 (9th Cir. 2008)*, a case decided after he filed his first postconviction petition. In *Sechrest*, the prosecutor repeatedly informed the jury that the defendant would not actually serve a life sentence if the jury sentenced him to life without parole, that prisoners are released even if they are sentenced to life without parole, and that the Board of Pardons had the ultimate authority to pardon anyone. *Id. at 808-09, 812-13*. We concluded this was misconduct because under *Nevada Revised Statute § 213.1099(4)*, the defendant was not eligible for parole. *Id. at 810*. Furthermore, we observed that the *Petrocelli* instruction contributed to the error as it was misleading when applied to the defendant **[*782]** because it confirmed the prosecutor's false comments on the possibility of parole. *Id. at 812*. The prosecutor's misconduct was prejudicial because it removed the jury's choice between a life and death sentence by repeatedly stating that unless the defendant was sentenced to death, he would be released and kill again. *Id. at 812-13*.

Although "a showing that the factual or legal basis for a claim was not reasonably available to counsel" can demonstrate "cause" to excuse a procedural default, *Carrier, 477 U.S. at 488*, that is not the case here. When Atkins filed his first state postconviction petition, available case law—which was relied on **[**44]** in *Sechrest*—offered a reasonable basis to challenge the *Petrocelli* instruction. *See Villafuerte v. Stewart, 111 F.3d 616, 629 (9th Cir. 1997)* (per curiam) (concluding that the petitioner did not demonstrate cause based on an opinion issued after he filed his state habeas petition, because he had "the tools to construct [this] constitutional claim" (quoting *Engle v. Isaac, 456 U.S. 107, 133, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982)*)). Specifically, Atkins could have relied on *Smith v. State, 106 Nev. 781, 802 P.2d 628 (Nev. 1990)*, which was decided before the conclusion of Atkins's trial and discussed in *Sechrest*. In *Smith*, the court explained that the Parole Board was restricted from granting parole under *Nevada Revised Statute § 213.1099(4)* for certain types of prisoners such as Atkins. *Smith, 802 P.2d at 630*. Additionally, Atkins could have relied on cases decided prior to his first state postconviction petition that discussed the contributing prejudicial effect of a commutation instruction, which he cites in his brief to this court. *See, e.g., Gallego v. McDaniel, 124 F.3d 1065 (9th Cir. 1997); Simmons v. South Carolina, 512 U.S. 154, 114 S. Ct. 2187, 129 L. Ed. 2d 133*

(1994); California v. Ramos, 463 U.S. 992, 103 S. Ct. 3446, 77 L. Ed. 2d 1171 (1983). Thus, the timing of Sechrest does not excuse the default of the jury instruction claim.

Atkins also suggests—in a one-line conclusory sentence in his reply brief—that his counsel's failure to raise the Petrocelli instruction claim on direct appeal provides cause to excuse the procedural default. This argument is both waived, see Delgadillo v. Woodford, 527 F.3d 919, 930 n.4 (9th Cir. 2008) ("Arguments raised for the first time in petitioner's reply brief are deemed waived."), [**45] and lacks merit. To make such an argument, Atkins would have to establish he exhausted an ineffective assistance of appellate counsel claim based specifically on failure to raise the Petrocelli instruction claim. See Carrier, 477 U.S. at 489 ("[A] claim of ineffective assistance" generally must "be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default."); Edwards v. Carpenter, 529 U.S. 446, 453, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000) ("[A]n ineffective-assistance-of-counsel claim asserted as cause for the procedural default of another claim can itself be procedurally defaulted"). As we discuss below, Atkins failed to do so.

ii.

Atkins argues that the broad catch-all ineffective assistance of counsel claim he raised in his state postconviction proceedings exhausted a more specific claim of ineffective assistance of counsel for failing to raise the Petrocelli instruction error as such. According to Atkins, he has thus shown cause to excuse the procedural default of the Petrocelli instruction claim. However, the general claim raised in state court cannot exhaust a new specific argument raised in federal habeas. Despite the district court's assertion to the contrary, we see no reference to the Petrocelli [*783] instruction in the Nevada Supreme Court's ruling. Atkins, 2020 U.S. Dist. LEXIS 121991, 2020 WL 3893628 at *46-47. Considering [**46] that Atkins never raised the Petrocelli instruction in state court, it follows that the Nevada Supreme Court would not have had the opportunity to consider whether counsel was ineffective for failing to raise such an argument on direct appeal. Neither did Atkins allege in his state postconviction petition that counsel was ineffective for failing to challenge the prosecutor's statements in closing argument. Atkins's new allegations in federal court as to the Petrocelli instruction thus fundamentally alter the broad ineffective assistance of counsel claim considered by the Nevada Supreme Court. See Dickens, 740 F.3d at 1318-19; see also Moormann v. Schriro, 426 F.3d 1044, 1056 (9th Cir. 2005) (finding unexhausted a more specific ineffective assistance claim for using only one expert to present an insanity defense when petitioner raised in state court an ineffective assistance of counsel claim for failing to investigate and present a viable defense). Atkins's broad ineffective assistance of counsel claim in the state courts, therefore, does not exhaust an ineffective assistance claim specific to the Petrocelli instruction.

The specific ineffective assistance claim is also procedurally defaulted. Atkins argues that, under Nevada Rules of Civil Procedure, the claim relates back to the broad ineffective [**47] assistance claim raised in his first state postconviction petition. But Nevada Revised Statute § 34.750 addresses pleadings in postconviction proceedings and prohibits supplemental pleadings beyond certain time limits unless ordered by the court. This statute controls over Nevada's Rules of Civil Procedure. See State v. Powell, 122 Nev. 751, 138 P.3d 453, 457-58 (Nev. 2006). Additionally, Atkins does not explain how exactly this claim would relate back to the previous petition, which has already been resolved. Thus, relation back does not solve Atkins's procedural default problem.

Because Atkins raises no additional arguments to support his assertion that his claim is not procedurally defaulted and does not argue that there is cause to excuse the default, we affirm the district court's denial of the claim. That, in turn, prevents Atkins from overcoming his default of the Petrocelli instruction claim, and we affirm the district court's denial of that claim as well.

IV.

Atkins seeks to expand the certificate of appealability to include two additional issues. We deny his request as to both.

A petitioner seeking to expand a certificate of appealability "must demonstrate that reasonable jurists would find the district court's assessment of the . . . claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). When a petitioner [**48] seeks a certificate of appealability on the denial of a procedural issue, the court must determine whether "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right" and whether "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

A.

Atkins first asks us to expand the certificate of appealability to include his claim that trial counsel performed deficiently in

the guilt phase by failing to timely investigate his psychological background and have him evaluated by an expert. Atkins points to different portions of Dr. Colosimo's penalty phase testimony as examples of what could have been used at the guilt **[*784]** phase to support a defense that he lacked the specific intent to commit murder. Specifically, Atkins references testimony as to his schizo-affective disorder, impulsive thought, diminished capacity, paranoid traits, drug experimentation, childhood head injury, delusional thinking, low IQ score, and generally impaired thinking. All these, according to Atkins, could have been used to show diminished capacity, lack of culpability, and an inability to premeditate a **[**49]** murder.

In state court, Atkins raised an ineffective assistance of counsel claim for failing to investigate and present psychological evidence at trial.[15] The Nevada Supreme Court concluded Atkins was not entitled to relief because counsel had undertaken investigation and Atkins had not shown what additional evidence would have been discovered that would have impacted the outcome of trial.[16] The Nevada Supreme Court concluded that Atkins had not shown that his counsel performed unreasonably or that he was prejudiced. In his federal petition, Atkins alleged that his counsel failed to have him timely evaluated for competence and failed to present any psychological evidence at the guilt phase. The district court held that the Nevada Supreme Court's conclusions as to counsel's performance and the lack of prejudice were reasonable under AEDPA. *Atkins, 2020 U.S. Dist. LEXIS 121991, 2020 WL 3893628 at *15-16*. The district court noted that while Dr. Colosimo testified that Atkins had "various forms of mental illness, there was nothing in his testimony supporting an argument that [Atkins] lacked the mental capacity to form the intent necessary for first-degree murder." *2020 U.S. Dist. LEXIS 121991, [WL] at *16*. The court further stated, "Atkins has never shown that further investigation, or better **[**50]** preparation of Dr. Colosimo, would have led to development of any such evidence." *Id.*

We are not persuaded by the State's argument that this claim is fundamentally altered because Atkins did not assert a claim related to failure to perform additional evaluation in state court. Despite new factual allegations in federal court that certain specific tests should have been performed, the substance of the ineffective assistance claim is the same: counsel was deficient in failing to timely request a competency hearing and failing to investigate and present a mental health defense that could have contradicted premeditation. The new allegations in federal court do not "fundamentally alter the legal claim already considered by the state courts." *Vasquez v. Hillery, 474 U.S. 254, 260, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986)*. Neither do the new allegations place the legal claim in a "significantly different and stronger evidentiary posture" than that presented in state court. *Filson, 908 F.3d at 574*; *see also Weaver v. Thompson, 197 F.3d 359, 364-65 (9th Cir. 1999)* (explaining that new factual allegations did not fundamentally alter the claim because the legal basis was the same and the factual basis remained "rooted in the same incident").

Atkins argues that the Nevada Supreme Court's denial on the merits was **[*785]** an unreasonable determination **[**51]** of fact as well as an unreasonable application of *Strickland*. However, there is no indication here of deficient performance by trial counsel. Although failure to conduct a prompt investigation into a defendant's mental health can signify deficient performance, *see, e.g., Crittenden v. Ayers, 624 F.3d 943, 960-61 (9th Cir. 2010)*, counsel here did not fail to conduct an investigation.[17] Atkins's counsel knew of his potential mental health issues and requested court approval for an evaluation months before trial, and when the first expert was unavailable successfully obtained authorization to substitute Dr. Colosimo. Atkins's counsel also sought a continuance for a competency hearing after receiving the initial report from Dr. Colosimo, but then withdrew that request after receiving Dr. Colosimo's second report. Atkins's counsel did not wait until the last minute to seek court authorization for an expert. Considering the circumstances counsel faced, including the delay in getting authorization for fees, the first expert's unexpected unavailability, and the short time between Melia's appointment as lead counsel and the start of trial, it does not appear that counsel performed deficiently for failing to have Atkins more promptly evaluated. *See Strickland, 466 U.S. at 688* ("[T]he performance **[**52]** inquiry must be whether counsel's assistance was reasonable considering all the circumstances."). Furthermore, as previously noted, Atkins's counsel apparently made a strategic decision to withdraw the

[15] This is the same claim that Atkins argues should be considered to have exhausted his certified claim of ineffective assistance of counsel in failing to prepare and adequately present Dr. Colosimo in the penalty phase. *See supra* Section III.A.

[16] Specifically, the Nevada Supreme Court noted that Atkins had met with Dr. Colosimo six times, Dr. Colosimo had conducted psychological testing on three occasions and spent a total of nine hours with Atkins, and Dr. Colosimo had provided Atkins's counsel with his written report and testified at the penalty phase hearing in mitigation of punishment.

[17] Under *28 U.S.C. § 2254(d)*, we consider only the evidence presented to the state courts. *See Twyford, 596 U.S. at 819*. To the extent Atkins attempts to rely on new declarations from counsels Melia and Kozal, we do not consider them.

motion for a competency hearing and use Dr. Colosimo solely for the penalty phase.

But even assuming Atkins's trial counsel performed deficiently, the Nevada Supreme Court's finding of lack of prejudice was reasonable. Dr. Colosimo's findings could not have supported a diminished capacity defense because Nevada does not recognize such as a defense. *See Crawford v. State, 121 Nev. 746, 121 P.3d 582, 591 (Nev. 2005)* ("[T]he technical defense of diminished capacity is not available in Nevada."); *Miller v. State, 112 Nev. 168, 911 P.2d 1183, 1185-87 (Nev. 1996)* (distinguishing the viable defense of legal insanity from unusable defense of diminished capacity). To the extent Atkins argues Dr. Colosimo's testimony would have demonstrated he was less culpable, the State presented evidence of felony murder, conspiracy to commit murder, and aiding and abetting theories of liability in addition to premeditation. Evidence as to level of culpability is typically the focus of sentencing. And, as to premeditation, Dr. Colosimo's perspective would not have provided much to negate the other evidence supporting a finding that **[**53]** Atkins did premeditate killing Mason, or aided and abetted the premeditated killing of Mason. The jury heard evidence that Atkins, Doyle, and Shawn killed Mason because they believed she was going to report a rape, and that Atkins prevented her from calling the police. The jury also heard evidence about the manner of killing, the three shoe impressions around her body, and the signs of considerable blunt and sharp trauma, sexual assault, lacerations, and a ligature mark around her neck. *See Hern v. State, 97 Nev. 529, 635 P.2d 278, 281 (Nev. 1981)* ("The nature and extent of the injuries, coupled with repeated blows, constitutes substantial evidence of willfulness, premeditation and deliberation."); *Cortinas v. State, 124 Nev. 1013, 195 P.3d 315, 326 (Nev. 2008)* ("[T]he use of a ligature and the time required to strangle a person are legitimate circumstances **[*786]** from which to infer that a killing is willful, deliberate, and premeditated.").

Counsel's failure to present testimony from Dr. Colosimo at the guilt phase did not result in a reasonable probability of a different outcome. *See Strickland, 466 U.S. at 694*. Because it does not appear debatable that the Nevada Supreme Court's decision was reasonable, we deny Atkins's request to expand the certificate of appealability to include this issue.

B.

Atkins also requests to expand the certificate **[**54]** of appealability to include his argument that trial counsel Melia was ineffective because she had a financial conflict of interest that discouraged her from requesting a continuance. According to Atkins, Melia knew the judge would not have granted a continuance or appointed her as Atkins's counsel if she indicated she was unprepared to proceed to trial on the scheduled timeline. Therefore, Atkins argues, Melia was forced to either proceed unprepared to trial or lose out on the financial opportunity of taking Atkins's case.

In his postconviction petition, Atkins raised a claim that the trial court abused its discretion in denying his request for a continuance. The Nevada Supreme Court did not address this claim, concluding it had been waived. In federal court, Atkins alleged Melia had a conflict which caused her to fail to request a continuance. Although he conceded he did not raise a conflict claim in state court, Atkins argued it should relate back to the prior claims of ineffective assistance of trial counsel. *Atkins, 2020 U.S. Dist. LEXIS 121991, 2020 WL 3893628, at *32*. The district court concluded that Atkins had failed to exhaust this claim, that it was procedurally defaulted, and that Atkins failed to demonstrate cause and prejudice to **[**55]** excuse the default. *2020 U.S. Dist. LEXIS 121991, [WL] at *32-33*.

We agree. At no time in state court did Atkins assert that Melia had a conflict of interest based on potential loss of financial benefit. The Nevada Supreme Court did not have a "fair opportunity" to evaluate this claim. *Davis, 511 F.3d at 1009*.

Additionally, Atkins cannot show cause or prejudice to overcome his procedural default. The record does not demonstrate that Atkins exhausted a claim of ineffective assistance of appellate counsel based on appellate counsel's failure to raise trial counsel's alleged conflict of interest on direct appeal; thus, state appellate counsel's failure to raise this claim on direct appeal cannot serve as cause. *See Carrier, 477 U.S. at 488-89*; *Edwards, 529 U.S. at 453*. Moreover, even if Atkins could show ineffective assistance of state postconviction counsel in failing to raise the conflict of interest claim in the initial state habeas proceeding, he fails to argue cause under *Martinez* and his arguments as to prejudice are unpersuasive because the claim is not substantial.

Nor has Atkins shown that his claim should be considered under *Sullivan v. Cuyler, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)*, which allows a presumption of prejudice if there is a showing of an actual conflict of interest affecting the adequacy of representation. *Id. at 349-50* ("[A] defendant who shows that **[**56]** a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice [] to obtain relief."). We have held that accepting representation for financial benefit is not the type of conflict envisioned by *Sullivan*. *See Bonin v. Calderon, 59 F.3d 815, 826 (9th Cir. 1995)* ("The fact that an attorney undertakes the

representation of a client because of a desire to profit does not by itself create the type of direct 'actual' conflict of interest required by [*Sullivan*]."). **[*787]** Furthermore, Atkins has not demonstrated an actual conflict as it does not appear from the record that Melia believed she would have lost the appointment if she requested a continuance, and she stated she was prepared to go to trial. Atkins has also failed to show any deficient performance by counsel or resulting prejudice.

Therefore, the underlying claim of ineffective assistance of counsel based on a conflict of interest does not have even "some merit," and Atkins cannot satisfy the *Martinez* criteria to excuse his procedural default. Because "jurists of reason would [not] find it debatable whether the district court was correct in its procedural ruling," *Lambright, 220 F.3d at 1026*, we deny Atkins's request to expand the certificate of appealability to this issue as well. **[**57]**

V.

We **AFFIRM** the district court's denial of Atkins's habeas petition and **DENY** Atkins's request to expand the certificate of appealability.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

STERLING ATKINS,

Petitioner - Appellant,

v.

JEREMY BEAN, Warden and STATE OF NEVADA ATTORNEY GENERAL'S OFFICE,

Respondents - Appellees.

No. 20-99008

D.C. No. 2:02-cv-01348-JCM-BNW
U.S. District Court for Nevada, Las Vegas

ORDER

Before: GOULD, CALLAHAN, SUNG, Circuit Judges.

The mandate is stayed pending the time to file a petition for certiorari. *See* 9th Cir. R. 22-2(e). Please note the following: (1) If no timely petition for certiorari is filed, the mandate will issue immediately upon the expiration of the time to file, absent an extension for good cause; (2) If a timely petition for certiorari is filed, the mandate will issue immediately upon notice to this court that the Supreme Court has denied the petition for certiorari unless the panel deems that extraordinary circumstances exist; and (3) If certiorari is granted, the stay of the mandate will continue until the Supreme Court's final disposition. *See* Fed. R. App. P. 41(d). If a petition for certiorari is filed, the moving party must notify this court in writing of that filing on the same day the petition is filed in the Supreme Court.

In addition, please note that this stay does not limit the ability to file a petition for panel rehearing and/or rehearing en banc with this court. *See* Fed. R. App. P. 35 & 40.

APPENDIX B

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STERLING ATKINS, Petitioner-Appellant, v. JEREMY BEAN, Warden; STATE OF NEVADA ATTORNEY GENERAL'S OFFICE, Respondents-Appellees.	No. 20-99008 D.C. No. 2:02-cv-01348-JCM-BNW District of Nevada, Las Vegas ORDER

Before: GOULD, CALLAHAN, and SUNG, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and to deny the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

The petition for rehearing and the suggestion for rehearing en banc are denied.

APPENDIX C

Atkins v. Gittere

United States District Court for the District of Nevada

July 10, 2020, Decided; July 10, 2020, Filed

Case No. 2:02-cv-01348-JCM-BNW

Reporter
2020 U.S. Dist. LEXIS 121991 *; 2020 WL 3893628

STERLING ATKINS, Petitioner, v. WILLIAM GITTERE, et al., Respondents.

Subsequent History: Affirmed by, Request denied by *Atkins v. Bean, 2024 U.S. App. LEXIS 30332 (9th Cir. Nev., Dec. 2, 2024)*

Prior History: *Atkins v. Filson, 2017 U.S. Dist. LEXIS 162528 (D. Nev., Sept. 28, 2017)*

Counsel: [*1] For Sterling Atkins, Petitioner: A. Richard Ellis, Law Offices of A. Richard Ellis, Mill Valley, CA.

For Nevada Attorney General, Timothy Filson, Respondents: Heather D. Procter, LEAD ATTORNEY, Nevada Attorney General's Office, Bureau of Criminal Justice - SPU, Carson City, NV.

Judges: JAMES C. MAHAN, UNITED STATES DISTRICT JUDGE.

Opinion by: JAMES C. MAHAN

Opinion

ORDER

Introduction

This action is a petition for a writ of habeas corpus by Sterling Atkins, a Nevada prisoner sentenced to death. The case is fully briefed and before the Court for adjudication of the merits of the claims remaining in Atkins' fourth amended habeas petition, and for resolution of Atkins' motion for an evidentiary hearing. The Court will deny Atkins' motion for an evidentiary hearing and will deny his petition.

Background Facts and Procedural History

In its order on Atkins' direct appeal, the Nevada Supreme Court described the factual background of this case as follows:

> On January 16, 1994, the nude body of twenty-year-old Ebony Mason was discovered twenty-five feet from the road in an unimproved desert area of Clark County. The woman's body was found lying face down with hands extended overhead to a point on the ground where it appeared that [*2] some digging had occurred. A four-inch twig protruded from the victim's rectum. Three distinct types of footwear impressions were observed in the area as well as a hole containing a broken condom, a condom tip and an open but empty condom package.
> In the opinion of the medical examiner, Mason died from asphyxia due to strangulation and/or from blunt trauma to the head. The autopsy revealed nine broken ribs, multiple areas of external bruising, contusions, lacerations, abrasions, and a ligature mark on the anterior surface of the neck. Mason's body also bore a number of patterned contusions consistent with footwear impressions on the skin of the back and chest. Finally, the autopsy revealed severe lacerations of the head and underlying hemorrhage within the skull indicating a blunt force trauma.
>
> A police investigation led to the arrest of appellant Sterling Atkins, Jr. ("Atkins") and Anthony Doyle in Las Vegas, Nevada. Atkins' brother, Shawn Atkins ("Shawn"), was also arrested, but his arrest took place in Ohio by agents of the Federal Bureau of Investigation ("FBI"). Upon his arrest, Shawn gave a voluntary statement to the FBI regarding the events leading up to Mason's death on January [*3] 15, 1994. Shawn stated that after returning to Atkins' apartment from a party that night, he, Atkins, and Doyle encountered Ebony Mason, a mutual acquaintance, who was intoxicated and/or high on drugs. Mason agreed to accompany the men to Doyle's apartment to have sex with them. According to Shawn, Mason had consensual sex with Atkins and oral sex with Shawn, but she refused Doyle when he attempted to have anal sex with her. After these activities, Doyle agreed to drive Mason to downtown Las Vegas. Doyle drove a pick-up truck with Shawn, Atkins and Mason accompanying him, but instead of driving

downtown, Doyle drove to a remote area in Clark County. Doyle was angry with Mason and demanded that she walk home. When she refused, Doyle stripped her clothes off and raped her as Shawn and Atkins watched, and then both Atkins and Doyle beat and kicked her until she died.

The State charged Doyle, Atkins and Shawn with one count each of murder, conspiracy to commit murder, robbery, first degree kidnapping and sexual assault. The State also filed a notice of intent to seek the death penalty. Thereafter, the district court granted Doyle's motion to sever trials and dismissed the robbery count **[*4]** against all three men. At a separate trial, commencing January 3, 1995, Doyle was convicted on all counts and sentenced to death for the murder. *See Doyle v. State, 112 Nev. 879, 921 P.2d 901 (1996).*

On February 13, 1995, prior to trial, Shawn entered into a plea bargain agreement wherein he pleaded guilty to first-degree murder and first-degree kidnapping and was sentenced to two concurrent life sentences with the possibility of parole. As part of the bargain, Shawn agreed to testify at Atkins' trial.

On March 20, 1995, Atkins' jury trial commenced. As the State's only eyewitness, Shawn testified that Atkins was not involved in Mason's beating and murder, but the State impeached Shawn with his prior inconsistent statements to the FBI and to witness Mark Wattley. At the conclusion of the guilt phase of the trial on March 30, 1995, the jury found Atkins guilty of murder, conspiracy to commit murder, first-degree kidnapping and sexual assault. At the conclusion of the penalty phase, the jury sentenced Atkins to death for the murder conviction.

Atkins v. State, 112 Nev. 1122, 1125-26, 923 P.2d 1119, 1121-22 (1996) (Respondents filed a copy of the opinion as Exh. 189 (ECF No. 93-12)). The judgment of conviction was entered on June 8, 1995. *See* Judgment of Conviction, Exh. 159 (ECF No. 92-21). Atkins was sentenced **[*5]** to death for the first-degree murder, a consecutive sentence of six years in prison for the conspiracy to commit murder, a consecutive sentence of life in prison without the possibility of parole for the first-degree kidnapping, and a consecutive sentence of life in prison without the possibility of parole for the sexual assault. *See id.*

Atkins appealed. On August 28, 1996, the Nevada Supreme Court reversed the sexual assault conviction, but affirmed the convictions of first-degree murder, conspiracy to commit murder, and first-degree kidnapping, as well as the death sentence. *See Atkins, 112 Nev. at 1137, 923 P.2d at 1129.* The Nevada Supreme Court denied rehearing on October 17, 1996. *See* Order Denying Rehearing, Exh. 195 (ECF No. 93-18). The United States Supreme Court denied certiorari on March 17, 1997. *See Atkins v. Nevada, 520 U.S. 1126, 117 S. Ct. 1267, 137 L. Ed. 2d 346 (1997).* The amended judgment of conviction, reflecting the reversal of the sexual assault conviction, was entered on April 30, 1997. *See* Amended Judgment of Conviction, Exh. 216 (ECF No. 93-39).

On April 18, 1997, Atkins filed a petition for writ of habeas corpus in the state district court. *See* Petition for Post-Conviction Relief, Exh. 211 (ECF No. 93-34); *see also* Supplemental Brief in Support of Petition, Exh. 232 (ECF No. **[*6]** 94-13). The state district court heard argument of counsel (Transcript of Proceedings, Exhs. 235, 236 (ECF Nos. 94-16, 94-17) and then denied the petition in an order filed on January 4, 2001. *See* Findings of Fact, Conclusions of Law and Order, Exh. 237 (ECF No. 94-18). Atkins appealed, and the Nevada Supreme Court affirmed on May 14, 2002. *See* Order of Affirmance, Exh. 261 (ECF No. 94-43).

Atkins initiated this federal habeas corpus action on October 11, 2002, by filing a pro se petition for writ of habeas corpus (ECF No. 1). Counsel was appointed for Atkins, and, with counsel, on May 19, 2005, Atkins filed what his counsel termed a "supplemental petition" (ECF No. 32). On December 10, 2007, Atkins filed a first amended petition (ECF No. 69), and on October 29, 2008, he filed a second amended petition (ECF No. 85).

Respondents filed a motion to dismiss on January 23, 2009 (ECF No. 88). The Court ruled on that motion on August 18, 2009 (ECF No. 105), dismissing certain of Atkins' claims, and finding certain of his claims unexhausted in state court. Atkins moved for a stay to allow him to exhaust his unexhausted claims in state court (ECF No. 108). The Court granted that motion and stayed **[*7]** the case (ECF Nos. 116, 119), and granted Atkins leave to file a third amended petition (ECF Nos. 116, 117).

On November 4, 2009, Atkins initiated a second state habeas action. *See* Petition for Writ of Habeas Corpus (Post-Conviction), Exh. 283 (ECF No. 194-20). On March 22, 2012, the state district court dismissed that petition. *See* Findings of Fact, Conclusions of Law and Order, Exh. 289 (ECF No. 194-26). Atkins appealed, and on April 23, 2014, the Nevada Supreme Court affirmed, ruling that the claims asserted by Atkins in his second state habeas action were untimely filed under *NRS 34.726*, barred by laches under *NRS 34.800*, and successive and an abuse of the writ under *NRS 34.810*. *See* Order of Affirmance, Exh. 307 (ECF No. 195-17). The Nevada Supreme Court denied Atkins' petition for rehearing. *See* Order Denying Rehearing, Exh. 312 (ECF No. 195-22).

The stay of this action was lifted on January 19, 2015 (ECF

No. 145), and Atkins filed a fourth amended petition for writ of habeas corpus—now the operative petition—on August 26, 2016 (ECF No. 183). In his fourth amended petition, Atkins asserts the following claims:

> 1(a). Atkins' federal constitutional rights were violated as a result of ineffective assistance of his **[*8]** trial counsel because his counsel "proceed[ed] to trial despite the fact that first chair counsel had been appointed only five days prior to trial and co-counsel was newly-admitted to the Nevada Bar and this was his first jury trial."
>
> 1(b). Atkins' federal constitutional rights were violated as a result of ineffective assistance of his trial counsel because of "ineffective assistance of counsel in *voir dire* and jury selection."
>
> 1(c). Atkins' federal constitutional rights were violated because his trial counsel were ineffective "for failure to assert a *Batson* challenge to the State's removal of Mr. Long, the only remaining African-American in the jury pool."
> 1(d). Atkins' federal constitutional rights were violated because his trial counsel were ineffective "for failure to argue that the trial court committed reversible error by excusing [Prospective Juror Number 1] ... and failure to question him regarding his attitude on the death penalty."
> 1(e). Atkins' federal constitutional rights were violated as a result of ineffective assistance of his trial counsel because of "cumulative ineffective assistance of counsel at the pre-trial phase."
>
> 2. Atkins' federal constitutional rights were violated **[*9]** because his trial counsel were ineffective "for failing to investigate and present evidence of Mr. Atkins' incompetency to stand trial."
> 3(a). Atkins' federal constitutional rights were violated because his trial counsel were ineffective "for failing to investigate and present psychological evidence at the guilt phase of the trial."
> 3(b). Atkins' federal constitutional rights were violated because his trial counsel were ineffective "for suggesting that Atkins 'jumped in' to the killing of Ebony Mason."
> 3(c). Atkins' federal constitutional rights were violated because his trial counsel were ineffective "for testifying instead of questioning."
> 3(d). Atkins' federal constitutional rights were violated because his trial counsel were ineffective "for denigrating the victim and terming her a 'hood rat.'"
> 3(e). Atkins' federal constitutional rights were violated because his trial counsel were ineffective "for failure to timely object to irrelevant and prejudicial evidence from the victim's father."
>
> 3(f). Atkins' federal constitutional rights were violated because his trial counsel were ineffective "for emphasizing on cross-examination that there were three patterns of footwear."
>
> 3(g). Atkins' federal **[*10]** constitutional rights were violated because his trial counsel were ineffective "for failure to present a shoe impression expert."
> 3(h). Atkins' federal constitutional rights were violated because his trial counsel were ineffective "for failure to obtain an independent hair analysis expert."
> 3(i). Atkins' federal constitutional rights were violated because his trial counsel were ineffective for "failure to impeach three key prosecution witnesses."
> 3(j). Atkins' federal constitutional rights were violated as a result of ineffective assistance of his trial counsel because of "cumulative ineffective assistance of counsel at the guilt phase."
> 4(a). Atkins' federal constitutional rights were violated as a result of ineffective assistance of his trial counsel because his "trial counsel unreasonably failed to retain and supervise appropriate investigators and other staff to conduct an adequate and timely investigation."
> 4(b). Atkins' federal constitutional rights were violated as a result of ineffective assistance of his trial counsel because his "trial counsel failed to investigate and present readily available and substantially mitigating social history evidence."
>
> 4(c). Atkins' federal constitutional **[*11]** rights were violated because his trial counsel were ineffective for "emphasizing [Atkins'] failure in prison and on parole."
> 4(d). Atkins' federal constitutional rights were violated because his trial counsel were ineffective for "not objecting to extensive testimony regarding parole."
> 4(e). Atkins' federal constitutional rights were violated because his trial counsel were ineffective for "eliciting harmful information from defense prison expert Mr. Hardin."
> 4(f). Atkins' federal constitutional rights were violated because his trial counsel were ineffective "for failure to challenge any of the six aggravating circumstances."
> 4(g). Atkins' federal constitutional rights were violated because his trial counsel were ineffective "in the preparation and presentation of defense expert Dr. Colosimo."
> 4(h). Atkins' federal constitutional rights were violated as a result of ineffective assistance of his trial counsel because of "cumulative ineffective assistance of counsel at the punishment phase."
> 5. Atkins' federal constitutional rights were violated because "lead counsel had a conflict of interest with her client that caused her to fail to request a continuance."

6. Atkins' federal constitutional [*12] rights were violated because of "prosecutorial misconduct under *Brady v. Maryland* and *Giglio v. United States* by failing to disclose deals made with the principal State's witnesses."
7(a). Atkins' federal constitutional rights were violated because "the trial court erred in denying defense counsels' motion challenging the composition of the jury pool and Mr. Atkins' conviction" and because of "under representation of African-Americans in the jury pool and on his jury."
7(b). Atkins' federal constitutional rights were violated because "the trial court erred in allowing hearsay statements made by Shawn Atkins to State's witness Mark Wattley."
7(c). Atkins' federal constitutional rights were violated because "the trial court erred in not allowing the defense a continuance."
7(d). Atkins' federal constitutional rights were violated because "the trial court committed reversible error by excusing juror number one, Mr. Corcoran and failing to further question him regarding his attitude on the death penalty."
7(e). Atkins' federal constitutional rights were violated on account of "trial court error for failing to grant a full an adequate competency hearing."

7(f). Atkins' federal constitutional [*13] rights were violated on account of "trial court error for allowing prosecutorial misconduct in final punishment phase argument and prosecutorial misconduct for the argument."
8. Atkins' federal constitutional rights were violated "because the prosecution used a racially-motivated peremptory challenge to exclude the only remaining African-American from the jury.
9. Atkins' federal constitutional rights were violated because "Nevada's unconstitutional common law definitions of the elements of the capital offense are unconstitutional and many of the aggravating factors were invalid."
10. Atkins' federal constitutional rights were violated because "the trial court erred in allowing the jury to speculate that Atkins could be paroled or granted clemency if he received a sentence of life without the possibility of parole.
11. Atkins' federal constitutional rights were violated because "the trial court gave an incorrect definition of reasonable doubt which lowered the State's burden of proof."
12. Atkins' federal constitutional rights were violated because "the definition of 'premeditation and deliberation' given [to Atkins'] jury was unconstitutional."

13. Atkins' federal constitutional rights [*14] were violated as a result of ineffective assistance of his appellate counsel.
14. Atkins' federal constitutional rights were violated because "the trial court erred in admitting irrelevant, cumulative and prejudicial victim impact evidence at the guilt and penalty phases of the trial."
15. Atkins' federal constitutional rights were violated because his trial "was conducted before judges who were popularly elected."
16. "The Nevada system of execution by lethal injection is unconstitutional."
17. Atkins' "sentence is unconstitutional due to the failure of the Nevada Supreme Court to conduct fair and adequate appellate review."
18. Atkins' death sentence is in violation of the federal constitution because "the Nevada capital punishment system is arbitrary and capricious."
19. Atkins' death sentence is in violation of the federal constitution because "the death penalty is cruel and unusual punishment."
20. Atkins' "conviction and sentence violate international law and the International Covenant on Civil and Political Rights."

21. Atkins' death sentence is in violation of the federal constitution because "the execution of a death sentence after keeping the condemned on death row for an inordinate [*15] amount of time constitutes cruel and unusual punishment."
22. Atkins' federal constitutional rights were violated because "the cumulative effect of errors undermined the fundamental fairness of the trial and the reliability of the death judgment."
23. Atkins' death sentence is in violation of the federal constitution because Atkins "may become incompetent to be executed."
24. Atkins' federal constitutional rights were violated because Atkins "is actually innocent of capital murder."

Fourth Amended Petition (ECF No. 183), pp. 91-330 (capitalization and punctuation altered in quotations of headings).

On December 22, 2016, Respondents filed a motion to dismiss (ECF No. 192), arguing that various of Atkins' claims are barred by the statute of limitations, unexhausted in state court, procedurally defaulted, and not cognizable in this federal habeas corpus action. In an order filed on September 28, 2017, the Court granted that motion in part and denied it in part. The Court dismissed Claims 1(b), 1(c), 3(b), 3(c), 3(d), 3(h), 4(c), 4(d), 4(e), 4(f), 8, 9 (in part), 13 (in part), 15

and 24 on the ground that they are barred by the statute of limitations, and Claim 23 on the ground that it is not [*16] cognizable in this action. In all other respects the Court denied the motion. The Court determined that, as the question of the procedural default of Atkins' claims involves consideration of the merits of the claims, those issues would be better addressed after Respondents filed their answer and Atkins his reply. Therefore, the Court's ruling on the motion to dismiss was without prejudice to Respondents reasserting their procedural default defenses in their answer.

The respondents filed an answer, responding to Atkins' remaining claims, on April 13, 2018 (ECF No. 219). Atkins filed a reply on September 7, 2018 (ECF No. 222). Respondents filed a response to Atkins' reply on January 18, 2019 (ECF No. 231).

Along with his reply, on September 7, 2018, Atkins filed a motion for an evidentiary hearing (ECF No. 223). Respondents filed an opposition to that motion on January 18, 2019 (ECF No. 230). Atkins did not reply.

Discussion

Standard of Review

Because this action was initiated after April 24, 1996, the amendments to *28 U.S.C. § 2254* enacted as part of the Antiterrorism and Effective Death Penalty Act (AEDPA) apply. *See Lindh v. Murphy, 521 U.S. 320, 336, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997)*; *Van Tran v. Lindsey, 212 F.3d 1143, 1148 (9th Cir. 2000)*, overruled on other grounds by *Lockyer v. Andrade, 538 U.S. 63, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003)*. *28 U.S.C. § 2254(d)* sets forth the primary standard of review under the [*17] AEDPA:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim ??
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). A state court decision is contrary to clearly established Supreme Court precedent, within the meaning of *28 U.S.C. § 2254(d)(1)*, "if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme Court's] precedent." *Lockyer, 538 U.S. at 73* (quoting *Williams v. Taylor, 529 U.S. 362, 405-06, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*). A state court decision is an unreasonable application of clearly established Supreme Court precedent, within the meaning of *28 U.S.C. § 2254(d)(1)*, "if the state court [*18] identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Lockyer, 538 U.S. at 75* (quoting *Williams, 529 U.S. at 413*). The "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous; the state court's application of clearly established law must be objectively unreasonable. *Id.* (*quoting Williams, 529 U.S. at 409*). The analysis under *section 2254(d)* looks to the law that was clearly established by United States Supreme Court precedent at the time of the state court's decision. *Wiggins v. Smith, 539 U.S. 510, 520, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)*.

The Supreme Court has instructed that "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter, 562 U.S. 86, 101, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)* (citing *Yarborough v. Alvarado, 541 U.S. 652, 664, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004)*). The Supreme Court has also instructed that "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id. at 102* (citing *Lockyer, 538 U.S. at 75*); *see also Cullen v. Pinholster, 563 U.S. 170, 181, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011)* (AEDPA standard is "a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt" (internal quotation marks and citations omitted)).

The state courts' [*19] "last reasoned decision" is the ruling subject to *section 2254(d)* review. *Cheney v. Washington, 614 F.3d 987, 995 (9th Cir. 2010)*. When a state appellate court does not provide an explanation for its decision, the federal habeas court "should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale" and "presume that the unexplained decision adopted the same reasoning." *Wilson v. Sellers, 138 S. Ct. 1188, 1192, 200 L. Ed. 2d 530 (2018)*; *see also Ylst v. Nunnemaker, 501 U.S. 797, 803-04, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991)* (the federal court may look through to the last reasoned state court decision).

Where the state court summarily denied a claim but there is no reasoned state-court decision on the claim, a presumption exists that the state court adjudicated the claim on the merits, unless "there is reason to think some other explanation for the state court's decision is more likely." *Richter, 562 U.S. at 99-100*. In that case, a reviewing federal court "must determine what arguments or theories supported or ... could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Id. at 102*.

In considering a habeas petitioner's claims under *section 2254(d)*, the federal court takes into account only the evidence presented **[*20]** in state court. *Pinholster, 563 U.S. at 185-87*.

The federal court's review is de novo for claims not adjudicated on their merits by the state courts. *See Cone v. Bell, 556 U.S. 449, 472, 129 S. Ct. 1769, 173 L. Ed. 2d 701 (2009); Porter v. McCollum, 558 U.S. 30, 39, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009)*.

Procedural Default and *Martinez*

In *Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)*, the Supreme Court held that a state prisoner who fails to comply with the state's procedural requirements in presenting claims is barred by the adequate and independent state ground doctrine from obtaining a writ of habeas corpus in federal court. *Coleman, 501 U.S. at 731-32* ("Just as in those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance."). Where such a procedural default constitutes an adequate and independent state ground for denial of habeas corpus, the default may be excused only if "a constitutional violation has probably resulted in the conviction of one who is actually innocent," or if the prisoner demonstrates cause for the default and prejudice resulting from it. *Murray v. Carrier, 477 U.S. 478, 496, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)*.

To demonstrate cause for a procedural default, the petitioner must "show that some objective factor external to the defense impeded" his efforts to comply **[*21]** with the state procedural rule. *Murray, 477 U.S. at 488*. For cause to exist, the external impediment must have prevented the petitioner from raising the claim. *See McCleskey v. Zant, 499 U.S. 467, 497, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991)*. With respect to the prejudice prong, the petitioner bears "the burden of showing not merely that the errors [complained of] constituted a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire [proceeding] with errors of constitutional dimension." *White v. Lewis, 874 F.2d 599, 603 (9th Cir. 1989)*, citing *United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982)*.

In *Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012)*, the Supreme Court ruled that ineffective assistance of post-conviction counsel may serve as cause to overcome the procedural default of a claim of ineffective assistance of trial counsel. The *Coleman* Court had held that the absence or ineffective assistance of state post-conviction counsel generally could not establish cause to excuse a procedural default because there is no constitutional right to counsel in state post-conviction proceedings. *See Coleman, 501 U.S. at 752-54*. In *Martinez*, however, the Supreme Court established an equitable exception to that rule, holding that the absence or ineffective assistance of counsel at an initial-review collateral proceeding may establish cause to excuse a petitioner's procedural default of substantial claims of **[*22]** ineffective assistance of trial counsel. *See Martinez, 566 U.S. at 9*. The Court described "initial-review collateral proceedings" as "collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial." *Id. at 8*.

In the September 28, 2017, order, the Court observed that, on the appeal in Atkins' first state habeas action, the Nevada Supreme Court ruled that certain of his claims—claims other than ineffective assistance of counsel claims—were procedurally barred under state law because Atkins did not raise those claims on his direct appeal. *See* Order filed September 28, 2017 (ECF No. 214), pp. 11-12. Those claims are subject to application of the procedural default doctrine in this case.

In the September 28, 2017, order, the Court also observed that, in Atkins' second state habeas action, the Nevada Supreme Court ruled that his entire petition was procedurally barred under state law, and, therefore, claims exhausted by Atkins in state court only in his second state habeas action are also subject to application of the procedural default doctrine. *See id. at 12*.

In addition, in the September 28, 2017, order, the Court pointed out that the Supreme Court has recognized that under certain **[*23]** circumstances it may be appropriate for a federal court to anticipate the state-law procedural bar of an unexhausted claim, and to treat such a claim as subject to the procedural default doctrine. *See id. at 10-11*. "An unexhausted claim will be procedurally defaulted, if state procedural rules would now bar the petitioner from bringing the claim in state

court." *Id.* (quoting *Dickens v. Ryan, 740 F.3d 1302, 1317 (9th Cir. 2014)* (citing *Coleman, 501 U.S. at 731*)).

In the September 28, 2017, order, the Court ruled that, under *Martinez*, Atkins might be able to overcome certain of his procedural defaults, but the Court declined to rule on the question of the procedural defaults until the merits of the claims were briefed. *See id.at 12*.

Standards Governing Claims of Ineffective Assistance of Counsel

In *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*, the Supreme Court propounded a two-part test for analysis of claims of ineffective assistance of counsel: the petitioner must demonstrate (1) that the attorney's representation "fell below an objective standard of reasonableness," and (2) that the attorney's deficient performance prejudiced the defendant such that "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 court considering a claim of ineffective **[*24]** assistance of counsel must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. *Id. at 689*. The petitioner's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the *Sixth Amendment*." *Id. at 687*. To establish prejudice under *Strickland*, it is not enough for the habeas petitioner "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id. at 693*. Rather, the errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id. at 687*.

Where a state court previously adjudicated a claim of ineffective assistance of counsel under *Strickland*, establishing that the state court's decision was unreasonable is especially difficult. *See Richter, 562 U.S. at 104-05*. In *Richter,* the Supreme Court instructed:

> The standards created by *Strickland* and *§ 2254(d)* are both "highly deferential," [*Strickland, 466 U.S. at 689*]; *Lindh v. Murphy, 521 U.S. 320, 333, n.7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997)*, and when the two apply in tandem, review is "doubly" so, *Knowles [v. Mirzayance, 556 U.S. 111, 123, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009)]*. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S., at 123, 129 S.Ct. at 1420. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with **[*25]** unreasonableness under *§ 2254(d)*. When *§ 2254(d)* applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.

Richter, 562 U.S. at 105; *see also Cheney v. Washington, 614 F.3d 987, 995 (9th Cir. 2010)* ("When a federal court reviews a state court's *Strickland* determination under AEDPA, both AEDPA and *Strickland*'s deferential standards apply; hence, the Supreme Court's description of the standard as 'doubly deferential.' [*Yarborough v. Gentry, 540 U.S. 1, 6, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003)* (per curiam)].").

Claim 1(a)

In Claim 1(a), Atkins claims that his federal constitutional rights were violated as a result of ineffective assistance of his trial counsel because his counsel "proceed[ed] to trial despite the fact that first chair counsel had been appointed only five days prior to trial and co-counsel was newly-admitted to the Nevada Bar and this was his first jury trial." Fourth Amended Petition (ECF No. 183), pp. 91-99.

Prior to trial and through the trial, Atkins was represented by three attorneys: Anthony Sgro, Laura Melia (now Laura Murry) and Kent Kozal. During the time leading up to, and at, Atkins' preliminary hearing, Atkins was represented by Sgro and Melia. *See* Minutes of the Justice Court, Exh. 1 (ECF No. 89-2); Transcript **[*26]** of Preliminary Hearing, Exhs. 20, 21 (ECF Nos. 21, 22, 23 and 24). Melia was then an associate in Sgro's office. After the preliminary hearing, which was conducted on May 19 and 20, 1994, Melia apparently left Sgro's employment, and was replaced on Atkins' case by Kozal. Later, as the trial approached, on May 15, 1995, as a result of a scheduling conflict on the part of Sgro, Sgro was allowed to withdraw, and Melia returned to the case, in Sgro's place, as lead counsel for Atkins. Atkins' trial commenced on May 20, 1995, with Atkins represented by Melia and Kozal. *See* Fourth Amended Petition (ECF No. 183), pp. 92-94. Atkins claims that his trial counsel proceeding to trial under those circumstances, with Melia back on his case for only five days before the start of the trial, amounted to ineffective assistance of counsel. *See id.*

Specifically, regarding the effect of his counsel proceeding to trial under these circumstances, Atkins claims:

> This rush to trial resulted in the failure of trial counsel, *inter alia*, to timely investigate, to timely prepare penalty phase witnesses, to fail to impeach State's witness with their contradictory testimony in the co-defendant's trial, to present **[*27]** evidence of Atkins' innocence of the crime, and present psychological evidence of Atkins'

competency to stand trial. As a result, no psychological evidence was presented at the guilt phase of his trial, although there was abundant evidence of his incompetency and his inability to make a reasoned decision to proceed to trial instead of accepting a plea to a life sentence which was offered. This failure and defense counsels' unpreparedness also resulted in the disastrous presentation of Dr. Colosimo's testimony at the penalty phase.

* * *

Additional consequences of the failure to request a continuance were ineffective assistance at *voir dire* and in the selection of the jury and at all phases of the trial.

* * *

The record shows many examples of deficient performance, discussed in more detail in the numerous claims and sub-claims of ineffective assistance of counsel that follow this claim. In summary they include, but are not limited to: 1) inadequate time to review the juror questionnaires and prepare *voir dire*; 3) [sic] completely inadequate jury selection, discussed in detail in the following sub-claim; 4) the failure to mount a *Batson* challenge to the State's dismissal of the one remaining **[*28]** African-American juror; 5) inadequate time to prepare cross-examination of the State's witnesses and direct examination of the defense witnesses, 6) failure to impeach key State's witness on inconsistent testimony in the co-defendant *Doyle*'s case which had just concluded; 7) failure to timely assess Mr. Atkins' competency, which resulted in the holding of a competency hearing after the trial had commenced; 8) failure to present any witnesses at the guilt phase of the trial or present Mr. Atkins' case for innocence; 9) attacking the victim's sexual habits by using a derogatory term, which led to damaging victim impact evidence at the guilt phase; 10) failure to competently present expert testimony of Dr. Colosimo; 11) failure to present readily available mitigating evidence of Atkins' deprived background and parental abuse; 12) failure to argue against any of the six alleged aggravating circumstances, which doomed Mr. Atkins' chance for a life sentence.

* * *

The prejudice component of *Strickland* is evident here as the direct result of the deficient performances of the defense outlined above. It includes:

1) the seating of a biased jury, as discussed in the following sub-claim;

2) the failure **[*29]** to assert a *Batson* challenge to the State's dismissal of the last remaining African-American meant that there were no African-Americans left on Mr. Atkins' jury;

3) Ms. Melia's unpreparedness in attacking the victim led to the disaster of the victim's father testifying at the guilt phase, which would have been otherwise inadmissible;

4) the failure to request a timely competency hearing until the trial had already begun led to the court's circumscribing that hearing (to the sole issue of Atkins' competency to reject a plea deal);

5) the failure to properly prepare Dr. Colosimo led to damaging testimony at the penalty phase, such as that Atkins lacked remorse and was self-centered;

6) counsels' unfamiliarity with the case led to their otherwise inexplicable failure to impeach key state's witnesses on their inconsistent testimony in the recently-completed trial of the co-defendant Anthony Doyle;

7) counsels' failure to challenge any of the six aggravating circumstances led to the jury finding them all to be true, despite a lack of evidence as to most of them.

Id. at 91-92, 98-99.

The Court reads Claim 1(a) as providing explanation and support for other claims of ineffective assistance of counsel in Atkins' petition. **[*30]** To the extent that in Claim 1(a) Atkins seeks relief for the ineffective assistance of trial counsel alleged in other more specific and more detailed claims, Claim 1(a) is repetitive and redundant, and unnecessary as a separate claim.

Viewed slightly differently, as Respondents point out (*see* Response to Reply (ECF No. 231), p. 10), Claim 1(a) is essentially a cumulative error claim, incorporating allegations presented in other claims throughout Atkins' petition. As such, it is repetitive and redundant of Claims 1(e), 3(j), 4(h) and 22, Atkins' other cumulative error claims, and, again, it is unnecessary as a separate claim.

The Court will deny Atkins habeas corpus relief on Claim 1(a) but will consider the allegations made by Atkins in Claim 1(a) in reviewing Atkins' other claims of ineffective assistance of trial counsel and his other cumulative error claims.

Claims 1(d) and 7(d), and the Related Part of Claim 13

In Claim 1(d), Atkins claims that his federal constitutional rights were violated because his trial counsel were ineffective "for failure to argue that the trial court committed reversible error by excusing [Prospective Juror Number 1] ... and failure to question him regarding **[*31]** his attitude on the death penalty." Fourth Amended Petition (ECF No. 183), pp. 123-

28. In Claim 7(d), Atkins claims that his federal constitutional rights were violated because "the trial court committed reversible error by excusing [Prospective Juror Number 1] and failing to further question him regarding his attitude on the death penalty." *Id. at 217-20*. And, in Claim 13, Atkins appears to claim that his appellate counsel was ineffective, in part, for not asserting a claim such as Claim 7(d) on his direct appeal. *Id.* at 293-94.

Prospective Juror Number 1 was the first prospective juror questioned. *See* Transcript of Trial, March 20, 1995, Exh. 121, pp. 3207-21 (ECF No. 91-22, pp. 20-34). Early on, under questioning by the trial judge, the following exchange occurred:

> THE COURT: Do you have any conscientious, moral or religious objections to the imposition of the death penalty?
> PROSPECTIVE JUROR NO. 1: I never considered — I don't know if my religion is against it or not, so I may seek a little counseling on that.
> THE COURT: Would you mind explaining, sir?
>
> PROSPECTIVE JUROR NO. 1: Well, I don't — I've never been asked that before, and I profess to Catholic faith, and I don't know if the Catholic faith accepts the **[*32]** death penalty or not.

Id. 3213 (ECF No. 92-22, p. 26). Later in the questioning of Prospective Juror Number 1, the following exchange took place:

> MR. SCHWARTZ [Prosecutor]: ... Sir, without prying into your religious beliefs, aside from your religious convictions, is there anything about the death penalty that personally causes you a problem, personal belief?
> PROSPECTIVE JUROR NO. 1: Well, yes, a little bit.
> MR. SCHWARTZ: Okay. Could you explain what gives you a problem with regard to the death penalty?
> PROSPECTIVE JUROR NO. 1: Well, a little bit in that — and it's probably related to the religion that a person [can] always change and, you know, has another chance.
>
> MR. SCHWARTZ: Okay. If you were selected as a member of this jury, and you believe that the State had proven the Defendant guilty of first-degree murder, and you and your fellow jurors announced that verdict in court and then you participated in the penalty phase, when again it's like a second trial — you'd hear testimony of witnesses, the attorneys would argue to the jury — and you would determine whether or not the Defendant should be sentenced [to] life imprisonment with parole, life imprisonment without parole or the death penalty, **[*33]** you'd have three options. If you were in that situation you felt the nature of the crime and what you had heard, the only appropriate punishment for this particular crime would be one of death, because of what you just told me, do you think you would automatically say, "I just can't do it. Anybody can change; I'm not going to vote for the death penalty. Under circumstances can I, myself do that." We have to know now. Once we select a jury it's too late.
> PROSPECTIVE JUROR NO. 1: If I was ...
> MR. SCHWARTZ: If you were the State and you were seeking the death penalty, would you want twelve individuals like yourself?
> PROSPECTIVE JUROR NO. 1: No, I wouldn't, sir.
> MR. SCHWARTZ: Under any circumstances, do you think you could come into a courtroom and pronounce a death sentence on an individual?
> PROSPECTIVE JUROR NO. 1: No, sir, I don't think I could.
> MR. SCHWARTZ: We challenge for cause, your Honor.
> THE COURT: Traverse?
> MR. KOZEL [defense counsel]: ... [E]arlier we talked about you may have a problem sentencing someone to death based upon your religion. Is that still the basis for your feelings?
>
> PROSPECTIVE JUROR NO. 1: Yes, because the way I was raised, and I profess these, that when it came down **[*34]** to it I don't think I could probably vote for the death penalty.
> MR. KOZEL: After listening to all the evidence for and against, all the aggravating and all the mitigating circumstances, under no situation could you vote for the death penalty?
> PROSPECTIVE JUROR NO. 1: No, I don't think I could.
> MR. KOZEL: Nothing further, your Honor.
> THE COURT: Thank you.... You are excused. Report back to the jury room for further instructions.

Id. at 3219-21 (ECF No. 91-22, pp. 32-34).

In his first state habeas action, Atkins asserted the claims of ineffective assistance of trial and appellate counsel—that his trial counsel was ineffective for not opposing the excusal of this juror, and that his appellate counsel was ineffective for not asserting on his direct appeal a claim that the excusal of the prospective juror was erroneous. *See* Appellant's Opening Brief, Exh. 256, pp. 24-28 (ECF No. 94-37, pp. 40-44). The Nevada Supreme Court ruled as follows on those claims:

> ... Atkins contends that his trial and appellate counsel were ineffective in failing to challenge the district court's excusal of a prospective juror because it was not "unmistakably clear" that he would automatically vote

> against the imposition of death. **[*35]** We disagree. At the end of a lengthy voir dire, the prospective juror indicated that he could not, under any circumstances, vote for the death penalty. We conclude that the district court properly excused the prospective juror and that Atkins' trial and appellate counsel were not ineffective for failing to object to the excusal.

Order of Affirmance, Exh. 261, p. 5 (ECF No. 94-43, p. 6). In a footnote, the Nevada Supreme Court cited, as follows, the United States Supreme Court's holding in *Wainwright v. Witt, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985)*:

> *See Wainwright v. Witt, 469 U.S. 412, 424, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985)* (holding that "the proper standard for determining when a prospective juror can be excluded because of his or her views on capital punishment ... [i]s whether the juiror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'") (quoting *Adams v. Texas, 448 U.S. 38, 45, 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980)*[])].

Id. at p. 5 n.11 (ECF No. 94-43, p. 6 n.11).

The Nevada Supreme Court accurately pointed to *Wainwright* as stating the standard for whether a juror may be excused because of his or her beliefs in opposition to the death penalty: "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright, 469 U.S. at 424*. Potential **[*36]** jurors must be dismissed from the juror pool where they make it "'unmistakably clear' that they could not be trusted to 'abide by existing law' and 'to follow conscientiously the instructions' of the trial judge." *Lockett v. Ohio, 438 U.S. 586, 595-596, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978)* (quoting *Boulden v. Holman, 394 U.S. 478, 484, 89 S. Ct. 1138, 22 L. Ed. 2d 433 (1969)*). The jury must be comprised of individuals who "will consider and decide the facts impartially and conscientiously apply the law as charged by the court." *Adams, 448 U.S. at 45*.

Applying *Strickland* and affording the Nevada Supreme Court's ruling the deference mandated by *28 U.S.C. § 2254(d)(1)*, this Court will deny Atkins relief on these claims of ineffective assistance of counsel concerning the excusal of Prospective Juror Number 1. The Nevada Supreme Court's ruling, that the excusal of the prospective juror was proper and that Atkins' counsel were not ineffective for failing to challenge his excusal, was reasonable.

The substantive claim in Claim 7(d)—that the trial court violated Atkins' federal constitutional rights by excusing Prospective Juror Number 1—is subject to dismissal under the procedural default doctrine. Atkins first asserted this claim in his first state habeas action, and the Nevada Supreme Court ruled it procedurally barred under state law. *See* Appellant's Opening Brief, Exh. 256, pp. 24-28 **[*37]** (ECF No. 94-37, pp. 40-44); Order of Affirmance, Exh. 261, p. 1 n.2 (ECF No. 94-43, p. 2 n.2) ("To the extent that Atkins raises independent constitutional claims, they are waived because they were not raised on direct appeal. *See NRS 34.810(1)(b)*."). Atkins does not show cause and prejudice relative to the procedural default; his appellate counsel was not ineffective for not asserting the claim on his direct appeal. Claim 7(d) will be denied as procedurally defaulted.

Claim 1(e)

In Claim 1(e), Atkins claims that his federal constitutional rights were violated as a result of ineffective assistance of his trial counsel because of "cumulative ineffective assistance of counsel at the pre-trial phase." Fourth Amended Petition (ECF No. 183), p. 128. This is a cumulative error claim covering the ineffective assistance counsel claims in Claims 1(a), 1(b), 1(c) and 1(d); as the Court does not find ineffective assistance of trial counsel as alleged in any of those claims, there is no ineffective assistance of counsel to be considered cumulatively, and Claim 1(e) fails. The Court will deny Atkins habeas corpus relief relative to Claim 1(e).

Claims 2 and 7(e), and the Related Part of Claim 13

In Claim 2, Atkins **[*38]** claims that his federal constitutional rights were violated because his trial counsel were ineffective "for failing to investigate and present evidence of Mr. Atkins' incompetency to stand trial." Fourth Amended Petition (ECF No. 183), pp. 129-39. In Claim 7(e), Atkins claims that his federal constitutional rights were violated on account of "trial court error for failing to grant a full and adequate competency hearing." *Id. at 221-22*. And, in Claim 13, Atkins appears to claim that his appellate counsel was ineffective, in part, for not asserting the claim in Claim 7(e) on his direct appeal. *Id.* at 293-94.

The conviction of a legally incompetent person violates due process, and where the evidence raises a "bona fide doubt about" the defendant's competency, due process requires that a full competency hearing be held. *See Pate v. Robinson, 383 U.S. 375, 385, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966)*. The test for competency is "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings

against him." *Dusky v. United States, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960)* (per curiam); *see also Clark v. Arnold, 769 F.3d 711, 729 (9th Cir. 2014)*. A hearing is required where there is "substantial evidence" giving rise to a "bona fide" doubt about the defendant's [*39] competence. *See Davis v. Woodford, 384 F.3d 628, 644 (9th Cir. 2004)*.

Atkins asserted these claims on the appeal in his first state habeas action. *See* Appellant's Opening Brief, Exh. 256, pp. 13-19, 40-42, 66 (ECF No. 94-37, pp. 29-35, 56-58, and ECF No. 94-38, p. 19).

The Nevada Supreme Court ruled on the ineffective assistance of counsel claims as follows:

> Atkins first claims that his trial counsel failed to adequately investigate Atkins' mental status. Atkins also alleges that his trial attorneys erred by failing to introduce evidence of his mental infirmities at the guilt phase of his trial to defend against premeditation. Atkins is not entitled to relief on these claims. First, pursuant to defense counsel's request, Atkins met with clinical psychologist Dr. Philip Colosimo six times. Dr. Colosimo conducted psychological testing of Atkins on three of those occasions, and estimated that he spent a total of nine hours with him. Dr. Colosimo provided defense counsel with his written report and testified at Atkins' penalty hearing in mitigation of punishment. Atkins has not indicated what material evidence would have been discovered through additional investigation into his mental status or how that evidence would have affected the outcome [*40] of his trial. Second, Dr. Colosimo explicitly concluded in his report that Atkins was competent at the time he committed the crimes. We therefore conclude that the record repels Atkins' claims that his trial counsel's investigation or use of psychological evidence was objectively unreasonable and that he was prejudiced.
>
> Next, Atkins contends that his trial counsel failed to timely move for a competency hearing and thereafter improperly withdrew the allegedly untimely motion. In support of these claims, Atkins states that his trial attorneys filed their motion two days prior to trial and cites (1) a letter received by defense counsel from Dr. Colosimo stating that Atkins suffers from various psychological infirmities; (2) Atkins' belief that a second death sentence could not be imposed for the murder of the single victim in this case [Footnote: In a severed trail that preceded Atkins', co-defendant Anthony Lavon Doyle was found guilty of, inter alia, first-degree murder and was sentenced to death. *See Doyle v. State, 112 Nev. 879, 884, 921 P.2d 901, 905 (1996)*.]; and (3) his summary rejection of a proffered plea bargain involving a sentence less than death. We conclude that Atkins has failed to establish that he was incompetent, or that a competency [*41] hearing would have been required had the issue been maintained. [Footnote: *See Melchor-Gloria v. State, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983)* (competency hearing required where substantial evidence shows that a defendant may be mentally incompetent to stand trial).] First, Dr. Colosimo's letter preceded his report in which he concluded that Atkins was competent at the time of the crimes. Atkins presents no evidence to suggest that his competency deteriorated in the approximately nine months between the crimes and trial. Further, Atkins presented a defense of "mere presence." Thus, his rejection of a guilty plea does not appear irrational. Finally, two days prior to trial defense counsel told the district court that Atkins had been disabused of his erroneous belief that two death sentences could not be imposed for the murder of one individual. Because the record belies Atkins' claim of incompetency, we conclude that his claims of ineffective assistance related to that claim lack merit. Similarly, Atkins' contentions that his appellate counsel should have argued that the district court erred in failing to grant Atkins a competency hearing, that Atkins was incompetent to be sentenced, and that he is or will be incompetent to be executed are not [*42] supported by the record and are without merit.

Order of Affirmance, Exh. 261, pp. 2-4 (ECF No. 94-43, pp. 3-5).

Atkins' claims of ineffective assistance of counsel in Claims 2 and 13, regarding his counsel's handling of the question of his competence to stand trial, are meritless, for the fundamental reason that there has never been any evidence presented to support the contention that Atkins was incompetent to stand trial. There is no showing that any such evidence was available to, or could have been developed by, Atkins' trial counsel. No such evidence was presented in Atkins' first state habeas action, and no such evidence is presented here. It always has been, and it remains, speculation that, had Atkins' trial counsel better prepared Dr. Colosimo, or earlier moved for a competency hearing, or done something else different with respect to the issue, they could have shown that Atkins was incompetent to stand trial. Absent any evidence indicating that Atkins was incompetent to stand trial, Atkins does not make any showing that his trial counsel performed unreasonably, or that he was prejudiced. And, absent such evidence, there is no showing that Atkins' appellate counsel was ineffective [*43] for failing to raise the issue on his direct appeal, or that he was prejudiced. The rulings on these claims by the Nevada Supreme Court were not contrary to, or an unreasonable application of, *Strickland* or any other

Supreme Court precedent. The Court will deny Atkins habeas corpus relief on these claims.

The substantive claim in Claim 7(e)—that the trial court violated Atkins' federal constitutional rights by failing to grant a full and adequate competency hearing—is subject to dismissal under the procedural default doctrine. Atkins first asserted this claim in state court in his first state habeas action, and the Nevada Supreme Court ruled it procedurally barred under state law. *See* Appellant's Opening Brief, Exh. 256, pp. 15-19 (ECF No. 94-37, pp. 31-35); Order of Affirmance, Exh. 261, p. 1 n.2 (ECF No. 94-43, p. 2 n.2). Atkins does not show cause and prejudice relative to the procedural default; his appellate counsel was not ineffective for not asserting the claim on his direct appeal. Therefore, Claim 7(e) will be denied as procedurally defaulted.

Claim 3(a)

In Claim 3(a), Atkins claims that his federal constitutional rights were violated because his trial counsel were ineffective **[*44]** "for failing to investigate and present psychological evidence at the guilt phase of the trial." Fourth Amended Petition (ECF No. 183), pp. 140-43.

Atkins asserted this claim in his first state habeas action. *See* Appellant's Opening Brief, Exh. 256, pp. 13-15 (ECF No. 94-37, pp. 29-31). The Nevada Supreme Court ruled on the claim as follows:

> Atkins ... claims that his trial counsel failed to adequately investigate Atkins' mental status. Atkins also alleges that his trial attorneys erred by failing to introduce evidence of his mental infirmities at the guilt phase of his trial to defend against premeditation. Atkins is not entitled to relief on these claims. First, pursuant to defense counsel's request, Atkins met with clinical psychologist Dr. Philip Colosimo six times. Dr. Colosimo conducted psychological testing of Atkins on three of those occasions, and estimated that he spent a total of nine hours with him. Dr. Colosimo provided defense counsel with his written report and testified at Atkins' penalty hearing in mitigation of punishment. Atkins has not indicated what material evidence would have been discovered through additional investigation into his mental status or how that evidence **[*45]** would have affected the outcome of his trial. Second, Dr. Colosimo explicitly concluded in his report that Atkins was competent at the time he committed the crimes. We therefore conclude that the record repels Atkins' claims that his trial counsel's investigation or use of psychological evidence was objectively unreasonable and that he was prejudiced.

Order of Affirmance, Exh. 261, pp. 2-3 (ECF No. 94-43, pp. 3-4).

The Court finds the Nevada Supreme Court's ruling on this claim to be reasonable. Atkins points to the penalty-phase testimony of Dr. Colosimo (Transcript of Trial, April 27, 1995, Exh. 147, pp. 38-78 (ECF No. 92-8, pp. 42-82)), and argues that Atkins' trial counsel should have presented Dr. Colosimo as a witness in the guilt phase of the trial in an attempt to show that Atkins did not have the mental capacity to form the intent necessary for first-degree murder. However, while Dr. Colosimo testified that Atkins had various forms mental illness, there was nothing in his testimony supporting an argument that he lacked the mental capacity to form the intent necessary for first-degree murder. Furthermore, Atkins has never shown that further investigation, or better preparation **[*46]** of Dr. Colosimo, would have led to development of any such evidence.

This ruling by the Nevada Supreme Court was not contrary to, or an unreasonable application of, *Strickland* or any other Supreme Court precedent. The Court will deny Atkins habeas corpus relief on Claim 3(a).

Claims 3(e) and 14, and the Related Part of Claim 13

In Claim 3(e), Atkins claims that his federal constitutional rights were violated because his trial counsel were ineffective "for failure to timely object to irrelevant and prejudicial evidence from the victim's father." Fourth Amended Petition (ECF No. 183), pp. 150-51. In Claim 14, Atkins claims that his federal constitutional rights were violated because "the trial court erred in admitting irrelevant, cumulative and prejudicial victim impact evidence at the guilt and penalty phases of the trial." *Id.* at 295-97. And, in the related part of Claim 13, Atkins claims that his counsel on his direct appeal was ineffective for not asserting, on the direct appeal, the claims in Claim 14. *Id.* at 293-94. As the Court reads these claims, Claim 3(e) concerns the testimony of Gary Mason, the victim's father, in the guilt phase of the trial (*see* Fourth Amended Petition (ECF No. 183), pp. 150-51; Transcript **[*47]** of Trial, March 23, 1995, Exh. 129, pp. 125-38 (ECF No. 91-34, pp. 36-49)), while Claims 14 and the related part of Claim 13 concern both the guilt-phase testimony Gary Mason and the penalty-phase testimony of Gary Mason and Maria Mason, the victim's mother (*see* Fourth Amended Petition (ECF No. 183), pp. 295-97; Transcript of Trial, April 26, 1995, Exh. 145, pp. 10-30 (ECF No. 92-6, pp. 14-34)).

During the guilt phase of Atkins' trial, the prosecution gave notice that Gary Mason would be called to testify, and the defense made a motion to exclude testimony by him regarding

the death of Ebony Mason's child about six months before her murder. *See* Transcript of Trial, March 23, 1995, Exh. 129, pp. 3879-84 (ECF No. 91-33, pp. 89-94). The trial court denied the motion, ruling that the victim's state of mind and possible explanations for her actions around the time of her murder were relevant, in part because there was evidence of her drug use and sexual activity on the night of her murder, and because, under cross-examination by defense counsel, prosecution witness Shawn Atkins had referred to her as a "hood rat," apparently referring to her alleged sexual proclivities. *See id*; *see also* **[*48]** Transcript of Trial, March 23, 1995, Exh. 129, p. 3843 (ECF No. 91-33, p. 53).

On his direct appeal, Atkins argued that the trial court erred in admitting the testimony of Gary Mason regarding the death of Ebony Mason's child. *See* Appellant's Opening Brief, Exh. 181, pp. 38-41 (ECF No. 93-3, pp. 20-23). The Nevada Supreme Court ruled on that claim as follows:

> Atkins next asserts that the district court erred in admitting evidence relating to the previous death of Ebony Mason's child because it was irrelevant and more prejudicial than probative.
>
> Trial courts have considerable discretion in determining the relevance and admissibility of evidence. [*Sterling v. State, 108 Nev. 391, 395, 834 P.2d 400, 403 (1992)*.] An appellate court should not disturb the trial court's ruling absent a clear abuse of that discretion. [*Lucas v. State, 96 Nev. 428, 431-32, 610 P.2d 727, 730 (1980)*.] Relevant evidence is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." *NRS 48.015*. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues or of misleading the jury. *NRS 48.035(1)*.
>
> We conclude that the evidence of Ebony Mason's **[*49]** child's death was relevant because it was offered to respond to disparaging comments regarding Mason's character elicited by the defense. Shawn testified on cross-examination that he believed Mason was either intoxicated or high on drugs the night of the murder. Essentially, the defense put the victim on trial. In response, the State presented testimony from Gary Mason, Ebony Mason's father, that Ebony's child had died in a bathtub drowning six months prior to Mason's death. Gary Mason further stated that as a result of the death, Ebony suffered "from major depression and a post-traumatic stress syndrome." Gary Mason described Ebony Mason's depression and her use of illegal drugs as a result of that tragedy.
>
> We conclude that the evidence of Ebony Mason's child's death and her consequent depression are relevant to explain the defense's characterization of her as a "hood rat" and substance abuser. Whether this evidence was more probative than prejudicial should be left to the sound discretion of the trial court. *Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985)*. We conclude that the district court's admission of this evidence was not an abuse of its discretion.

Atkins, 112 Nev. at 1133-34, 923 P.2d at 1126-27.

To the extent that the Nevada Supreme Court's ruling regarding Gary Mason's **[*50]** guilt-phase testimony about the death of the victim's child was based on state law, it is authoritative and beyond the scope of this federal habeas corpus action. *See Bradshaw v. Richey, 546 U.S. 74, 76, 126 S. Ct. 602, 163 L. Ed. 2d 407 (2005)* ("[S]tate court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus.") (citing *Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)*); *Mullaney v. Wilbur, 421 U.S. 684, 691, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975)*.

Focusing on the Nevada Supreme Court's rejection of Atkins' claim under the federal constitution—that the admission of Gary Mason's testimony about the death of the victim's child, in the guilt phase of the trial, violated Atkins' federal constitutional rights—where a state court has ruled on an issue without analysis, the federal habeas court still affords the ruling deference under *28 U.S.C. § 2254(d)*. "Under *§ 2254(d)*, a habeas court must determine what arguments or theories supported or ... could have supported, the state court's decision; and then it must ask 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, 562 U.S. at 102*.

It is well established that "[h]abeas relief is available for wrongly admitted evidence only when the questioned evidence renders the trial so fundamentally **[*51]** unfair as to violate federal due process." *Jeffries v. Blodgett, 5 F.3d 1180, 1192 (9th Cir. 1993)* (as amended). However, "[t]he Supreme Court has made very few rulings regarding the admission of evidence as a violation of due process." *Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009)*. "Although the Court has been clear that a writ should be issued when constitutional errors have rendered the trial fundamentally unfair, it has not yet made a clear ruling that admission of irrelevant or overly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ." *Id.* (internal citation omitted); *see also Alberni v. McDaniel,*

458 F.3d 860, 863-67 (2006). Atkins does not point to any clearly established federal law, as determined by the Supreme Court, holding that admission of testimony such as that at issue here violates a defendant's right to due process of law. This Court cannot find that the Nevada Supreme Court's ruling was an unreasonable application of Supreme Court precedent, such as to warrant habeas relief under 28 U.S.C. § 2254(d). The testimony of Gary Mason about the death of the victim's child, in the guilt phase of Atkins' trial, was not so unfairly prejudicial as to render Atkins' trial fundamentally unfair. The Court will deny Atkins habeas corpus relief with respect to the part of Claim 14 that he raised **[*52]** in state court on his direct appeal.

In his first state habeas action, Atkins asserted claims that the trial court erred in admitting the testimony of Gary Mason and Maria Mason. *See* Petition for Post-Conviction Relief, Exh. 211, p. 3 (ECF No. 93-34, p. 4); Supplemental Brief in Support of Petition, Exh. 232, pp. 69-71 (ECF No. 94-13, pp. 70-72). The state district court ruled those claims to be procedurally barred. *See* Findings of Fact, Conclusions of Law and Order, Exh. 237 (ECF No. 94-18). On the appeal in the state habeas action, Atkins asserted the narrower claim, already resolved on Atkins' direct appeal, that it was error to allow the testimony of Gary Mason regarding the death of the victim's child, but he conceded in his briefing that the claim was procedurally barred. *See* Appellant's Opening Brief, Exh. 256, p. 69 (ECF No. 94-38, p. 22).

Atkins' claims regarding Gary Mason's testimony in the guilt phase beyond the subject of the death of the victim's child—concerning the victim's drug addiction, depression, post-traumatic stress disorder, and efforts at rehabilitation—are subject to denial as procedurally defaulted, unless Atkins can show cause and prejudice relative to the **[*53]** procedural defaults. There is no showing that this testimony was irrelevant, or improper in any way; and that testimony did not render Atkins' trial fundamentally unfair. The Court, then, finds insubstantial Atkins' claim that his trial counsel was ineffective for not objecting to this testimony. The Court finds that Atkins' appellate counsel was not ineffective for not asserting this substantive claim on his direct appeal. And, the Court finds that Atkins' counsel in his first state habeas action was not ineffective for failing to assert a claim of ineffective assistance of trial counsel relative to this testimony. This part of Claims 3(e), 13 and 14—again, regarding Gary Mason's testimony in the guilt phase beyond the subject of the death of the victim's child—will be denied as procedurally defaulted.

Regarding the part of Claims 13 and 14 concerning the penalty-phase testimony of Gary Mason and Maria Mason, it is well-established that victim impact testimony is allowed in capital murder cases so long as it is not such as to render the trial fundamentally unfair. In Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991), the Supreme Court held that, in the penalty phase of a capital trial, "if the State chooses to permit the admission **[*54]** of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar." Payne, 501 U.S. at 827. The Court added: "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." Id. at 825 (citing Darden v. Wainwright, 477 U.S. 168, 179-83, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986)). The Court determines that any claim that the penalty-phase testimony of Gary Mason or Maria Mason (*see* Transcript of Trial, April 26, 1995, Exh. 145, pp. 10-30 (ECF No. 92-6, pp. 14-34)) rendered Atkins' trial fundamentally unfair would have been meritless. Atkins' appellate counsel was not ineffective for not asserting such a claim on Atkins' direct appeal. The parts of Claims 13 and 14 concerning the penalty-phase testimony of Gary Mason and Maria Mason will be denied as procedurally defaulted.

Claims 3(f) and 3(g)

Claims 3(f) and 3(g) are claims of ineffective assistance of counsel related to the evidence of shoe prints found at the scene of the murder and on the victim's body. In Claim 3(f), Atkins claims that his federal constitutional rights were violated because his trial counsel were ineffective "for emphasizing on cross-examination that there were three patterns of footwear." Fourth Amended Petition **[*55]** (ECF No. 183), p. 151. And, in Claim 3(g), Atkins claims that his federal constitutional rights were violated because his trial counsel were ineffective "for failure to present a shoe impression expert." Id. at 152-53.

Taking Claim 3(g) first, Atkins asserted this claim in his first state habeas action, and it was denied. The Nevada Supreme Court ruled on the claim as follows:

> ... Atkins claims that trial counsel were ineffective in failing to call an expert witness to rebut the State's contention that three different shoe prints were recovered from the area surrounding the victim and from the victim herself. This claim lacks merit. First, Atkins has failed to articulate how the rebuttal testimony of an expert witness would have affected the outcome of Atkins' trial. Second, in her cross-examination of the State's expert, defense counsel established (1) that the expert could not identify who was wearing the shoes leaving marks on and around the victim's body, and (2) that although three distinct footwear patterns were recovered from the crime

> scene, one shoe could have left multiple patterns. Further, defense counsel reiterated in her closing argument that three footwear patterns did not necessarily **[*56]** indicate the presence of three different shoes. Thus, the record repels Atkins' claim that his trial counsel's performance was objectively unreasonable or that he was prejudiced by their failure to call the suggested expert witness.

Order of Affirmance, Exh. 261, p. 7 (ECF No. 94-43, p. 8).

This Court determines that this claim is without merit, and that the Nevada Supreme Court's ruling was reasonable. Atkins does not in this action, and did not in state court, proffer any opinion of any expert to demonstrate what an expert might have said and how an expert opinion might have benefitted the defense. It is speculation that an expert witness would have opined in a manner that would have undermined the strong evidence that three different footwear patterns were found at the scene of the murder and on the victim's body. As the Court of Appeals stated in *Wildman v. Johnson, 261 F.3d 832 (9th Cir. 2001)*:

> ... Wildman has not shown that his case was prejudiced as a result of not retaining an arson expert. Wildman offered no evidence that an arson expert would have testified on his behalf at trial. He merely speculates that such an expert could be found. Such speculation, however, is insufficient to establish prejudice. *See Grisby v. Blodgett, 130 F.3d 365, 373 (9th Cir.1997)* (speculating as **[*57]** to what expert would say is not enough to establish prejudice).

Wildman, 261 F.3d at 839.

The Nevada Supreme Court's ruling, rejecting the claim made here by Atkins in Claim 3(g) was not contrary to, or an unreasonable application of, *Strickland*, or any other Supreme Court precedent. The Court will deny Atkins relief on Claim 3(g).

In Claim 3(f), Atkins contends that his trial counsel was ineffective in cross-examining prosecution witness David Lemaster, a crime scene analyst, because, as Atkins' sees it, his counsel questioned Lemaster in a way that affirmed that three separate footwear patterns were found that the scene of the crime, and thereby "needlessly emphasized the culpability of her client." Fourth Amended Petition (ECF No. 183), p. 151.

In his first state habeas action, Atkins made no claim like the one in Claim 3(f). *See* Petition for Post-Conviction Relief, Exh. 211 (ECF No. 93-34); Supplemental Brief in Support of Petition, Exh. 232 (ECF No. 94-13); Appellant's Opening Brief, Exh. 256 (ECF Nos. 94-37, 94-38). Therefore, this claim is subject to denial as procedurally defaulted, unless Atkins can show cause and prejudice under *Martinez*.

Lemaster was present at the autopsy of the victim, and he photographed **[*58]** several bruises on her body. *See* Transcript of Trial, March 23, 1995, Exh. 129, pp. 3947-49 (ECF No. 91-34, pp. 63-65). On direct examination, Lemaster testified that he saw "three distinct separate types of patterns" left by footwear on the victim's body, and he described the three distinct patterns that he saw. *See id.* at 3951-52 (ECF No. 91-34, pp. 68-69). Atkins' trial counsel cross-examined Lemaster on this subject as follows:

> Q. And you testified regarding different patterns of, I believe you called them contusion areas. Is that what you called them?
> A. They were described as bruises or contusions.
> Q. Okay.
> A. The two are synonymous.
> Q. And you indicated that there were three different patterns of contusion areas?
> A. In my opinion.
> Q. Okay.
> A. What I saw.
> Q. And you also testified that you're aware of what footprints look like from burglary cases or something that you've worked on?
> A. Absolutely. Many times at burglary scenes footwear evidence is present and ...
> Q. Okay.
> A. ... many times have I documented it.
> Q. Are you a footprint expert?
> A. No, I'm not.
> Q. Okay. And in looking at those three different patterns that you talked about, you're not indicating those are three separate footprints, are you?
>
> A. **[*59]** I don't understand your question.
> Q. Each pattern does not represent a different footprint, does it?
> A. Each pattern ...
> Q. you describe in those pictures three different patterns.
> A. Yes.
> Q. I think one was a - I think Mr. - I think you were asked whether they were small herringbone, large herringbone, and a diamond shape. Is that correct?
> A. Counsel described it as that and I agreed. I could also add my own descriptors to that.
> Q. Okay. And you're not saying that a separate shoe made each one of those prints, the patterns, correct?
> A. What I'm saying is, by looking at it, the three patterns seemed separate and distinct to me.
> Q. Right. But my question to you is they're different patterns, they're not different footprints according to

your testimony, correct?
A. I'm going to say to me, by looking at them once again, they appear to be three distinct different pattern types.
Q. You're not a footprint expert, right?
A. No, ma'am, I have not attended FBI footprint.
Q. Okay. And your testimony is that they're merely three different patterns?
A. Yes, ma'am.

Id. at 3965-67 (ECF No. 91-34, pp. 81-83).

Taking into consideration Lemaster's direct testimony, the cross-examination of him, and the entire record of the trial, **[*60]** the Court concludes that this claim of ineffective assistance of trial counsel is without merit. When Atkins' trial counsel cross-examined Lemaster, Lemaster had already made clear in his direct testimony that he observed three different and distinct footwear patterns on the victim's body. On cross-examination, Atkins' counsel did not add to that or emphasize it unduly; what she did in her cross-examination was point out that Lemaster could not be certain that those three patterns necessarily were made by three different shoes. She also brought out the fact that Lemaster was not a footwear expert. Atkins' trial counsel's cross-examination of Lemaster was not objectively unreasonable. Moreover, it is plain that Atkins was not prejudiced; several other witnesses testified that there were three different and distinct footwear patterns on the victim's body. *See* Transcript of Trial, March 23, 1995, Exh. 129, pp. 3898-3900, 3911-13 (ECF No. 91-34, pp. 14-16, 27-29) (testimony of Dr. Robert Jordan, forensic pathologist who performed autopsy); Transcript of Trial, March 27, 1995, Exh. 133, pp. 4286-87 (ECF No. 91-40, pp. 25-26) (testimony of Karen Good, crime scene analyst present at the autopsy); **[*61]** Transcript of Trial, March 27, 1995, Exh. 133, pp. 4292-93 (ECF No. 91-40, pp. 31-32) (testimony of Norman R. Ziola, police officer present at the autopsy); Transcript of Trial, March 28, 1995, Exh. 135, pp. 52-53 (ECF No. 91-42, pp. 57-58) (testimony of Richard George Good, Sr., police firearms and tool mark examiner who examined footwear patterns on victim's body).

Therefore, the Court finds that Atkins' claim of ineffective assistance of trial counsel in Claim 3(f) is meritless and is not substantial within the meaning of *Martinez*. Atkins' counsel in his first state habeas action was not ineffective for not asserting this claim. Atkins does not show cause and prejudice relative to the procedural default of Claim 3(f). Claim 3(f) will be denied as procedurally defaulted.

Claim 3(i)

In Claim 3(i), Atkins claims that his federal constitutional rights were violated because his trial counsel were ineffective for "failure to impeach three key prosecution witnesses." Fourth Amended Petition (ECF No. 183), pp. 154-60. The claim focuses on Atkins' trial counsel's cross-examination of prosecution witnesses Mark Wattley, Jerry Anderson and Michael Smith. *See id.*

Atkins did not assert such a claim **[*62]** in his first state habeas action. *See* Petition for Post-Conviction Relief, Exh. 211 (ECF No. 93-34); Supplemental Brief in Support of Petition, Exh. 232 (ECF No. 94-13); Appellant's Opening Brief, Exh. 256 (ECF Nos. 94-37, 94-38). Therefore, Claim 3(i) is subject to denial as procedurally defaulted, unless Atkins can show cause and prejudice relative to the procedural default under *Martinez*.

Atkins compares the testimony of Wattley, Jerry Anderson and Smith in Doyle's trial (Pet. Exh. 66 (ECF No. 183-29) (testimony of Wattley in Doyle's trial); Pet. Exh. 67 (ECF No. 183-30) (testimony of Jerry Anderson in Doyle's trial); Pet. Exh. 68 (ECF No. 183-31) (testimony of Smith in Doyle's trial)) to their testimony in Atkins' trial (Transcript of Trial, March 27, 1995, Exh. 133, pp. 28-45 (ECF No. 91-39, pp. 33-50) (testimony of Wattley in Atkins' trial); Transcript of Trial, March 27, 1995, Exh. 133, pp. 49-91 (ECF No. 91-39, p. 54 - ECF No. 91-40, p. 2) (testimony of Jerry Anderson in Atkins' trial); (testimony of Smith in Atkins' trial)), identifies perceived differences between the testimony in the two trials, and contends that his trial counsel were ineffective for not exploiting those **[*63]** differences in cross-examining the witnesses. *See* Fourth Amended Petition (ECF No. 183), pp. 154-60.

The Court determines that this claim is insubstantial. Wattley, Jerry Anderson and Smith were not present when the murder occurred; they were not eyewitnesses. Generally, rather, each observed events and heard conversations, involving Atkins, Doyle and Shawn, after the murder. Many of the alleged differences in their testimony in the two trials were not differences at all; rather, they were occasions where the witness provided more detail in one trial than in the other. Many of those are occasions where the prosecutors naturally elicited different details in the two trials because there were different defendants on trial. Some of the alleged differences were merely differences in the wording used by the witness in answering questions in the two trials. All of the alleged differences were, in this Court's view, inconsequential. Atkins' counsel in his first state habeas action was not ineffective for not asserting this claim of ineffective assistance of counsel.

Atkins does not show cause and prejudice, under *Martinez*, relative to the procedural default of this claim. Claim 3(i) will be **[*64]** denied as procedurally defaulted.

Claim 3(j)

In Claim 3(j), Atkins claims that his federal constitutional rights were violated as a result of ineffective assistance of his trial counsel because of "cumulative ineffective assistance of counsel at the guilt phase." Fourth Amended Petition (ECF No. 183), pp. 154-60. Atkins does not show any deficiencies of his counsel's performance in the guilt phase of his trial. Therefore, there are no deficiencies of counsel to be considered cumulatively. The Court will deny Atkins habeas corpus relief on Claim 3(j).

Claim 4(a)

In Claim 4(a), Atkins claims that his federal constitutional rights were violated as a result of ineffective assistance of his trial counsel because his "trial counsel unreasonably failed to retain and supervise appropriate investigators and other staff to conduct an adequate and timely investigation." Fourth Amended Petition (ECF No. 183), p. 172.

Claim 4(a) is similar to Claim 1(a) in that Claim 4(a) provides explanation and support for other claims of ineffective assistance of counsel in Atkins' petition, particularly Claim 4(b). Claim 4(a) does not set forth any specific facts showing how the alleged inadequate investigation **[*65]** prejudiced Atkins. To the extent that in Claim 4(a) Atkins seeks relief for the same alleged ineffective assistance of trial counsel alleged in other, more specific and more detailed claims (again, particularly Claim 4(b)), Claim 4(a) is repetitive and redundant, and unnecessary as a separate claim.

The Court will deny Atkins habeas corpus relief on Claim 4(a) but will consider the allegations made by Atkins in Claim 4(a) in reviewing Atkins' other claims of ineffective assistance of trial counsel.

Claim 4(b)

In Claim 4(b), Atkins claims that his federal constitutional rights were violated as a result of ineffective assistance of his trial counsel because his "trial counsel failed to investigate and present readily available and substantially mitigating social history evidence." Fourth Amended Petition (ECF No. 183), pp. 172-81.

In the penalty phase of his trial, Atkins called his father, Sterling Atkins, Sr., as a witness. *See* Transcript of Trial, April 27, 1995, Exh. 147 (ECF No. 92-8). Sterling Atkins, Sr., testified that he and Atkins' mother, Lorraine, had arguments every day, and some physical fights. *Id.* at 4 (ECF No. 92-8, p. 8). He testified that Atkins witnessed his fights with Lorraine. **[*66]** *Id.* He testified that he was an alcoholic, that both he and his wife drank every day, and that it was an "everyday occurrence" to be drunk in front of Atkins and his siblings. *Id.* at 4-5 (ECF No. 92-8, pp. 8-9). He testified, as follows, that he physically abused Atkins:

> Q. Did you ever physically abuse Sterling?
>
> A. Yes, ma'am.
>
> Q. And can you explain that to the jury?
>
> A. Well, with drinking and arguments with the mother, it was constantly - you know, kids get into things, and like I say ... Kids get into things, and it was constantly always argument in the home, and Bubba was - Sterling [would] kind of act up. And the worst came out on him.
>
> Q. ... Was there any physical punishments imposed in your home?
>
> A. Yes.
>
> Q. What type of physical punishments?
>
> A. I did the whooping, and it would be - you know, I would hit him with my hand, anything that was around.

Id. at 6 (ECF No. 92-8, p. 10.) He testified that Atkins and his siblings were removed from his home by the State of California, and placed first with a relative and then in a foster home, and he testified, as follows, why that happened:

> Q. Okay. Can you tell the jury why they removed the children from your home?
>
> A. Sterling and Shawn had started a fire, and I **[*67]** had took their finger and rubbed it over the burner on the stove. And my wife called the police, and they came and they took the kids.
>
> Q. Were you ever charged with anything?
>
> A. I was charged with child abuse.

Id. at 6-7 (ECF No. 92-8, pp. 10-11). He testified that he was not a role model for Atkins, and that Atkins did not grow up in a healthy environment. *Id.* at 7-8 (ECF No. 92-8, pp. 11-12).

Atkins also called his half-sister, Stephanie Normand, as a witness. *See* Transcript of Trial, April 27, 1995, Exh. 147 (ECF No. 92-8). She testified that she lived in the home with Atkins when he was growing up, and that they moved around a lot, and lived in several different places. *Id.* at 12-13 (ECF No. 92-8, pp. 16-17). She testified as follows:

> Q. Can you explain to the jury and to the Court what it was like growing up in your household?
>
> A. Well, both of my parents are alcoholics, so there was a lot of fighting and arguing and beatings.
>
> Q. Was there arguing between your parents?
>
> A. Between my parents.
>
> Q. Was there arguing with the children as well?

A. Yes.
Q. What type of beatings were there?

A. My dad put - like, Shawn and Sterling got caught playing with fire, and he put their hands on the stove and burnt their hands up really bad. **[*68]** And we got taken away. They gave - took us to foster homes.
Q. Did you all go to foster homes together?
A. Yes, and then they split us up.
Q. Okay. How long were you in foster homes?
A. About a year, two years.
Q. Is that the only physical punishment that you remember growing up?
A. No.
Q. What other kinds of physical punishment was there?
A. He would beat Sterling more than us, me and Shawn. Sterling seemed to get into more trouble or something - with a 2x4, just with everything, belts, 2x4's, anything he could pick up he would use.
Q. And how often did that occur?
A. All the time.
Q. Growing up in your household, would you think - would you say it was the same as the friends that you were hanging around with at that time?
A. No.
Q. How was it different?
A. There was always a lot of arguing and fighting. I would run away. I ran away about three different occasions, because I didn't want to be around my family.
Q. Did you ever observe Sterling getting physically punished by your father?
A. Yes.
Q. Did you ever try to do anything?

A. I was cutting a pie one time, and I don't know what he did, but my dad was hitting him, just beating on him. And I was so mad that I wanted to stick him with the knife that **[*69]** I was cutting the pie with.
Q. And did you?
A. No, I didn't stick him with it.
Q. Did you do anything?
A. I threw the pie down and I told him to stop hitting him. And he turned around, and he punched me in the mouth.
Q. Are there any other - are there any other kind of punishments that were imposed in your household?
A. He would make them stand in corners overnight putting their hands on the wall, and just let them stay there. They couldn't move or nothing.
Q. And you said - you testified earlier that it was Sterling that got the brunt of most of the punishment?
A. Always.
Q. More so than Shawn?
A. Yes.
Q. More so than yourself?
A. Yes.

Id. at 13-15 (ECF No. 92-8, pp. 17-19). She testified that, because her mother was an alcoholic, she took on most of the responsibility for raising Atkins and Shawn, although she was only three years older than Atkins. *Id.* at 15-16 (ECF No. 92-8, pp. 19-20). Regarding her parents' alcoholism, she testified as follows:

> Q. You stated your parents were alcoholics. Did you ever see them drunk?
>
> A. All the time. I would have to carry my mom - like, she would have to go to the bathroom, I would have to take her to the bathroom because she would be so drunk she would fall. I would pick her up and **[*70]** put her in the bed, feed her before she went to sleep so she wouldn't get sick.
> Q. Now you...
> A. I would drive my dad home when he would get really drunk and he'd be down the street or something; I would have to throw him in the back of the truck and drive him home.

Id. at 16 (ECF No. 92-8, p. 20). She testified that Atkins' parents were not good role models. *Id.* at 18 (ECF No. 92-8, p. 22).

Atkins also called Jack Hardin as a witness in the penalty phase of his trial. *See* Transcript of Trial, April 27, 1995, Exh. 147 (ECF No. 92-8). Hardin was retired from employment as Associate Warden of Operations at the Northern Nevada Correctional Center. *See id.* at 22 (ECF No. 92-8, p. 26). Hardin testified about the process a prisoner convicted of first-degree murder would go through when received into the prison system, about where such a prisoner would be incarcerated, and about what the conditions would be like. *Id.* at 23-37 (ECF No. 92-8, pp. 27-41).

Atkins then called Dr. Philip Colosimo, a psychologist. *See* Transcript of Trial, April 27, 1995, Exh. 147 (ECF No. 92-8). Dr. Colosimo interviewed of Atkins, administered a battery of psychological tests to him, and prepared a report. *See id.* at 40 (ECF No. 92-8, p. 44). Dr. Colosimo spent approximately **[*71]** nine hours with Atkins over the course of six meetings. *See id.* at 40-41 (ECF No. 92-8, pp. 44-45). Dr. Colosimo testified that he determined that Atkins had "a schizo-effective disorder which means that he has signs and symptoms [of] schizophrenia, disorganized thinking, bizarre mentation, and affective problems - that is, he has depression sometimes with some kind of manic activity, but mostly depressive by nature, with paranoid thoughts." *See id.* at 44 (ECF No. 92-8, p. 48). He testified that "[p]aranoid traits

include a tremendous suspiciousness of others and their intentions, and it's sort of a real delusional viewpoint of the world, that the world is out to get him or to hurt him." *Id.* He testified that he:

> Also determined [Atkins] had psychoactive substance dependence and that included, as he has reported, he has experimented with just a lot of drugs. He talked about LSD, cannabis, cocaine, and also alcohol. And I imagine there are others as well.

Id. at 44-45 (ECF No. 92-8, pp. 48-49). He testified further:

> I determined that this individual has antisocial personality characteristics. It's been referred to as sociopathy or psychopathic behaviors. Has schizoid withdrawn style in that he doesn't trust others and **[*72]** alienates [himself] from others and alienates himself from his family much of the time. Also he has narcissistic personality characteristics.

Id. at 45 (ECF No. 92-8, p. 49). Dr. Colosimo testified that Atkins had "a head injury he obtained at an adolescent age where he was beaten very heavily in a fight ... he was apparently knocked out and also beaten in the head - in the back of the head and the front of the head and incurred [an] unconscious period. He could not remember how long he was unconscious." *Id.* at 45-46 (ECF No. 92-8, pp. 49-50). Dr. Colosimo testified that Atkins had "psycho-social stressers, and that was determined to be social, socialization problems, emotional problems, financial, general adjustment difficulties." *Id.* at 46 (ECF No. 92-8, p. 50). Dr. Colosimo testified that Atkins' "highest adaptation or current adaptation level" indicated that he "functions daily in sort of a symptomatic way and also has psychiatric problems that exist throughout the day." *Id.* Dr. Colosimo testified:

> And as I reported before, the paranoid thinking, the delusional thinking, the bizarre mentations, also has reports hearing voices. And he said that the voices were quiet when he was inside the prison. And I had asked **[*73]** him if any of these voices told him to do some of the things he did. He was not clear in his answer.
>
> He did note that the voices were much louder when he was out of prison. After being placed in prison in a controlled shelter environment, these voices have not been as pronounced and are faint instead of pronounced.

Id. Dr. Colosimo testified that Atkins read at the third-grade level, his spelling was at the second-grade level, and his arithmetic was at the second-grade level. *Id.* at 47 (ECF No. 92-8, p. 51). He testified that this indicated "a pronounced functional lag in academic achievement, and this is usually found in people that have impoverished environments growing up." *Id.* He testified that Atkins was "functioning with a full scale IQ of 87," which is "dull normal intelligence or well below average." *Id.* at 47-48 (ECF No. 92-8, pp. 51-52). He testified that Atkins had "some left-to-right hemispheric dysfunctioning ... that he has a dysfunctioning in the left hemisphere." *Id* at 48 (ECF No. 92-8, p. 52). He testified that Atkins "had a verbal IQ of 84 which is in the low average range, and also it would indicate that he has experienced pronounced learning disabilities since he began school." *Id.* Dr. Colosimo **[*74]** testified further:

> Q. Okay. With respect to your conclusion of this case,
>
> "His impaired thinking could cause poor decision and judgment-making. His chronic feelings and anxiety cause him to hear voices and think the worst of every situation."
>
> Could you explain that a little bit?
>
> A. Yeah. Mr. Atkins has attention deficit disorder that I failed to mention in Axis 1. Attention deficit disorder ... causes individuals going through elementary and adolescence and their adulthood to have learning impairments. In his case, the information was never really processed well within his overall cerebral functioning. That is, he may have an impulsive thought and he would follow through and do it without really looking at the consequences.
>
> And it gets even deeper than that. Even his basic living needs and his home hygiene and various things that he should be taking care of himself, he was unable to do that well because of the inability to process this information and made sense out of it in his environment or in reality, which I'm sure had led to his concentration and attention problems in school and made him a very ... learner with a poor prognosis, made him unbearable many times in elementary and in **[*75]** high school which he never completed. He went to the eighth or ninth grad and then dropped out.
>
> Basically because of his inability to attend, his impulsive thinking and behaviors, I believe that he probably also had a thought disorder back then which may have been precipitated by the heavy blow to the head in gang fights
>
> Q. Now, these psychological problems, if you will, that Sterling Atkins is experiencing, could you tell me whether those are genetically based or if those were a product of his environment?
>
> A. The attention deficit disorder and also schizophrenia for that matter has been known to be largely based in genetics. If one parent, for example, has it, you have a 50 percent chance of getting it. And if both parents have it, then you're most surely going to get it.
>
> I think the argument for genetic or heredity versus environmental is at issue here. Environmentally he was

brought up by his father mostly, and his mother, who stayed together until '91 and then divorced. But from what Mr. Atkins reports, he was abused physically by his father whom he called an alcoholic since his very early childhood years. This most certainly had a great impact on his ability to think and reason, process **[*76]** information, and to be able to learn.

Id. at 48-50 (ECF No. 92-8, pp. 52-54). In addition, Dr. Colosimo testified:

I would imagine that Mr. Atkins would have been a good case of diagnosed attachment disorder which is a childhood diagnosis when young. These all lead to a high recidivism rate for delinquency in childhood and adolescence, and also into adulthood.

* * *

Q. ... [D]o you believe Sterling Atkins perceives situations the same as you or I might perceive them?

A. No, I don't.

Q. Could you tell me a little bit about the differences?

A. Sterling has been in and out of foster homes and prisons most of his life. He really gets very anxious, and of course, his impulsivity and his inability to attend to the laws of the society [that] he's operating in prevail.

When he is in prison or when he was in juvenile homes, Sterling seemed to enjoy those quite a bit, because he knew what his boundaries were. He knew how far he could go. And although at times he stated that he had some rough times being in these places, it seemed that - his history indicates that not long out of these places he was back in again and his probation periods were relatively short because of him being returned back to those places because **[*77]** of delinquent behaviors.

I think he sees the world as a very scary, anxious world. I think he sees it from a paranoid perspective. And he is very suspicious of others' intentions, and that accounts much for his anger and violence and in the way he impulsively does things in a violent way. He never really had the opportunity to have that structure built into his psyche. He's been primarily managed by outward control of his behaviors. And these in turn would - he would not show any type of criminal behavior on his part while in prison or being in juvenile homes.

He said the foster homes worked out for a little while, but he really wanted to get back to his parents. His parents would take him back for short periods of time and then be out of his life again, although not really providing the steadiness that ne needed.

Q. So you think he would adapt well to the control of the environments that is a prison?

A. Most certainly.

Id. at 51-53 (ECF No. 92-8, pp. 55-57).

Atkins' claim in Claim 4(b) is that his trial counsel were ineffective for not developing and presenting more mitigation evidence.

Atkins argues that he exhausted this claim in state court in his first state habeas action, and the Court agrees. **[*78]** *See* Reply (ECF No. 222), p. 113; *see also* Supplemental Brief in Support of Petition, Exh. 232, pp. 37-39 (ECF No. 94-13, pp. 38-40). In the claim in his first state habeas action, Atkins asserted:

As evidence in mitigation of punishment, counsel called Sterling Atkins Sr., Petitioner's father[,] and Stephanie Normand, Petitioner's sister. Sterling Atkins Sr. testified that he was an alcoholic and often would physically abuse the Petitioner and his siblings. Sterling Atkins Sr. testified that on one occasion he took the Petitioner's and Shawn Atkins' fingers and rubbed them over the burner on the stove. Sterling Atkins Sr. testified that as a result of this incident the police took the Petitioner and Shawn. He testified that they went to live with their uncle in [Cerritos], and then they went to a foster home.

Stephanie Normand, Petitioner's [half-sister], also testified during the penalty phase. Stephanie testified that the family lived in many different places. She testified to the arguing and the beatings. She testified to the burning of the Petitioner and Shawn and the fact that all of the children were taken away from the parents and placed into [a] foster home. Stephanie testified **[*79]** that the Petitioner, Shawn and herself were ultimately split apart. She testified that the Petitioner was beaten the most. She stated that her father used a 2x4, belts or anything he could pick up.

If petitioner's counsel had conducted anything other than the most cursory examination into petitioner's background, counsel would have been able to present compelling evidence, readily available at the time of Mr. Atkins' state court proceedings, to corroborate the physical abuse that the Petitioner sustained at the hand of his father over the course of many years. Had trial counsel conducted an adequate mitigation investigation, they would have discovered available evidence that petitioner was systematically subjected to severe physical and emotional abuse by his father throughout his childhood and adolescence, and that Sterling Atkins terrorized petitioner and his brother and sister with brutal acts of physical and emotional abuse.

a. Loraine Atkins

Petitioner's Mother, Loraine Atkins, could have described Sterling Atkins' treatment of his sons in great

detail, relaying stories of severe beatings that rarely if ever resulted in medical treatment, and describing a life of extreme poverty **[*80]** and physical and emotional neglect.

b. Shawn Atkins

Shawn Atkins could have corroborated their childhood. Trial counsel did not speak to Shawn Atkins at any time in preparation for petitioner's trial and sentencing hearing. It is believed that Shawn Atkins would have testified during the penalty phase as to the physical and mental childhood abuse that was inflicted upon them by their father.

c. Foster Parents

Other witnesses with compelling information on petitioner's background, but who were not contacted by petitioner's trial counsel, were the foster parents of Sterling Atkins.

d. Sterling's Uncle

Sterling Atkins[']' uncle, who cared for the petitioner and his brother and sister[,] could also have corroborated the physical and mental childhood abuse that was inflicted upon the petitioner by his father. He was not contacted by defense counsel.

e. Further time requested to develop mitigating evidence

It is believed that there are other witnesses that would have been available to testify to the abuse and neglect sustained by the petitioner during the course of his childhood. It is further believed that there is additional evidence of the petitioner's mental deficiencies that surfaced when he **[*81]** was a very young boy. It is requested that an evidentiary hearing be granted to examine these issues more thoroughly. It is also requested that petitioner have additional time as well as the resources of an investigator to more fully develop these issues.

Id. (citations to trial transcript omitted). The state district court denied the claim. *See* Findings of Fact, Conclusions of Law and Order, Exh. 237, pp. 21-22 (ECF No. 94-18, pp. 22-23). On the appeal, the Nevada Supreme Court affirmed, ruling as follows:

> ... Atkins contends that his trial counsel failed to discover and present corroborating evidence of the physical and emotional abuse that Atkins suffered throughout his childhood. The record belies this claim. To develop such evidence, defense counsel called Atkins' father and sister to testify at Atkins' penalty hearing. Both of these witnesses testified to the repeated physical and emotional abuse Atkins received from his formerly alcoholic father and otherwise established that Atkins grew up in a very dysfunctional environment and was at one point removed from his parents' home and placed in foster care. Further, Atkins has failed to explain how additional testimony would have **[*82]** altered the outcome of his trial. We therefore conclude that Atkins has failed to articulate how his counsel's performance was objectively unreasonable or how he was prejudiced.

Order of Affirmance, Exh. 261, p. 5 (ECF No. 94-43, p. 6).

In federal court, in Claim 4(b), Atkins presents the same claim, but instead of pointing to Lorraine Atkins, Shawn Atkins, Atkins' foster parents, his uncle, and unnamed "other witnesses," as witnesses who could have provided corroborating testimony, he points to Shawn, Evelyn Gomez, Alicia Palencia, and Vaedra Sowerby-Jones, and he supports the claim with declarations of those individuals. *See* Fourth Amended Petition (ECF No. 183), pp. 172-81; *see also* Declaration of Shawn Atkins, Pet. Exh. 27 (ECF No. 183-16, pp. 1-9); Declaration of Evelyn Gomez, Pet. Exh. 29 (ECF No. 183-16, pp. 16-21); Declaration of Alicia Palencia, Pet. Exh. 30 (ECF No. 183-16, pp. 22-27); Declaration of Vaedra Sowerby-Jones, Pet. Exh. 32 (ECF No. 183-16, pp. 31-37).

Atkins contends that Shawn could have testified regarding: the abuse of Atkins by his father; Atkins' mother's life; Atkins' grandmother's life; Atkins' great-grandfather's violent nature; an incident involving Atkins' **[*83]** uncle, Junior, entering Atkins' family's home with a gun; an incident involving Atkins' father shoving Stephanie into a wall; an incident involving Atkins' father beating Shawn because he had trouble putting on underwear; the incident involving Atkins' father burning Atkins' and Shawn's hands on a stove; an incident involving Atkins' father "jamming a cigar down [his] throat and throwing him out a window;" violence between Atkins' father and mother; violence directed at Stephanie by Atkins' mother; gambling, alcohol and drug addiction on the part of various family members; times when Atkins' family lived in shelters or was homeless; Atkins' and his siblings' placement in foster homes; an incident in which Atkins' father stabbed Atkins' Uncle Philip; Stephanie's drug addiction; Atkins' drug addiction; Atkins' poor performance in school; and Atkins' low mental functioning. *See id.* at 172-77. Atkins contends that Evelyn Gomez, his great aunt, could have testified regarding Atkins' maternal grandparents' lives; Atkins' mother's life; Atkins' father's life; times when Atkins' family was homeless; and Atkins' parents' alcoholism. *See id.* at 177-78. Atkins contends that Alicia Palencia, Atkins' maternal aunt, could **[*84]** have testified regarding Atkins' mother's life; Atkins' parents' drug use and alcoholism; Atkins' father's abuse of Atkins' mother; an incident involving Atkins' mother shooting Atkins' father; an incident involving Atkins' mother stabbing Atkins' father; times when the Atkins family was homeless; the incident involving Atkins' father burning Atkins' and Shawn's hands on a stove; Stephanie's

drug addiction; and Atkins' mother's stroke, placement in a care facility, and death. *See id.* at 177-78. As for Vaedra Sowerby-Jones, who was Doyle's girlfriend when the murder took place, Atkins claims she could have provided potentially mitigating testimony regarding Atkins' apparent low mental functioning and emotional instability. *See id.* at 180-81.

In considering a claim under *28 U.S.C. § 2254(d)(1)*, a federal habeas court is not to consider evidence that was not presented in state court; federal habeas review of state court decisions under *§ 2254(d)(1)* "is limited to the record that was before the state court that adjudicated the claim on the merits." *Pinholster, 563 U.S. at 181*. The Supreme Court explained:

> *Section 2254(d)(1)* refers, in the past tense, to a state-court adjudication that "resulted in" a decision that was contrary to, or "involved" an unreasonable application of, established law. **[*85]** This backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time *i.e.*, the record before the state court.

Id. at 181-82. In other words, if a claim was adjudicated on the merits by a state court, "evidence later introduced in federal court is irrelevant to *§ 2254(d)(1)* review." *Id. at 184*; *see also Crittenden v. Chappell, 804 F.3d 998, 1010 (9th Cir. 2015)* ("*Pinholster* precludes the consideration of new evidence [ ] for the purpose of determining whether the last reasoned state court decision was contrary to or an unreasonable application of clearly established law"); *Floyd v. Filson, 949 F.3d 1128, 1147-48 (2020)* (federal district court properly declined to consider news articles presented in federal court but not in state court in support of claim that petitioner's constitutional rights were violated by trial court's failure to grant change of venue).

Comparing Claim 4(b) to the similar claim Atkins asserted in his first state habeas action, the Court determines that Claim 4(b) is exhausted and not procedurally defaulted. The new factual allegations in Claim 4(b) and the new evidence presented in support of the claim—that is, the allegations and evidence presented in federal court **[*86]** but not in state court—do not "fundamentally alter" the claim. *See Vasquez v. Hillery, 474 U.S. 254, 260, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986)*. A claim is "new" and unexhausted if "new factual allegations either fundamentally alter the legal claim already considered by the state courts or place the case in a significantly different and stronger evidentiary posture than it was when the state courts considered it." *Dickens v. Ryan, 740 F.3d 1302, 1318 (9th Cir. 2014)* (en banc). In federal court, Atkins presents allegations about mitigating testimony that could have been given by Evelyn Gomez, Alicia Palencia and Vaedra Sowerby-Jones; those allegations were not made in state court. In addition, Atkins presents evidence that was not presented in state court: the declarations of Shawn, Gomez, Palencia, and Sowerby-Jones. The Court determines that the new allegations and evidence do not place the claim in a significantly different and stronger evidentiary posture than in state court.

Turning, then, to the determination to be made under *28 U.S.C. § 2254(d)(1)*, the Court determines that the Nevada Supreme Court's ruling was reasonable. The Nevada Supreme Court reasonably found the evidence proffered by Atkins to be largely cumulative of the evidence presented by Atkins at trial. And, the Nevada Supreme Court reasonably determined that the **[*87]** additional evidence would not have raised a reasonable probability of a different outcome in the sentencing phase of the trial. Contrary to Atkins' argument, the testimony of his father and his half-sister in the penalty phase of his trial was forceful; it graphically conveyed the abuse, neglect and dysfunction that Atkins endured during his upbringing. Additionally, Dr. Colosimo's testimony provided expert corroboration for the testimony of Atkins' father and half-sister. Affording the Nevada Supreme Court's ruling the deference mandated by *section 2254(d)(1)*, the Court concludes that it is arguable by fairminded jurists that the Nevada Supreme Court's ruling on this claim was correct. *See Richter, 562 U.S. at 101*. The Nevada Supreme Court's ruling was not contrary to, or an unreasonable application of, *Strickland*, or any other Supreme Court precedent. The Court will deny Atkins relief on Claim 4(b).

In the alternative, treating the new allegations and evidence as fundamentally altering the claim, rendering Claim 4(b) a new claim that is technically exhausted but subject to procedural default analysis, the Court determines that Atkins does not overcome the procedural default under *Martinez*. The declarations of Shawn, Gomez, **[*88]** Palencia, and Sowerby-Jones provide some new evidence, regarding drug and alcohol use, violence and dysfunction on the part of Atkins' parents, grandparents and even great-grandparents, but, for the most part, that new information is not particularly mitigating as, for the most part, it does not involve Atkins directly. The declarations mention, briefly, some events not revealed to the jury in the penalty phase of the trial, or in the first state habeas action, that might have directly involved Atkins or that he might have witnessed, for example the incident involving Junior entering the family home with a gun, the incident involving Atkins' father shoving Stephanie into a wall, the incident involving Atkins' father beating Shawn because he had trouble putting on his underwear, the incident involving Atkins' father "jamming a cigar down [his] throat and throwing him out a window," and the incident involving

Atkins' father stabbing Atkins' Uncle Philip. However, regarding many of those events, the declarations do not indicate whether Atkins was involved or witnessed them, or how he was personally affected. Moreover, this new information does not significantly alter the portrayal of **[*89]** the nightmarish abuse, neglect and dysfunction in Atkins' family that was presented to the jury through the testimony of Atkins' father, his half-sister, and Dr. Colosimo. The Court determines that Atkins was not prejudiced by the failure of his counsel in his first state habeas action to support his claim with declarations such as those of Shawn, Gomez, Palencia and Sowerby-Jones, and Atkins was not prejudiced by his trial counsel not presenting such testimony at trial. There is no showing that the new evidence would have raised a reasonable probability of a different outcome in Atkins' first state habeas action or the penalty phase of his trial. Therefore, alternatively, the Court will deny Claim 4(b) as procedurally defaulted.

Claim 4(g)

In Claim 4(g), Atkins claims that his federal constitutional rights were violated in the penalty phase of his trial because his trial counsel were ineffective "in the preparation and presentation of defense expert Dr. Colosimo." Fourth Amended Petition (ECF No. 183), pp. 186-92.

Here again, Atkins argues that he exhausted this claim in his first state habeas action. *See* Reply (ECF No. 222), pp. 117-18 ("There can be no good-faith argument that this **[*90]** claim is unexhausted."). The Court agrees. In his first state habeas action, Atkins claimed that his trial attorneys were ineffective because they "failed to adequately investigate, consult, or produce and offer psychological evidence at the trial." Supplemental Brief in Support of Petition, Exh. 232, p. 9 (ECF No. 94-13, p. 10); *see also id.* at 9-17. The state district court denied the claim. *See* Findings of Fact, Conclusions of Law and Order, Exh. 237 (ECF No. 94-18). On the appeal in Atkins' first state habeas action, the Nevada Supreme Court ruled:

> Atkins first claims that his trial counsel failed to adequately investigate Atkins' mental status.
> * * *
>
> Atkins is not entitled to relief on these claims. First, pursuant to defense counsel's request, Atkins met with clinical psychologist Dr. Philip Colosimo six times. Dr. Colosimo conducted psychological testing of Atkins on three of those occasions, and estimated that he spent a total of nine hours with him. Dr. Colosimo provided defense counsel with his written report and testified at Atkins' penalty hearing in mitigation of punishment. Atkins has not indicated what material evidence would have been discovered through additional investigation into **[*91]** his mental status or how that evidence would have affected the outcome of his trial. Second, Dr. Colosimo explicitly concluded in his report that Atkins was competent at the time he committed the crimes. We therefore concluded that the record repels Atkins' claims that his trial counsel's investigation or use of psychological evidence was objectively unreasonable and that he was prejudiced.

Order of Affirmance, Exh. 261, pp. 2-3 (ECF No. 94-43, pp. 3-4). The Nevada Supreme Court's denial of relief on this claim was reasonable.

Dr. Colosimo testified that he determined that Atkins had "a schizo-effective disorder which means that he has signs and symptoms [of] schizophrenia, disorganized thinking, bizarre mentation, and affective problems---that is, he has depression sometimes with some kind of manic activity, but mostly depressive by nature, with paranoid thoughts." *See* Transcript of Trial, April 27, 1995, Exh. 147, p. 44 (ECF No. 92-8, p. 48). He also testified that Atkins had "psychoactive substance dependence." *See id.* at 44-45 (ECF No. 92-8, pp. 48-49). He testified further that Atkins had "antisocial personality characteristics" and "narcissistic personality characteristics." *See id.* at 45 (ECF No. 92-8, **[*92]** p. 49). Dr. Colosimo testified that Atkins had "psycho-social stressers, and that was determined to be social, socialization problems, emotional problems, financial, general adjustment difficulties." *Id.* at 46 (ECF No. 92-8, p. 50). He testified that Atkins has "psychiatric problems that exist throughout the day." *Id.* He testified that along with "paranoid thinking, the delusional thinking, the bizarre mentations," Atkins also reported hearing voices. *See id.* He testified that Atkins said the voices were not as loud when he was inside the prison. *See id.* Dr. Colosimo testified that Atkins' intellectual function was at a low, second to third-grade, level, and that his IQ was well below average. *See id.* at 47-48 (ECF No. 92-8, pp. 51-52). Dr. Colosimo testified that Atkins also had attention deficit disorder. *See id.* at 48-49 (ECF No. 92-8, pp. 52-53). He testified further as follows:

> Q. ... [D]o you believe Sterling Atkins perceives situations the same as you or I might perceive them?
> A. No, I don't.
> Q. Could you tell me a little bit about the differences?
>
> A. Sterling has been in and out of foster homes and prisons most of his life. He really gets very anxious, and of course, his impulsivity and his inability to attend **[*93]** to the laws of the society [that] he's operating in prevail.
> When he is in prison or when he was in juvenile homes, Sterling seemed to enjoy those quite a bit, because he

knew what his boundaries were. He knew how far he could go. And although at times he stated that he had some rough times being in these places, it seemed that - his history indicates that not long out of these places he was back in again and his probation periods were relatively short because of him being returned back to those places because of delinquent behaviors.

I think he sees the world as a very scary, anxious world. I think he sees it from a paranoid perspective. And he is very suspicious of others' intentions, and that accounts much for his anger and violence and in the way he impulsively does things in a violent way. He never really had the opportunity to have that structure built into his psyche. He's been primarily managed by outward control of his behaviors. And these in turn would - he would not show any type of criminal behavior on his part while in prison or being in juvenile homes.

He said the foster homes worked out for a little while, but he really wanted to get back to his parents. His parents would **[*94]** take him back for short periods of time and then be out of his life again, although not really providing the steadiness that ne needed.

Q. So you think he would adapt well to the control of the environments that is a prison?

A. Most certainly.

Id. at 50-51 (ECF No. 92-8, pp. 54-55).

Atkins parses Dr. Colosimo's testimony and pulls from it passages where his testimony could be construed as indicating Atkins was prone to unsocial or criminal behavior, and he argues that his counsel performed inadequately for eliciting such testimony, or for allowing it to come out on cross-examination. This Court, though, finds that, considered as a whole, Dr. Colosimo's testimony tended to help the defense in the penalty phase of the trial. Dr. Colosimo provided some psychological explanation for Atkins' behavior, and tied that explanation to the violence, abuse, neglect and dysfunction that Atkins grew up with, and that might arguably have mitigated his culpability, and his sentence. Extending to the Nevada Supreme Court the deference required under *section 2254(d)*, and to trial counsel the deference required under *Strickland*, the Court determines that it could be argued that the Nevada Supreme Court could reasonably have found **[*95]** that trial counsel's performance with respect to the presentation of Dr. Colosimo was not unreasonable, or that, at any rate, Atkins was not prejudiced.

Alternatively, if the Court were to treat Claim 4(g) as unexhausted, presenting a new claim in federal court, one that is technically exhausted but subject to procedural default analysis, the Court would conclude that Atkins does not overcome the procedural default under *Martinez*. The only new evidence in support of this claim, presented in federal court but not in state court, is the following paragraph in a declaration of Kent Kozal, one of Atkins' trial attorneys:

> Although I do not recall Dr. Colosimo specifically, I believe either a psychologist or psychiatrist was used in preparing Mr. Atkins' defense, and he testified during his penalty trial. I may have met with this doctor, and I got a sense from his testimony that he was upset because we should have consulted or prepped him more. I got the feeling that this doctor felt put on the spot during the hearing because we did not prep him enough for it.

Declaration of Kent Kozal, Pet. Exh. 63, p. 2 ¶10 (ECF No. 183-28, p. 3 ¶10). This vague and incomplete recollection by trial counsel **[*96]** does not affect the Court's view of this claim. The Court determines that Atkins was not prejudiced by his counsel in his first state habeas action not supporting his claim with such a declaration. Atkins does not show his trial counsel to have performed unreasonably with respect to the presentation of Dr. Colosimo's testimony, or that he prejudiced by his trial counsel's performance in that regard. Therefore, alternatively, the Court will deny Claim 4(g) as procedurally defaulted.

Claim 4(h)

In Claim 4(h), Atkins claims that his federal constitutional rights were violated as a result of ineffective assistance of his trial counsel because of "cumulative ineffective assistance of counsel at the punishment phase." Fourth Amended Petition (ECF No. 183), p. 192. The Court determines that there was no attorney error as alleged in Claims 4(b) and 4(g); therefore, there is no attorney error to be considered cumulatively, and this claim fails. In the alternative, assuming, for the purpose of analysis, that trial counsel performed below standard as alleged in Claims 4(b) and 4(g), and considering those claims cumulatively with respect to the question of prejudice, the Court would find that the **[*97]** Nevada Supreme Court reasonably determined that Atkins was not prejudiced. There is no showing that absent these alleged errors of his counsel, considered cumulatively, there would have been a reasonable probability of a different result in the penalty phase of the trial. *See Strickland, 466 U.S. at 688, 694*. Or, stated differently, the Nevada Supreme Court could reasonably have determined that these alleged errors, considered cumulatively, did not deprive Atkins of a fair trial, with a reliable result. *See id. at 687*. The Court will deny Atkins habeas corpus relief on Claim 4(h).

Claim 5

In Claim 5, Atkins claims that his constitutional rights were violated because "lead counsel had a conflict of interest with her client that caused her to fail to request a continuance." Fourth Amended Petition (ECF No. 183), pp. 193-96. Atkins claims that the alleged conflict arose because when Melia was appointed five days before trial, she was forced to decide whether to inform the trial court that she was unprepared and would have to seek a continuance, and thereby risk not being appointed, and lose out financially on the opportunity to take on Atkins' capital case, or proceed to trial unprepared. *See id.*

Atkins concedes that this claim **[*98]** was not raised in state court as a stand-alone claim. *See id.* at 196; *see also* Reply (ECF No. 222), pp. 130-32. The Court agrees and determines that the claim is technically exhausted but subject to the procedural default doctrine. The Court finds further that Atkins does not show cause and prejudice, by showing ineffective assistance of either his appellate or state post-conviction counsel, because the claim lacks merit.

Atkins argues that, because his claim is that his counsel had a conflict of interest, he need not show resulting prejudice. *See* Fourth Amended Petition (ECF No. 183), pp. 195-96. The Court disagrees. The constitutional right to effective assistance of counsel may be violated when a criminal defendant's counsel has a conflict of interest. *See Mickens v. Taylor, 535 U.S. 162, 166-70, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002); Cuyler v. Sullivan, 446 U.S. 335, 345-50, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).* It is insufficient to show a mere possibility of a conflict; the petitioner must show an actual conflict that adversely affected counsel's performance. *See Mickens, 535 U.S. at 172-74; Cuyler, 446 U.S. at 348-49.* If counsel actively represents multiple defendants with conflicting interests, such that an actual conflict adversely affects counsel's performance, prejudice is presumed. *See Cuyler, 446 U.S. at 349-50.* However, the Supreme Court has instructed that *Cuyler* "does not clearly establish, or indeed even support **[*99]** ... expansive application" of that rule to cases outside the context of multiple concurrent representation. *Mickens, 535 U.S. at 175.* The presumption of prejudice only applies in the context of representation of multiple clients because of the "high probability of prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice." *Id.*

Atkins presents no evidence substantiating his assertion that Melia had an actual conflict of interest, that she was compelled to take the case and not seek a continuance because of personal financial considerations.

With respect to the question of prejudice, Atkins argues:

> As for prejudice, it has been discussed ... in the three claims devoted to ineffective assistance of counsel at the pre-trial guilt and punishment phases of the trial. Among other prejudicial events, trial counsel failed to have Mr. Atkins evaluated for competency until immediately prior to trial, thus foregoing a fair chance to show his incompetency; trial counsel had less than two hours to review juror questionnaires, resulting in a jury biased against Mr. Atkins; trial counsel's unpreparedness resulted in her denigrating the victim as a "hood rat," which led to the very **[*100]** damaging testimony of her father at the guilt phase; and there was the prejudicial testimony of Dr. Colosimo.
>
> * * *
>
> The numerous claims of ineffective assistance of trial counsel ... easily establish prejudice.

Fourth Amended Petition (ECF No. 183), pp. 195-96. As Atkins refers to his other claims of ineffective assistance as the alleged prejudice, this claim, much like Claims 1(a) and 4(a), is essentially background explanation and argument regarding his other claims, and is repetitive and redundant, and unnecessary as a separate claim. Or, viewed differently, it is essentially a cumulative error claim, incorporating allegations presented in other claims in Atkins' petition, and is repetitive and redundant of Atkins' other cumulative error claims, and unnecessary as a separate claim.

Therefore, the Court determines that, as a stand-alone claim, Claim 5 is without merit. Atkins' appellate and state post-conviction counsel were not ineffective for not asserting this claim. Atkins does not show cause and prejudice relative to the procedural default. The claim will be denied as procedurally defaulted. The Court will, however, consider the allegations made by Atkins in Claim 5 in reviewing **[*101]** Atkins' other claims of ineffective assistance of trial counsel and his other cumulative error claims.

Claim 6

In Claim 6, Atkins claims that his federal constitutional rights were violated because of "prosecutorial misconduct under *Brady v. Maryland* and *Giglio v. United States* by failing to disclose deals made with the principal State's witnesses." Fourth Amended Petition (ECF No. 183), pp. 197-209. Claim 6 also includes a claim of ineffective assistance of trial counsel, for trial counsel's alleged failure to discover and obtain evidence of the deals that the prosecution allegedly made with the witnesses. *See id.* And, in the related part of Claim 13, Atkins claims that his counsel on his direct appeal was ineffective for not asserting, on his direct appeal, a claim like Claim 6. *Id.* at 293-94.

In his first state habeas action, Atkins claimed that the prosecution failed to turn over impeachment information

regarding witnesses Michael Smith and Jerry Anderson, and that his trial counsel was ineffective for failing to obtain such information. *See* Supplemental Brief in Support of Petition, Exh. 232, pp. 40-43 (ECF No. 94-13, pp. 41-44). Atkins asserted "[o]n information and belief" that those witnesses **[*102]** "were offered incentives by the prosecution to provide evidence against the Petitioner." *Id.* at 41 (ECF No. 94-13, p. 42). Atkins also claimed that his appellate counsel was ineffective for not raising, on his direct appeal, the claims asserted in his petition. *See id.* at 56-57 (ECF No. 94-13, pp. 57-58). The state district court denied those claims, finding that Atkins' trial counsel were aware of the previous or pending cases against Anderson and Smith, and that there was no evidence that either received favorable treatment in return for testimony in Atkins' case. *See* Findings of Fact, Conclusions of Law and Order, Exh. 237, pp. 24-26 (ECF No. 94-18, pp. 25-27). The state district court concluded:

> Based on the foregoing, Defendant fails to meet his burden in showing that counsels failed to request this information, that this information actually existed and that if it did exist that it would have had any [effect] on the credibility of Anderson or Smith at trial.

Id. at 26 (ECF No. 94-18, p. 27). Atkins then asserted these claims on his appeal in his state habeas action. *See* Appellant's Opening Brief, Exh. 256, pp. 37-40, 66 (ECF No. 94-37, pp. 53-56, 82). The Nevada Supreme Court affirmed the denial of relief on **[*103]** these claims, ruling as follows:

> ... Atkins contends that his trial counsel failed to file appropriate requests compelling prosecutors to divulge alleged inducements provided to State witnesses Michael E. Smith and Jerry Anderson. The record belies this claim. On April 18, 1994, defense counsel issued a subpoena to the custodian of records for LVMPD [Las Vegas Metropolitan Police Department] specifically requesting production of documents pertaining to Anderson's robbery arrest and a missing persons case in which he may have been involved. Defense counsel subsequently filed a discovery motion requesting "any and all *Brady* and *Giglio* material" [footnote omitted] with respect to both Smith and Anderson. In this motion, defense counsel indicated that Anderson had provided his statement to police concerning the instant murder incident to his arrest on traffic ticket bench warrants, and that he was thereafter released from custody. Also, in her cross-examination of Smith, defense counsel elicited that he had provided his statement to LVMPD officers incident to his arrest for offenses unrelated to the instant crimes, but that no charges were ever filed against him. Finally, to the extent **[*104]** that Atkins premises this allegation of ineffective assistance "[o]n information and belief ... that confidential informants and/or cooperating witnesses were offered incentives by the prosecution to provide evidence against [Atkins]," such speculation is insufficient to support Atkins' claim of ineffective assistance. We conclude that the record repels the claim that defense counsel's investigation into possible State-sponsored inducements to its witnesses fell below an objective standard of reasonableness or that Atkins was prejudiced.

Order of Affirmance, Exh. 261, p. 8 (ECF No. 94-43, p. 9). This Court determines that the Nevada Supreme Court's ruling was reasonable.

"[T]he Constitution requires a fair trial, and one essential element of fairness is the prosecution's obligation to turn over exculpatory evidence." *Milke v. Ryan, 711 F.3d 998, 1002-03 (9th Cir. 2013)* (citing *United State v. Bagley, 473 U.S. 667, 674-75, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)*; *Giglio v. United States, 405 U.S. 150, 153-55, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972)*; *Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*). Under *Brady* and its progeny, the prosecution must disclose to the defense evidence favorable to the accused and material to either guilt or punishment; this requirement applies irrespective of the good faith or bad faith of the prosecution. *Brady, 373 U.S. at 87*; *see also United States v. Collins, 551 F.3d 914, 923 (9th Cir. 2009)*. "Any evidence that would tend to call the government's case into doubt is favorable for *Brady* purposes." **[*105]** *Milke*, 711 at 1012 (citing *Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)*. This includes material that would impeach a prosecution witness. *Id.* There are three elements of a *Brady* violation: (1) the state withholds evidence, either willfully or inadvertently, (2) the evidence withheld is favorable to the defendant, either because it is exculpatory or impeaching, and (3) the evidence is material. *See Strickler, 527 U.S. at 281-82*; *Milke, 711 F.3d at 1012*. In evaluating the effect of a *Brady* violation, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)*.

Atkins did not show in state court, and does not show here, that the prosecution had an agreement with Smith or Jerry Anderson, or provided either with any benefit in return for his testimony, or that any exculpatory or impeachment information was withheld from the defense. Atkins' *Brady* claim is speculative. Furthermore, Atkins makes no showing that his trial counsel performed **[*106]** unreasonably with

respect to these issues. The Nevada Supreme Court reasonably rejected these claims. The Nevada Supreme Court's ruling was not contrary to, or any unreasonable application of, *Brady* or *Giglio*, or any other United States Supreme Court precedent.

With respect to the part of Claim 6 concerning an alleged agreement with witness Mark Wattley, that claim was not presented in state court in Atkins' first state habeas action, and it is subject to application of the procedural default doctrine. As with Jerry Anderson and Smith, Atkins' does not make any showing that the prosecution had an agreement with Wattley, that the prosecution provided Wattley with beneficial treatment in return for his testimony, or that the prosecution withheld information from the defense about any such arrangement. There is no showing that Atkins' state post-conviction counsel was ineffective for not raising this issue in his first state habeas action. Atkins does not make a showing of cause and prejudice with respect to these claims; they will be denied as procedurally defaulted.

Claim 7(a) and the Related Part of Claim 13

In Claim 7(a), Atkins claims that his federal constitutional rights were violated **[*107]** because "the trial court erred in denying defense counsels' motion challenging the composition of the jury pool and Mr. Atkins' conviction" and because of "under representation of African-Americans in the jury pool and on his jury." Fourth Amended Petition (ECF No. 183), pp. 210-211. And, in the related part of Claim 13, Atkins claims that his counsel on his direct appeal was ineffective for not asserting, on his direct appeal, the claim in Claim 7(a). *Id.* at 293-94.

Atkins asserted such claims in his first state habeas action. *See* Supplemental Brief in Support of Petition, Exh. 232, pp. 30-35, 56-57 (ECF No. 94-13, pp. 31-36, 57-58). The state district court ruled the substantive claim to be procedurally barred because it could have been raised on appeal. *See* Findings of Fact, Conclusions of Law and Order, Exh. 237, p. 8 (ECF No. 94-18, p. 9). The court denied the claim of ineffective assistance of appellate counsel, ruling that "[t]his claim would not have been successful on appeal and therefore appellate counsel was not ineffective for failing to raise it on appeal." *Id.* at 32-33 (ECF No 94-13, pp. 33-34). On the appeal in Atkins' first state habeas action, the Nevada Supreme ruled the substantive claim **[*108]** procedurally barred under state law. *See* Order of Affirmance, Exh. 261, p. 1 n.2 (ECF No. 94-43, p. 2 n.2). Regarding the claim of ineffective assistance of appellate counsel, the Nevada Supreme Court ruled as follows:

> ... Atkins claims that his appellate counsel was ineffective for failing to raise on direct appeal that Atkins was denied his constitutional right to be tried by a jury composed of a fair cross-section of the community and for failing to challenge the district court's denial of a motion for discovery to develop this claim. In support of this contention, Atkins alleges that "the master list from which his petit jury was selected ... under represented black persons and other constitutionally cognizable groups that make up Clark County." He also asserts that "there were only three black Americans in the entire pool."
>
> To demonstrate a prima facie violation of the fair cross-section requirement, a defendant must demonstrate
>
> > (1) that the group alleged to be excluded is a 'distinctive group in the community; and (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; **[*109]** and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. [Footnote: *Duren v. Missouri, 439 U.S. 357, 364, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979).*]
>
> Atkins has failed to carry the burden of establishing a prima facie violation of this doctrine. [Footnote: *See Evans v. State, 112 Nev. 1172, 1186, 926 P.2d 265, 275 (1996).*] Although he has sufficiently identified a distinctive group, he has failed to carry his burden of establishing either underrepresentation or systemic exclusion. First, although he states that only three members of his jury panel appeared to be African-American, Atkins fails to otherwise provide the statistical data necessary for determining relative underrepresentation as required by the second prong of the *Duren* tripartite test. Second, Atkins has failed to demonstrate that the alleged underrepresentation was due to systemic exclusion of African-Americans in the jury selection process as required by the third prong. [Footnote: It appears that Atkins attempts to meet this third prong by suggesting that the State improperly used a peremptory challenge to exclude a potential juror based on his race. This is not the kind of evidence that supports a finding of systematic exclusion; rather, it is a separate and distinct issue requiring a different analysis **[*110]** than that required under *Duren*. *See Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)* (providing the basis for evaluating race-based objections to peremptory challenges).] Because Atkins has failed to establish a prima facie violation of the fair cross-section doctrine, we conclude that Atkins' appellate counsel was not ineffective for failing to raise this issue. We further

> conclude that Atkins failed to demonstrate that the district court abused its discretion in denying his motion for discovery.

See Order of Affirmance, Exh. 261, pp. 15-16 (ECF No. 94-43, pp. 16-17). The Nevada Supreme Court's ruling was reasonable. "[T]he selection of a petit jury from a representative cross section of the community is an essential component of the *Sixth Amendment* right to a jury trial." *Taylor v. Louisiana, 419 U.S. 522, 528, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975)*. However, the Court in *Taylor* stated:

> It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition, *Fay v. New York, 332 U.S. 261, 284, 67 S.Ct. 1613, 1625, 91 L.Ed. 2043 (1947)*; *Apodaca v. Oregon, 406 U.S. 404, at 413, 92 S.Ct., at 1634, 1972 U.S. LEXIS 56* (plurality opinion); but the jury wheels, pools of names, panels, or venires from which juries **[*111]** are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.

Id. at 538. To make a prima facie showing that there has been violation of the defendant's right to a jury selected from a representative cross section of the community, the defendant must show:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979). Under the third prong, the disproportionate exclusion need not be intentional to be unconstitutional, but it must be systematic. *See Randolph v. California, 380 F.3d 1133, 1141 (9th Cir. 2004)*. Atkins has never made a colorable showing that African Americans were underrepresented in, or systematically excluded from, the venire from which his jury was chosen. The Nevada Supreme Court's ruling on this claim was not contrary to, or an unreasonable application of *Taylor* or *Duren*, or any other Supreme Court precedent. The Court will deny Atkins habeas corpus relief with **[*112]** respect to the claim of ineffective assistance of appellate counsel relative to this issue in Claim 13.

The substantive claim in Claim 7(a) is subject to denial as procedurally defaulted. As is discussed above, Atkins does not show ineffective assistance of his appellate counsel for failure to assert this claim on his direct appeal; therefore, he does not show cause and prejudice such as to overcome the procedural default. The Court will deny Claim 7(a) as procedurally defaulted.

Claim 7(b) and the Related Part of Claim 13

In Claim 7(b), Atkins claims that his federal constitutional rights were violated because "the trial court erred in allowing hearsay statements made by Shawn Atkins to State's witness Mark Wattley." Fourth Amended Petition (ECF No. 183), pp. 211-214. In the related part of Claim 13, Atkins claims that his appellate counsel was ineffective for not asserting, on his direct appeal, the claim in Claim 7(b). *Id.* at 293-94.

When called as a witness at trial by the prosecution, Shawn Atkins testified that he and his brother, Atkins, were only minimally involved in Ebony's murder, and did not strike any of the blows that killed her. *See* Testimony of Shawn Atkins, Transcript of Trial, March **[*113]** 23, 1995, Exh. 129, pp. 28-35, 60-61 (ECF No. 91-33, pp. 33-40, 65-66). He testified that he only saw Atkins kick Ebony once, to see if she was conscious. *See id.* at 32 (ECF No. 91-33, p. 37). In essence, Shawn's testimony was that Doyle was the primary assailant who viciously attacked Ebony and killed her, without significant participation by Atkins. *See id.* at 28-35, 60-61 (ECF No. 91-33, pp. 33-40, 65-66).

Later in the trial, over Atkins' objection, the prosecution called Mark Wattley as a witness, to testify about statements that Shawn made to him. Wattley testified that Shawn told him that after he "jumped it off," Atkins and Doyle started "whooping on" Ebony, that they "went crazy, and they hit her in the head with a rock, stomped her, choked her with her pants leg." Testimony of Mark Wattley, Transcript of Trial, March 27, 1995, Exh. 133, p. 32 (ECF No. 91-39, p. 37). Wattley testified further as to what Shawn told him: "I guess, after they got through kicking her, he said Bubba [Atkins] tried to choke her with a pants leg around her, you know, neck, and then that's when Tony hit her in the head with a rock." *Id.* at 33 (ECF No. 91-39, p. 38).

On his direct appeal, Atkins claimed that the admission of Wattley's testimony **[*114]** about Shawn's statements was improper under state evidence law and violated his federal constitutional rights. *See* Appellant's Opening Brief, Exh. 181, pp. 10-20 (ECF No. 93-2, pp. 19-29). The Nevada Supreme Court denied relief on those claims; in its opinion, the court discussed only Atkins' claims under state law. *See Atkins, 112*

Nev. at 1130-32, 923 P.2d at 1125-26.

The Nevada Supreme Court's ruling, under state law, regarding the admission of Wattley's testimony is authoritative and beyond the scope of this federal habeas corpus action. *See Bradshaw, 546 U.S. at 76* ("[S]tate court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus.") (citing *Estelle, 502 U.S. at 67-68*).

Regarding the Nevada Supreme Court's denial of Atkins' claims under federal law, because the Nevada Supreme Court provided no analysis of those claims, this federal habeas court "must determine what arguments or theories supported or ... could have supported, the state court's decision; and then it must ask 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, 562 U.S. at 102*. "Habeas relief is available for wrongly admitted **[*115]** evidence only when the questioned evidence renders the trial so fundamentally unfair as to violate federal due process." *Jeffries, 5 F.3d at 1192*. However, "[t]he Supreme Court has made very few rulings regarding the admission of evidence as a violation of due process." *Holley, 568 F.3d at 1101*. "Although the Court has been clear that a writ should be issued when constitutional errors have rendered the trial fundamentally unfair, it has not yet made a clear ruling that admission of irrelevant or overly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ." *Id.* (internal citation omitted). Atkins does not point to any clearly established federal law, as determined by the Supreme Court, holding that admission of testimony such as that at issue here violates a defendant's right to due process of law. In fact, Atkins makes no argument at all, beyond generalized claims of violation of his due process rights, in support of his federal law claim. *See* Reply (ECF No. 222), p. 153. Atkins does not show that the Nevada Supreme Court's ruling was an unreasonable application of Supreme Court precedent, such as to warrant habeas relief under *28 U.S.C. § 2254(d)*. Wattley's testimony about what Shawn told him was not **[*116]** so unfairly prejudicial as to render Atkins' trial fundamentally unfair. The Court will deny Atkins habeas corpus relief with respect to Claim 7(b).

Turning to the related claim of ineffective assistance of appellate counsel in Claim 13, that claim was raised in state court, in Atkins' first state habeas action (*see* Supplemental Brief in Support of Petition, Exh. 232, pp. 61-64, 56-57 (ECF No. 94-13, pp. 62-65, 57-58); Appellant's Opening Brief, Exh. 256, pp. 66, 69 (ECF No. 94-38, pp. 19, 22), and the Nevada Supreme Court affirmed the denial of the claim without discussion. *See* Order of Affirmance, Exh. 261 (ECF No. 94-43). This claim is without merit and the Nevada Supreme Court's denial of it was reasonable. Atkins' appellate counsel did in fact assert the claim regarding Wattley's testimony on Atkins' appeal, and Atkins makes no argument regarding what further his appellate counsel should have done in that regard. The Court will deny Atkins habeas corpus relief on the part of Claim 13 asserting that appellate counsel was ineffective for not claiming on Atkins' appeal that Wattley's testimony about Shawn's statements violated his federal constitutional rights.

Claim 7(c) and the Related **[*117]** Part of Claim 13

In Claim 7(c), Atkins claims that his federal constitutional rights were violated because "the trial court erred in not allowing the defense a continuance." Fourth Amended Petition (ECF No. 183), pp. 215-217. And, in the related part of Claim 13, Atkins claims that his counsel on his direct appeal was ineffective for not asserting, on his direct appeal, the claim in Claim 7(c). *Id.* at 293-94.

Atkins concedes that the substantive claim, Claim 7(c), "does not seem to have been brought in state court." *Id.* at 217. In fact, however, Atkins did raise the claim on the appeal in his first state habeas action, but the Nevada Supreme Court ruled it to be procedurally barred. *See* Appellant's Opening Brief, Exh. 256, pp. 19-21 (ECF No. 94-37, pp. 35-37); Order of Affirmance, Exh. 261, p. 1 n.2 (ECF No. 94-43, p. 2 n.2). Either way, the claim is subject to the procedural default doctrine, and the question is whether Atkins shows cause and prejudice to overcome the procedural default.

Atkins raised the related claim of ineffective assistance of appellate counsel in Claim 13 in his first state habeas action. *See* Supplemental Brief in Support of Petition, Exh. 232, pp. 21-24, 56-57 (ECF No. 94-13, pp. 22-25, **[*118]** 57-58); Appellant's Opening Brief, Exh. 256, pp. 19-21, 66 (ECF No. 94-37, pp. 35-37; ECF No. 94-38, p. 19). The Nevada Supreme Court denied relief on that claim as follows:

> ... Atkins alleges that his appellate attorney failed to contend that the district court erred in denying Atkins' pretrial motion for continuance. Approximately one month before the scheduled start of Atkins' trial, lead defense attorney Anthony P. Sgro filed a motion for continuance due to a conflict that had developed with another capital case in which he was also defense counsel. Approximately eleven days before Atkins' trial, the district court denied the motion. The following day, Atkins filed a motion to allow substitution of attorneys in which he requested the reappointment of former co-counsel Laura Melia, who had withdrawn from the case following Atkins' preliminary hearing. The district court granted this motion approximately one week prior to the commencement of Atkins' trial. On March 20, 1995,

after jury voir dire had begun, Atkins expressed concern to the district court that Ms. Melia was not adequately prepared to defend him. Then, at the close of the guilt phase of his trial, Atkins stated that he **[*119]** felt rushed to trial.

Based upon our review of the record, we conclude that the district court's denial of Mr. Sgro's motion to continue Atkins' trial did not constitute an abuse of discretion. [Footnote: *See Wesley v. State, 112 Nev. 503, 511, 916 P.2d 793, 799 (1996)* ("The decision to grant or deny trial continuances is within the sound discretion of the district court and will not be disturbed absent a clear abuse of discretion.").] First, the record indicates that Ms. Melia was qualified to represent a capital defendant and that Mr. Sgro endorsed her return to Atkins' case. Also, in response to Atkins' statement of March 20, the district court stated that Ms. Melia was familiar with the case, having performed as co-counsel through Atkins' preliminary hearing. In response to Atkins' comment at the close of the guilt phase of his trial, the district court stated that Ms. Melia never indicated that she was not adequately prepared to proceed with Atkins' defense but had she so indicated "this court would not have excused Mr. Sgro." Ms. Melia then interjected that she continued to believe that she was adequately prepared to represent Atkins. Thus, the record indicates that the district court properly acted within its discretion, and we conclude **[*120]** that appellate counsel was not ineffective for failing to challenge the district court's denial of Mr. Sgro's motion for continuance.

Order of Affirmance, Exh. 261, pp. 10-11 (ECF No. 94-43, pp. 11-12).

Atkins does not show the Nevada Supreme Court's ruling on his claim of ineffective assistance of appellate counsel to be unreasonable. The Nevada Supreme Court's ruling was not contrary to, or an unreasonable application of, *Strickland*, or any other Supreme Court precedent, and was not unreasonable in view of the evidence. The Court will deny Atkins habeas corpus relief on this claim of ineffective assistance of his appellate counsel.

Returning to the substantive claim in Claim 7(c), that claim is procedurally defaulted, and Atkins does not show cause and prejudice with respect to it. Atkins does not show that his appellate counsel was ineffective for not asserting the claim on his direct appeal. And, moreover, Atkins does not show the substantive claim—that his federal constitutional rights were violated by the denial of a continuance—to have any merit. The only authority Atkins cites in support of the claim, beyond citation to the constitutional provisions he claims were violated, is **[*121]** *Ungar v. Sarafite, 376 U.S. 575, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964)*. *See* Reply (ECF No. 222), p. 155. The Court in *Ungar* stated the following about when denial of a continuance might violate a defendant's constitutional right to due process of law:

> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. *Avery v. Alabama, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377*. Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. *Chandler v. Fretag, 348 U.S. 3, 75 S.Ct. 1, 99 L.Ed. 4*. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. *Nilva v. United States, 352 U.S 385, 77 S.Ct. 431, 1 L.Ed.2d 415; Torres v. United States, 270 F.2d 252 (C.A.9th Cir.)*; cf. *United States v. Arlen, 252 F.2d 491 (C.A.2d Cir.)*.

Ungar, 376 U.S. at 589-90. Under the facts in this case, where the trial judge denied the continuance and replaced one of Atkins' attorneys with an attorney who had represented him through his preliminary hearing and said she was prepared for trial, denial of a continuance was not so arbitrary that Atkins' federal constitutional right **[*122]** to due process of law was violated, and Atkins' appellate counsel was not ineffective for not asserting this claim on his direct appeal. Atkins does not show cause and prejudice relative to the procedural default of Claim 7(c). Claim 7(c) will be denied as procedurally defaulted.

Claim 7(f) and the Related Part of Claim 13

In Claim 7(f), Atkins claims that his federal constitutional rights were violated on account of "trial court error for allowing prosecutorial misconduct in final punishment phase argument and prosecutorial misconduct for the argument." Fourth Amended Petition (ECF No. 183), pp. 222-26. And, in the related part of Claim 13, Atkins claims that his counsel on his direct appeal was ineffective for not asserting, on his direct appeal, the claim in Claim 7(f). *Id.* at 293-94.

Atkins claims that his federal constitutional rights were violated because the prosecutors made the following comments to the jury in closing arguments in the penalty phase of the trial:

1. "Ebony Mason's parents can visit Ebony Mason, but

they have to go to the cemetery to visit their young child." Transcript of Trial, April 27, 1995, Exh. 147, p. 107 (ECF No. 92-9, p. 26) (court struck comment and admonished jury **[*123]** to disregard).

2 "[T]he Defendant has already stabbed someone in the back, brutally murdered a young woman within a span of about two years. Where does he go from here? What does he do for an encore?" *Id.* at 109 (ECF No. 92-9, p. 28) (court sustained objection and admonished jury to disregard).

3. "The shorter the sentence, the sooner this community will find out." *Id.* (ECF No. 92-9, p. 28) (court sustained objection and admonished jury to disregard).

4. "And this community deserves...." *Id.* (ECF No. 92-9, p. 28) (court cut off prosecutor, sustained objection, and admonished jury to disregard).

5 "Deterrence is achieved through severity of punishment. It is important for the image of the criminal justice system, for those who view how it works, that they understand that lines are drawn that you don't go over. On January 15th, 1994 this Defendant went over the line. A sentence of death will send a strong message to the future Sterling Bubba Scarface Atkins of the world." *Id.* at 110-11 (ECF No. 92-9, pp. 29-30).

6. "We should use the criminal justice system to protect society from physical danger. We should be ashamed and alarmed to live in a society that does not express through its institutions the public's proper **[*124]** sense [of] proportionate punishment for those people such as the Defendant. Preserving the life of a cold-blooded murderer compromises the value of life." *Id.* at 111 (ECF No. 92-9, p. 30).

7 "[C]apital punishment is essential in an ordered society such as this that allows its citizens to rely on the legal process rather than self-help." *Id.* (ECF No. 92-9, p. 30).

8. "It would be easy for you to sentence the Defendant to life in prison without the possibility of parole and be done with it. That would not do justice to the facts of this case based upon the evidence." *Id.* at 112 (ECF No. 92-9, p. 31).

9. "Failure to condemn crime has the effect of condoning it. Justice requires criminals get what they deserve, and what criminals deserve is based upon what they did." *Id.* (ECF No. 92-9, p. 31).

10. "A sentence of death would do justice to the facts of this case and give value to the life of Ebony Mason." *Id.* at 113 (ECF No. 92-9, p. 32).

11. "Someone once said that, 'Our human capacity for good makes the death penalty tragic, but our human capacity for evil makes it necessary.'" *Id.* (ECF No. 92-9, p. 32).

12. "The return of a death verdict is society's act of self-defense. The return of a death verdict is the enforcement **[*125]** of society's right to be free from murder." *Id.* (ECF No. 92-9, p. 32).

13. "You can feel good about a verdict of death. You can hold your head up high when you walk out of this building. If asked what you did down at the courthouse in the case of *State v. Sterling Atkins*, you can respond by saying you heard evidence about a man who kidnapped and sexually assaulted a young mother of two, a man who participated in the shoving of a stick into the rectum of that poor young woman, a man who left foot impressions on her body, a man who did all this while on parole for yet another violent felony that he had committed. If asked what you did on that case you can respond by saying you found the Defendant guilty of first-degree murder and you sentenced him to death. That's what you did down at the courthouse in the case of the *State v. Sterling Atkins*. You can reply by saying you did justice in that case." *Id.* at 114 (ECF No. 92-9, p. 33).

14. "[T]he only way the law can be made sacred is to entitle it to inflict the penalty of death." *Id.* (ECF No. 92-9, p. 33).

15. "What is the act that the Defense wants to mitigate here? It's been the position of the Defense throughout this case that Sterling didn't participate **[*126]** in the death of Ebony Mason. So why the talk of mitigation? On the one hand they seem to be saying, 'He didn't do it;' and on the other they're saying, 'Well if he did it, then this is why.'" *Id.* at 128 (ECF No. 92-9, p. 47) (court sustained objection).

16. "The torture aggravator brings this point out. This wasn't just a bullet in the head. Hit over the head; she's knocked out; she dies. She was savaged for a period, a significant period, of time by a group of individuals. How many times during this period of time as she was clawing, trying to get up, trying to fight [off] her attackers, dragged across the ground, beaten, stomped, how many times did Ebony think 'This is it? I'm dead; this is it.'" *Id.* at 130-31 (ECF No. 92-9, pp. 49-50) (objection overruled).

17. "There was the stomping. Nine ribs broken, any one

> of which capable of producing serious injury or death. How many times did Ebony suffer death as these different individuals took turns jumping on her? And then lying there while somebody got something to put around her neck—a pair of pants—where she was choked, perhaps to unconsciousness. What was going through her mind? And then, that not working, somebody finding a rock and her repeatedly being **[*127]** struck in the head with that rock." *Id.* at 131 (ECF No. 92-9, p. 50).
>
> 18. "And in a civilized society you have to hold people responsible for their conduct. What's the alternative? Chaos." *Id.* at 137 (ECF No. 92-9, p. 56).

Fourth Amended Petition (ECF No. 183), pp. 222-24. Atkins also cites comments made by the prosecutors regarding the potential sentence of life without the possibility of parole (*Id.* at 225); those comments are considered, below, in the context of Claim 10.

Atkins argues that the prosecutors' comments were improper because they were "designed to appeal to the passions, fears and vulnerabilities of the jury," citing *United States v. Koon, 34 F.3d 1416 (9th Cir. 1994), rev'd on other grounds, 518 U.S. 81, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996)*, and because they "point[ed] to a particular crisis in our society and ask[ed] the jury to make a statement," citing *United States v. Leon-Reyes, 177 F.3d 816 (9th Cir. 1999)*. *See* Fourth Amended Petition (ECF No. 183), pp. 225-26; *see also* Reply (ECF No. 222), pp. 168-70.

Atkins asserted this claim—the claim in Claim 7(f)—in state court on his direct appeal. *See* Appellant's Opening Brief, Exh. 181, pp. 51-57 (ECF No. 93-34 pp. 3-9). The Nevada Supreme Court denied Atkins relief, ruling as follows:

> Atkins also contends that the prosecutor's comments during closing argument of the penalty phase amount to prosecutorial **[*128]** misconduct.
>
> "[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." *United States v. Young, 470 U.S. 1, 11, 105 S. Ct. 1038, 1044, 84 L.Ed.2d 1 (1985)*. In addition, should this court determine that improper comments were made by the prosecutor, "it must be determined whether the errors were harmless beyond a reasonable doubt." *Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1155 (1988)*. It is not enough that the prosecutor's remarks are undesirable. *Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471, 91 L.Ed.2d 144 (1986)*. The Constitution guarantees a fair trial, not necessarily a perfect trial. *Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104 (1990)*. Thus, the relevant inquiry is whether the prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process. *Darden, 477 U.S. at 181, 106 S. Ct. at 2471*.
>
> Atkins contends that during closing argument of the penalty phase, the prosecutor inflamed the passion of the jury with the following remarks:
>
> > Consider this in contrast to Ebony Mason. She will never see her children again or hear their laughter. She will never experience the joy of watching her children grow up, get an education, get married, have children of their own. She will never again be able to watch the sunrise or the **[*129]** sunset. [Objection overruled.]
> >
> > She will never again listen to music or read a book. She will never again see her mother, her father, her grandmother, her brother, or her sister and, of course, her children. Ebony Mason's parents can visit Ebony Mason, but they have to go to the cemetery to visit their young child. [Court: "Counsel, the last part, I will strike that. The jury is admonished to disregard the last statement."]]
> >
> > While prison life within those walls might not be easy, within those walls, there is life, and where there is life, there is hope. What would Ebony Mason give to be in a situation where she could see her parents? [Objection overruled.]
> >
> > What would Ebony Mason give to be in a situation where she could hug her children, where she could see the sunrise and sunset. What would Ebony Mason give just to be alive?
> >
> > * * *
> >
> > The Defendant has already stabbed someone in the back, brutally murdered a young woman within a span of about two years. Where does he go from here? What does he do for an encore? [Objection sustained.]
> >
> > The shorter the sentence, the sooner this community will find out. [Objection sustained.]
> >
> > * * *
>
> This wasn't just a bullet in the head. Hit over the head; she's knocked **[*130]** out; she dies. She was savaged for a period, a significant period of time, by a group of individuals. How many times during this period of time as she was clawing, trying to get up, trying to fight off her attackers, dragged across the ground, beaten, stomped, how many times did Ebony think, "This is it? I'm dead; this is it."

[Objection overruled.]

We conclude that the aforementioned closing arguments by the prosecutor during the penalty phase were proper as they described the impact of the crime on the victim and her family. *Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597, 115 L.Ed.2d 720 (1991)*. In *Homick v. State, 108 Nev. 127, 825 P.2d 600 (1992)*, this court "applaud[ed] the decision in *Payne* as a positive contribution to capital sentencing, and conclud[ed] that it fully comports with the intendment of the Nevada Constitution." *Id. at 136, 825 P.2d at 606*. This court reasoned:

> The key to criminal sentencing in capital cases is the ability of the sentencer to focus upon and consider both the individual characteristics of the defendant and the nature and impact of the crime he committed. Only then can the sentencer truly weigh the evidence before it and determine a defendant's just desserts. Apropos to the point is the statement by the venerable Justice Cardozo in *Snyder v. Massachusetts, 291 U.S. 97, 122 [54 S. Ct. 330, 338, 78 L.Ed. 674] (1934)*, that "justice, though due to the accused is due to the accuser **[*131]** also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."

Id. at 137, 825 P.2d at 606. The contested arguments related specifically to the impact of the crime on Ebony Mason and her family. They described to the jury the nature and the impact of the crime committed. We conclude that they do not constitute prosecutorial misconduct.

Atkins further contends that the prosecutor committed misconduct by impermissibly arguing that the jury should return a verdict of death in order to please the jury members' friends and neighbors. He cites *Collier v. State, 101 Nev. 473, 705 P.2d 1126 (1985)*, in support of his position. In *Collier*, this court disapproved of a prosecutor's statement to the jury that it must be angry with the defendant or else "we are not a moral community." *Id. at 479, 705 P.2d at 1129-30*. This court found this comment, among others, to be a blatant attempt to inflame the jury and an inappropriate encouragement to approach their duties with anger. *Id.* This court rejected the State's contention that general comments about community standards are proper. *Id.*
In the instant case, the prosecutor stated the following during closing argument:

> You can feel good about a verdict of death. You can hold your head up high when you walk **[*132]** out of this building. If asked what you did down at the courthouse in the case, *State v. Sterling Atkins*, you can respond by saying you heard evidence about a man who kidnapped and sexually assaulted a young mother of two, a man who participated in the shoving of a stick into the rectum of that poor young woman, a man who left foot impressions on her body, a man who did all this while on parole for yet another violent felony that he committed. If asked what you did on that case you can respond by saying you found the Defendant guilty of first degree murder and you sentenced him to death. That's what you did down at the courthouse in the case of *State v. Sterling Atkins*. You can reply by saying you did justice in that case.

We conclude that the prosecutor's comments in the instant case do not rise to the level of those in *Collier*. Rather, the prosecution sought to persuade the jury to do justice in this particular case. Accordingly, we conclude that there was no prosecutorial misconduct.

Atkins, 112 Nev. at 1135-37, 923 P.2d at 1127-29.

Atkins does not show the Nevada Supreme Court's ruling to be contrary to, or an unreasonable application of, United States Supreme Court precedent. In support of his argument, Atkins cites *Koon* and ***[*133]*** *Leon-Reyes*, both of which are Ninth Circuit Court of Appeals cases. *See* Fourth Amended Petition (ECF No. 183), pp. 225-26; *see also* Reply (ECF No. 222), pp. 168-70. In both *Koon* and *Leon-Reyes*, the court of appeals cited *Viereck v. United States, 318 U.S. 236, 247-48, 63 S. Ct. 561, 87 L. Ed. 734 (1943)* for the general proposition that "[p]rosecutors may not make comments calculated to arouse the passions or the prejudices of the jury." *Leon-Reyes, 177 F.3d at 823*; *Koon, 34 F.3d at 1443*. Atkins does not make any showing that it was unreasonable for the Nevada Supreme Court to determine that the prosecutors in this case did not violate that proscription. And, Atkins does not point to any other Supreme Court support for his argument.

In Claim 7(f), Atkins cites portions of the prosecutors' arguments that he did not contest in state court. The new factual allegations in Claim 7(f), however, do not "fundamentally alter" the claim. *See Vasquez, 474 U.S. at 260*. The new allegations do not place the claim in a significantly different and stronger evidentiary posture than it was when the state courts considered it. *See Dickens, 740 F.3d at 1318*.

Alternatively, if the new allegations are viewed as

fundamentally altering Claim 7(f), or placing it in a significantly different and stronger evidentiary posture, such that the claim is, in part, subject to the procedural default **[*134]** doctrine, the Court would conclude that Atkins' appellate counsel was not ineffective within the meaning of *Strickland* for not including those additional factual allegations in Atkins' claim on his direct appeal. The Court would determine, then, that Atkins does not show cause for the procedural default, and would deny the claim, as to the new allegations, as procedurally defaulted.

Atkins asserted his claim of ineffective assistance of his appellate counsel in state court, in his first state habeas action. *See* Supplemental Brief in Support of Petition, Exh. 232, pp. 56-57, 71-75 (ECF No. 94-13, pp. 57-58, 72-76); Appellant's Opening Brief, Exh. 256, pp. 66, 70 (ECF No. 94-38, pp. 19, 23). The Nevada Supreme Court denied relief on that claim without discussion. *See* Order of Affirmance, Exh. 261 (ECF No. 94-43). As is discussed above, Atkins' appellate counsel did in fact assert a claim like that in Claim 7(f) on his direct appeal. The Nevada Supreme could reasonably have determined that the comments of the prosecutors Atkins now adds to his claim were not so unfairly prejudicial as to amount to a violation of Atkins' federal constitutional right to due process of law, and that, therefore, **[*135]** his appellate counsel was not ineffective for not raising an issue regarding the newly added comments. Affording the Nevada Supreme Court's ruling the deference required under *section 2254(d)*, the Court finds that the ruling was not contrary to, or an unreasonable application of, *Strickland* or any other United States Supreme Court precedent. The Court will deny Atkins relief on the part of Claim 13 in which he claims his appellate counsel was ineffective vis-à-vis the claims in Claim 7(f).

Claim 9(C)(iii) and the Related Part of Claim 13

In Claim 9, Atkins claims that Atkins' federal constitutional rights were violated because "Nevada's unconstitutional common law definitions of the elements of the capital offense are unconstitutional and many of the aggravating factors were invalid." Fourth Amended Petition (ECF No. 183), pp. 235-62. In the part of Claim 9 designated Claim 9(C)(iii), Atkins claims that "the use of the first and second aggravators, that the murder was committed by a person who was previously convicted of a felony [involving the use or threat of violence to the person of another] and the murder was committed by a person under a sentence of imprisonment were duplicative and hence also **[*136]** unconstitutional." *Id.* at 241-42. In the September 28, 2017, order, ruling on Respondents' motion to dismiss, the Court dismissed the remainder of Claim 9 on statute of limitations grounds. *See* Order (ECF No. 214), pp. 26-27. In the part of Claim 13 related to Claim 9(C)(iii), Atkins claims that his counsel on his direct appeal was ineffective for not asserting, on his direct appeal, the claim in Claim 9(C)(iii). *Id.* at 293-94.

Atkins did not assert a claim like Claim 9(C)(iii) on his direct appeal. *See* Appellant's Opening Brief, Exh. 181 (ECF No. 93-34).

In his first state habeas action, Atkins asserted the claim that his appellate counsel was ineffective for not including on his direct appeal the claim in Claim 9(C)(iii). *See* Supplemental Brief in Support of Petition, Exh. 232, pp. 53-54, 56-57 (ECF No. 94-13, pp. 54-55, 57-58); Appellant's Opening Brief, Exh. 256, pp. 62-63, 66 (ECF No. 94-38, pp. 15-16, 19). The Nevada Supreme Court ruled on that claim of ineffective assistance of appellate counsel as follows:

> ... Atkins claims that his appellate counsel was ineffective for failing to argue that Atkins' death sentence is unconstitutional "due to the finding of the duplicative aggravating circumstances that **[*137]** (1) the murder was committed by a person who was previously convicted of a felony involving the use or threat of violence; and (2) that the murder was committed by a person under sentence of imprisonment." Atkins contends that these aggravators are duplicative because they are both based upon his prior conviction for assault with use of a deadly weapon. [Footnote: Atkins committed the instant crimes while on parole from this conviction.] Atkins' claim is without merit. The fact that these two aggravators arise out of the same prior conviction does not render the aggravators duplicative because they "could, hypothetically, be based upon completely different circumstances and ... they address different state interests." [Footnote: *Geary v. State, 112 Nev. 1434, 1448, 930 P.2d 719, 728 (1996)*.] Thus, Atkins' claim of ineffective assistance of appellate counsel must fail because the issue did not have a reasonable probability of success on appeal.

Order of Affirmance, Exh. 261, pp. 14-15 (ECF No. 94-43, pp. 15-16).

Atkins does not show this ruling, on his claim of ineffective assistance of appellate counsel, to be unreasonable in light of Supreme Court precedent. Atkins does not show that the two aggravating circumstances are duplicative, and, at **[*138]** any rate, he cites no Supreme Court precedent supporting his contention that duplicative aggravating circumstances violate a capital defendant's federal constitutional rights. Atkins does not show that the Nevada Supreme Court's ruling was unreasonable under *Strickland*. Therefore, applying *section 2254(d)*, the Court will deny Atkins relief on the part of Claim 13 related to Claim 9(C)(iii).

Turning to Claim 9(C)(iii) itself, because that claim was not raised on Atkins' direct appeal it is subject to the procedural default doctrine here. The Court agrees with the Nevada Supreme Court's conclusion that Atkins' appellate counsel was not ineffective for failing to raise the claim, as Atkins does not show that the aggravating circumstances at issue were duplicative or that duplicative aggravating circumstances are violative of a defendant's federal constitutional rights. Atkins does not show cause and prejudice for the procedural default. Claim 9(C)(iii) will be denied as procedurally defaulted.

Claim 10 and the Related Part of Claim 13

In Claim 10, Atkins claims that his federal constitutional rights were violated because "the trial court erred in allowing the jury to speculate that Atkins could be paroled **[*139]** or granted clemency if he received a sentence of life without the possibility of parole." Fourth Amended Petition (ECF No. 183), pp. 263-69. In the part of Claim 13 related to Claim 10, Atkins claims that his counsel on his direct appeal was ineffective for not asserting the claim in Claim 10. *Id.* at 293-94.

Atkins did not assert a claim like Claim 10 on his direct appeal. *See* Appellant's Opening Brief, Exh. 181 (ECF No. 93-34). In his first state habeas action, Atkins asserted the claim that his appellate counsel was ineffective for not including in his direct appeal a claim like that in Claim 10. *See* Supplemental Brief in Support of Petition, Exh. 232, pp. 57-59 (ECF No. 94-13, pp. 58-60); Appellant's Opening Brief, Exh. 256, pp. 67-68 (ECF No. 94-38, pp. 20-21). The Nevada Supreme Court ruled on that claim of ineffective assistance of appellate counsel as follows:

> ... Atkins contends that his appellate counsel failed to raise the issue of an alleged instance of prosecutorial misconduct. The State elicited testimony from a defense witness, a retired prison warden, that the Pardons Board could commute a sentence of life without the possibility of parole to a sentence of life with the possibility **[*140]** of parole. Atkins characterizes this as a "misstatement of the powers" of the Pardons Board that "may have convinced the jury that the only way to keep [Atkins] off the street was to kill him." [Footnote omitted.] We conclude that Atkins has failed to identify a "misstatement" of the Pardons Board's powers. *NRS 213.085*, which precludes the Pardons Board from commuting a sentence of death or life imprisonment without possibility of parole to a sentence that would allow parole, became effective on July 1, 1995, and this court has held that a retroactive application of the statute is unconstitutional. [Footnote: *Miller v. Warden, 112 Nev. 930, 921 P.2d 882 (1996).*] Atkins was convicted in June 1995. Accordingly, had Atkins' jury sentenced him to life without the possibility of parole, he would have been eligible for commutation of his sentence by the Pardons Board to a sentence of life with the possibility of parole. [*See Smith v. State, 106 Nev. 781, 802 P.2d 628 (1990)* (holding that pursuant to *NRS 213.1099(4)* and *Nev. Const. art 5, § 4(2)* the Board of Pardons may commute a sentence of life without parole to a sentence allowing for parole).

Order of Affirmance, Exh. 261, p. 13 (ECF No. 94-43, p. 14). The ruling of the Nevada Supreme Court was reasonable.

The trial court instructed the jury, in the penalty phase of Atkins' trial, as **[*141]** follows:

> Life imprisonment with the possibility of parole is a sentence of life imprisonment which provides that a defendant would be eligible for parole after a period of ten years. This does not mean that he would be paroled after ten years, but only that he would be eligible after that period of time.
>
> Life imprisonment without the possibility of parole means exactly what it says, that a defendant shall not be eligible for parole.
>
> If you sentence a defendant to death, you must assume that the sentence will be carried out.
>
> Although under certain circumstances and conditions the State Board of Pardons Commissioners has the power to modify sentences, you are instructed that you may not speculate as to whether the sentence you impose may be changed at a later date.

Jury Instructions, Exh. 149, Instruction No. 17 (ECF No. 92-11, p. 19). The prosecutors made arguments in their closing arguments consistent with this instruction, including the following:

> It was mentioned several times—a minute ago by counsel for the Defense—that you have an instruction which correctly states that life without the possibility of parole means life without the possibility of parole. And that's true. And life with **[*142]** the possibility of parole means life with the possibility of parole. But the instruction that comes right after that gives a little explanation of what seems to have been a conflict in what we've been hearing here, and that is that life without the possibility of parole can become life with the possibility of parole at some point down the road based upon the activities of the pardons board.
>
> * * *
>
> You're not supposed to speculate about whether that will happen in this particular case. The instructions will tell you you can't speculate. You're not supposed to go back

> and say "Is this going to be pardoned if we give him life without parole? Is some pardons board later down the road going to give him life with?" You can't do that. Okay? That would be a violation of the law. But you are entitled to know that that is provided for in our law. Anything less than that knowledge to you would be unfair.

Transcript of Trial, April 27, 1995, Exh. 147, pp. 137-39 (ECF No. 92-9, pp. 56-58).

Jury instructions that inform the jury of the possibility of commutation of a sentence of life without the possibility of parole to a life sentence with the possibility of parole may not violate the federal Constitution **[*143]** if the instructions are accurate. *California v. Ramos, 463 U.S. 992, 1004, 103 S. Ct. 3446, 77 L. Ed. 2d 1171 (1983)*. However, an instruction that is accurate in the abstract might nonetheless violate the Constitution if it is misleading given the facts of the particular case. *See Coleman v. Calderon, 210 F.3d 1047, 1050-51 (9th Cir. 2000)* ("[I]nstruction was misleading because it told the jury that the Governor had the power to commute Coleman's sentence but left out the additional hurdles to be overcome to obtain such a commutation."); *Gallego v. McDaniel, 124 F.3d 1065, 1074-77 (9th Cir.1997)* (instruction misleading because defendant was under sentence of death in another jurisdiction, essentially ruling out any possibility of parole). Furthermore, even where an instruction regarding the possibility of executive clemency is accurate, a prosecutor's inflammatory or misleading arguments on the subject may violate the defendant's federal constitutional rights. *See Sechrest v. Ignacio, 549 F.3d 789, 807-12 (9th Cir. 2008)*.

The Nevada Supreme Court ruled that the jury instruction at issue in this case did not misstate Nevada law. This federal habeas court does not review state court rulings on matters of state law. *See Bradshaw, 546 U.S. at 76*. And, Atkins makes no showing that the jury instruction was inaccurate, misleading, or confusing, given his particular circumstances, or that it otherwise violated his federal constitutional rights. *See Ramos, 463 U.S. at 1009* (emphasizing importance **[*144]** of accuracy of jury instructions regarding possibility of commutation of a sentence of life without the possibility of parole).

Nor does Atkins show that the prosecutors committed misconduct in their arguments to the jury on the subject, such as to render Atkins' trial unfair and violate his federal constitutional rights. The prosecutors did little more than restate the jury instruction. The prosecutors did not comment on the likelihood that Atkins' sentence would be commuted to one allowing parole or the likelihood that parole would be granted. The prosecutors stated that the jury was not to speculate about that. *Cf. Sechrest, 549 F.3d at 812* (describing the prosecutor's arguments in that case as "erroneous," and stating that the prosecutor "misled the jurors."). There was no prosecutorial misconduct as claimed by Atkins.

Under the circumstances here, affording the state court ruling the deference required under *28 U.S.C. §2254(d)*, and affording Atkins' appellate counsel the deference required under *Strickland*, the Court will deny Atkins habeas corpus relief on the claim of ineffective assistance of appellate counsel in Claim 13, in which he claims that his appellate counsel was ineffective for failing to raise on his direct **[*145]** appeal a claim regarding the jury instruction and prosecution arguments regarding the possibility that the Board of Pardons could commute a sentence of life without the possibility of parole to a sentence of life with the possibility of parole.

As for the substantive claim in Claim 10—that Atkins was denied his due process right to a fair trial by the jury instruction and prosecution arguments—that claim is procedurally defaulted, and, as Atkins does not show his appellate counsel to have been ineffective, he does not show cause and prejudice such as to overcome the procedural default. Furthermore, it is plain from Atkins' claim, and the authority he cites, that the claim was available before the Ninth Circuit Court of Appeals' decision in *Sechrest*; the timing of the decision in *Sechrest* does not amount to cause for Atkins' default of this claim. The Court will deny Atkins habeas corpus relief on Claim 10.

Claim 11 and the Related Part of Claim 13

In Claim 11, Atkins claims that his federal constitutional rights were violated because "the trial court gave an incorrect definition of reasonable doubt which lowered the State's burden of proof." Fourth Amended Petition (ECF No. 183), pp. **[*146]** 270-73. In Claim 13, Atkins claims that his counsel on his direct appeal was ineffective for not asserting the claim in Claim 11. *Id.* at 293-94.

The following instruction, Instruction No. 29, was given to the jury in the guilt phase of Atkins' trial:

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

Jury Instruction No. 29, Exh. 138 (ECF No. 91-48, p. 31). Atkins claims this instruction improperly lowered the State's

burden of proof, and thereby violated his federal constitutional rights, and he claims that his appellate counsel was ineffective for not including this claim in his direct appeal.

Atkins did not assert the substantive claim on his direct appeal. *See* Appellant's Opening Brief, Exh. 181 (ECF No. 93-34). In his first state habeas action, Atkins asserted both the substantive **[*147]** claim and the claim that his appellate counsel was ineffective for not including the substantive claim in his direct appeal. *See* Supplemental Brief in Support of Petition, Exh. 232, pp. 51-53, 56-57 (ECF No. 94-13, pp. 52-54, 57-58); Appellant's Opening Brief, Exh. 256, pp. 61-62 (ECF No. 94-38, pp. 14-15).

The Nevada Supreme Court ruled the substantive claim procedurally barred because it was not raised on Atkins' direct appeal. *See* Order of Affirmance, Exh. 261, p. 1 n.2 (ECF No. 94-43, p. 2 n.2). The Nevada Supreme Court denied the claim of ineffective assistance of appellate counsel, on its merits, stating that it had repeatedly upheld such instructions against identical attacks. *See* Order of Affirmance, Exh. 261, pp. 8-9.

The Court determines that Atkins' claim that this jury instruction was unconstitutional under federal law is without substance. *See* Fourth Amended Petition (ECF No. 183), pp. 270-73; Reply ECF No. 222), pp. 195-98 (withdrawing part of claim). And, the Nevada Supreme Court's ruling that the instruction was proper under state law is authoritative and beyond the scope of this federal constitutional action. *See Bradshaw, 546 U.S. at 76*.

The Court, therefore, finds that the Nevada Supreme Court's **[*148]** ruling, denying Atkins' claim of ineffective assistance of appellate counsel, was reasonable; that ruling was not contrary to, or an unreasonable application of, Supreme Court precedent. The Court will deny the part of Claim 13 related to Claim 11 on that ground.

The substantive claim in Claim 11 will be denied as procedurally defaulted. As Atkins' appellate counsel was not ineffective for not asserting this claim on his direct appeal, Atkins does not show cause and prejudice for the procedural default.

Claim 12 and the Related Part of Claim 13

In Claim 12, Atkins claims that his federal constitutional rights were violated because "the definition of 'premeditation and deliberation' given [to Atkins'] jury was unconstitutional." Fourth Amended Petition (ECF No. 183), pp. 274-92. In the related part of Claim 13, Atkins claims that his counsel on his direct appeal was ineffective for not asserting the claim in Claim 12. *Id.* at 293-94.

Here, Atkins places at issue the so-called "*Kazalyn* instruction," a jury instruction approved by the Nevada Supreme Court in *Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992)*, and *Powell v. State, 108 Nev. 700, 838 P.2d 921 (1992)*, and disapproved by the same court eight years later in *Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000)*. The *Kazalyn* instruction, as given in the guilt phase of Atkins' trial, was as follows: **[*149]**

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

Jury Instruction No. 7, Exh. 138 (ECF No. 91-48, p. 9). Atkins argues that this instruction was unconstitutional because it collapsed three elements of first-degree murder—"willful, deliberate and premeditated"—into one element: "premeditated."

Atkins did not assert any such claim on his direct appeal. *See* Appellant's Opening Brief, Exh. 181 (ECF No. 93-34). In his first state habeas action, Atkins asserted both the substantive claim and the claim that his appellate counsel was ineffective for not including the substantive claim in his direct appeal. *See* Supplemental Brief in Support of Petition, Exh. 232, pp. 47-50, 56-57 (ECF No. 94-13, pp. 48-51, 57-58); **[*150]** Appellant's Opening Brief, Exh. 256, pp. 44-57 (ECF No. 94-37, pp. 60-65, and ECF No. 94-38, pp. 2-10).

The Nevada Supreme Court ruled the substantive claim procedurally barred because it was not raised on Atkins' direct appeal. *See* Order of Affirmance, Exh. 261, p. 1 n.2 (ECF No. 94-43, p. 2 n.2). The Nevada Supreme Court denied the claim of ineffective assistance of appellate counsel, on its merits, stating that it had repeatedly upheld such instructions against identical attacks. *See* Order of Affirmance, Exh. 261, pp. 8-9 (ECF No. 94-43, pp. 9-10).

In *Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007)*, the Ninth Circuit Court of Appeals held that the *Kazalyn* instruction was unconstitutional because it relieved the State "of its burden of proving every element of first-degree murder beyond a reasonable doubt." Subsequently, however, in *Babb v. Lozowsky, 719 F.3d 1019 (9th Cir. 2013)*, the court determined that its holding in *Polk* is no longer good law in

light of the intervening ruling of the Nevada Supreme Court in *Nika v. State, 124 Nev. 1272, 198 P.3d 839 (2008)*, that *Byford* represented a change, rather than a clarification, of Nevada law. *See Babb, 719 F.3d at 1029*. In light of *Nika* and *Babb*, it is now well-established that in cases in which the conviction became final after *Powell* but before *Byford*—that is, between 1992 and 2000—the *Kazalyn* instruction **[*151]** accurately stated Nevada law and did not violate the defendant's federal constitutional rights. *See Babb, 719 F.3d at 1029-30*; *see also Riley v. McDaniel, 786 F.3d 719, 723-24 (9th Cir. 2015)*. Atkins' conviction became final on March 17, 1997, when the Supreme Court denied certiorari following the Nevada Supreme Court's order affirming his conviction. *See Colwell v. State, 118 Nev. 807, 820, 59 P.3d 463, 472 (2002)*. Atkins' substantive claim is, therefore, foreclosed by *Babb*. The instruction was not unconstitutional.

It follows that the Nevada Supreme Court's ruling that Atkins' appellate counsel was not ineffective for not asserting this claim on his direct appeal was reasonable. Atkins does not show that ruling to be contrary to, or an unreasonable application of, *Strickland*, or any other Supreme Court precedent. The Court will deny the part of Claim 13 related to Claim 12 on that ground.

The substantive claim in Claim 12 will be denied as procedurally defaulted. Because the claim is meritless, and because Atkins' appellate counsel was not ineffective for not asserting the claim on his direct appeal, Atkins does not show cause and prejudice relative to the procedural default.

Claim 13

In Claim 13, Atkins claims that his federal constitutional rights were violated as a result of ineffective assistance of his appellate counsel. **[*152]** Fourth Amended Petition (ECF No. 183), pp. 273-94. Atkins states: "Any purely-record-based claims or sub-claims discussed herein could and should have been raised on the direct appeal if the basis for them was entirely present in the record itself." *Id.* at 294.

In the September 28, 2017, order, on Respondents' motion to dismiss, the Court dismissed Claim 13 in part as follows:

> Respondents argue that this claim is barred by the statute of limitations. See Motion to Dismiss [ECF No. 192], pp. 19-20. Applying the principles discussed above, the Court finds that Claim 13 relates back to Atkins' original petition to the extent that Atkins claims his appellate counsel was ineffective for failing to raise, on his direct appeal, the following of the claims that appear in his fourth amended habeas petition in this case: Claims 1(a), 1(d), 1(e), 2, 3(a), 3(e), 3(f), 3(g), 3(i), 3(j), 4(a), 4(b), 4(g), 4(h), 5, 6, 7(a), 7(b), 7(c), 7(d), 7(e), 7(f), 9 (only the part of Claim 9 discussed in part (C)(iii) of Claim 9), 10, 11, 12, 14, 16, 17, 18, 19, 20, 21, 22, and 23. On the other hand, Claim 13 does not relate back to Atkins' original petition, is barred by the statute of limitations, and will be dismissed, **[*153]** to the extent that Atkins claims his appellate counsel was ineffective for failing to raise, on his direct appeal, the following of the claims in his fourth amended habeas petition in this case: Claims 1(b), 1(c), 3(b), 3(c), 3(d), 3(h), 4(c), 4(d), 4(e), 4(f), 8, 9 (except for the part of Claim 9 discussed in part (C)(iii) of Claim 9), 15, and 24.

Order filed September 28, 2017 (ECF No. 214), pp. 27-28; *see also id.* at 33.

Of the parts of Claim 13 not dismissed in the September 28, 2017, order, the following are claims of ineffective assistance of counsel or *Brady/Giglio* claims, are not "purely-record-based claims," and, as the Court understands Claim 13, these claims are not incorporated into Claim 13: Claims 1(a), 1(d), 1(e), 2, 3(a), 3(e), 3(f), 3(g), 3(i), 3(j), 4(a), 4(b), 4(g), 4(h), 5 and 6.

Regarding Claim 13 as it relates to Claim 23—Atkins' claim that he may become incompetent to be executed—that claim is without merit. Atkins makes no showing that his appellate counsel performed unreasonably in not asserting such a claim on his direct appeal. That part of Claim 13 will be denied on the ground that the Nevada Supreme Court's denial of relief on the claim was reasonable. *See* Appellant's **[*154]** Opening Brief, Exh. 256, pp. 43-44, 66-67 (ECF No. 94-37, pp. 59-60, and ECF No. 94-38, pp. 19-20); Order of Affirmance, Exh. 261, pp. 3-4 (ECF No. 94-43, pp. 4-5).

Regarding the parts of Claim 13 not dismissed in the September 28, 2017, order, other than the part related to Claim 23—that is, the parts related to Claims 7(a), 7(b), 7(c), 7(d), 7(e), 7(f), 9C(iii), 10, 11, 12, 14, 16, 17, 18, 19, 20, 21 and 22—those parts of Claim 13 are discussed elsewhere in this order, in conjunction with the related underlying claims.

Claim 16 and the Related Part of Claim 13

In Claim 16, Atkins claims that "[t]he Nevada system of execution by lethal injection is unconstitutional." Fourth Amended Petition (ECF No. 183), pp. 300-05. As the Court understands Claim 16, Atkins assert that execution by lethal injection, conducted in the manner in which Nevada authorities intend to conduct it in his case, would be unconstitutional. *See id.* In the related part of Claim 13, Atkins claims that his counsel on his direct appeal was ineffective for not asserting, on his direct appeal, the claim in

Claim 16. *Id.* at 293-94.

Such a challenge to Nevada's protocol for carrying out a death sentence is not cognizable in this federal **[*155]** habeas corpus action. In *Nelson v. Campbell, 541 U.S. 637, 124 S. Ct. 2117, 158 L. Ed. 2d 924 (2004)*, a state prisoner sentenced to death filed a civil rights action, under *42 U.S.C. § 1983*, alleging that the state's proposed use of a certain procedure, not mandated by state law, to access his veins during a lethal injection would constitute cruel and unusual punishment. The Supreme Court reversed the lower courts' ruling that the claim sounded in habeas corpus and could not be brought as a *Section 1983* action. The Supreme Court ruled that *Section 1983* was an appropriate vehicle for the prisoner to challenge the lethal injection procedure prescribed by state officials. *Nelson, 541 U.S. at 645*. The Court stated that the prisoner's suit challenging "a particular means of effectuating a sentence of death does not directly call into question the 'fact' or 'validity' of the sentence itself [because by altering the lethal injection procedure] the State can go forward with the sentence." *Id. at 644*. In *Hill v. McDonough, 547 U.S. 573, 126 S. Ct. 2096, 165 L. Ed. 2d 44 (2006)*, the Court reaffirmed the principles articulated in *Nelson*, ruling that an as-applied challenge to lethal injection was properly brought by means of a Section 1983 action. *Hill, 547 U.S. at 580-83*.

Nelson and *Hill* suggest that a *Section 1983* action is the more appropriate vehicle for such a challenge to a method of execution. *See also Glossip v. Gross, 576 U.S. 863, 135 S.Ct. 2726, 2738, 192 L. Ed. 2d 761 (2015)* ("In *Hill*, the issue was whether a challenge **[*156]** to a method of execution must be brought by means of an application for a writ of habeas corpus or a civil action under *§ 1983*. We held that a method-of-execution claim must be brought under *§ 1983* because such a claim does not attack the validity of the prisoner's conviction or death sentence." (citations to *Hill* omitted)); *Beardslee v. Woodford, 395 F.3d 1064, 1068-69 (9th Cir. 2005)* (holding that claim that California's lethal injection protocol violated *Eighth Amendment* "is more properly considered as a 'conditions of confinement' challenge, which is cognizable under *§ 1983*, than as a challenge that would implicate the legality of his sentence, and thus be appropriate for federal habeas review").

Given the amount of time that passes before a death sentence is carried out, it is certainly possible—perhaps likely—that a state's execution protocol will change between the time when a death sentence is imposed and the time when it is carried out. In this regard, the Court notes that Atkins bases his claim on "the Nevada Department of Corrections April 2006 execution manual," without any citation to that manual and apparently without submitting a copy of it as an exhibit. *See* Fourth Amended Petition (ECF No. 183), p. 300. Habeas corpus law and procedure have not developed and are **[*157]** unsuited to adjudicate the constitutionality of an execution protocol that may change after a court imposes the death sentence. The Court concludes that a challenge to a state's execution protocol is not a challenge to the constitutionality of the petitioner's custody or sentence. *See 28 U.S.C. § 2254*. A challenge to a state's execution protocol is more akin to a suit challenging the conditions of custody, which must be brought as a civil rights action under *42 U.S.C. § 1983*. Claim 16 will be denied as not cognizable in this federal habeas corpus action.

Turning to Atkins' claim, in Claim 13, that his appellate counsel was ineffective for not asserting a claim like Claim 16 on his direct appeal, Atkins asserted such a claim in his petition in his first state habeas action. *See* Supplemental Brief in Support of Petition, Exh. 232, pp. 56-57, 78-82 (ECF No. 94-13, pp. 57-58, 79-83). The state district court denied the claim. *See* Findings of Fact, Conclusions of Law and Order, Exh. 237, pp. 37-38 (ECF No. 94-18, pp. 38-39). However, Atkins then apparently abandoned the claim in that action; he did not assert such a claim on his appeal. *See* Appellant's Opening Brief, Exh. 256 (ECF No. 94-37). As such, the claim is procedurally **[*158]** defaulted, and Atkins does not make any showing of cause and prejudice to overcome the procedural default. This claim of ineffective assistance of appellate counsel will be denied as procedurally defaulted.

Claim 17 and the Related Part of Claim 13

In Claim 17, Atkins claims that his "sentence is unconstitutional due to the failure of the Nevada Supreme Court to conduct fair and adequate appellate review." Fourth Amended Petition (ECF No. 183), pp. 306-08. The gist of Atkins' claim in Claim 17 is that the Nevada Supreme Court did not adequately conduct its review of his case under *NRS 177.055(2)*, which, among other things, requires the state appellate court to review capital cases to determine: "[w]hether the evidence supports the finding of an aggravating circumstance or circumstances;" "[w]hether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor"; and "[w]hether the sentence of death is excessive, considering both the crime and the defendant." *NRS 177.055(2)*. In the related part of Claim 13, Atkins claims that his appellate counsel was ineffective for not asserting such a claim on his direct appeal. *Id.* at 293-94.

Atkins did not assert the substantive claim in Claim 17 on his **[*159]** direct appeal. *See* Appellant's Opening Brief, Exh. 181 (ECF No. 93-34). Atkins did assert these claims in his petition in his first state habeas action. *See* Supplemental

Brief in Support of Petition, Exh. 232, pp. 56-57, 59-61 (ECF No. 94-13, pp. 57-58, 60-61). The state district court denied relief. *See* Findings of Fact, Conclusions of Law and Order, Exh. 237 (ECF No. 94-18). Then, it appears that Atkins abandoned these claims, as he did not raise them on his appeal. *See* Appellant's Opening Brief, Exh. 256 (ECF No. 94-37).

Therefore, these claims are procedurally defaulted. The Court finds the substantive claim to be without merit; Atkins does not make any colorable showing that the evidence did not support the finding of an aggravating circumstance, that his death sentence was imposed under the influence of passion, prejudice or any arbitrary factor, or that his death sentence is excessive. Atkins does not make any showing that the Nevada Supreme Court did not adequately conduct the review required by *NRS 177.055(2)*. Atkins does not point to any federal authority supporting his contention that his federal constitutional rights were violated as he claims. Atkins does not show cause and prejudice **[*160]** with respect to either the substantive claim or the claim of ineffective assistance of appellate counsel. Both Claim 17 and the related part of Claim 13 will be denied as procedurally defaulted.

Claim 18 and the Related Part of Claim 13

In Claim 18, Atkins claims that his death sentence is in violation of the federal constitution because "the Nevada capital punishment system is arbitrary and capricious." Fourth Amended Petition (ECF No. 183), pp. 309-11. Atkins makes several general allegations regarding the operation of the Nevada death penalty system and contends that, as a result of the shortcomings he alleges, it is constitutionally defective. *See id.* In the related part of Claim 13, Atkins claims that his appellate counsel was ineffective for not asserting a claim such as this on his direct appeal. *Id.* at 293-94.

Atkins did not assert the substantive claim in Claim 18 on his direct appeal. *See* Appellant's Opening Brief, Exh. 181 (ECF No. 93-34). Atkins did assert both the substantive claim and the claim of ineffective assistance of appellate counsel in his first state habeas action. *See* Supplemental Brief in Support of Petition, Exh. 232, pp. 56-57, 75-78 (ECF No. 94-13, pp. 57-58, 76-79). The **[*161]** state district court denied relief on the claims. *See* Findings of Fact, Conclusions of Law and Order, Exh. 237 (ECF No. 94-18). Atkins then asserted these claims on the appeal in that state habeas action. *See* Appellant's Opening Brief, Exh. 256, pp. 66-67, 71-73 (ECF No. 94-38, pp. 19-20, 24-26). The Nevada Supreme Court ruled the substantive claim procedurally barred, and ruled as follows on the claim of ineffective assistance of Atkins' appellate counsel:

> ... Atkins contends that his appellate counsel was ineffective for failing to challenge ... Nevada's death penalty statutory scheme in particular.... [T]his court has repeatedly upheld Nevada's death penalty scheme against similar challenges. [Footnote: *See, e.g., Gallego v. State, 117 Nev. , , 23 P.3d 227, 242 (2001); Leonard v. State, 117 Nev. , , 17 P.3d 397, 416 (2001); Middleton v. State, 114 Nev. 1089, 1116-17, 968 P.2d 296, 314-15 (1998).*] .... Accordingly, Atkins' appellate counsel was not ineffective for failing to raise these issues.

Order of Affirmance, Exh. 261, p. 10 (ECF No. 94-43, p. 11); *see also id.* at 1 n.2 (ECF No. 94-43, p. 1 n.2) ("To the extent that Atkins raises independent constitutional claims, they are waived because they were not raised on direct appeal. *See NRS 34.810(1)(b)*.").

The Nevada Supreme Court's ruling on Atkins' claim of ineffective assistance of his appellate counsel is reasonable. Atkins' underlying **[*162]** claim is insubstantial. He does not show Nevada's death penalty system to be unconstitutional, and, at any rate, he makes no attempt to show that he was prejudiced. Atkins' appellate counsel did not perform unreasonably in not asserting this claim on his direct appeal. The Court will deny the claim of ineffective assistance of appellate counsel, affording the state court ruling the deference mandated by *28 U.S.C. §2254(d)*, and will deny the underlying substantive claim as procedurally defaulted.

Claim 19 and the Related Part of Claim 13

In Claim 19, Atkins claims that his death sentence is in violation of the federal constitution because "the death penalty is cruel and unusual punishment." Fourth Amended Petition (ECF No. 183), pp. 312-13. In this claim, Atkins contends that "the death penalty is cruel and unusual punishment in all circumstances." *See id.* In the related part of Claim 13, Atkins claims that his appellate counsel was ineffective for not asserting a claim such as this on his direct appeal. *Id.* at 293-94.

Atkins did not assert the substantive claim in Claim 19 on his direct appeal. *See* Appellant's Opening Brief, Exh. 181 (ECF No. 93-34). Atkins asserted both the substantive claim and the claim of ineffective **[*163]** assistance of appellate counsel in his first state habeas action. *See* Supplemental Brief in Support of Petition, Exh. 232, pp. 56-57, 78-79 (ECF No. 94-13, pp. 57-58, 79-80). The state district court denied relief on the claims. *See* Findings of Fact, Conclusions of Law and Order, Exh. 237 (ECF No. 94-18). Atkins then asserted these claims on the appeal in that state habeas action. *See*

Appellant's Opening Brief, Exh. 256, pp. 66-67, 73-74 (ECF No. 94-38, pp. 19-20, 26-27). The Nevada Supreme Court ruled the substantive claim procedurally barred, and ruled as follows on the claim of ineffective assistance of Atkins' appellate counsel:

> ... Atkins contends that his appellate counsel was ineffective for failing to challenge the constitutionality of the death penalty in general.... [W]e reject Atkins' underlying constitutional challenges to the death penalty in general. We have repeatedly upheld the general constitutionality of the death penalty under the *Eighth Amendment* and the Nevada Constitution. [Footnote: *See, e.g., Colwell v. State, 112 Nev. 807, 814-15, 919 P.2d 403, 407-08 (1996); Bishop v. State, 95 Nev. 511, 517-18, 597 P.2d 273, 276-77 (1979).*] .... Accordingly, Atkins' appellate counsel was not ineffective for failing to raise these issues.

Order of Affirmance, Exh. 261, p. 10 (ECF No. 94-43, p. 11); *see also id.* at 1 n.2 (ECF No. 94-43, **[*164]** p.1 n.2).

The Nevada Supreme Court's ruling on Atkins' claim of ineffective assistance of his appellate counsel is reasonable. Atkins' underlying claim is foreclosed by United States Supreme Court precedent. *See Glossip v. Gross, 576 U.S. 863, 135 S.Ct. 2726, 2739, 192 L. Ed. 2d 761 (2015); Baze v. Rees, 553 U.S. 35, 47, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008); Gregg v. Georgia, 428 U.S. 153, 187, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).* Atkins' appellate counsel did not perform unreasonably in not asserting this claim on his direct appeal. The Court will deny the claim of ineffective assistance of appellate counsel, affording the state court ruling the deference mandated by *28 U.S.C. §2254(d)*, and will deny the underlying substantive claim as procedurally defaulted.

Claim 20 and the Related Part of Claim 13

In Claim 20, Atkins claims that his "conviction and sentence violate international law and the International Covenant on Civil and Political Rights." Fourth Amended Petition (ECF No. 183), p. 314. In the related part of Claim 13, Atkins claims that his appellate counsel was ineffective for not asserting a claim such as this on his direct appeal. *Id.* at 293-94.

Atkins did not assert the substantive claim in Claim 19 on his direct appeal. *See* Appellant's Opening Brief, Exh. 181 (ECF No. 93-34). Atkins asserted both the substantive claim and the claim of ineffective assistance of appellate counsel in his first state habeas action. *See **[*165]*** Supplemental Brief in Support of Petition, Exh. 232, pp. 56-57, 83-84 (ECF No. 94-13, pp. 57-58, 84-85). The state district court denied relief on the claims. *See* Findings of Fact, Conclusions of Law and Order, Exh. 237 (ECF No. 94-18). Atkins then asserted these claims on the appeal in that state habeas action. *See* Appellant's Opening Brief, Exh. 256, pp. 66-67, 74-75 (ECF No. 94-38, pp. 19-20, 27-28). The Nevada Supreme Court ruled the substantive claim procedurally barred, and ruled as follows on the claim of ineffective assistance of Atkins' appellate counsel:

> ... Atkins contends that his appellate counsel failed to argue that Atkins' conviction and sentence are invalid pursuant to the rights and protections afforded him under the International Covenant on Civil and Political Rights ("ICCPR"), a treaty ratified by the United States Senate in 1992. [Footnote: *See* ICCPR, opened for signature Dec. 19, 1966, U.N.T.S. 171.] Atkins alleges that the Covenant provides any person charged with a criminal offense a number of guarantees, which he lists. Atkins then concludes that all of the listed guarantees "were violated in his case, and are pleaded elsewhere throughout this petition." It **[*166]** is Atkins' responsibility to present relevant authority and cogent argument, and we need not address issues that are not so presented. [Footnote: *Maresca v. State, 103 Nev. 669, 673, 748P.2d 3, 6 (1987); see generally, Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).*] On this basis, we conclude that Atkins is not entitled to relief on this claim.

Order of Affirmance, Exh. 261, p. 14 (ECF No. 94-43, p. 15); *see also id.* at 1 n.2 (ECF No. 94-43, p. 1 n.2).

The Nevada Supreme Court's ruling on Atkins' claim of ineffective assistance of his appellate counsel is reasonable. Atkins did not present authority or argument supporting a claim that he is entitled to habeas relief on this ground. Atkins does not demonstrate that the International Covenant on Civil and Political Rights creates rights enforceable in state or federal court. Atkins' appellate counsel did not perform unreasonably in not asserting this claim on his direct appeal. The Court will deny the claim of ineffective assistance of appellate counsel, affording the state court ruling the deference mandated by *28 U.S.C. §2254(d)*, and will deny the underlying substantive claim as procedurally defaulted.

Claim 21 and the Related Part of Claim 13

In Claim 21, Atkins claims that his death sentence is in violation of the federal constitution because **[*167]** "the execution of a death sentence after keeping the condemned on death row for an inordinate amount of time constitutes cruel

and unusual punishment." Fourth Amended Petition (ECF No. 183), pp. 315-20. In the related part of Claim 13, Atkins claims that his appellate counsel was ineffective for not asserting a claim such as this on his direct appeal. *Id.* at 293-94.

The Court determines that this claim is barred by the statute of limitations. In the order filed September 28, 2017, on Respondents' motion to dismiss, the Court deferred ruling on this statute of limitations issue, citing *28 U.S.C. § 2244(d)* and noting that "the factual predicate for this claim—that 'the execution of a death sentence after keeping the condemned on death row for an inordinate amount of time constitutes cruel and unusual punishment'—could arguably have arisen within a year before Atkins filed his fourth amended petition." Order filed September 28, 2017 (ECF No. 214), p. 29, quoting Fourth Amended Petition (ECF No. 183), p. 315. In his Reply, Atkins' argument on this point, in its entirety, is as follows: "Prior to the filing of the fourth amended petition, Atkins had not been on death row for an inordinate amount of time and raising it **[*168]** now was his first practical opportunity to do so." Reply (ECF No. 222), p. 242. The Court disagrees. Atkins was convicted, and the death penalty was imposed, on June 8, 1995. *See* Judgment of Conviction, Exh. 159 (ECF No. 92-21). Justice Stevens' statement respecting the denial of certiorari in *Lackey v. Texas, 514 U.S. 1045, 1045, 115 S. Ct. 1421, 131 L. Ed. 2d 304 (1995)*, articulating the arguable basis for a claim such as this, was published just months before, on March 27, 1995. In *Lackey*, the petitioner had been on death row for some 17 years. *See Lackey, 514 U.S. at 1045.* Twelve years after Atkins' conviction, on December 10, 2007, Atkins filed his first amended petition (ECF No. 69), thirteen years after his conviction, on October 29, 2008, Atkins filed his second amended petition (ECF No. 85), and fifteen years after his conviction, on April 13, 2010, Atkins filed his third amended petition (ECF No. 117); Atkins did not include in any of those amended petitions a claim like that in Claim 21. The Court determines that the factual predicate, and legal underpinnings, for the claim were available prior to one year before Atkins filed his fourth amended petition on August 26, 2016 (ECF No. 183). Claim 21 and the related claim of ineffective assistance of appellate counsel in Claim **[*169]** 13 are barred by the statute of limitations and will be denied primarily on that ground.

Furthermore, both Claim 21 and the related part of Claim 13 are procedurally defaulted, and they will be denied on that alternative ground as well. Atkins concedes that he never raised this claim in any court before he filed his fourth amended petition in this case. *See* Reply (ECF No. 222), p. 242. Atkins does not demonstrate cause and prejudice to overcome the procedural default of either claim.

The Court will deny Atkins habeas corpus relief with respect to Claim 21 and the related part of Claim 13.

Claim 22 and the Related Part of Claim 13

Claim 22 of Atkins' fourth amended petition is a cumulative error claim; that is, in Claim 22, Atkins incorporates his other claims, and asserts that, considered cumulatively, the errors alleged in his other claims warrant federal habeas corpus relief. *See* Fourth Amended Petition (ECF No. 183), pp. 321-23. In the related part of Claim 13, Atkins claims that his appellate counsel was ineffective for not asserting such a claim on his direct appeal. *Id.* at 293-94.

The Court has identified no constitutional error, and therefore finds there to be no error to consider cumulatively. **[*170]** The Court will deny Atkins habeas corpus relief with respect to Claim 22.

The Court determines, further, that the Nevada Supreme Court reasonably denied Atkins relief on his cumulative error claim in state court. The Court affords that ruling deference under *28 U.S.C. § 2254(d)* and will deny Atkins relief on the part of Claim 13 related to Claim 22.

Motion for Evidentiary Hearing

Atkins has filed a motion for an evidentiary hearing (ECF No. 168). Respondents filed an opposition to that motion (ECF No. 23). Atkins did not reply.

In his motion for evidentiary hearing, Atkins requests an evidentiary hearing regarding his argument that he can overcome the procedural default of many of his claims by showing his actual innocence under *Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)*. In the September 28, 2017, order, the Court found Atkins' *Schlup* argument unavailing, without need for an evidentiary hearing. *See* Order filed September 28, 2107 (ECF No. 214), pp. 13-16, 31. The Court will not revisit that ruling here.

Atkins also requests an evidentiary hearing regarding all his claims of ineffective assistance of counsel. Atkins makes this request generally, without identifying any particular questions of fact on which an evidentiary hearing is warranted, and **[*171]** without giving any indication why an evidentiary hearing is called for with regard to any such questions of fact. Atkins does not identify what witnesses he would call to testify, or what other evidence he would seek to present, regarding any particular factual question. The Court determines there to be no need for an evidentiary hearing on any of the claims resolved in this order, and the Court will not

grant Atkins an evidentiary hearing based on the generalized motion he has presented.

The Court will deny Atkins' motion for an evidentiary hearing.

Certificate of Appealability

The standard for the issuance of a certificate of appealability requires a "substantial showing of the denial of a constitutional right." *28 U.S.C. §2253(c)*. The Supreme Court has interpreted *28 U.S.C. § 2253(c)* as follows:

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy *§ 2253(c)* is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where, as here, the district court dismisses the petition based on procedural grounds. We hold as follows: When **[*172]** the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000); *see also James v. Giles, 221 F.3d 1074, 1077-79 (9th Cir. 2000)*.

Applying the standard articulated in *Slack*, the Court finds that a certificate of appealability is warranted with respect to Claims 4(b), 4(g), 4(h), 10, and the part of Claim 13 related to Claim 10. The Court will grant Atkins a certificate of appealability with regard to those claims. With regard to the remainder of Atkins' claims, the Court will deny him a certificate of appealability.

Conclusion

IT IS THEREFORE ORDERED that the Petitioner's Fourth Amended Petition for Writ of Habeas Corpus (ECF No. 183) is **DENIED**.

IT IS FURTHER ORDERED Petitioner's Motion for Evidentiary Hearing (ECF No. 223) is **DENIED**.

IT IS FURTHER ORDERED that Petitioner is granted a certificate of appealability with respect to Claims 4(b), 4(g), 4(h), 10, and the part of Claim 13 **[*173]** related to Claim 10, of his Fourth Amended Petition for Writ of Habeas Corpus (ECF No. 183). With respect to all other claims, the Court denies a certificate of appealability.

IT IS FURTHER ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

DATED July 10, 2020.

/s/ James C. Mahan

JAMES C. MAHAN,

UNITED STATES DISTRICT JUDGE

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APPENDIX D

Atkins v. Filson

United States District Court for the District of Nevada

September 28, 2017, Decided; September 28, 2017, Filed

2:02-cv-01348-JCM-PAL

Reporter
2017 U.S. Dist. LEXIS 162528 *

STERLING ATKINS, Petitioner, vs. TIMOTHY FILSON, et al., Respondents.

Subsequent History: Writ of habeas corpus denied, Certificate of appealability granted, in part, Certificate of appealability denied, in part, Motion denied by *Atkins v. Gittere, 2020 U.S. Dist. LEXIS 121991 (D. Nev., July 10, 2020)*

Prior History: *Atkins v. State, 112 Nev. 1122, 923 P.2d 1119, 1996 Nev. LEXIS 135 (Aug. 28, 1996)*

Counsel: [*1] For Sterling Atkins, Petitioner: A. Richard Ellis, Law Offices of A. Richard Ellis, Mill Valley, CA.

For Nevada Attorney General, Timothy Filson, Respondents: Heather D. Procter, LEAD ATTORNEY, Nevada Attorney General's Office, Bureau of Criminal Justice - SPU, Carson City, NV.

Judges: James C. Mahan, UNITED STATES DISTRICT JUDGE.

Opinion by: James C. Mahan

Opinion

ORDER

Introduction

This action is a petition for writ of habeas corpus by Sterling Atkins, a Nevada prisoner sentenced to death. The case is before the Court with respect to a motion to dismiss filed by the respondents. In that motion, respondents assert that various claims in Atkins' fourth amended habeas petition are barred by the statute of limitations, unexhausted in state court, procedurally defaulted, and not cognizable in this federal habeas corpus action. Atkins has, in turn, filed a motion for leave to conduct discovery and a motion for an evidentiary hearing. All three motions are fully briefed. The Court will grant the motion to dismiss in part and deny it in part, will deny Atkins' motion for leave to conduct discovery and his motion for evidentiary hearing, and will set a schedule for respondents to file an answer.

Background

In its order on Atkins' [*2] direct appeal, the Nevada Supreme Court described the factual background of this case as follows:

> On January 16, 1994, the nude body of twenty-year-old Ebony Mason was discovered twenty-five feet from the road in an unimproved desert area of Clark County. The woman's body was found lying face down with hands extended overhead to a point on the ground where it appeared that some digging had occurred. A four-inch twig protruded from the victim's rectum. Three distinct types of footwear impressions were observed in the area as well as a hole containing a broken condom, a condom tip and an open but empty condom package.
>
> In the opinion of the medical examiner, Mason died from asphyxia due to strangulation and/or from blunt trauma to the head. The autopsy revealed nine broken ribs, multiple areas of external bruising, contusions, lacerations, abrasions, and a ligature mark on the anterior surface of the neck. Mason's body also bore a number of patterned contusions consistent with footwear impressions on the skin of the back and chest. Finally, the autopsy revealed severe lacerations of the head and underlying hemorrhage within the skull indicating a blunt force trauma.
>
> A police investigation [*3] led to the arrest of appellant Sterling Atkins, Jr. ("Atkins") and Anthony Doyle in Las Vegas, Nevada. Atkins' brother, Shawn Atkins ("Shawn"), was also arrested, but his arrest took place in Ohio by agents of the Federal Bureau of Investigation ("FBI"). Upon his arrest, Shawn gave a voluntary statement to the FBI regarding the events leading up to Mason's death on January 15, 1994. Shawn stated that after returning to Atkins' apartment from a party that night, he, Atkins, and Doyle encountered Ebony Mason, a mutual acquaintance, who was intoxicated and/or high

on drugs. Mason agreed to accompany the men to Doyle's apartment to have sex with them. According to Shawn, Mason had consensual sex with Atkins and oral sex with Shawn, but she refused Doyle when he attempted to have anal sex with her. After these activities, Doyle agreed to drive Mason to downtown Las Vegas. Doyle drove a pick-up truck with Shawn, Atkins and Mason accompanying him, but instead of driving downtown, Doyle drove to a remote area in Clark County. Doyle was angry with Mason and demanded that she walk home. When she refused, Doyle stripped her clothes off and raped her as Shawn and Atkins watched, and then both **[*4]** Atkins and Doyle beat and kicked her until she died.

The State charged Doyle, Atkins and Shawn with one count each of murder, conspiracy to commit murder, robbery, first degree kidnapping and sexual assault. The State also filed a notice of intent to seek the death penalty. Thereafter, the district court granted Doyle's motion to sever trials and dismissed the robbery count against all three men. At a separate trial, commencing January 3, 1995, Doyle was convicted on all counts and sentenced to death for the murder. *See Doyle v. State, 112 Nev. 879, 921 P.2d 901 (1996).*

On February 13, 1995, prior to trial, Shawn entered into a plea bargain agreement wherein he pleaded guilty to first-degree murder and first-degree kidnapping and was sentenced to two concurrent life sentences with the possibility of parole. As part of the bargain, Shawn agreed to testify at Atkins' trial.

On March 20, 1995, Atkins' jury trial commenced. As the State's only eyewitness, Shawn testified that Atkins was not involved in Mason's beating and murder, but the State impeached Shawn with his prior inconsistent statements to the FBI and to witness Mark Wattley. At the conclusion of the guilt phase of the trial on March 30, 1995, the jury found Atkins guilty of **[*5]** murder, conspiracy to commit murder, first-degree kidnapping and sexual assault. At the conclusion of the penalty phase, the jury sentenced Atkins to death for the murder conviction.

Atkins v. State, 112 Nev. 1122, 1125-26, 923 P.2d 1119, 1121-22 (1996) (respondents filed a copy of the opinion as Respondents' Exhibit 189 (ECF No. 93-12)).

Atkins appealed. *See* Appellant's Opening Brief, Respondents' Exhibit 181 (ECF Nos. 93-2, 93-3, 93-4); Appellant's Reply Brief, Respondents' Exhibit 188 (ECF No. 93-11). The Nevada Supreme Court reversed the sexual assault conviction, but affirmed the convictions of first-degree murder, conspiracy to commit murder, and first-degree kidnapping, as well as the death sentence. *See Atkins, 112 Nev. at 1137, 923 P.2d at 1129.*

Atkins then unsuccessfully litigated a state-court petition for writ of habeas corpus. *See* Petition for Post-Conviction Relief, Respondents' Exhibit 211 (ECF No. 93-34); Supplemental Brief in Support of Petition, Respondents' Exhibit 232 (ECF No. 94-13); Findings of Fact, Conclusions of Law and Order, Respondents' Exhibit 237 (ECF No. 94-18); Appellant's Opening Brief, Respondents' Exhibit 256 (ECF Nos. 94-37, 94-38); Order of Affirmance, Respondents' Exhibit 261 (ECF No. 94-43).

Atkins initiated this federal habeas corpus action on October 11, **[*6]** 2002, by filing a *pro se* petition for writ of habeas corpus (ECF No. 1). Counsel was appointed for Atkins, and, with counsel, on May 19, 2005, Atkins filed what his counsel termed a "supplemental petition" (ECF No. 32). On December 10, 2007, Atkins filed a first amended petition (Docket No. 69), and on October 29, 2008, he filed a second amended petition (ECF No. 85).

Respondents filed a motion to dismiss on January 23, 2009 (ECF No. 88). The Court ruled on that motion on August 18, 2009 (ECF No. 105), dismissing certain of Atkins' claims, and finding certain of his claims unexhausted in state court. Atkins moved for a stay to allow him to exhaust his unexhausted claims in state court (ECF No. 108). The Court granted that motion and stayed the case on March 15, 2010 (ECF No. 116), and granted Atkins leave to file a third amended petition (ECF No. 116, 117).

On November 4, 2009, Atkins initiated a second state habeas action. *See* Petition for Writ of Habeas Corpus (Post-Conviction), Respondents' Exhibit 283 (ECF No. 194-20). On March 22, 2012, the state district court dismissed Atkins' petition. *See* Findings of Fact, Conclusions of Law and Order, Respondents' Exhibit 289 (ECF No. 194-26). **[*7]** Atkins appealed, and on April 23, 2014, the Nevada Supreme Court affirmed, ruling that the claims asserted by Atkins' in his second state habeas action were untimely filed under *NRS 34.726*, barred by laches under *NRS 34.800*, and successive and an abuse of the writ under *NRS 34.810*. *See* Appellant's Opening Brief, Respondents' Exhibit 303 (ECF No. 195-13); Order of Affirmance, Respondents' Exhibit 307 (ECF No. 195-17). The Nevada Supreme Court denied Atkins' petition for rehearing. *See* Order Denying Rehearing, Respondents' Exhibit 312 (ECF No. 195-22). The Nevada Supreme Court's remittitur was issued on December 9, 2014. *See* Remittitur, Respondents' Exhibit 315 (ECF No. 195-25).

The stay of this action was lifted on January 19, 2015 (ECF No. 145), and Atkins filed a fourth amended petition for writ

of habeas corpus -- now the operative petition -- on August 26, 2016 (ECF No. 183).

On December 22, 2016, respondents filed the motion to dismiss that is before the Court (ECF No. 192). On April 21, 2017, Atkins filed an opposition to the motion to dismiss (ECF No. 202), along with his motion for leave to conduct discovery (ECF Nos. 201, 204) and motion for evidentiary hearing (ECF No. 203). Respondents replied to Atkins' **[*8]** opposition to the motion to dismiss (ECF No. 209), and filed oppositions to the motion for leave to conduct discovery (ECF No. 210) and motion for evidentiary hearing (ECF No. 211) on July 21, 2017. Atkins filed replies in support of his motion for leave to conduct discovery (ECF No. 213) and motion for evidentiary hearing (ECF No. 212), on July 27, 2017.

Analysis

Waiver of Defenses

Atkins argues that the respondents waived the procedural defenses that they assert in their motion to dismiss -- particularly, the statute of limitations defense -- because they did not assert those defenses in earlier filings. *See* Opposition to Motion to Dismiss (ECF No. 202), pp. 18-21. Specifically, Atkins argues that respondents could have raised their procedural defenses, but did not, in 2005 in a motion for a more definite statement filed in response to Atkins' original and supplemental petitions (ECF No. 39), in 2006 in an opposition to a motion for leave to conduct discovery (ECF No. 45), and in 2008 in an opposition to a motion for leave to file a second amended petition (ECF No. 83). *See id.* at 19. Atkins argues that respondents waived their defenses under *Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts*. *See id.*

Rule 5 speaks only to what the respondents must **[*9]** include in an answer; the respondents in this case have not yet filed an answer. Furthermore, respondents' procedural defenses are specific to Atkins' fourth amended habeas petition, which was only filed on August 26, 2016. Respondents have not improperly bypassed any opportunity to assert procedural defenses to the claims in Atkins' fourth amended petition. Respondents' assertion of their procedural defenses has been in accord with the scheduling orders in this case.

Respondents have not waived the procedural defenses asserted in their motion to dismiss.

Statute of Limitations

Legal Standards

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), there is a one-year statute of limitations applicable to federal habeas corpus petitions. The statute provides:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created **[*10]** by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1)(A-D).

The petitioner is entitled to statutory tolling of the limitations period while a "properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." *28 U.S.C. § 2244(d)(2)*.

The AEDPA statute of limitations is also subject to equitable tolling. *Holland v. Florida, 560 U.S. 631, 649, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010)*.

Expiration of the Limitations Period in this Case

In the Court's August 19, 2009, order, concerning the previous motion to dismiss in this action, the Court ruled as follows with respect to the application of the statute of limitations:

> In this case, Atkins' judgment of conviction became final on April 3, 1997, when the Nevada Supreme Court issued its remittitur, following the **[*11]** denial of certiorari by the United States Supreme Court. *See* Exhibits 205, 208 [ECF Nos. 93-28, 93-31]; *see also*

Wixom v. Washington, 264 F.3d 894, 897 (9th Cir. 2001).

The AEDPA limitations period is tolled while a "properly filed application" for post conviction or other collateral relief is pending before a state court. *28 U.S.C. § 2244(d)(2)*. A "properly filed application" is one in which the "delivery and acceptance are in compliance with the applicable laws and rules governing filings." *Dictado v. Ducharme, 244 F.3d 724, 726-27 (9th Cir.2001)*, *quoting Artuz v. Bennett, 531 U.S. 4, 121 S.Ct. 361, 364, 148 L. Ed. 2d 213 (2000)*. On April 18, 1997, Atkins filed his state habeas petition. *See* Exhibit 211 [ECF No. 93-34]. That filing tolled the limitations period after only 15 days had run against it. The state habeas proceedings remained pending until July 22, 2002, when the Nevada Supreme Court issued its remittitur after affirming the denial of habeas corpus relief. *See* Exhibits 261, 262, 263 [ECF Nos. 94-43, 94-44, 93-45].

Atkins filed his original habeas corpus petition, initiating this federal habeas corpus action, on October 11, 2002 [ECF No. 1]. Therefore, another 81 days ran against the limitations period between July 22 and October 11, 2002. In total then, before the filing of the original petition in this case, only 96 days (15 days plus 81 days) ran against the limitations **[*12]** period. The original petition in this case was filed well with the one-year limitations period.

Atkins did not amend his petition until May 12, 2005 (more than two and a half years later) when he filed a "Supplemental Petition for Writ of Habeas Corpus" [ECF No. 32]. There was no statutory tolling of the limitations period by virtue of the pendency of this federal habeas corpus action between October 11, 2002, and May 12, 2005. *See Duncan v. Walker, 533 U.S. 167, 181-82, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001)*. Therefore, the supplemental petition filed by Atkins on May 12, 2005, was filed outside the one-year limitations period. And, the amended petition filed on December 10, 2007 [ECF No. 69], as well as the second amended petition filed on October 29, 2008 [ECF No. 85], were both filed well beyond the expiration of the limitations period.

Order entered August 19, 2009 (ECF No. 105), pp. 22-23.

In *Mayle v. Felix, 545 U.S. 644, 125 S. Ct. 2562, 162 L. Ed. 2d 582 (2005)*, the Supreme Court held that "[s]o long as the original and amended petitions state claims that are tied to a common core of operative facts, relation back will be in order," but that "[a]n amended habeas petition ... does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and **[*13]** type from those the original pleading set forth." *Mayle, 545 U.S. at 650, 664*.

Therefore, unless Atkins can show that equitable tolling is warranted, the question of the timeliness of the claims in his fourth amended petition turns upon whether the claims relate back to the filing of Atkins' original petition in 2002.

Equitable Tolling

Atkins argues that he is entitled to equitable tolling because he relied upon the Court's scheduling orders in this case. *See* Opposition to Motion to Dismiss, pp. 77-80.

The AEDPA limitations period is subject to equitable tolling. *Holland v. Florida, 560 U.S. 631, 649, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010)*. A petitioner may be entitled to equitable tolling if he can show "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Id.* (quoting *Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005))*; *see also Sossa v. Diaz, 729 F.3d 1225, 1229 (9th Cir. 2013)* ("[T]he requirement that extraordinary circumstances stood in [the petitioner's] way suggests that an external force must cause the untimeliness, rather than ... merely oversight, miscalculation or negligence on [the petitioner's] part, all of which would preclude the application of equitable tolling." (internal quotations and citations omitted); *Ramirez v. Yates, 571 F.3d 993, 997 (9th Cir. 2009)* ("The petitioner must additionally show that the extraordinary circumstances **[*14]** were the cause of his untimeliness ... and that the extraordinary circumstances made it impossible to file a petition on time." (internal quotations, citations, and alteration omitted)). "The high threshold of extraordinary circumstances is necessary 'lest the exceptions swallow the rule.'" *Lakey v. Hickman, 633 F.3d 782, 786 (9th Cir. 2011)*, quoting *Mendoza v. Carey, 449 F.3d 1065, 1068 (9th Cir. 2006)*. It is the habeas petitioner's burden to establish that equitable tolling is warranted. *Pace, 544 U.S. at 418*; *Rasberry v. Garcia, 448 F.3d 1150, 1153 (9th Cir. 2006)* ("Our precedent permits equitable tolling of the one-year statute of limitations on habeas petitions, but the petitioner bears the burden of showing that equitable tolling is appropriate."). The Court finds that Atkins does not show that equitable tolling is warranted.

Atkins argues, essentially, that he is entitled to equitable tolling because he relied upon the Court's scheduling orders in determining when to file his amended petition. *See* Opposition to Motion to Dismiss, pp. 77-80. Instructions from a court do not serve as a basis for equitable tolling unless the

court "affirmatively misled" the petitioner. *Ford v. Pliler, 590 F.3d 782, 786-87 (9th Cir. 2009)*. There is no showing by Atkins that he was affirmatively misled. The Court's scheduling orders granted leave for Atkins to conduct discovery, set time limits for Atkins to do investigation **[*15]** and conduct discovery, and set time limits for Atkins to file his amended petitions; those orders did not make any statement about, or have any bearing on, the operation of the statute of limitations. Atkins has not made any factual allegation, or proffered any evidence, suggesting otherwise.

Moreover, the United States Supreme Court decided *Mayle* on June 23, 2005, holding that an amended habeas petition does not relate back when it asserts a new ground for relief supported by facts that differ in both time and type from those set forth in the original pleading. *Mayle, 545 U.S. at 650*. If Atkins and his counsel were under any misconception about whether new claims in an amended petition would relate back to Atkins' original petition, *Mayle* cleared that up. However, despite the plain import of *Mayle*, Atkins did not file his first amended habeas petition until December 10, 2007, more than two years after *Mayle* clarified the law regarding the relation back of amended habeas petitions. That period of time, after the *Mayle* decision and after there could have been no confusion about the question of the relation back of new claims in an amended habeas petition, is, in itself, far in excess of the applicable one-year **[*16]** limitations period.

To the extent that Atkins argues that equitable tolling is warranted because of failures of his federal habeas counsel, including any failure of his counsel to recognize the import of the Supreme Court's *Mayle* decision (*see* Opposition to Motion to Dismiss, p. 81), that argument is without merit. A petitioner is not entitled to equitable tolling when his untimeliness is attributable to his own "oversight, miscalculation or negligence." *Waldron-Ramsey v. Pacholke, 556 F.3d 1008, 1011 (9th Cir. 2009)* (internal quotations, citation, and alteration omitted). And, a petitioner is not entitled to equitable tolling where the cause of his late filing is incorrect advice from counsel. *Frye v. Hickman, 273 F.3d 1144, 1146 (9th Cir. 2001)* ("We conclude that the miscalculation of the limitations period by ... counsel and his negligence in general do not constitute extraordinary circumstances sufficient to warrant equitable tolling."). There is no suggestion in this case of the sort of "egregious misconduct" on the part of counsel with regard to the running of the statute of limitations that could warrant equitable tolling. *See Spitsyn v. Moore, 345 F.3d 796, 800-02 (9th Cir. 2003)* (equitable tolling warranted where attorney retained to prepare and file habeas petition, failed to do so, and disregarded requests to return files until well after **[*17]** the date the petition was due).

Atkins has not shown that any extraordinary circumstance prevented timely filing of his amended habeas petitions. *See Holland, 560 U.S. at 649*. Equitable tolling is not warranted.

Exhaustion

Legal Standards

A federal court may not grant relief on a habeas corpus claim not exhausted in state court. *28 U.S.C. § 2254(b)*. The exhaustion doctrine is based on the policy of federal-state comity, and is designed to give state courts the initial opportunity to correct alleged constitutional deprivations. *See Picard v. Connor, 404 U.S. 270, 275, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971)*. To exhaust a claim, a petitioner must fairly present that claim to the State's highest court, and must give that court the opportunity to address and resolve it. *See Duncan v. Henry, 513 U.S. 364, 365, 115 S. Ct. 887, 130 L. Ed. 2d 865 (1995)(per curiam)*; *Keeney v. Tamayo-Reyes, 504 U.S. 1, 10, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992)*. The "fair presentation" requirement is satisfied when the claim has been presented to the highest state court by describing the operative facts and the legal theory upon which the federal claim is based. *See Anderson v. Harless, 459 U.S. 4, 6, 103 S. Ct. 276, 74 L. Ed. 2d 3 (1982)*; *Batchelor v. Cupp, 693 F.2d 859, 862 (9th Cir.1982), cert. denied, 463 U.S. 1212, 103 S. Ct. 3547, 77 L. Ed. 2d 1395 (1983)*. To fairly present a federal constitutional claim to the state court, the petitioner must alert the court to the fact that he asserts a claim under the United States Constitution. *Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir.1999), cert. denied, 529 U.S. 1009, 120 S. Ct. 1281, 146 L. Ed. 2d 228 (2000), citing Duncan, 513 U.S. at 365-66*.

Procedural Default

Legal Standards

In *Coleman v. Thompson*, the Supreme Court held that a state **[*18]** prisoner who fails to comply with the state's procedural requirements in presenting his claims is barred by the adequate and independent state ground doctrine from obtaining a writ of habeas corpus in federal court. *Coleman v. Thompson, 501 U.S. 722, 731-32, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)* ("Just as in those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance."). Where such a procedural default constitutes an adequate and

independent state ground for denial of habeas corpus, the default may be excused only if "a constitutional violation has probably resulted in the conviction of one who is actually innocent," or if the prisoner demonstrates cause for the default and prejudice resulting from it. *Murray v. Carrier, 477 U.S. 478, 496, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)*.

The Supreme Court has recognized that under certain circumstances it may be appropriate for a federal court to anticipate the state-law procedural bar of an unexhausted claim, and to treat such a claim as subject to the procedural default doctrine. "An unexhausted claim will be procedurally defaulted, if state procedural rules would now bar the petitioner **[*19]** from bringing the claim in state court." *Dickens v. Ryan, 740 F.3d 1302, 1317 (9th Cir. 2014)* (citing *Coleman v. Thompson, 501 U.S. 722, 731, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)*).

To demonstrate cause for a procedural default, the petitioner must "show that some objective factor external to the defense impeded" his efforts to comply with the state procedural rule. *Murray, 477 U.S. at 488*. For cause to exist, the external impediment must have prevented the petitioner from raising the claim. *See McCleskey v. Zant, 499 U.S. 467, 497, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991)*. With respect to the prejudice prong, the petitioner bears "the burden of showing not merely that the errors [complained of] constituted a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire [proceeding] with errors of constitutional dimension." *White v. Lewis, 874 F.2d 599, 603 (9th Cir. 1989)*, citing *United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982)*.

In *Martinez v. Ryan, 566 U.S. 1, 132 S.Ct. 1309, 182 L. Ed. 2d 272 (2012)*, the Supreme Court ruled that ineffective assistance of post-conviction counsel may serve as cause, to overcome the procedural default of a claim of ineffective assistance of trial counsel. In *Martinez*, the Supreme Court noted that it had previously held, in *Coleman v. Thompson, 501 U.S. 722, 746-47, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)*, that "an attorney's negligence in a postconviction proceeding does not establish cause" to excuse a procedural default. *Martinez, 132 S.Ct. at 1319*. The *Martinez* Court, however, "qualif[ied] *Coleman* by recognizing a narrow exception: inadequate assistance of counsel at initial-review collateral proceedings may **[*20]** establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Id. at 1315*. The Court described "initial-review collateral proceedings" as "collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial." *Id.*

The Procedural Default in this Case

On Atkins' appeal in his first state habeas action, the Nevada Supreme Court addressed his claims of ineffective assistance of trial and appellate counsel on their merits. *See* Order of Affirmance, Exhibit 261 (ECF No. 94-43). With respect to Atkins' other claims, however, the Nevada Supreme Court ruled: "To the extent that Atkins raises independent constitutional claims, they are waived because they were not raised on direct appeal." *Id.* at 1 n.2 (ECF No. 94-43, p. 2 n.2) (citing *NRS 34.810(1)(b)*). Therefore, claims other than ineffective assistance of counsel claims raised in Atkins' first state habeas action were ruled procedurally barred, and are subject to application of the procedural default doctrine.

On Atkins' appeal in his second state habeas action, the Nevada Supreme Court ruled that his entire petition was untimely under *NRS 34.726*, barred by laches under *NRS 34.800*, and successive and an abuse of the writ under **[*21]** *NRS 34.810*. *See* Order of Affirmance, Respondents' Exhibit 307 (ECF No. 195-17). All the claims in that action were ruled procedurally barred. Therefore, claims exhausted by Atkins in state court only in his second state habeas action are also subject to application of the procedural default doctrine.

Treatment of Claims Subject to Procedural Default Doctrine

Respondents argue that many of Atkins' claims are procedurally defaulted. *See* Motion to Dismiss, pp. 43-45 (regarding anticipatory procedural default of unexhausted claims), pp. 45-46 (arguing that Claims 1(b), 3(d), 3(e), 4(b), 4(f), 6(in part), 7(a), 7(d), 7(e), 7(f), 9 (in part), 10, 11, 12, 13, 14, 16, 17, 19, 20, 22 and 23 were ruled procedurally barred in Atkins' first and/or second state habeas actions and are, therefore, procedurally defaulted). This includes the claims respondents claim to be unexhausted in state court, as respondents argue that such claims are now subject to anticipatory procedural bars. Atkins, in turn, argues that he can show cause and prejudice for the procedural defaults, in that his counsel on his direct appeal and in his first state habeas action were ineffective for not asserting the defaulted claims. The **[*22]** Court determines that these arguments raise the question of the merits of the claims, and, therefore, will be better addressed after respondents file an answer, and Atkins files a reply.

Therefore, the Court will deny respondents' motion to dismiss to the extent it is brought on the ground of exhaustion and procedural default, without prejudice to respondents asserting those defenses in their answer, along with their argument regarding the merits of Atkins' claims.

Atkins' Gateway Actual Innocence Claim (Claim 24)

In Claim 24, Atkins claims that his "conviction and sentence are unlawfully and unconstitutionally imposed, in violation of the *Fifth*, *Sixth*, *Eighth*, and *Fourteenth Amendments to the United States Constitution*, because he is actually innocent of the murder of Ebony Mason." Fourth Amended Petition, p. 325. The Court understands Atkins to assert this claim as both a substantive claim for federal habeas corpus relief, and also as a "gateway" claim under *Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)*.

A convincing showing of actual innocence may enable a habeas petitioner to overcome a procedural default, and allow consideration of the merits of an otherwise procedurally defaulted claim. *See Schlup, 513 U.S. at 315, 323-27*. Such a showing may also allow for an exception to the statute of limitations, allowing consideration of **[*23]** the merits of a claim otherwise barred by the statute of limitations. *See McQuiggin v. Perkins, 569 U.S. 383, 133 S. Ct. 1924, 1928, 185 L. Ed. 2d 1019 (2013)*; *Lee v. Lampert, 653 F.3d 929, 934 (9th Cir. 2011)* (en banc).

Actual innocence, in this context, "means factual innocence, not mere legal insufficiency." *Bousley v. United States, 523 U.S. 614, 623, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998)*. In asserting a gateway actual innocence claim, the petitioner must "support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial." *Schlup, 513 U.S. at 324*.

"[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *McQuiggin, 133 S.Ct. at 1928* (quoting *Schlup, 513 U.S. at 329*). This is an extremely demanding standard that "permits review only in the 'extraordinary' case." *House v. Bell, 547 U.S. 518, 538, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006)*.

A court considering whether a petitioner has established actual innocence for purposes of a gateway claim must consider "all the evidence, old and new, incriminating and exculpatory, admissible at trial or not." *Lee, 653 F.3d at 938* (internal quotation marks omitted). The analysis "does not turn on discrete findings regarding disputed points of fact, and '[i]t is not the district court's independent judgment as **[*24]** to whether reasonable doubt exists that the standard addresses.'" *House, 547 U.S. at 539-40* (quoting *Schlup, 513 U.S. at 329* (alteration in original)). Rather, the court must "make a probabilistic determination about what reasonable, properly instructed jurors would do." *Schlup, 513 U.S. at 329*.

In assessing a gateway actual innocence claim, "the timing of the [petition]" is a factor bearing on the "reliability of th[e] evidence" purporting to show actual innocence. *Schlup, 513 U.S. at 332*; *see also McQuiggin, 133 S.Ct. at 1936*.

The new evidence on which Atkins' claim of actual innocence is based is an unsigned and undated declaration of Jerry Anderson, Petitioner's Exhibit 34 (ECF No. 183-17, pp. 2-6), and a January 19, 2015, declaration of Nicole Vantoorn, Petitioner's Exhibit 35 (ECF No. 183-17, pp. 10-14). Anderson was a witness for the prosecution at Atkins' trial. Vantoorn was an investigator hired by Atkins' former attorney in this case. Vantoorn states in her declaration that she interviewed Anderson on January 13, 2015, and Anderson told her the information that is included in the unsigned Anderson declaration.

For purposes of the analysis here, the Court puts aside the fact that the Anderson declaration is unsigned, the question whether Anderson could be produced to testify and would testify under oath **[*25]** to the information in the unsigned declaration, and the obvious credibility issues regarding Anderson. The Court assumes the truth of everything stated in the unsigned Anderson declaration and the Vantoorn declaration.

Assuming the truth of everything in these declarations, Atkins falls far short of showing actual innocence of the murder in this case. In his declaration, Anderson apparently seeks to convey that he believes that Anthony Doyle, who was also convicted and sentenced to death for the murder, was more culpable for the murder than Atkins. However, much of what Anderson says has little or no bearing on whether Atkins is actually guilty or innocent of murder; this includes Anderson's statements about Doyle's character, about Doyle being a gang member and drug dealer, about Doyle's statements regarding his part in the murder, about Doyle's motive to murder Ebony Mason, about Doyle's attitude when talking about the murder, about Doyle's attempts to coerce others to take blame for the murder, about Doyle's intimidation of witnesses, including Anderson, about Anderson's initial lies regarding what he knew about the murder, and about Anderson's fear of Doyle and his associates.

What **[*26]** Anderson actually says about the murder -- without saying how he knows -- is the following:

> Tony [Doyle] was the *main guy* who killed Ebony. Tony got Ebony high off sherm. he gave her the sherm to get her high so they could have sex. Tony and Bubba

> [Atkins] were with Ebony, and *Bubba did begin a fight with her* when she was getting out of the truck. Bubba just wanted Ebony to leave. Tony, however, was the one who killed Ebony. He was mad that she wouldn't have sex with him. *Bubba fought with her*, but Tony took it too far when he got a brick and hit her over the head killing her. Tony decapitated Ebony.

Declaration of Jerry Anderson, Petitioner's Exhibit 34, ¶ 15 (ECF No. 183-17, p. 4) (emphasis added); *see also* Declaration of Nicole Vantoorn, Petitioner's Exhibit 35, p. 4, ¶ 17 (ECF No. 183-17, p. 13). This does not show Atkins to be innocent of murder. In fact, this shows that, while Anderson believes Doyle was the "main guy who killed Ebony," Atkins participated in the murder.

Anderson states:

> Tony took pleasure in killing Ebony and that surprised me. Tony giggled about it and talked about killing her all the time. Bubba [Atkins] got mad when Tony did this because Bubba did not intend **[*27]** for Ebony to be killed.

Declaration of Jerry Anderson, Petitioner's Exhibit 34, ¶ 16 (ECF No. 183-17, p. 5); *see also* Declaration of Nicole Vantoorn, Petitioner's Exhibit 35, p. 4, ¶ 18 (ECF No. 183-17, p. 13). Anderson also says that "Bubba was mad at Tony for killing Ebony." Declaration of Jerry Anderson, Petitioner's Exhibit 34, ¶ 3 (ECF No. 183-17, p. 2); *see also* Declaration of Nicole Vantoorn, Petitioner's Exhibit 35, p. 2, ¶ 4 (ECF No. 183-17, p. 11). Anderson's statements about Atkins' feelings about the murder, after the fact, and his lack of intent with respect to it, are conclusory, and are of little import when considered together with the evidence at trial.

The statements by Anderson in his declaration, twenty-one years after Mason's murder, is nowhere near the sort of evidence necessary to satisfy the *Schlup* standard. Atkins does not show that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt. Atkins has not made a showing of actual innocence sufficient to overcome the statute of limitations bar.

Analysis of Individual Claims

Scope of Analysis

As is explained above, the Court will deny respondents' motion **[*28]** to dismiss, without prejudice, to the extent it is based on exhaustion and procedural default.

The following analysis addresses the individual claims that respondents contend are barred by the statute of limitations.

In the following analysis, the Court also addresses certain of respondents' arguments that Atkins' claims are not cognizable in this federal habeas corpus action. To the extent that any such arguments, regarding the cognizability of claims, are not addressed in the following analysis, the Court determines that those issues will be better addressed in connection with the merits of Atkins' claims, after respondents file an answer and Atkins files a reply, and respondents' motion to dismiss will be denied without prejudice as to those arguments.

Claim 1(a)

In Claim 1, Atkins claims that he was denied effective assistance of counsel, in violation of his federal constitutional rights, pretrial and in jury selection. Fourth Amended Petition (ECF No. 183), pp. 85-91. Claim 1 includes five distinct subparts, each setting forth a separate claim, identified as Claims 1(a), 1(b), 1(c), 1(d) and 1(e). In Claim 1(a), Atkins claims: "Defense counsel were ineffective in proceeding to trial **[*29]** despite the fact that first chair counsel had been appointed only five days prior to trial and co-counsel was newly-admitted to the Nevada Bar and this was his first jury trial." *Id.* at 91-99.

Respondents argue that Claim 1(a) is barred by the statute of limitations because it does not relate back to Atkins' original habeas petition in this action. *See* Motion to Dismiss, p. 15. The Court finds, however, that Claim 1(a) does relate back to Atkins' claim in his original petition that the trial court abused its discretion by denying a continuance of the trial. As such, Claim 1(a) is not barred by the statute of limitations. The motion to dismiss will be denied with respect to Claim 1(a).

Claim 1(b)

In Claim 1(b), Atkins claims that his counsel were ineffective "in *voir dire* and jury selection." Fourth Amended Petition, pp. 99-116.

Respondents argue that Claim 1(b) is barred by the statute of limitations because it does not relate back to Atkins' original habeas petition in this action. *See* Motion to Dismiss, p. 15. Atkins argues that it relates back to Ground 1 of his original petition. Ground 1 of Atkins' original petition, however, included no allegations regarding jury selection. *See* Petition for **[*30]** Writ of Habeas Corpus (ECF No. 1). Ground 1 of the original petition and Claim 1(b) do not share a common core of operative fact, and, as a result, Claim 1(b) does not relate back to the filing of the original petition. Claim 1(b)

will be dismissed as barred by the statute of limitations.

Claim 1(c)

In Claim 1(c), Atkins claims that he received ineffective assistance of counsel because of his counsel's "failure to assert a *Batson* challenge to the State's removal of Mr. Long, the only remaining African-American in the jury pool." Fourth Amended Petition, pp. 116-23.

Respondents argue that Claim 1(c) is barred by the statute of limitations because it does not relate back to Atkins' original habeas petition in this action. *See* Motion to Dismiss, p. 15. This claim is barred by the statute of limitations. Atkins makes no colorable argument that this claim relates back to his timely-filed original petition. *See* Opposition to Motion to Dismiss, pp. 88-89. There is no claim in Atkins' original petition that arises from the same core operative facts. Claim 1(c) does not relate back to the filing of the original petition. Claim 1(c) will be dismissed because it is barred by the statute of limitations. **[*31]**

Claim 1(e)

In Claim 1(e), Atkins claims that his constitutional rights were violated as a result of the cumulative effect of ineffective assistance of counsel in the pre-trial phase of his case. Fourth Amended Petition, p. 128.

Respondents argue that Claim 1(e) is barred by the statute of limitations because it does not relate back to Atkins' original habeas petition in this action. *See* Motion to Dismiss, p. 15. As this is a cumulative error claim, the Court determines that it relates back to the original petition, and is not barred by the statute of limitations, to the extent that any of the constituent claims upon which it is based relate back and are not barred. Respondents' motion to dismiss will be denied with respect to Ground 1(e).

Claim 2

In Claim 2, Atkins claims that he received ineffective assistance of counsel because of his counsel's failure "to investigate and present evidence of Mr. Atkins's incompetency to stand trial." Fourth Amended Petition, pp. 129-39.

Respondents argue that Claim 2 is barred by the statute of limitations. *See* Motion to Dismiss, p. 15. The Court finds that Claim 2 relates back to Ground 1 of Atkins' original petition. *See* Petition for Writ of Habeas Corpus **[*32]** (ECF No. 1). The Court will deny the motion to dismiss with respect to Claim 2.

Claim 3(b)

In Claim 3, Atkins claims that he was denied effective assistance of counsel, in violation of his federal constitutional rights, in the guilt phase of his trial. Fourth Amended Petition, p. 140. Claim 3 includes ten distinct subparts, each setting forth a separate claim, identified as Claims 3(a), 3(b), 3(c), 3(d), 3(e), 3(f), 3(g), 3(h), 3(i) and 3(j). In Claim 3(b), Atkins claims that he received ineffective assistance of counsel because, in cross-examining Atkins' brother, Shawn Atkins, Atkins' counsel suggested that "Atkins 'jumped in' to the killing of Ebony Mason." Fourth Amended Petition, pp. 143-44.

Respondents argue that Claim 3(b) is barred by the statute of limitations. *See* Motion to Dismiss, p. 16. In response, Atkins argues that this claim relates back to Ground 7 in his original petition. However, there is nothing in Ground 7, or anywhere else in Atkins' original petition, regarding counsel's cross-examination of Shawn Atkins. *See* Petition for Writ of Habeas Corpus (ECF No. 1). Claim 3(b) does not share a common core of operative fact with any claim in Atkins' original petition, and **[*33]** does not relate back to the filing of the original petition. Claim 3(b) is barred by the statute of limitations, and it will be dismissed on that ground.

Claim 3(c)

In Claim 3(c), Atkins claims that, in cross-examining Shawn Atkins, Atkins' counsel were ineffective for "testifying instead of questioning." Fourth Amended Petition, pp. 144-45.

Respondents argue that Claim 3(c) is barred by the statute of limitations. *See* Motion to Dismiss, p. 16. In response, Atkins argues that this claim "relates back to the broader claims of ineffective assistance of counsel." *See* Opposition to Motion to Dismiss, p. 102. However, there is nothing in Atkins' original petition regarding his counsel's cross-examination of Shawn Atkins. *See* Petition for Writ of Habeas Corpus (ECF No. 1). Claim 3(c) does not share a common core of operative fact with any claim in Atkins' original petition, and, therefore, does not relate back to the filing of the original petition. Claim 3(c) is barred by the statute of limitations, and it will be dismissed on that ground.

Claim 3(d)

In Claim 3(d), Atkins claims that, in cross-examining Shawn

Atkins, Atkins' counsel were ineffective for "denigrating the victim and terming her **[*34]** a 'hood rat.'" Fourth Amended Petition, pp. 145-49.

Respondents argue that Claim 3(d) is barred by the statute of limitations. Here too, in response, Atkins argues that this claim relates back to the "broader ineffective assistance of counsel claims." *See* Opposition to Motion to Dismiss, p. 103. But, again, there is nothing in Atkins' original petition regarding his counsel's cross-examination of Shawn Atkins. *See* Petition for Writ of Habeas Corpus (ECF No. 1). Claim 3(d) does not share a common core of operative fact with any claim in Atkins' original petition, and does not relate back to the filing of the original petition. Claim 3(d) is barred by the statute of limitations, and it will be dismissed on that ground.

Claim 3(e)

In Claim 3(e), Atkins claims that his counsel were ineffective for failing "to timely object to irrelevant and prejudicial evidence from the victim's father." Fourth Amended Petition, pp. 150-51.

Respondents argue that Claim 3(e) is barred by the statute of limitations. *See* Motion to Dismiss, p. 16. Atkins argues in response that this claim relates back to Ground 20(c) of his original petition. The Court agrees. Claim 3(e) is based on the same core of operative **[*35]** facts as Ground 20(c) in Atkins' original petition. Claim 3(e) relates back and is not barred by the statute of limitations. The Court will deny respondents' motion to dismiss with respect to Claim 3(e).

Claim 3(f)

In Claim 3(f), Atkins claims that, in cross-examining David Lemaster, a crime scene analyst, his counsel were ineffective for "emphasizing ... that there were three patterns of footwear." Fourth Amended Petition, p. 151.

Respondents argue that Claim 3(f) is barred by the statute of limitations. *See* Motion to Dismiss, p. 16. Atkins argues in response that this claim relates back to Ground 9 of his original petition. *See* Opposition to Motion to Dismiss, p. 107. The Court agrees. Ground 9 of the original petition also concerns Atkins' counsel's handling of the footprint evidence, a common core of operative fact. *See* Petition for Writ of Habeas Corpus (ECF No. 1). Claim 3(f) relates back to the filing of the original petition and is not barred by the statute of limitations. The Court will deny respondents' motion to dismiss with respect to Claim 3(f).

Claim 3(h)

In Claim 3(h), Atkins claims that his counsel were ineffective "for failure to obtain an independent hair analysis expert." **[*36]** Fourth Amended Petition, pp. 153-54.

Respondents argue that Claim 3(h) is barred by the statute of limitations. Atkins does not claim that he asserted such a claim in his original petition, but, rather argues that it should relate back to his general claims of ineffective assistance of counsel in his original petition. *See* Opposition to Motion to Dismiss, p. 110. Nothing in Atkins' original petition referenced his trial counsel's failure to obtain an independent hair analysis expert. *See* Petition for Writ of Habeas Corpus (ECF No. 1). Claim 3(h) does not share a common core of operative fact with any claim in Atkins' original petition. Claim 3(h) is barred by the statute of limitations, and it will be dismissed on that ground.

Claim 3(i)

In Claim 3(i), Atkins claims that his counsel were ineffective "for their failure to impeach three key prosecution witnesses," Mark Wattley, Jerry Anderson and Michael Smith. Fourth Amended Petition, pp. 154-60.

Respondents argue that this claim is barred by the statute of limitations. *See* Motion to Dismiss, pp. 16-17. The Court, however, finds that this claim relates back to Ground 1 of Atkins' original petition, in which he asserted that his counsel **[*37]** was ineffective for failing to investigate Wattley, Anderson and Smith. *See* Petition for Writ of Habeas Corpus (ECF No. 1). Claim 3(i) and Ground 1 of Atkins' original petition share a common core of operative fact. Claim 3(i) relates back, and is not barred by the statute of limitations. The Court will deny respondents' motion to dismiss with respect to Claim 3(i).

Claim 3(j)

In Claim 3(j), Atkins claims that his constitutional rights were violated as a result of the cumulative effect of ineffective assistance of counsel in the guilt phase of his trial. Fourth Amended Petition, p. 160.

Respondents argue that Claim 3(j) is barred by the statute of limitations because it does not relate back to Atkins' original habeas petition in this action. *See* Motion to Dismiss, p. 17. As this is a cumulative error claim, the Court determines that it relates back to the original petition, and is not barred by the statute of limitations, to the extent that any of the constituent claims upon which it is based relate back and are not barred.

Respondents' motion to dismiss will be denied with respect to Ground 3(j).

Claim 4(a)

In Claim 4, Atkins claims that he was denied effective assistance of counsel, in **[*38]** violation of his federal constitutional rights, in the penalty phase of his trial. Fourth Amended Petition, pp. 161-71. Claim 4 includes eight distinct subparts, each setting forth a separate claim, identified as Claims 4(a), 4(b), 4(c), 4(d), 4(e), 4(f), 4(g) and 4(h). In Claim 4(a), Atkins claims: "Trial counsel unreasonably failed to retain and supervise appropriate investigators and other staff to conduct an adequate and timely investigation." *Id.* at 172.

Respondents' claim that Claim 4(a) is barred by the statute of limitations. *See* Motion to Dismiss, p. 17. The Court, however, determines that Claim 4(a) relates back to Ground 1 of Atkins' original petition, in which Atkins claimed that he received ineffective assistance of counsel because of his counsel's failure to conduct adequate investigation, and also to Ground 3, in which he claimed the trial court abused its discretion by failing to grant a continuance of the trial. *See* Petition for Writ of Habeas Corpus (ECF No. 1). Claim 4(a) is not barred by the statute of limitations. The Court will deny the motion to dismiss with respect to Claim 4(a).

Claim 4(b)

In Claim 4(b), Atkins claims that his counsel were ineffective for failing "to investigate **[*39]** and present readily available and substantially mitigating social history evidence." Fourth Amended Petition, pp. 172-81.

Respondents argue that this claim does not relate back to Atkins' original petition, and is, therefore, barred by the statute of limitations. *See* Motion to Dismiss, p. 17. The Court finds, however, that this claim relates back to Ground 7 of Atkins' original petition, in which Atkins alleged, in part: "Counsel unreasonably failed to uncover substantial, compelling evidence in mitigation of punishment." *See* Petition for Writ of Habeas Corpus (ECF No. 1). Claim 4(b) is not barred by the statute of limitations. The Court will deny respondents' motion to dismiss with respect to Claim 4(b).

Claim 4(c)

In Claim 4(c), Atkins claims that his counsel were ineffective "for emphasizing [Atkins'] failure in prison and on parole." Fourth Amended Petition, pp. 181-82.

Respondents argue that Claim 4(c) is barred by the statute of limitations. *See* Motion to Dismiss, p. 17. Atkins does not claim that he asserted any related claim in his original petition. *See* Opposition to Motion to Dismiss, p. 117. Nothing in Atkins' original petition referenced his trial counsel emphasizing Atkins' **[*40]** failure in prison and on parole. *See* Petition for Writ of Habeas Corpus (ECF No. 1). Claim 4(c) does not share a common core of operative fact with any claim in Atkins' original petition. Claim 4(c) is barred by the statute of limitations, and it will be dismissed on that ground.

Claim 4(d)

In Claim 4(d), Atkins claims that his counsel were ineffective "for not objecting to extensive testimony regarding parole." Fourth Amended Petition, pp. 182-83. The subject of this claim is Atkins' trial counsel's handling of the testimony of "Mr. Stuart of the Nevada Department of Paroles." *See id.*

Respondents argue that Claim 4(d) is barred by the statute of limitations. Atkins does not claim that he asserted any related claim in his original petition. *See* Opposition to Motion to Dismiss, p. 117. Nothing in Atkins' original petition referenced his trial counsel's handling of Stuart's testimony. *See* Petition for Writ of Habeas Corpus (ECF No. 1). Claim 4(d) does not share a common core of operative fact with any claim in Atkins' original petition. Claim 4(d) is barred by the statute of limitations, and it will be dismissed on that ground.

Claim 4(e)

In Claim 4(e), Atkins claims that his counsel were **[*41]** ineffective "for eliciting harmful information from defense prison expert Mr. Hardin." Fourth Amended Petition, pp. 183-84.

Respondents argue that Claim 4(e) is barred by the statute of limitations. *See* Motion to Dismiss, p. 17. Atkins does not claim that he asserted any related claim in his original petition. *See* Opposition to Motion to Dismiss, p. 118. Nothing in Atkins' original petition referenced his trial counsel's questioning of Hardin. *See* Petition for Writ of Habeas Corpus (ECF No. 1). Claim 4(e) does not share a common core of operative fact with any claim in Atkins' original petition. Claim 4(e) is barred by the statute of limitations, and it will be dismissed on that ground.

Claim 4(f)

In Claim 4(f), Atkins claims that his counsel were ineffective

"for failure to challenge any of the six aggravating circumstances." Fourth Amended Petition, pp. 184-86. The gist of this claim is that his counsel did not make any argument to the jury to attempt to undermine the State's showing with respect to the aggravating circumstances on which the death penalty was based. *See id.*

Respondents argue that Claim 4(f) is barred by the statute of limitations. *See* Motion to Dismiss, pp. 17-18. Atkins **[*42]** does not claim that he asserted any related claim in his original petition. *See* Opposition to Motion to Dismiss, pp. 118-19. Nothing in Atkins' original petition referenced his trial counsel's argument to the jury, or lack thereof, with respect to the aggravating circumstances. *See* Petition for Writ of Habeas Corpus (ECF No. 1). Claim 4(f) does not share a common core of operative fact with any claim in Atkins' original petition. Claim 4(f) is barred by the statute of limitations, and it will be dismissed on that ground.

Claim 4(g)

In Claim 4(g), Atkins claims that his counsel were ineffective "in the preparation and presentation of defense expert Dr. Colosimo." Fourth Amended Petition, pp. 186-92.

Respondents argue that this claim does not relate back to Atkins' timely-filed original habeas petition. *See* Motion to Dismiss, p. 18. That argument is meritless. In Ground 1 of Atkins' original petition, Atkins claimed ineffective assistance of counsel based upon his trial counsel's failure "to adequately investigate, consult, or produce and offer psychological evidence at the trial," and, in subpart B of that claim, Atkins identified one aspect of the claim as "Dr. Colosimo's psychiatric **[*43]** evaluation of Appellant during penalty phase in support of mitigation." *See* Petition for Writ of Habeas Corpus (ECF No. 1). Claim 4(g) relates back to the filing of Atkins' original petition, and is not barred by the statute of limitations. The Court will deny respondents' motion to dismiss with respect to Claim 4(g).

Claim 4(h)

Atkins claims that his constitutional rights were violated as a result of the cumulative effect of ineffective assistance of counsel in the penalty phase of his trial. Fourth Amended Petition, p. 192.

Respondents argue that Claim 4(h) is barred by the statute of limitations because it does not relate back to Atkins' original habeas petition in this action. *See* Motion to Dismiss, p. 18. As this is a cumulative error claim, the Court determines that it relates back to the original petition, and is not barred by the statute of limitations, to the extent that any of the constituent claims upon which it is based relate back and are not barred. Respondents' motion to dismiss will be denied with respect to Ground 4(h).

Claim 5

In Claim 5, Atkins claims that his constitutional rights were violated because his "lead trial counsel had a conflict of interest with her client **[*44]** that caused her to fail to request a continuance." Fourth Amended Petition, pp. 193-96.

Respondents' claim that Claim 5 is barred by the statute of limitations. *See* Motion to Dismiss, p. 18. The Court, however, determines that Claim 5 relates back to Ground 3 of Atkins' original petition, in which Atkins claimed that the trial court abused its discretion by failing to grant a continuance of the trial. *See* Petition for Writ of Habeas Corpus (ECF No. 1). Claim 5 is not barred by the statute of limitations. The Court will deny the motion to dismiss with respect to Claim 5.

Claim 8

In Claim 8, Atkins claims that his constitutional right to a fair trial was violated because "the prosecution used a racially-motivated peremptory challenge to exclude the only remaining African-American from the jury." Fourth Amended Petition, pp. 227-34.

Respondents argue that Claim 8 is barred by the statute of limitations. *See* Motion to Dismiss, pp. 18-19. Atkins does not claim that he asserted any related claim in his original petition. *See* Opposition to Motion to Dismiss, pp. 139-40. Indeed, Atkins did not, in his original petition, make any claim regarding the prosecution's peremptory challenge of any juror. **[*45]** *See* Petition for Writ of Habeas Corpus (ECF No. 1). Claim 8 does not share a common core of operative fact with any claim in Atkins' original petition. Claim 8 is barred by the statute of limitations, and will be dismissed on that ground.

Claim 9

In Claim 9, Atkins claims that "Nevada's ... common law definitions of the elements of the capital offense are unconstitutional and many of the aggravating factors were invalid." Fourth Amended Petition, pp. 235-62.

Respondents argue that Claim 9 is barred by the statute of limitations. *See* Motion to Dismiss, p. 19. Atkins' original petition included a claim that his death sentence was

unconstitutionally based on "the duplicative aggravating circumstances that (1) the murder was committed by a person involved, who was previously convicted of a felony involving the use [or] threat of violence, and (2) that the murder was committed by a person under sentence of imprisonment." Petition for Writ of Habeas Corpus (ECF No. 1), Ground 15. The portion of Claim 9 making this assertion -- found in Part (C)(iii) of Claim 9 -- relates back to Atkins' original petition and is not barred by the statute of limitations. The remainder of Claim 9 does not relate **[*46]** back, and is barred by the statute of limitations.

Therefore, the Court will deny respondents' motion to dismiss with respect to the part of Claim 9 in which he claims that two of the aggravating circumstances were duplicative, which may be identified as Claim 9(C)(iii). The Court will grant respondents' motion to dismiss with respect to the remainder of Claim 9.

Claim 10

In Ground 10, Atkins claims that his constitutional rights were violated because the trial court allowed the jury "to speculate that Atkins could be paroled or granted clemency if he received a sentence of life without the possibility of parole." Fourth Amended Petition, pp. 263-69.

Respondents argue that this claim is barred by the statute of limitations. *See* Motion to Dismiss, p. 19. The Court, however, finds that this claim is sufficiently related to Ground 19 of his original petition -- "Appellate counsel erred in failing to raise the issue of prosecutorial misconduct as to comments made to the jury by the prosecutor about commutation or pardon of a death sentence" -- that the two claims arise from a common core of operative fact. *See* Petition for Writ of Habeas Corpus (ECF No. 1). The Court will deny the motion to **[*47]** dismiss with respect to Claim 10.

Claim 13

In Claim 13, Atkins claims that his constitutional rights were violated on account of ineffective assistance of his appellate counsel on his direct appeal to the Nevada Supreme Court. Fourth Amended Petition, pp. 293-94.

Respondents argue that this claim is barred by the statute of limitations. *See* Motion to Dismiss, pp. 19-20. Applying the principles discussed above, the Court finds that Claim 13 relates back to Atkins' original petition to the extent that Atkins claims his appellate counsel was ineffective for failing to raise, on his direct appeal, the following of the claims that appear in his fourth amended habeas petition in this case: Claims 1(a), 1(d), 1(e), 2, 3(a), 3(e), 3(f), 3(g), 3(i), 3(j), 4(a), 4(b), 4(g), 4(h), 5, 6, 7(a), 7(b), 7(c), 7(d), 7(e), 7(f), 9 (only the part of Claim 9 discussed in part (C)(iii) of Claim 9), 10, 11, 12, 14, 16, 17, 18, 19, 20, 21, 22, and 23. On the other hand, Claim 13 does not relate back to Atkins' original petition, is barred by the statute of limitations, and will be dismissed, to the extent that Atkins claims his appellate counsel was ineffective for failing to raise, on his direct appeal, the **[*48]** following of the claims in his fourth amended habeas petition in this case: Claims 1(b), 1(c), 3(b), 3(c), 3(d), 3(h), 4(c), 4(d), 4(e), 4(f), 8, 9 (except for the part of Claim 9 discussed in part (C)(iii) of Claim 9), 15, and 24.

Claim 14

In Claim 14, Atkins claims that his constitutional rights were violated "due to the admission of cumulative and prejudicial victim impact testimony at the guilt and penalty phases of his trial." Fourth Amended Petition, pp. 295-97.

Respondents argue that Claim 14 is barred by the statute of limitations. *See* Motion to Dismiss, p. 20. However, the Court finds that Claim 14 relates back to Ground 20(c) of Atkins' original petition, and is not barred. *See* Petition for Writ of Habeas Corpus (ECF No. 1). Respondents' motion to dismiss will be denied with respect to Claim 14.

Claim 15

In Claim 15, Atkins claims that his constitutional rights were violated because his "capital trial, sentencing, and review on direct appeal were conducted before state judicial officers whose tenure in office was not during good behavior but whose tenure was dependent on popular election." Fourth Amended Petition, pp. 298-99.

Respondents argue that this claim is barred by the statute **[*49]** of limitations. *See* Motion to Dismiss, p. 20. Atkins does not claim that he asserted any related claim in his original petition. *See* Opposition to Motion to Dismiss, p. 159. In Atkins' original petition, there is no claim that shares a common core of operative fact with Claim 15. *See* Petition for Writ of Habeas Corpus (ECF No. 1). Claim 15 is barred by the statute of limitations, and it will be dismissed on that ground.

Claim 21

In Claim 21, Atkins claims that "the execution of a death sentence after keeping the condemned on death row for an

inordinate amount of time constitutes cruel and unusual punishment." Fourth Amended Petition, pp. 315-20.

Respondents argue that Claim 21 is barred by the statute of limitations. *See* Motion to Dismiss, p. 20. Atkins does not claim that he asserted such a claim in his original petition, *see* Opposition to Motion to Dismiss, p. 164, and, indeed, he did not. However, the statute of limitations at *28 U.S.C. § 2244* runs from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation **[*50]** of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1)(A-D). Here, the factual predicate for this claim -- that "the execution of a death sentence after keeping the condemned on death row for an inordinate amount of time constitutes cruel and unusual punishment" -- could arguably have arisen within a year before Atkins filed his fourth amended petition. The resolution of this question is tied to the question of the merits of this claim. The Court will, therefore, deny the motion to dismiss Claim 21, without prejudice. The denial of the motion to dismiss as to this claim is without prejudice to the respondents presenting argument in their answer, along with argument regarding the merits of the claim, that the factual predicate for this claim was discoverable **[*51]** more than a year before the fourth amended petition was filed, and that, therefore, the claim is barred by the statute of limitations.

Claim 22

In Claim 22, Atkins claims that the cumulative effect of the errors described elsewhere in his petition resulted in a violation of his constitutional rights. Fourth Amended Petition, pp. 321-23.

Respondents argue that Claim 22 is barred by the statute of limitations because it does not relate back to Atkins' original habeas petition in this action. *See* Motion to Dismiss, p. 20. As this is a cumulative error claim, the Court determines that it relates back to the original petition, and is not barred by the statute of limitations, to the extent that any of the constituent claims upon which it is based relate back and are not barred. Respondents' motion to dismiss will be denied with respect to Claim 22.

Claim 23

In Claim 23, Atkins claims that he "may become incompetent to be executed." Fourth Amended Petition, p. 324.

Respondents argue that this claim is not cognizable in this federal habeas corpus action. *See* Motion to Dismiss, p. 48. Atkins does not respond to this argument and does not cite any authority supporting a habeas corpus claim based on **[*52]** the allegation that he may become incompetent in the future. The Court determines that Atkins does not, in Claim 23, state a claim upon which relief may be granted. The Court will grant respondents' motion to dismiss with respect to Claim 23.

Claim 24

In Claim 24, Atkins claims that he is actually innocent of capital murder. Fourth Amended Petition, pp. 325-30.

Respondents argue that this claim is barred by the statute of limitations. *See* Motion to Dismiss, p. 21. Atkins does not respond to that argument. As is discussed above, the Court finds that this claim has no merit as a gateway claim asserted to overcome Atkins' procedural defaults and statute of limitations bars. This claim does not relate back to any claim in Atkins' original petition. Moreover, the evidence on which Atkins bases this claim was obtained by Atkins' counsel in January 2015 (*see* Petitioner's Exhibit 34 (ECF No. 183-17, pp. 2-6); Petitioner's Exhibit 35 (ECF No. 183-17, pp. 10-14)); Atkins makes no argument as to why he was not able to assert Claim 24 within a year after obtaining that evidence. *See 28 U.S.C. § 2244(d)(1)(D)*. To the extent it is asserted as a substantive claim rather than a gateway claim, Claim 24 is barred by the statute **[*53]** of limitations, and it will be dismissed on that ground.

Motion for Evidentiary Hearing

Atkins filed a motion requesting an evidentiary hearing (ECF No. 203), and the parties have fully briefed that motion (ECF Nos. 211, 212). Atkins requests an evidentiary hearing with respect the procedural defenses raised by the respondents in their motion to dismiss. Specifically, Atkins requests an

evidentiary hearing "for the express purpose of showing cause and prejudice and a fundamental miscarriage of justice, as outlined in his actual innocence claim...." Motion for Evidentiary Hearing (ECF No. 203), p. 4.

With regard to the question whether any of Atkins claims are barred by the procedural default doctrine, as is explained above, the Court will not address those issues until the parties have filed their answer and reply, and the merits of all Atkins' remaining claims have been briefed. Therefore, Atkins' request for an evidentiary hearing concerning issues related to procedural default issues will be denied, without prejudice to Atkins again requesting such an evidentiary hearing in a motion for evidentiary hearing filed in conjunction with his reply.

Atkins also requests an evidentiary hearing **[*54]** with respect to his gateway claim of actual innocence. *See* Motion for Evidentiary Hearing, pp. 4, 9. However, the Court finds that an evidentiary hearing related to this issue is unnecessary. As is discussed above, in addressing Atkins' gateway actual innocence claim, for purposes of analysis, the Court assumes the truth of everything stated in the two declarations that represent the new evidence proffered by Atkins in support of his claim of actual innocence. Therefore, the Court does not see any need for an evidentiary hearing on the gateway actual innocence claim.

The Court will deny Atkins' motion for an evidentiary hearing, without prejudice to Atkins seeking an evidentiary hearing on any issue in a new motion for evidentiary hearing filed in conjunction with his reply to respondents' answer. *See* Order entered August 10, 2015 (ECF No. 167) (scheduling order).

Motion for Leave to Conduct Discovery

Atkins filed a motion for leave to conduct discovery (ECF Nos. 201, 204), and the parties have fully briefed that motion (ECF Nos. 210, 213).

A habeas petitioner is not entitled to discovery "as a matter of ordinary course." *Bracy v. Gramley, 520 U.S. 899, 904, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997); see also Campbell v. Blodgett, 982 F.2d 1356, 1358 (9th Cir. 1993).* *Rule 6(a) of the Rules Governing Section 2254 Cases* provides that "[a] judge may, for good cause, authorize **[*55]** a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery;" *Rule 6(b)* states that "[a] party requesting discovery must provide reasons for the request." *Rule 6(a)* and *(b), Rules Governing § 2254* Cases in the United States District Courts.

Atkins requests leave of court to serve a subpoena upon the Federal Public Defender for the District of Nevada (FPD), to obtain materials obtained by the FPD in discovery in the course of their representation of Antonio Doyle, who was also convicted of murder and sentenced to death for the killing of Ebony Mason, and who also has a capital habeas corpus action pending in this Court. *See* Renewed Motion for Leave to Conduct Discovery (ECF No. 204); Subpoena, Exhibit 15 in Support of *See* Renewed Motion for Leave to Conduct Discovery (ECF No. 201-1, pp. 77-79). Atkins contends that, in discovery in Doyle's case, the FPD obtained material that might substantiate certain of Atkins' claims in this case, particularly his claims regarding undisclosed benefits allegedly provided by the State to witnesses who testified against Atkins at trial. *See See* Renewed Motion for Leave to Conduct Discovery (ECF No. 204). The Court will deny Atkins' **[*56]** motion.

Early on in this case -- between 2005 and 2007 -- there were extensive discovery proceedings, and Atkins was granted leave to conduct certain discovery. *See, e.g.*, Motion for Leave to Conduct Discovery (ECF No. 31); Order entered October 25, 2005 (ECF No. 38); Motion for Leave to Conduct Discovery (ECF No. 42); Order entered June 29, 2006 (ECF No. 47). Notwithstanding that, Atkins now claims that his counsel had an agreement with Doyle's counsel, whereby Doyle's counsel would conduct discovery for Atkins, as well as their own client, and would share with Atkins the material obtained in that discovery. Atkins does not point to any writing confirming the existence of any such agreement. Atkins does not claim that the Court was ever notified of the existence of any such agreement. And, Atkins certainly does not claim that the Court ever approved of any such arrangement. In the order entered in this case on June 29, 2006, granting Atkins leave to conduct certain discovery, there was no mention of any arrangement whereby Doyle's counsel was conducting any discovery for Atkins. *See* Order entered June 29, 2006 (ECF No. 47). Every indication in that order is that the Court understood **[*57]** Atkins' counsel to be conducting Atkins' discovery. To the extent that, in the June 29, 2016, order, leave to conduct discovery was denied, it was because of shortcomings in Atkins' showing in his motion; it was not because the FPD was conducting the discovery for Atkins. In short, Atkins' claim that Doyle's counsel agreed to conduct discovery for him is unsupported and unconvincing.

Moreover, the Court observes that the subpoena Atkins wishes to serve on the FPD seeks "all discovery provided to the Federal Public Defender by the Clark County District Attorney's Office, the Las Vegas Metropolitan Police Department and the FBI in the case of Antonio Lavon Doyle v. E.K. McDaniel, Cause no. CV-N-00-101." *See* Subpoena, Exhibit 15 in Support of *See* Renewed Motion for Leave to

Conduct Discovery (ECF No. 201-1, pp. 77-79). The subpoena is patently overbroad.

The Court finds Atkins' motion for leave to conduct discovery -- seeking leave of court to serve a subpoena on counsel for another capital habeas corpus petitioner, to obtain access to what that habeas petitioner has discovered -- to be meritless. Atkins does not show good cause for such discovery. His motion will be denied.

IT IS THEREFORE [*58] ORDERED that respondents' Motion to Dismiss (ECF No. 192) is **GRANTED IN PART AND DENIED IN PART**. The following claims in petitioner's Fourth Amended Petition for Writ of Habeas Corpus (ECF No. 183) are dismissed: 1(b), 1(c), 3(b), 3(c), 3(d), 3(h), 4(c), 4(d), 4(e), 4(f), 8, 9 (all of Claim 9 is dismissed except the part of Claim 9 discussed in part (C)(iii) of Claim 9), 13 (Claim 13 is dismissed to the extent that Atkins claims his appellate counsel was ineffective for failing to raise, on his direct appeal, the following of the claims in his fourth amended habeas petition in this case: Claims 1(b), 1(c), 3(b), 3(c), 3(d), 3(h), 4(c), 4(d), 4(e), 4(f), 8, 9 (except for the part of Claim 9 discussed in part (C)(iii) of Claim 9), 15, and 24), 15, 23, and 24. In all other respects, respondents' Motion to Dismiss is denied.

IT IS FURTHER ORDERED that petitioner's Motion for Evidentiary Hearing (ECF No. 203) is **DENIED**.

IT IS FURTHER ORDERED that petitioner's Renewed Motion for Leave to Conduct Discovery (ECF Nos. 201, 204) is **DENIED**.

IT IS FURTHER ORDERED that respondents shall have **60 days** from the date this order is entered to file an answer, responding to the remaining claims in petitioner's **[*59]** Fourth Amended Petition for Writ of Habeas Corpus (ECF No. 183).

IT IS FURTHER ORDERED that, in all other respects, the schedule for further proceedings in the order entered August 10, 2015 (ECF No. 167) shall remain in effect.

Dated day of September 28, 2017.

/s/ James C. Mahan

UNITED STATES DISTRICT JUDGE

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APPENDIX E

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

STERLING ATKINS, Petitioner, vs. E.K. McDANIEL, *et al.*, Respondents.	2:02-cv-1348-JCM-PAL **ORDER**

Introduction

This action is a petition for writ of habeas corpus by Sterling Atkins, a Nevada prisoner sentenced to death. It is before the court with respect to a motion to dismiss (docket #88) filed by respondents on January 23, 2009. In that motion, respondents assert that several claims in Atkins' second amended petition (docket #85) are unexhausted in state court, that several of Atkins' claims are not cognizable in this federal habeas corpus action, and that one of Atkins' claims is barred by the statute of limitations. Atkins filed an opposition to the motion to dismiss on May 1, 2009 (docket #98). Respondents filed a reply on July 10, 2009 (docket #104). The court will grant the motion to dismiss in part and deny it in part.

Background[1]

In its opinion on Atkins' direct appeal, the Nevada Supreme Court described the factual background of this case as follows:

> On January 16, 1994, the nude body of twenty-year-old Ebony Mason was discovered twenty-five feet from the road in an unimproved desert area of Clark County. The woman's body was found lying face down with hands extended overhead to a point on the ground where it appeared that some digging had occurred. A four-inch twig protruded from the victim's rectum. Three distinct types of footwear impressions were observed in the area as well as a hole containing a broken condom, a condom tip and an open but empty condom package.
>
> In the opinion of the medical examiner, Mason died from asphyxia due to strangulation and/or from blunt trauma to the head. The autopsy revealed nine broken ribs, multiple areas of external bruising, contusions, lacerations, abrasions, and a ligature mark on the anterior surface of the neck. Mason's body also bore a number of patterned contusions consistent with footwear impressions on the skin of the back and chest. Finally, the autopsy revealed severe lacerations of the head and underlying hemorrhage within the skull indicating a blunt force trauma.
>
> A police investigation led to the arrest of appellant Sterling Atkins, Jr. ("Atkins") and Anthony Doyle in Las Vegas, Nevada. Atkins' brother, Shawn Atkins ("Shawn"), was also arrested, but his arrest took place in Ohio by agents of the Federal Bureau of Investigation ("FBI"). Upon his arrest, Shawn gave a voluntary statement to the FBI regarding the events leading up to Mason's death on January 15, 1994. Shawn stated that after returning to Atkins' apartment from a party that night, he, Atkins, and Doyle encountered Ebony Mason, a mutual acquaintance, who was intoxicated and/or high on drugs. Mason agreed to accompany the men to Doyle's apartment to have sex with them. According to Shawn, Mason had consensual sex with Atkins and oral sex with Shawn, but she refused Doyle when he attempted to have anal sex with her. After these activities, Doyle agreed to drive Mason to downtown Las Vegas. Doyle drove a pick-up truck with Shawn, Atkins and Mason accompanying him, but instead of driving downtown, Doyle drove to a remote area in Clark County. Doyle was angry with Mason and demanded that she walk home. When she refused, Doyle stripped her clothes off and raped her as Shawn and Atkins watched, and then both Atkins and Doyle beat and kicked her until she died.
>
> The State charged Doyle, Atkins and Shawn with one count each of murder, conspiracy to commit murder, robbery, first degree kidnapping and sexual assault. The State also filed a notice of intent to seek the death penalty. Thereafter, the district court granted Doyle's motion to sever trials and dismissed the robbery count against all three men. At a separate trial, commencing January 3, 1995, Doyle was convicted on all counts and sentenced to death for the murder. *See Doyle v. State*, 112 Nev. 879, 921 P.2d 901 (1996).

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[1] This statement of the background of this case is set forth only to provide context for this order. The court does not intend, in this section of this order, to make any finding with respect to any disputed fact.

> On February 13, 1995, prior to trial, Shawn entered into a plea bargain agreement wherein he pleaded guilty to first-degree murder and first-degree kidnapping and was sentenced to two concurrent life sentences with the possibility of parole. As part of the bargain, Shawn agreed to testify at Atkins' trial.
>
> On March 20, 1995, Atkins' jury trial commenced. As the State's only eyewitness, Shawn testified that Atkins was not involved in Mason's beating and murder, but the State impeached Shawn with his prior inconsistent statements to the FBI and to witness Mark Wattley. At the conclusion of the guilt phase of the trial on March 30, 1995, the jury found Atkins guilty of murder, conspiracy to commit murder, first-degree kidnapping and sexual assault. At the conclusion of the penalty phase, the jury sentenced Atkins to death for the murder conviction.

Atkins v. State, 112 Nev. 1122, 1125-26, 923 P.2d 1119, 1121-22 (1996) (a copy of the opinion is in the record as Exhibit 189).

Atkins appealed. *See* Exhibits 181, 188.[2] The Nevada Supreme Court reversed the sexual assault conviction, but affirmed the convictions of first-degree murder, conspiracy to commit murder, and first-degree kidnapping, as well as the death sentence. *See Atkins*, 112 Nev. at 1137, 923 P.2d at 1129.

Atkins then unsuccessfully litigated a state-court petition for writ of habeas corpus. *See* Exhibits 211, 232, 237, 256, 261.

Atkins initiated this federal habeas corpus action on October 11, 2002, by filing a *pro se* petition for a writ of habeas corpus (docket #1). Counsel was appointed for Atkins (*see* docket #4, #8, #9, #10, #11, #12, #13, and #14).

Atkins filed two motions for leave to conduct discovery (docket #31, #42). The court granted those motions in part and denied them in part, and granted Atkins leave to conduct certain discovery (docket #38, #47). The discovery was to be completed by August 29, 2007 (*see* docket #65).

On December 10, 2007, Atkins filed a first amended habeas petition (docket #69), and, on October 29, 2008, he filed a second amended habeas petition (docket #85).

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[2] Unless otherwise indicated, the exhibits referred to in this order are those filed by respondents in support of their motion to dismiss, and found in the record at docket #89, #90, #91, #92, #93, and #94.

Respondents filed their motion to dismiss on January 23, 2009 (docket #88). Atkins filed his opposition to that motion on May 1, 2009 (docket #98). Atkins filed a supplement to his response to the motion to dismiss on May 18, 2009 (docket #100). Respondents filed a reply in support of their motion to dismiss on July 10, 2009 (docket #104).

Analysis

Atkins' second amended habeas petition contains 28 claims (referred to in this order as Grounds 1 through 28). Most of those 28 claims are challenged in one manner or another by respondents in their motion to dismiss. Each of the claims in second amended petition is considered below, with respect to the issues raised in the motion to dismiss.

Ground 1

In Ground 1, Atkins claims that he was denied effective assistance of counsel, in violation of his federal constitutional rights, because his trial counsel failed to conduct effective pretrial investigation. Second Amended Petition (docket #85), pp. 12-18. Atkins claims that his counsel failed to perform an adequate investigation of the facts, and failed "to investigate for or present evidence of a substantial defense." *See id.* at 12. Atkins asserts that his counsel failed to investigate witnesses Shawn Atkins, Anthony Doyle, Mark Wattley, Jerry Anderson, Darren Anderson, Vedra Sowerby, and Michael Smith. *See id.* More specifically, Atkins claims that his counsel failed to conduct investigation that would have shown that witness Michael Smith received inducements in return for his testimony (*id.* at 14), that witness Jerry Anderson received inducements in return for his testimony (*id.* at 14-15), that witness Shawn Atkins received inducements in return for his testimony and was coerced to testify beyond his own knowledge (*id.* at 15); that Atkins "suffered from neurological impairment as well as a psychiatric illness" (*id.* at 15); and that Atkins was abused physically and emotionally by his father (*id.* at 16).

Respondents argue that Ground 1 has not been exhausted in state court. *See* Motion to Dismiss, pp. 17-18.

A federal court may not grant relief on a habeas corpus claim not exhausted in state court. 28 U.S.C. § 2254(b). The exhaustion doctrine is based on the policy of federal-state comity, and is designed to give state courts the initial opportunity to correct alleged constitutional deprivations. *See Picard v. Conner*, 404 U.S. 270, 275 (1971). To exhaust a claim, a petitioner must fairly present that claim to the State's highest court, and must give that court the opportunity to address and resolve it. *See Duncan v. Henry*, 513 U.S. 364, 365 (1995)(*per curiam*); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992). The "fair presentation" requirement is satisfied when the claim has been presented to the highest state court by describing the operative facts and the legal theory upon which the federal claim is based. *See Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Batchelor v. Cupp*, 693 F.2d 859, 862 (9th Cir.1982), *cert. denied*, 463 U.S. 1212 (1983). To fairly present a federal constitutional claim to the state court, the petitioner must alert the court to the fact that he asserts a claim under the United States Constitution. *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir.1999), *cert. denied*, 529 U.S. 1009 (2000), *citing Duncan*, 513 U.S. at 365-66.

Atkins claims that he exhausted Ground 1 in his state habeas proceedings. *See* Second Amended Petition, pp. 17-18. A careful reading of Atkins' opening brief on the appeal in the state habeas proceedings indicates that Atkins has exhausted some, but not all, of the specific claims in Ground 1. Atkins has exhausted Ground 1 to the extent he claims that his trial counsel's investigation was inadequate with respect to the following matters:

- Michael Smith's arrest and alleged receipt of inducements in return for his testimony (*see* Exhibit 256, pp. 38-39);
- Jerry Anderson's arrests and alleged receipt of inducements in return for his testimony (*id.* at 39);
- Atkins' alleged neurological impairment and psychiatric illness (*id.* at 7-15, 34);
- Shawn Atkins' potential mitigation testimony (*id.* at 35);
- the abuse of Atkins by his father (*id.* at 35).

In all other respects, the court finds Ground 1 to be unexhausted.

Respondents also argue that Ground 1 is not cognizable in this federal habeas action because Atkins' pleading of Ground 1 is conclusory. *See* Motion to Dismiss, p. 34. The court finds that Atkins' pleading of Ground 1, at least to the extent Ground 1 is exhausted, is sufficient. The court will deny the motion to dismiss so far as it is based on this contention. Respondents may, however, reassert this contention in their answer, with respect to the merits of Ground 1, if and when an answer is appropriate.

Respondents also argue that Ground 1 is not cognizable in this federal habeas action to the extent that it is based on alleged violation of the International Covenant on Civil and Political Rights (ICCPR). *See* Motion to Dismiss, pp. 40-42. However, the habeas corpus statute explicitly extends habeas corpus relief to violation of treaties. *See* 28 U.S.C. § 2254(a) ("... on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."). Atkins' reliance in Ground 1 on a violation of the ICCPR is cognizable. That, however, is not to say that this will necessarily turn out to be a viable claim for habeas corpus relief; that determination must await full briefing on the merits of Ground 1.

Ground 2

In Ground 2, Atkins claims that his federal constitutional right to due process of law was violated by the prosecutor's knowing use of perjured and false testimony by Shawn Atkins. Second Amended Petition, p. 18.

Respondents argue that Ground 2 is unexhausted. *See* Motion to Dismiss, pp. 18-19. In his second amended petition, Atkins claims that he exhausted Ground 2 on his direct appeal and in his state habeas proceedings. *See* Second Amended Petition, pp. 18-19. However, in his opposition to the motion to dismiss, Atkins points only to three pages of the opening brief on his direct appeal as the place where he exhausted Ground 2. Response to Motion to Dismiss (docket #98), pp. 11-12. Atkins does not point to any argument to the Nevada Supreme Court in his state habeas action in which he could be considered to have exhausted Ground 2. Atkins claims that he raised the claim that is now Ground 2 at pages 29, 30, and 31 of the opening brief on his direct appeal. *See id.*

However, while there is mention there of Shawn Atkins' testimony, there is no claim that the prosecution knowingly presented perjured and false testimony by Shawn Atkins and no claim of any resulting due-process violation. *See* Exhibit 181, pp. 29-31. The court finds that Ground 2 is unexhausted in state court.

Next, respondents point out that in Ground 2, in addition to a violation of his federal constitutional right to due process of law, Atkins also claims a violation of a provision of the Nevada Constitution, and respondents assert that state constitutional violations are not bases for federal habeas corpus relief. *See* Motion to Dismiss, p. 40; *see also* Second Amended Petition, p. 18. Respondents' argument on this point is well taken. A state constitutional violation is not cognizable in a federal habeas corpus action. *See* 28 U.S.C. § 2254(a). Ground 2 shall be dismissed to the extent it asserts a violation of a Nevada state constitutional provision.

Ground 3

In Ground 3, Atkins claims that his federal constitutional right to due process of law was violated "as a result of the prosecution[']s use of coercion to influence the key testimony of alleged accomplice Shawn Atkins." Second Amended Petition, p. 19.

In his second amended petition, Atkins claims that he exhausted Ground 3 on his direct appeal and on the appeal in his state habeas proceedings. *See* Second Amended Petition, pp. 18-19. However, in his response to the motion to dismiss, Atkins points to only a three-page portion of the opening brief on his direct appeal as the place where he exhausted Ground 3. Response to Motion to Dismiss, p. 12. Atkins does not point to any argument to the Nevada Supreme Court in his state habeas action in which he could be considered to have exhausted Ground 3. As with Ground 2, Atkins claims that he raised the claim that is now Ground 3 at pages 29, 30, and 31 of the opening brief on his direct appeal. *See id.* However, there is no claim there that Shawn Atkins was coerced into testifying, or that Shawn Atkins was forced to fit his testimony into the prosecution's theory of the case. *See* Exhibit 181, pp. 29-31. The court finds that Ground 3 is unexhausted in state court.

Grounds 4 and 5

There is no issue raised in the motion to dismiss with respect to Ground 4 or Ground 5.

Ground 6

In Ground 6, Atkins claims that his federal constitutional rights to due process of law and effective assistance of counsel were violated as a result of the trial court's denial of his request for a continuance. Second Amended Petition, pp. 32-35.

Respondents argue that Ground 6 is not cognizable, at least in part, because Atkins erroneously cites the Sixth Amendment as the source of his federal constitutional right to due process of law. *See* Motion to Dismiss, p. 40. Despite the erroneous citation to the Sixth Amendment, however, Atkins plainly makes the claim in Ground 6 based on his federal constitutional right to due process of law. Ground 6 is cognizable in this federal habeas action.

Respondents also argue that Ground 6 is unexhausted in state court. *See* Motion to Dismiss, pp. 19-20. That argument, however, is without merit. In the opening brief on the appeal in his state habeas proceedings, Atkins included a very similar claim, which opened with the following:

> Appellant's conviction is invalid under the federal and state constitutional guarantees of due process, equal protection, and effective assistance of counsel, because the trial court abused its discretion by denying appellant's request for a continuance. U.S. Const. Amends IV, V, VI, VII & XIV; Nevada Constitution Art. I and IV.

Exhibit 256, p. 19. Ground 6 has been exhausted in state court.

Ground 7

In Ground 7, Atkins claims that his "conviction is unconstitutional because one of the aggravating circumstances was not supported by substantial evidence and was vacated which required the court to re-weigh the remaining aggravating circumstances against the mitigating circumstances – but this was not done." Second Amended Petition, p. 35.

Respondents point out that in Ground 7, in addition to violations of Atkins' federal constitutional rights to due process of law and equal protection of the law, he also claims a violation of a provision of the Nevada constitution, and respondents assert that state constitutional violations

are not bases for federal habeas corpus relief. *See* Motion to Dismiss, p. 40; Second Amended Petition, pp. 35-36. Respondents' argument on this point is well taken. A state constitutional violation is not cognizable in this federal habeas corpus action. *See* 28 U.S.C. § 2254(a). Ground 7 shall be dismissed to the extent it asserts a violation of a Nevada state constitutional provision.

Ground 8

In Ground 8, Atkins claims that he was denied his federal constitutional right to effective assistance of counsel on account of his trial counsel's failure to argue that there was insufficient evidence that he committed first degree kidnapping. Second Amended Petition, pp. 37-38.

Respondents argue that Ground 8 is unexhausted in state court. *See* Motion to Dismiss, pp. 20-21. Respondents recognize that Atkins asserted a very similar claim on the appeal in his state habeas proceedings (*see* Exhibit 256, pp. 22-23), but respondents point to two sentences he added to the claim as it is formulated in this federal habeas action, claiming that those additions render the claim unexhausted. *See* Motion to Dismiss, pp. 20-21. Respondents argue that the newly added sentences add a prejudice allegation that was not in the claim in state court. *See id.* This argument is without merit. A claim of unconstitutional ineffective assistance of counsel inherently includes a claim of prejudice. *See Strickland v. Washington*, 466 U.S. 668, 691-94 (1984). The general claims of prejudice in Ground 8 do not "fundamentally alter the legal claim already considered by the state courts." *Chacon v. Wood*, 36 F.3d 1459, 1468 (9th Cir.1994) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986)). Ground 8 has been exhausted in state court.

Ground 9

In Ground 9, Atkins claims that he was denied his federal constitutional right to effective assistance of counsel on account of his trial counsel's failure to argue that the trial court committed reversible error by excusing a juror. Second Amended Petition, pp. 39-43. In addition, Atkins also claims that the exclusion of the juror violated his "constitutional right to a fair and impartial jury panel which was not predisposed to the death penalty, rendering his conviction unconstitutional." *Id.* at 43.

Respondents argue that the claimed violation of Atkins' constitutional right to a fair and impartial jury is unexhausted in state court. *See* Motion to Dismiss, p. 21; Reply (docket #104), p. 10. The court disagrees. The claim, as formulated in state court asserted a violation of Atkins' right to "trial by jury," and cited the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. *See* Exhibit 256, p. 24. The court finds that, in state court, regarding the dismissal of the juror, Atkins sufficiently raised a claim of violation of his right to a fair and impartial jury – as well as a claim of ineffective assistance of counsel. Ground 9 has been exhausted in state court.

Ground 10

In Ground 10, Atkins claims that his conviction is unconstitutional because the trial court denied his motion "challenging the composition of the petit jury for systematic under representation of constitutionally cognizable group and motion for discovery and an evidentiary hearing." Second Amended Petition, p. 43 (as in original).

Respondents assert that Ground 10 is unexhausted in state court. *See* Motion to Dismiss, pp. 21-22. Ground 10, though, is nearly identical to an argument made by Atkins on the appeal in his state habeas proceedings. *See* Exhibit 256, pp. 28-32. What minor changes there are between the argument in the brief to the Nevada Supreme Court and the issue as presented in this case do not fundamentally alter the legal claim. *See Chacon*, 36 F.3d at 1468. Ground 10 is exhausted.

Respondents point out that, in Ground 10, Atkins lists the Thirteenth Amendment as one of the federal constitutional provisions he claims to have been violated. *See* Second Amended Petition, p. 47. Atkins responds to that argument, stating that the citation to the Thirteenth Amendment was a clerical mistake, and requesting leave to amend the petition to cite to the Eighth Amendment instead. Response to Motion to Dismiss, p. 15. Respondents reply, stating that they "recognize the clerical error and do not object to Atkins amending his petition to correct this single error." Reply, p. 10. Accordingly, the court will allow the amendment. Henceforth, the citation at line 15 of page 47 of Atkins' Second Amended Petition shall read: "*See* Amendments 8 and 14 to the U.S. Constitution."

Respondents also point out that in Ground 10, in addition to violations of Atkins federal constitutional rights, he also claims a violation of a provision of the Nevada constitution, and respondents assert that state constitutional violations are not bases for federal habeas corpus relief. *See* Motion to Dismiss, p. 40; Second Amended Petition, p. 43. Respondents' argument on this point is well taken. A state constitutional violation is not cognizable in this federal habeas corpus action. *See* 28 U.S.C. § 2254(a). Ground 10 shall be dismissed to the extent it asserts a violation of a Nevada state constitutional provision.

Ground 11

In Ground 11, Atkins claims that his counsel were ineffective with respect to certain aspects of his representation. Second Amended Petition, pp. 49-53. Atkins claims that his counsel were ineffective for failing to discover that he suffered from neurological impairment and psychiatric illness, for failing to develop certain mitigation evidence (the testimony of Atkins' mother, Loraine Atkins, and his brother, Shawn Atkins), for failing to conduct certain investigation and discovery to rebut the State's case in aggravation (regarding Atkins' 1992 conviction for assault with use of a deadly weapon), for failing to call Shawn Atkins as a witness to rebut allegations made by Mark Wattley, and for failing to have an independent expert examine the footprint evidence and testify at trial. *Id.*

Respondents' argue that Ground 11 is unexhausted. Here again, however, the claim in Ground 11 was presented, in nearly identical terms, in Atkins' brief to the Nevada Supreme Court on the appeal in his state habeas proceedings. *See* Exhibit 256, pp. 33-37. Again, respondents engage in the unhelpful exercise of pointing out minor additions and changes in wording between the state-court brief and the second amended petition in this case. For example – reducing their exhaustion analysis to near absurdity – respondents argue that Ground 11 is unexhausted because, in the second amended petition in this case, Atkins introduces the word "problematic" to describe his representation in the trial court. *See* Motion to Dismiss, p. 23. Respondents' word-for-word approach to the exhaustion analysis is unsupported by the law, and does nothing to advance

respondents' position. The minor changes from the argument in the state-court brief to the second amended petition in this case do not fundamentally alter the legal claim. *See Chacon*, 36 F.3d at 1468. Ground 11 is exhausted.

Respondents also argue that Ground 11 is not cognizable in this federal habeas action because Atkins' pleading of Ground 11 is conclusory. *See* Motion to Dismiss, p. 34. The court finds that Atkins' pleading of Ground 11 is sufficient. The court will deny the motion to dismiss so far as it is based on this contention. Respondents may, however, reassert this contention in their answer, with respect to the merits of Ground 11, if and when an answer is appropriate.

Respondents also argue that Ground 11 is not cognizable in this federal habeas action to the extent that it is based on alleged violation of the International Covenant on Civil and Political Rights (ICCPR). *See* Motion to Dismiss, pp. 40-42. However, the habeas corpus statute explicitly extends habeas corpus relief to violation of treaties. *See* 28 U.S.C. § 2254(a) ("... on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."). Atkins' reliance in Ground 11 on a violation of the ICCPR is cognizable. That is not to say that this will necessarily turn out to be a viable claim for habeas corpus relief; that determination must await full briefing on the merits of Ground 11.

Ground 12

In Ground 12, Atkins claims that his constitutional rights to due process of law, equal protection of the laws, effective assistance of counsel, cross-examination and confirmation, and a reliable sentence, were violated because of undisclosed inducements provided by the State to prosecution witnesses Michael Smith and Jerry Anderson. Second Amended Petition, pp. 53-56.

Respondents claim that Ground 12 is unexhausted, because in Ground 12 Atkins cites the "Fifth, Sixth, Seventh and Fourteenth Amendments," whereas in his brief before the Nevada Supreme Court he cited the Fifth, Sixth, *Eighth*, and Fourteenth Amendments. *See* Motion to Dismiss, pp. 23-24; Second Amended Petition, p. 54, line 1; Exhibit 256, p. 37. Respondents claim that Atkins' Seventh Amendment claim is not exhausted. *See* Motion to Dismiss, pp. 23-24.

In response, Atkins states that the reference to the Seventh Amendment was in error, and he requests leave to amend that citation to reference the Eighth Amendment. Response to Motion to Dismiss, p. 17. In their reply, respondents recognize the clerical mistake and state that they do not object to Atkins amending his petition to correct that error. Reply, p. 14. Accordingly, the court will allow the amendment. Henceforth, line 1 of page 54 of Atkins' Second Amended Petition shall read: "under the Fifth, Sixth, Eighth and Fourteenth Amendments." As so amended, Ground 12 is exhausted.

Respondents go on to argue that Atkins' second amended petition does not state facts or argument showing an Eighth Amendment violation. Motion to Dismiss, p. 24; Reply, p. 14. The court finds that the Eighth Amendment violation is sufficiently pled, and will deny the motion to dismiss so far as it is based on this contention. Respondents may, however, reassert this contention in their answer, with respect to the merits of Ground 12, if and when an answer is appropriate.

Grounds 13 and 14

There is no issue raised in the motion to dismiss with respect to Ground 13 or Ground 14.

Ground 15

In Ground 15, Atkins claims that his constitutional rights were violated because of Nevada's improper definitions of the elements of first degree murder, specifically the definitions of "premeditation and deliberation" and "implied malice." Second Amended Petition, pp. 61-65.

Respondents assert that Ground 15 is unexhausted. However, the claims raised in Ground 15 were in fact raised – in federal constitutional terms – in Atkins' brief before the Nevada Supreme Court in his state habeas proceedings. *See* Exhibit 256, pp. 44-57 (definition of "premeditation and deliberation") and pp. 57-61 (definition of "implied malice"). Respondents' argument that Atkins did not, in state court, make a federal constitutional claim based on the Fifth and Sixth Amendments is a misrepresentation of Atkins' state-court briefing. *See* Exhibit 256, p. 44, lines 8, 17, and p. 57, lines 8-9. Ground 15 is exhausted.

Grounds 16, 17, 18, and 19

There is no issue raised in the motion to dismiss with respect to Ground 16, Ground 17, Ground 18, or Ground 19.

Ground 20

In Ground 20, Atkins claims that he received ineffective assistance of appellate counsel. Second Amended Petition, pp. 72-75. Atkins focuses his argument primarily on a claim that his counsel failed to raise on appeal the issue of the prosecutor's argument concerning possible commutation or pardon of a death sentence. *See id.* at 73-75. In addition, Atkins includes a broader claim within Ground 20 that "[a]ppellate counsel unreasonably failed to raise on appeal the constitutional issues asserted in this petition, and Mr. Atkins incorporates the allegations of those claims." *Id.* at p. 72, lines 17-19.

Respondents argue that Ground 20 is unexhausted to the extent that it incorporates claims that were not raised on the appeal in Atkins' state habeas proceeding. Motion to Dismiss, pp. 25-26. This argument is meritorious. Atkins included the same broad incorporation clause in his claim of ineffective assistance of appellate counsel in state court. *See* Exhibit 256, p. 66, lines 10-12. However, that language incorporated a different set of claims – the set of claims in the opening appellate brief, as opposed to the set of claims in the second amended petition in this case. Therefore, Ground 20 is unexhausted to the extent it incorporates claims that were not raised on the appeal in Atkins' state habeas proceeding. Specifically, the court finds Ground 20 to be unexhausted to the extent it incorporates the unexhausted portion of Ground 1, Ground 2, Ground 3, the unexhausted portion of Ground 21, Ground 22, Ground 25, Ground 27, and Ground 28.

The primary argument in Ground 20, however – that Atkins' appellate counsel was ineffective for not raising the issue of the prosecutor's arguments regarding commutation and pardons – is exhausted. *See* Exhibit 256, pp. 67-68.

Respondents also argue that Ground 20 is not cognizable in this federal habeas action because Atkins' pleading of Ground 20 is conclusory. *See* Motion to Dismiss, p. 34. The court finds

that Atkins' pleading of Ground 20 is sufficient. The court will deny the motion to dismiss so far as it is based on this contention. Respondents may, however, reassert this contention in their answer, with respect to the merits of Ground 20, if and when an answer is appropriate.

Ground 21

In Ground 21, in the introduction to the claim, Atkins claims that he was denied his constitutional rights to due process of law, equal protection of the laws, effective assistance of counsel, and a reliable sentence, by the failure of the Nevada Supreme Court to conduct fair and adequate appellate review of his conviction and sentence. Second Amended Petition, p. 75. In its more specific allegations, Ground 21 contains five distinct parts:

- Atkins claims he was denied his constitutional rights to due process of law and a reliable sentence because of the Nevada Supreme Court's failure to provide adequate review of death penalty cases. *See* Second Amended Petition, pp. 75-77.

- Atkins claims he was denied his constitutional right to confront witnesses against him, under the Sixth and Fourteenth Amendments, on account of the admission of testimony by Mark Wattley regarding statements made by Shawn Atkins. *See id.* at 77-80.

- Atkins claims he was denied his constitutional right to confront witnesses against him, under the Sixth and Fourteenth Amendments, as well as his constitutional right to due process of law, on account of the admission of testimony by FBI Agent Larkin regarding statements made by Shawn Atkins. *See id.* at 80-84.

- Atkins claims that he was denied his constitutional right to a fair trial on account of the introduction of evidence regarding the death of Ebony Mason's child. *See id.* at 84-86.

- Atkins claims that he was denied his constitutional rights to fundamental fairness, to a reliable determination of punishment, and to an individualized determination of an appropriate sentence guided by clear, objective, and evenly-applied standards, as guaranteed by the Sixth, Eighth, and Fourteenth Amendments, on account of the state courts' allowance of inflammatory and prejudicial remarks made in argument by the prosecution. *See id.* at 86-89.

Respondents argue that Ground 21 is unexhausted in part. *See* Motion to Dismiss, pp. 26-27. The court agrees. Atkins did not argue before the Nevada Supreme Court, on either his direct appeal or the appeal in his state habeas proceedings, that he was denied effective assistance of counsel with

respect to any of the allegations in Ground 21. *See* Exhibit 181, pp. 10-41, 51-57; Exhibit 256, pp. 68-70. The ineffective assistant of counsel claims in Ground 21 are unexhausted.

Also, Atkins did not argue before the Nevada Supreme Court, on either his direct appeal or the appeal in his state habeas proceedings, that he was denied his constitutional rights to due process of law and a reliable sentence because of the Nevada Supreme Court's failure to provide adequate review of death penalty cases. *See* Exhibit 181; Exhibit 256. That portion of Ground 21 is unexhausted.

Atkins did assert, before the Nevada Supreme Court, that he was denied his constitutional right to confront witnesses against him, under the Sixth and Fourteenth Amendments, on account of the admission of testimony by Mark Wattley regarding statements made by Shawn Atkins. *See* Exhibit 181, pp. 10-20; *see especially id.* at 19. That claim is exhausted.

Atkins also asserted, before the Nevada Supreme Court, that he was denied his constitutional right to confront witnesses against him, under the Sixth and Fourteenth Amendments, as well as his constitutional right to due process of law, on account of the admission of testimony by FBI Agent Larkin regarding statements made by Shawn Atkins. *See* Exhibit 181, pp. 20-38; *see especially id.* at 24, 37. That claim, too, is exhausted.

Atkins also argued to the Nevada Supreme Court that he was denied his constitutional right to a fair trial on account of the introduction of evidence regarding the death of Ebony Mason's child. *See* Exhibit 181, pp. 38-41; *see especially id.* at 41. That claim is exhausted.

Finally, Atkins did argue to the Nevada Supreme Court that he was denied his constitutional rights to fundamental fairness, to a reliable determination of punishment, and to an individualized determination of an appropriate sentence guided by clear, objective, and evenly-applied standards, as guaranteed by the Sixth, Eighth, and Fourteenth Amendments, on account of the state courts' allowance of inflammatory and prejudicial remarks made in argument by the prosecution. *See* Exhibit 181, pp. 51-57; *see especially id.* at 51. That claim is exhausted.

The court finds, then, that the following parts of Ground 21 have been exhausted in state court:

- Atkins' claim that he was denied his constitutional right to confront witnesses against him, under the Sixth and Fourteenth Amendments, on account of the admission of testimony by Mark Wattley regarding statements made by Shawn Atkins. *See* Exhibit 181, pp. 10-20.

- Atkins' claim that he was denied his constitutional right to confront witnesses against him, under the Sixth and Fourteenth Amendments, as well as his constitutional right to due process of law, on account of the admission of testimony by FBI Agent Larkin regarding statements made by Shawn Atkins. *See* Exhibit 181, pp. 20-38.

- Atkins' claim that he was denied his constitutional right to a fair trial on account of the introduction of evidence regarding the death of Ebony Mason's child. *See* Exhibit 181, pp. 38-41.

- Atkins claims that he was denied his constitutional rights to fundamental fairness, to a reliable determination of punishment, and to an individualized determination of an appropriate sentence guided by clear, objective, and evenly-applied standards, as guaranteed by the Sixth, Eighth, and Fourteenth Amendments, on account of the state courts' allowance of inflammatory and prejudicial remarks made in argument by the prosecution. *See* Exhibit 181, pp. 51-57.

All other parts of Ground 21 are unexhausted.

Ground 22

Ground 22 is a cumulative error claim. *See* Second Amended Petition, pp. 90-91. Atkins incorporates into Ground 22 every factual allegation contained in his entire second amended petition, and Atkins claims that the "cumulative effect of the errors demonstrated in this petition was to deprive the proceedings against Mr. Atkins of fundamental fairness and to result in a constitutionally unreliable sentence." *Id.* at 90.

Respondents assert that this claim is unexhausted. Motion to Dismiss, pp. 27-28. The court agrees. To the extent that there are any unexhausted claims in the second amended petition – and there are several – those unexhausted claims are incorporated into Ground 22, as the factual basis for that claim, and the cumulative error claim in Ground 22 is, consequently, unexhausted.

Ground 23

In Ground 23, Atkins claims that his death sentence is unconstitutional "because the Nevada capital punishment system operates in an arbitrary and capricious manner, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments." Second Amended Petition, p. 91. Atkins claims that, because of overly broad definitions of first degree murder and the available aggravating circumstances, in practice, Nevada's capital punishment system makes a death sentence permissible in every case of an unlawful killing. *Id.* at 91-93. Atkins claims that Nevada law gives sentencing bodies untrammeled power, and provides no rational method for separating those cases that warrant the imposition of the death penalty from those that do not. *Id.* at 92. According to Atkins, in the absence of rational guidance for imposition of the death penalty, Nevada sentencers are left to impose the death penalty based on illegitimate considerations. *Id.* at 93. Atkins claims that, additionally, the capital punishment system in Nevada suffers from "under-funding of defense counsel, the lack of consistent and adequate appellate review process and the pervasive effects of race." *Id.* at 93.

Respondents assert that Ground 23 is unexhausted in state court. Motion to Dismiss, pp. 28-29. Atkins made this same claim on the appeal in his state habeas proceedings. *See* Exhibit 256, pp. 71-73. However, respondents argue that Ground 23 is unexhausted because Atkins includes language in the claim incorporating every allegation in his second amended petition into Ground 23. *See* Second Amended Petition, p. 91, lines 20-21. Respondents argue that, therefore, the allegations incorporated into the claim differ from the allegations incorporated into the claim in state court. *See* Exhibit 256, p. 71, lines 7-8. This court finds, though, that the incorporation clause in the claim is not a central element of the claim, and the difference between the claims incorporated by means of that clause in state court and in this case, do not fundamentally alter the legal claim. *See Chacon*, 36 F.3d at 1468. Ground 23 is exhausted.

Respondents also argue that Ground 23 is not cognizable in this federal habeas action to the extent that it is based on alleged violation of the International Covenant on Civil and Political Rights

(ICCPR). *See* Motion to Dismiss, pp. 40-42. However, the habeas corpus statute explicitly extends habeas corpus relief to violation of treaties. *See* 28 U.S.C. § 2254(a) ("... on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."). Atkins' reliance in Ground 23 on a violation of the ICCPR is cognizable. That is not to say that this will necessarily turn out to be a viable claim for habeas corpus relief; that determination must await full briefing on the merits of Ground 23.

Ground 24

In Ground 24, Atkins claims that his death sentence is unconstitutional because the death penalty is cruel and unusual punishment. " Second Amended Petition, pp. 94-95.

Respondents argued in their motion to dismiss that Ground 24 is unexhausted. *See* Motion to Dismiss, pp. 29-31. In response, Atkins asserted that he exhausted Ground 24 on the appeal in his state habeas proceedings. Response to Motion to Dismiss, pp. 19-20. In their reply, the respondents acknowledged that the claim was exhausted in the state habeas appeal, and respondents withdraw the argument that Ground 24 is unexhausted. Reply, p. 20. Ground 24 is exhausted. *See* Exhibit 256, pp. 73-74.

Ground 25

In Ground 25, Atkins claims that his death sentence is unconstitutional because execution by lethal injection is cruel and unusual punishment." Second Amended Petition, pp. 96-106.

Respondents contend that Ground 25 is unexhausted in state court. *See* Motion to Dismiss, p. 31. Atkins responds that he "implicitly raised this issue in his direct appeal and state habeas petition." Response to Motion to Dismiss, p. 20. Atkins argues that the "Nevada Supreme Court has a statutory duty to conduct a *sua sponte* review of constitutional issues under *Bejarano v. State*, 106 Nev. 840, 843, 801 P.2d 1388 (1990) and *Bennett v. State*, 111 Nev. 1099, 1108-1109, 901 P.2d 676 (1995)." *Id.* However, neither *Bejarano* nor *Bennett* remotely stands for the proposition that the Nevada Supreme Court is under a legal obligation to review claims such as this one. Nevada's mandatory review in capital cases does not extend to a claim that execution by lethal injection is

cruel and unusual punishment. *See* NRS 177.055. Atkins did not raise this claim on his direct appeal or on the appeal in his state habeas proceedings. *See* Exhibits 181, 256. Ground 25 is unexhausted.

Ground 26

In Ground 26, Atkins claims that his conviction and sentence "are invalid pursuant to the rights and protections afforded him under the international covenant on civil and political rights and Article VI of the U.S. Constitution." Second Amended Petition, p. 106.

Respondents argue that Ground 26 is not cognizable in this federal habeas action to the extent that it is based on alleged violation of the International Covenant on Civil and Political Rights (ICCPR). *See* Motion to Dismiss, pp. 40-42. However, the habeas corpus statute explicitly extends habeas corpus relief to violation of treaties. *See* 28 U.S.C. § 2254(a) ("... on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."). Atkins' reliance in Ground 26 on a violation of the ICCPR is cognizable. That is not to say that this will necessarily turn out to be a viable claim for habeas corpus relief; that determination must await full briefing on the merits of Ground 26.

Ground 27

In Ground 27, Atkins claims that his death penalty is unconstitutional because the prosecution used the same evidence to support his conviction of first-degree murder and to prove aggravating factors making him eligible for the death penalty. *See* Second Amended Petition, pp. 108-13.

Atkins responds that he "implicitly raised this issue in his direct appeal and state habeas petition." Response to Motion to Dismiss, p. 21. Atkins argues that the "Nevada Supreme Court has a statutory duty to conduct a *sua sponte* review of constitutional issues under *Bejarano v. State*, 106 Nev. 840, 843, 801 P.2d 1388 (1990) and *Bennett v. State*, 111 Nev. 1099, 1108-1109, 901 P.2d 676 (1995)." *Id.* However, neither *Bejarano* nor *Bennett* stands for the proposition that the Nevada Supreme Court is under a legal obligation to review claims such as this one. Nevada's mandatory

review in capital cases does not extend to a claim that a death penalty is unconstitutional because the same evidence was used to prove first degree felony murder and to prove aggravating circumstances. *See* NRS 177.055. Atkins did not raise this claim on his direct appeal or on the appeal in his state habeas proceedings. *See* Exhibits 181, 256. Ground 27 is unexhausted.

Respondents also argue that Ground 27 is not cognizable in this federal habeas corpus action because, in addition to violations of Atkins federal constitutional rights, he also claims a violation of a provision of the Nevada constitution. *See* Motion to Dismiss, p. 40; *see also* Second Amended Petition, p. 108. Respondents assert that state constitutional violations are not bases for federal habeas corpus relief. *See* Motion to Dismiss, p. 40. Respondents' argument is well taken. A state constitutional violation is not cognizable in this federal habeas corpus action. *See* 28 U.S.C. § 2254(a). Ground 27 is not cognizable in this action, to the extent it asserts a violation of a Nevada state constitutional provision.

Respondents also argue that Ground 27 is barred by the statute of limitations.

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) went into effect. Pub.L. No. 104-132, 110 Stat. 1214-1226 (1996). The AEDPA made various amendments to the statutes controlling federal habeas corpus practice. One of the amendments imposed a one-year statute of limitations on the filing of federal habeas corpus petitions. With respect to the statute of limitations, the habeas corpus statute provides:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

In this case, Atkins' judgment of conviction became final on April 3, 1997, when the Nevada Supreme Court issued its remittitur, following the denial of certiorari by the United States Supreme Court. *See* Exhibits 205, 208; *see also Wixom v. Washington,* 264 F.3d 894, 897 (9th Cir.2001).

The AEDPA limitations period is tolled while a "properly filed application" for post conviction or other collateral relief is pending before a state court. 28 U.S.C. § 2244(d)(2). A "properly filed application" is one in which the "delivery and acceptance are in compliance with the applicable laws and rules governing filings." *Dictado v. Ducharme,* 244 F.3d 724, 726-27 (9th Cir.2001), *quoting Artuz v. Bennett*, 531 U.S. 4, 121 S.Ct. 361, 364 (2000). On April 18, 1997, Atkins filed his state habeas petition. *See* Exhibit 211. That filing tolled the limitations period after only 15 days had run against it. The state habeas proceedings remained pending until July 22, 2002, when the Nevada Supreme Court issued its remittitur after affirming the denial of habeas corpus relief. *See* Exhibits 261, 262, 263.

Atkins filed his original habeas corpus petition, initiating this federal habeas corpus action, on October 11, 2002 (docket #1). Therefore, another 81 days ran against the limitations period between July 22 and October 11, 2002. In total then, before the filing of the original petition in this case, only 96 days (15 days plus 81 days) ran against the limitations period. The original petition in this case was filed well with the one-year limitations period.

Atkins did not amend his petition until May 12, 2005 (more than two and a half years later) when he filed a "Supplemental Petition for Writ of Habeas Corpus" (docket #32). There was no statutory tolling of the limitations period by virtue of the pendency of this federal habeas corpus

action between October 11, 2002, and May 12, 2005. *See Duncan v. Walker*, 533 U.S. 167, 181-82 (2001). Therefore, the supplemental petition filed by Atkins on May 12, 2005, was filed outside the one-year limitations period. And, the amended petition filed on December 10, 2007 (docket #69), as well as the second amended petition filed on October 29, 2008 (docket #85), were both filed well beyond the expiration of the limitations period.

The question of the timeliness of the assertion of Ground 27, then, comes down to whether the assertion of that claim in Atkins' second amended petition relates back to the filing of Atkins' original petition in 2002. In *Mayle v. Felix*, 545 U.S. 644 (2005), the Supreme Court held that "[s]o long as the original and amended petitions state claims that are tied to a common core of operative facts, relation back will be in order," but that "[a]n amended habeas petition ... does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Mayle*, 545 U.S. at 650, 664.

There are two claims in Atkins' original petition that involve aggravating factors: Grounds 4 and 15 of the original petition.

In Ground 4 of the original petition, Atkins claimed:

> Because one of the aggravating circumstances was not supported by substantial evidence and was vacated, the court must re-weigh the remaining aggravating circumstances against the mitigating circumstances. Petitioner is entitled to a new trial and penalty phase based upon ineffective assistance of counsel as trial counsel failed to argue that there was insufficient evidence that Sterling Atkins committed first degree kidnapping in violation of NRS 200.310.

Petition for Writ of Habeas Corpus (docket #1), p. 11 (CM/ECF pagination). This claim in Atkins' original petition and Ground 27 in the second amended petition do not share a common core of operative facts. The gist of Ground 4 of the original petition was that there was not sufficient evidence to support the kidnapping aggravating factor; the gist of Ground 27 of the second amended petition is that kidnapping and sexual assault were used both as predicate felonies for felony murder and as aggravating factors. These are two different claims, based on two different sets of factual

assertions. The mere fact that they both happen to involve aggravating factors does not mean that they share the same core of operative facts.

In Ground 15 of the original petition, Atkins claimed:

> Petitioner's death sentence violates the constitution guarantees of due process of law and a reliable sentence, and the privilege against self incrimination, due to the finding of the duplicative aggravating circumstances that (1) the murder was commited by by a person involved, who was previously convicted of a felony involving the use of threat of violence: and (2) that the murder was committed by a person under sentence of imprisonment. U.S. Const. Amends. 5, 8, 14.

Petition for Writ of Habeas Corpus (docket #1), p. 11 (CM/ECF pagination) (as in original). Here again, this claim in Atkins' original petition and Ground 27 in the second amended petition do not share a common core of operative facts. The gist of Ground 15 of the original petition was that two of the aggravating circumstances were duplicative; the gist of Ground 27 of the second amended petition is that kidnapping and sexual assault were used both as predicate felonies for felony murder and as aggravating factors. These are two different claims, based on two different sets of factual assertions. The mere fact that they both happen to involve aggravating factors does not mean that they share the same core of operative facts.

The court finds that Ground 27 of the second amended petition does not relate back, under *Mayle*, to any claim in Atkins' original petition. Ground 27 was, therefore, filed outside the applicable one-year limitations period and is time-barred. Consequently, Ground 27 will be dismissed.

Ground 28

In Ground 28, Atkins claims:

> The trial judge instructed the jury regarding premeditation, but did not instruct the jury regarding wilfulness and deliberation. The resulting instruction was unconstitutional and injuriously affected the verdict by omitting independent jury findings on essential elements of the offense: wilfulness and deliberation."

Second Amended Petition, p. 113; *see also id.* at 113-16.

Atkins admits that he has never raised this claim before the Nevada Supreme Court. *See* Response to Motion to Dismiss, pp. 21-22. Atkins argues, however, that this claim was not cognizable before 2007, when *Polk v. Sandoval*, 503 F.3d 903 (9th Cir. 2007), was decided. *See id.* at 21. Atkins does not explain this contention, and does not cite any authority for it. The court finds that this claim – a claim of unconstitutional jury instructions – was cognizable before *Polk* was decided. Cognizability does not depend upon the existence of Ninth Circuit precedent to support the claim.

Moreover, the issues of cognizability and exhaustion are largely unrelated. Even if this claim was not cognizable until 2007, as Atkins claims, the simple fact is that it has not been presented to the state courts. Ground 28 is unexhausted.

Treatment of Unexhausted Claims

Atkins requests that, if the court finds any of his claims to be unexhausted, the court should stay this action to allow him to return to state court to exhaust his unexhausted claims. *See* Response to Motion to Dismiss, pp. 6-10, 26.

In his response to the motion to dismiss, Atkins cites, and discusses the holding in, *Rhines v. Weber*, 544 U.S. 269 (2005). Atkins appears to request a stay under *Rhines*. In *Rhines*, the Supreme Court placed limitations upon the discretion of the district courts to stay mixed habeas petitions to facilitate habeas petitioners' return to state court to exhaust claims without suffering a statute of limitations bar. The *Rhines* Court stated:

> [S]tay and abeyance should be available only in limited circumstances. Because granting a stay effectively excuses a petitioner's failure to present his claims first to the state courts, stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless. *Cf.* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State").

Rhines, 544 U.S. 277. However, despite his discussion of the *Rhines* holding, Atkins did not attempt to make the showing required under *Rhines* to warrant a stay of his mixed petition. *See* Response to Motion to Dismiss.

On May 19, 2009, Atkins filed an addendum to his response to the motion to dismiss (docket #100), pointing out the decision of the Ninth Circuit Court of Appeals in *King v. Ryan*, 564 F.3d 1133 (9th Cir.2009). In *King*, the court of appeals ruled that the so-called "*Kelly* procedure" survived *Rhines* and is still available to federal habeas petitioners with unexhausted claims. Following the *Kelly* procedure, a petitioner first amends his mixed petition to delete any unexhausted claims; then, the court stays and holds in abeyance the amended, and now fully exhausted, petition, while the petitioner exhausts the deleted claims in state court; finally, the petitioner amends his stayed petition to re-attach the now fully exhausted claims that he deleted before. *King*, 564 F.3d at 1135; *Kelly v. Small*, 315 F.3d 1063, 1070-71 (9th Cir.2002).

There are distinct differences between the procedures established by *Rhines* and *Kelly*. The first, of course, is that *Rhines* requires a showing of good cause, while *Kelly* does not.

Also, though, under *Rhines* the court stays and holds in abeyance both the exhausted and unexhausted claims, whereas under *Kelly* the petitioner deletes the unexhausted claims and the court only stays and holds in abeyance the remaining fully exhausted petition. This is an important distinction, because under *Kelly*, after completing the state proceedings, a petitioner must amend his federal petition to re-allege the deleted claims, and that amendment must comply with the one-year AEDPA statue of limitations. Therefore, the *Kelly* procedure is unavailing if the statute of limitations has already run out before the petitioner seeks the stay, or if its expiration is imminent and sure to occur during the stay. *See King*, 564 F.3d at 1141. A petitioner obtaining a *Rhines* stay, on the other hand, does not have to worry about the statute of limitations, because his unexhausted claims remain in his federal petition during the stay. *See id.* at 1140.

The statute of limitations, therefore, seriously limits the usefulness of the *Kelly* procedure. In this case, it appears likely that the statute of limitations applicable to all of Atkins' claims ran out

long ago – in July 2003 – as there is no statutory tolling during the pendency of a federal habeas petition. *See Duncan v. Walker*, 533 U.S. 167, 181-82 (2001); *see also* discussion of Ground 27, *supra*. It appears that for the *Kelly* procedure to be of any use to Atkins, his unexhausted claims must relate back, under *Mayle*, to exhausted claims in his timely-filed original petition, such that they may be considered timely after they are exhausted and added back into the federal petition. There has been no briefing by the parties regarding the question whether the *Kelly* procedure would actually be of use to Atkins, or whether the statute of limitations renders it unavailing.

Because the parties have not adequately addressed the key issues regarding Atkins' request for a stay – whether he can make the showing required for a *Rhines* stay, and whether a *Kelly* stay would be availing to him, considering the effect of the statute of limitations – the court will provide Atkins an opportunity to file a motion for a stay, and fully brief his request for a stay. If Atkins does not move for a stay, or if he cannot, in a motion for a stay, show a stay to be warranted, the court will require Atkins to abandon his unexhausted claims and proceed with his remaining exhausted claims, or the court will dismiss Atkins' entire petition, based on the rule of *Rose v. Lundy*, 455 U.S. 509 (1982).

IT IS THEREFORE ORDERED that respondents' Motion to Dismiss (docket #88) is **GRANTED IN PART AND DENIED IN PART**, as follows.

IT IS FURTHER ORDERED that Ground 27 of the petitioner's Second Amended Petition (docket #85) is **DISMISSED**, as barred by the statute of limitations.

IT IS FURTHER ORDERED that Grounds 2, 7, and 10 of the petitioner's Second Amended Petition are **DISMISSED** to the extent that they claim violations of provisions of the Nevada Constitution.

IT IS FURTHER ORDERED that the petitioner is granted leave of court to amend Ground 10 of his Second Amended Petition as follows: the citation at line 15 of page 47 of the Second Amended Petition shall read: "*See* Amendments 8 and 14 to the U.S. Constitution." This amendment shall be considered done. The petitioner need take no further action with respect to the amendment.

IT IS FURTHER ORDERED that the petitioner is granted leave of court to amend Ground 12 of his Second Amended Petition as follows: line 1 of page 54 of the Second Amended Petition shall read: "under the Fifth, Sixth, Eighth and Fourteenth Amendments." This amendment shall be considered done. The petitioner need take no further action with respect to the amendment.

IT IS FURTHER ORDERED that the court finds Grounds 2, 3, 22, 25, and 28 of the petitioner's Second Amended Petition to be unexhausted in state court. In addition, the court finds Grounds 1, 20, and 21 to be partly unexhausted in state court, as is described in this order.

IT IS FURTHER ORDERED that petitioner shall have **45 days** from the date of entry of this order to file and serve a motion for a stay. Respondents shall have **30 days** following the service of such a motion to respond. Petitioner shall have **20 days** following the service of the response to file a reply. If petitioner does not file a motion for a stay, or if he does not in such motion show that a stay is warranted, the court will require petitioner to abandon his unexhausted claims and proceed with his remaining exhausted claims, or the court will dismiss his entire petition, based on the rule of *Rose v. Lundy*, 455 U.S. 509 (1982).

Dated this 19th day of August, 2009.

UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE SUPREME COURT OF THE STATE OF NEVADA

STERLING ATKINS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 60756

FILED

APR 23 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant Sterling Atkins' post-conviction petition for a writ of habeas corpus in a death penalty case. Eighth Judicial District Court, Clark County; Jennifer P. Togliatti, Judge.

This court issued its remittitur from Atkins' direct appeal on April 3, 1997, *see Atkins v. State*, 112 Nev. 1122, 923 P.2d 1119 (1996), and Atkins filed the instant post-conviction petition for a writ of habeas corpus on November 4, 2009. Because the petition was filed more than one year after this court issued its remittitur, the district court denied it as untimely based on NRS 34.726(1). The district court also concluded that the petition was successive because Atkins had previously filed a post-conviction petition for a writ of habeas corpus and constituted an abuse of the writ because he raised claims new and different from those raised in his previous petition. *See* NRS 34.810(1)(b)(2); NRS 34.810(2). And, because the State specifically pleaded laches, the district court concluded that Atkins was required to overcome the rebuttable presumption of prejudice to the State. *See* NRS 34.800(2). Without conducting an evidentiary hearing, the district court determined that Atkins failed to

SUPREME COURT
OF
NEVADA

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demonstrate good cause to excuse the procedural bars, *see* NRS 34.726(1); NRS 34.810(3), and dismissed his petition.

Atkins contends that the district court erred by concluding that he failed to demonstrate good cause and by doing so without conducting an evidentiary hearing. When reviewing a district court's determination regarding good cause, we give deference to its factual findings but review its legal conclusions de novo. *State v. Huebler*, 128 Nev. ___, ___, 275 P.3d 91, 95 (2012), *cert. denied*, 568 U.S. ___, 133 S. Ct. 988 (2013). A petitioner is entitled to an evidentiary hearing if he "asserts specific factual allegations that are not belied or repelled by the record and that, if true, would entitle him to relief." *Nika v. State*, 124 Nev. 1272, 1300-01, 198 P.3d 839, 858 (2008).

First, Atkins contends that the district court erred by concluding that post-conviction counsel's ineffectiveness did not constitute good cause to excuse the procedural bars. We disagree. Although the ineffective assistance of post-conviction counsel may provide cause to file a successive petition where, as here, the appointment of post-conviction counsel was mandated by NRS 34.820(1), *McKague v. Warden*, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996), the claim must be raised in a timely fashion. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Because the instant petition was filed more than seven years after this court resolved the appeal involving his first post-conviction petition, *see Atkins v. State*, Docket No. 37292 (Order of Affirmance, May 14, 2002), and Atkins failed to demonstrate how post-conviction counsel's deficiencies precluded him from filing the instant petition within a reasonable time, we conclude that the district court did not err by determining that this ground was insufficient to excuse the procedural bars.

Second, Atkins contends that the district court erred by concluding that his low intelligence did not constitute good cause to excuse the procedural bars. We disagree. Atkins filed his first, timely petition in proper person, which belies any suggestion that his low intelligence precluded him from filing a petition within a reasonable time. But regardless, a petitioner's low intelligence is not an impediment external to the defense and is not sufficient cause to excuse the procedural bars, *Phelps v. Dir., Nev. Dep't of Prisons*, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988). We conclude that the district court did not err by determining that this ground was insufficient to excuse the procedural bars.

Third, Atkins contends that the district court erred by concluding that his pursuit of relief in federal court did not constitute good cause to excuse the procedural bars. We conclude that the district court did not err by determining that this ground was insufficient to excuse the procedural bars. *See Colley v. State*, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989), *abrogated by statute on other grounds as recognized by Huebler*, 128 Nev. at ___, n.2, 275 P.3d at 95 n.2.

Fourth, Atkins contends that the district court erred by concluding that the holding in *Crawford v. Washington*, 541 U.S. 36 (2004), which was announced after he filed his first petition, did not constitute good cause to excuse the procedural bars. We disagree for two reasons. First, Atkins filed the instant petition almost five years after *Crawford* was announced, and therefore failed to raise this claim in a reasonable time. *See Hathaway*, 119 Nev. at 252-53, 71 P.3d at 506. Second, *Crawford* does not apply retroactively on collateral review of a conviction, such as Atkins', that was final before *Crawford* was decided.

Whorton v. Bockting, 549 U.S. 406, 417 (2007). We conclude that the district court did not err by determining that this ground was insufficient to excuse the procedural bars.

Because the district court correctly concluded that Atkins failed to demonstrate good cause and that he was not entitled to an evidentiary hearing, we

ORDER the judgment of the district court AFFIRMED.

Gibbons, C.J.

Pickering, J.

Hardesty, J.

Parraguirre, J.

Douglas, J.

Cherry, J.

Saitta, J.

cc: Hon. Jennifer P. Togliatti, District Judge
Marc Picker
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

SUPREME COURT
OF
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CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
STERLING ATKINS,
#1192027
Defendant.

CASE NO: 94C120438-3
DEPT NO: IX

94C120438-3
FFCO
Findings of Fact, Conclusions of Law and O
1806180

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING ATKINS' SECOND STATE POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS

DATE OF HEARING: 8/2/10
TIME OF HEARING: 9:00 A.M.

THIS CAUSE having come on for hearing before the Honorable Jennifer Togliatti, District Judge, on the 2nd day of August, 2010, the Petitioner not being present, Represented by MARC P. PICKER, the Respondent being represented by DAVID ROGER, District Attorney, by and through NANCY A. BECKER, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, draft findings and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

PROCEDURAL HISTORY

Sterling Mark Atkins, hereinafter "Atkins," along with two co-defendants, his brother Shawn Atkins ("Shawn") and Anthony Doyle[1], ("Doyle") were charged by Amended

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[1] Anthony Doyle was found guilty by a jury of First-Degree Murder, Conspiracy To Commit

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Criminal Complaint on February 25, 1994, with one (1) count each of Murder, Conspiracy to Commit Murder, Robbery, First Degree Kidnapping, and Sexual Assault. Atkins was represented by Anthony Sgro and Laura Melia. A preliminary hearing was held on May 19 and 20, 1994. All defendants were subsequently bound over to district court on all counts.

On May 27, 1994, the State filed a Notice of Intent to Seek the Death Penalty against Atkins, alleging seven aggravating factors. The aggravating factors alleged were: 1) The murder was committed by a person previously convicted of a felony; 2) The murder was committed by a person under sentence of imprisonment; 3) The murder was committed by a person engaged in the commission of or an attempt to commit robbery; 4) The murder was committed by a person engaged in the commission of or an attempt to commit sexual assault; 5) The murder was committed by a person engaged in the commission of or an attempt to commit any first degree kidnapping; 6) The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody, and; 7) The murder involved torture, depravity of mind or the mutilation of the victim. An Amended Information was filed on June 1, 1994, and Atkins was arraigned on June 2, 1994. Trial was set for February 13, 1995.

Atkins filed a pretrial Petition for Writ of Habeas Corpus on July 27, 1994. He alleged there was insufficient evidence produced at the preliminary hearing to establish probable cause that a sexual assault, robbery, or first degree kidnapping occurred. The district court denied the petition as to the sexual assault and kidnapping. However, it dismissed the robbery count.

On August 29, 1994, Atkins, through counsel, filed an ex parte motion for appointment of new co-counsel. The court ordered Kent Kozal to substitute for Laura Melia. Trial was ultimately set for March 20, 1995.

On February 27, 1995, Mr. Sgro filed a Motion to Continue Trial on behalf of Atkins. Mr. Sgro stated that after various objections he was scheduled to begin trial in another capital case on March 27, 1995. Based on this fact, Mr. Sgro stated he would be unable to go

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Murder, First-Degree Kidnapping, and Sexual Assault. See Doyle v. State, 112 Nev. 879, 921 P.2d 901 (1996). Shawn Atkins entered a guilty plea to the offenses of First-Degree Murder and First-Degree Kidnapping.

forward in Atkins's case. The district court denied the motion to continue on March 9, 1995. On March 10, 1995, Atkins moved to have his original co-counsel, Ms. Melia, substitute for Mr. Sgro. Atkins signed a consent to the substitution.

On March 20, 1995, Atkins was charged by way of Amended Information with one count each of Murder, Conspiracy to Commit Murder, First-Degree Kidnapping, and Sexual Assault. Trial began with jury selection the same day. Atkins was found guilty on all counts. The jury subsequently determined that Atkins should be sentenced to death by lethal injection for the murder conviction. A Judgment of Conviction was filed on June 8, 1995.

Atkins filed a timely Notice of Appeal on June 20, 1995. On August 28, 1996, The Nevada Supreme Court affirmed Arkins' convictions for murder, conspiracy to commit murder and kidnapping in Atkins v. State, 112 Nev. 1122, 923 P.2d 1119 (1996); Supreme Court Case No. 27169. It also upheld Atkins' death sentence. It vacated Atkins' sexual assault conviction based on insufficient evidence. Remittitur was stayed pending a filing of writ of certiorari with the United States Supreme Court, which was denied on March 17, 1997. Remittitur issued on April 3, 1997. Atkins raised the following issues on direct appeal: Claim 1 – admission of various hearsay statements; Claim 2 – admission of evidence relating to the death of the victim's child; Claim 3 – insufficient evidence of sexual assault; Claim 4 – constitutionality of NRS 200.033(4); Claim 5 – various claims of prosecutorial misconduct.

Atkins filed his first Petition for Writ of Habeas Corpus (Post-Conviction) on April 18, 1997. He subsequently filed a Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) on April 25, 2000. The State filed its response on October 25, 2000. Atkins' petition was denied by the district court on December 8, 2000. Atkins filed a timely Notice of Appeal on January 12, 2001. The Nevada Supreme Court rejected all of Atkins' claims and affirmed the denial of the petition on May 14, 2002. Remittitur issued on June 11, 2002. Atkins raised the following issues in his first post-conviction petition: Claim 1 – ineffective assistance of trial counsel for failing to adequately investigate, consult, or produce and offer psychological evidence; Claim 2 – ineffective assistance of trial counsel for failing to timely

raise a competency issue and ineffective assistance of appellate counsel for failing to raise the issue on direct appeal; Claim 3 – the District Court abused its discretion when it denied Atkins' motion for a continuance and appellant counsel was therefore deficient for failing to raise this claim on direct appeal; Claim 4 – ineffective assistance of appellate counsel for failing to challenge the sexual assault aggravator on direct appeal; Claim 5 – ineffective assistance of trial counsel for failing to argue there was insufficient evidence of First Degree Kidnapping; Claim 6 – ineffective asssistance of trial counsel for failing to challenge the district court's excusal of a prospective juror because it was not clear he would automatically vote against the death penalty and ineffective assistance of appellate counsel for failing to raise the issue on direct appeal; Claim 7 – ineffective assistance of appellate counsel for failing to argue that Atkins was denied his constitutional right to be tried by a jury composed of a fair cross-section of the community and that the district court erred in denying his motion for discovery to develop this claim on direct appeal; Claim 8 – additional claims of ineffective assistance of trial counsel including: 1) Unreasonably failing to uncover substantial, compelling evidence in mitigation of punishment, 2) Failing to call Shawn Atkins as a witness to rebut allegations made by another witness, and 3) Failing to have footprint evidence independently examined; Claim 9 – ineffective assistance of trial counsel for failing to discover evidence of inducements provided to the key prosecution informant; Claim 10 – Atkins alleged he was incompetent to be sentenced to death; Claim 11 – Atkins alleged he was incompetent to be executed; Claims 12 & 13 – ineffective assistance of trial counsel for failing to challenge jury instructions such as: 1) The definitions of premeditation and deliberation, 2) The definition of implied malice, 3) The statutorily mandated reasonable doubt definition, and 4) the equal and exact justice instruction; Claim 14 – ineffective assistance of appellate counsel for failing to argue on direct appeal that since two of aggravating circumstances found by the jury: 1) That he had been convicted of a prior felony involving violence and 2) The murder was committed by a person under a sentence of imprisonment, stemmed from the same previous conviction they were duplicative and unconstitutional; Claim 15 – ineffective assistance of appellate counsel for failing to argue

on direct appeal that Atkins was subjected to a double jeopardy violation when the State used his previous conviction for assault with a deadly weapon as an aggravating factor; Claim 16 – ineffective assistance of appellate counsel for failing to argue on direct appeal that Atkins was excluded from critical stages of the capital proceedings, particularly in-chambers meetings and bench conferences; Claim 17 – a general claim of ineffective assistance of appellate counsel for failing to raise the issues discussed in his petition; Claim 18 – the Nevada Supreme Court conducted an inadequate review of the claims Atkins raised in his direct appeal; Claim 19 – cumulative error; Claim 20, 21, & 22 – Atkins raised various challenges to the death penalty including: 1) The imposition of the death penalty is arbitrary and capricious, 2) The death penalty itself violates the Eight Amendment to the United States Constitution and international law, and 3) Nevada's method of lethal injection violates the Eight Amendment to the United States Constitution and international law; Claim 23 – ineffective assistance of appellate counsel for failing to argue on direct appeal that Atkins' conviction and sentence were invalid pursuant to the International Covenant on Civil and Political Rights (ICCPR).

Atkins filed the instant Petition for Writ of Habeas Corpus on November 4, 2009. The State filed its Response and Motion to Dismiss on March 18, 2010.

STATEMENT OF FACTS[2]

This case involves the brutal murder of twenty-year-old Ebony Mason ("Mason") in January of 1994. Sterling Atkins, Jr., together with co-defendants Anthony Doyle and Shawn Atkins (Atkins' brother) severely beat and strangled Mason. Mason was anally penetrated with a stick; however the evidence did not establish whether this occurred before or after death.

On the evening of January 15, 1994, Atkins, Anthony Doyle, Shawn Atkins and Darrin Anderson were in Atkins' apartment. The four went out for a while using Anderson's truck. Anderson left the group and went back to Atkins' apartment, allowing the others to

[2] The facts are taken from the Nevada Supreme Court opinion in Atkins v. State, 112 Nev. 1122, 1125-1126, 923 P.2d 1119, 1121-1122 (1996) and the trial transcripts.

use his truck. As the three were returning to the apartment, they encountered twenty-year-old Ebony Mason. Mason was an acquaintance of Doyle and Atkins.

Mason joined the group and accompanied them to the apartment. Anderson was already there. Mason and Atkins went to a back bedroom to "make-out." They returned after about fifteen (15) minutes. Mason asked Anderson for a ride to her home in downtown Las Vegas. Anderson refused, but he gave the truck keys to Doyle so that Doyle and Atkins could take Mason home.

Mason, Doyle, Shawn and Atkins left the apartment. Doyle was driving the truck; Shawn was in the passenger's seat. Mason and Atkins were in the truck bed. Rather than proceed immediately to Mason's home, the group decided to stop at Doyle's place. While at Doyle's residence, Mason had intercourse with Atkins and oral sex with Shawn. Doyle came into the room as Shawn and Mason were concluding their encounter. Doyle tried to have anal intercourse with Mason. She refused. Doyle became angry and tried to force Mason. Mason made some remark about calling the police, telling Doyle he'd tried to rape her.

The four left Doyle's, allegedly to take Mason downtown. Once again Doyle was driving, Shawn was in the passenger's seat and Atkins, with Mason, were in the truck bed. Doyle stopped at a gas station. Mason exited the truck indicating she wanted to make a phone call. She appeared to be afraid of Doyle. Atkins feared she was going to call 911 and convinced her not to call anyone and to return to the truck.

The four left the gas station and proceeded towards downtown. As Doyle passed the downtown exit, Shawn asked him what he was doing. Doyle responded "Fuck that bitch. I'm going to make her walk". Doyle drove to a deserted area. Doyle wanted Mason to get out of the truck. Mason refused and the three spent about a half hour arguing with Mason. Eventually Shawn ordered Mason out of the truck, and when she didn't move Shawn tried to assist her. Doyle also grabbed at her. Shawn and Mason fell to the ground.

Shawn struggled with Mason briefly then Doyle began beating on her. Shawn got up and stood by Atkins. Both watched Doyle beat Mason, rip off her clothes and attempt to have sex with her. At some point Mason managed to get to her feet only to be thrown down

again by Doyle. Doyle said he "can't let the bitch live." Then Doyle and Atkins kicked and stomped on Mason. From the three distinct shoe impressions, Shawn obviously kicked or stomped on Mason as well. Atkins used part of Mason's clothes to choke her while Doyle hit Mason with a rock.

On January 16, 1994, Mason's nude body was discovered twenty-five feet from the road in an unimproved desert area of Clark County. Mason's body was lying face down with hands extended overhead, and it appeared that Mason had dug into the ground with her fingers. Three distinct types of footwear impressions were observed in the area, none of which matched the tread design of a pair of women's athletic shoes located on the nearby dirt road. There was also a hole containing a broken condom, a condom tip and an open but empty condom package.

Police received information that Darrin Anderson's truck may have been involved in Mason's murder. Police contacted Anderson who indicated he had given his truck to Doyle and the Atkins brothers and they left the apartment with Mason. According to Anderson, when he learned Mason was dead, he confronted Atkins, Shawn and Doyle about what happened. Atkins told Anderson they had taken Mason home. A search of Anderson's truck located a pair of blood-stained white socks shoved behind the seats. They were wet and appeared to have been washed. As a result blood-typing and DNA examinations were not possible.

In the timeframe preceding the murder, Doyle spent considerable time with his girlfriend, and mother of his child, Vaedra Roseman-Sowerby. Doyle, Atkins, Mark Wattley and Jerry Anderson would often spend the night at Sowerby's apartment. She was on vacation the night of the murder. Upon her return she had a conversation with Doyle that "shocked her." When she saw Atkins in about early February 1994 he was upset. As a result of what Doyle told her, she asked Atkins if he wanted to talk. Atkins said, "I'm in a lot of trouble." Atkins also said he didn't want to go to prison and that he would kill himself first. Subsequently, on another occasion, Atkins asked her about the country Trinidad. Sowerby comes from Trinidad. In that conversation, Atkins wanted to know how to obtain a passport

and details about moving to Trinidad.

Sowerby indicated that the night before Doyle and Atkins were arrested for the murder, Atkins told Doyle to "get rid of those shoes." Atkins was referring to a pair of autographed Adidas athletic shoes. Sowerby indicated Doyle, Atkins and others frequently wore each others shoes and clothing. When the police executed a search warrant on Doyle's residence the next day, the shoes were seized. Subsequent forensic analysis indicated they matched one of the footwear impressions found on Mason's body and at the crime scene.

Wattley and Anderson both testified to incidents where Shawn, Atkins or Doyle discussed some aspect of the murder in each other's presence. Wattley testified that Shawn gave him details of what Doyle and Atkins did. Wattley also testified about a hat that resembled the one Mason was wearing the night of the murder. Wattley saw both Doyle and Atkins in possession of the hat. Anderson stated that Atkins admitted he "killed a chick" and that when Doyle was teasing Shawn and Atkins about being unable to handle a girl, Atkins told Doyle to shut up because Doyle didn't do any better.

Atkins and Doyle were arrested in Las Vegas. Shawn was arrested in Ohio by agents of the Federal Bureau of Investigation ("FBI"). Upon his arrest, Shawn gave a voluntary statement to the FBI regarding the events leading up to Mason's death on January 15, 1994. FBI Agent James Larkin testified regarding Shawn's statements, which were inconsistent with some of his trial testimony.

In the opinion of the medical examiner, Mason died from asphyxia due to strangulation and/or from blunt trauma to the head. The autopsy revealed nine broken ribs, multiple areas of external bruising, contusions, lacerations, abrasions, and a ligature mark on the anterior surface of the neck. Mason's lung and liver had been lacerated, apparently as a result of the broken ribs. Mason's body also bore a number of patterned contusions consistent with footwear impressions found at the scene. Three distinct impressions were visible on the skin of the back and chest. A four-inch long stick/twig was shoved into Mason's rectum. The stick barely protruded. The medical examiner could not determine whether the stick was thrust into Mason's rectum before, during or after death. Finally, the

autopsy revealed severe lacerations of the head and underlying hemorrhage within the skull indicating blunt force trauma. Laboratory analysis revealed traces of the drug PCP in Mason's system.

Forensic examination of the seized Adidas shoes indicated that the bottoms matched one of the three distinct footwear impressions found at the scene and on Mason's body. A sexual assault kit was done at the time of the autopsy. Control samples were obtained from Doyle, Shawn and Atkins. No semen was found on the anal and vaginal swabs, therefore there was no DNA evidence available for comparison. However, hair samples removed from a sheet used to wrap Mason's body for transport and from one of the bloody socks were similar to Atkins's hair and dissimilar to hairs from Mason, Doyle, Shawn and Darrin Anderson.

The jury also heard testimony regarding Shawn's negotiations. On February 13, 1995, prior to trial, Shawn entered into a plea bargain agreement wherein he pleaded guilty to First-Degree Murder and First-Degree Kidnapping and was sentenced to two concurrent life sentences with the possibility of parole. As part of the bargain, Shawn agreed to testify at Atkins' trial.

Michael Smith, who had been arrested in an unrelated matter, provided the police with the names of those he believed were responsible for the murder. Smith recounted statements made by Doyle regarding a killing to which Doyle claimed to have been a party. According to Smith, he and Doyle had overheard a girl tell some other people about her friend having been killed. At that time, Doyle commented to Smith that "we had to take someone out." Doyle further stated that he, Darrin Anderson, Shawn Atkins, and Sterling "Bubba" Atkins were at Anderson's house with a girl and that each had sex with the girl. While they were taking the girl home, she told the men that the she was going to report them for rape and jumped from the truck in which they were riding. They were eventually able to coax the girl back into the truck and decided to kill her rather than face possible rape charges. The girl was apparently so inebriated or under the influence of drugs that she was oblivious to the direction the men were traveling. When they arrived at a remote area, the

girl was pulled from the truck and choked. Unsuccessful in their attempt to choke her to death, the men then beat the girl. Finally, Doyle told Smith, two of the men held the girl down while the other repeatedly dropped a brick on her face until she died.

With information obtained form Smith, the police contacted Darrin Anderson. Testimony indicated Anderson told the police that, on the night of January 15, 1994, he was present with Doyle at the home of Shawn and Sterling "Bubba" Atkins. After arriving, the four left Atkins' residence to attend a nearby party. Anderson returned alone to Atkins' residence a short time later, and the other three returned thereafter in the company of Ebony Mason, who appeared inebriated or under the influence of drugs. Later, Mason asked for a ride home, and Anderson suggested that Doyle use Anderson's truck. Anderson awoke the next morning to find Doyle and the Atkins brothers asleep at Atkins' residence.

Investigators also interviewed Mark Wattley, another of Doyle's friends. Wattley told them that he was present during a conversation where Doyle made statements describing how Shawn Atkins was unable to subdue Mason and how Sterling "Bubba" Atkins intervened "and hit her with a head punch and dropped her." Thereafter, Doyle told Wattley that he (Doyle) began kicking Mason in the head. Eventually, one of the men grabbed a brick or a rock and hit the girl in the head. At one point in the conversation, Doyle demonstrated how he (Doyle) jumped in the air and caused both of his feet to come down on Mason during the beating.

FINDINGS OF FACT

1. The Court adopts the above Procedural History as its first Finding of Fact.

2. The Court adopts the above Statement of Facts as its second Finding of Fact.

3. This is Atkins' second state petition for post-conviction relief.

4. The current Petition for Writ of Habeas Corpus (Post-Conviction) was filed on November 4, 2009, approximately fourteen years after the filing of Atkins' Judgment of Conviction and twelve years after Remittitur was issued on direct appeal from the Judgment of Conviction.

5. The following claims are time-barred under NRS 34.726 as they were filed

more than one year from the Remittitur on direct appeal; Claim 1 – ineffective assistance of trial counsel (failure to: conduct an adequate investigation, present evidence of his alleged neurological impairments and psychiatric illnesses, and present adequate mitigation evidence which included physical and psychological abuse by his father); Claim 2 – the State allegedly coerced witness Shawn Atkins into testifying untruthfully; Claim 3 – the State used coercion to influence Shawn Atkins' testimony; Claim 4 – ineffective assistance of appellate counsel (failure to raise all calims presented in the instant petition); Claim 5 – inadequate review by the Nevada Superme Court; Claim 6 – cumulative error; Claim 8 – Kazalyn Instruction.

6. The following claims in the instant petition involve issues that either were, or could have been, raised at trial, on direct appeal or in a previous timely post-conviction petition. They are therefore procedurally barred under NRS 34.810 as either waived, successive or an abuse of the writ. Claim 1 – ineffective assistance of trial counsel (failure to: conduct an adequate investigation, present evidence of his alleged neurological impairments and psychiatric illnesses, and present adequate mitigation evidence which included physical and psychological abuse by his father); Claim 2 – the State allegedly coerced witness Shawn Atkins into testifying untruthfully; Claim 3 – the State used coercion to influence Shawn Atkins' testimony; Claim 4 – ineffective assistance of appellate counsel (failure to raise all calims presented in the instant petition); Claim 5 – inadequate review by the Nevada Superme Court; Claim 6 – cumulative error; Claim 7 – constitutionality of Nevada's lethal injection protocol; Claim 8 – Kazalyn Instruction.

7. In the State's Response and Motion to Dismiss, the State alleged laches under NRS 34.800. The instant petition was filed over fourteen years after the entry of the Judgment of Conviction. Therefore, the rebuttable presumption of prejudice to the State under NRS 34.800 applies.

8. The legal and factual issues surrounding the claims raised in the instant petition are intertwined, and the State is likely to have difficulty with memories, location and availability of witnesses from the 1990s, creating actual prejudice.

9. Atkins failed to meet his burden to prove facts by a preponderance of the evidence to rebut the presumption of prejudice.

10. The following claims are barred by the doctrine of law of the case as they were raised in previous proceeding and rejected by the Nevada Supreme Court: Claim 1 – ineffective assistance of trial counsel (failure to: conduct an adequate investigation, present evidence of his alleged neurological impairments and psychiatric illnesses, and present adequate mitigation evidence which included physical and psychological abuse by his father); Claim 2 – the State allegedly coerced witness Shawn Atkins into testifying untruthfully; Claim 3 – the State used coercion to influence Shawn Atkins' testimony; Claim 4 – ineffective assistance of appellate counsel (failure to raise all calims presented in the instant petition); Claim 5 – inadequate review by the Nevada Supreme Court; Claim 6 – cumulative error.

11. As good cause to excuse the procedural delays, Atkins asserts his need to exhaust his State claims in order to pursue Federal remedies. However, pursuit of federal remedies does not constitute good cause to overcome state procedural bars. Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989). Atkins also cites as to the Kazalyn claim, the Ninth Circuit decision Polk v. Sandoval, 503 F.3d 903 (2007). However, nothing in Polk v Sandoval indicates it is retroactive to cases that were final when the Nevada Supreme Court issued its opinion in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). Moreover, the Nevada Supreme Court in Nika v. State, 124 Nev. 1272, 198 P.3d 839 (2008), has ruled that Byford is not retroactive and does not apply to cases that were final when Byford was issued.

12. Even if the use of the Kazalyn Instruction constituted error, Atkins would not be entitled to relief since any such error would be harmless beyond a reasonable doubt. There was overwhelming evidence of premeditation and deliberation presented by the State. The evidence showed that the three defendants feared that Mason was going to report that Doyle had tried to rape her. They then proceeded to drive her to a remote area of the desert under the ruse of taking her home. After Doyle unsuccessfully attempted to have sex with Mason again, he stated that he "can't let the bitch live." It was after this point that Atkins

began to join Doyle in the brutal beating. Atkins further chocked Mason while Doyle beat her with a rock. Such evidence clearly shows premeditation and deliberation.

Furthermore, The State proceeded on two alternate theories of First Degree Murder liability. In addition to a theory based on premeditation and deliberation, the State also argued for a First Degree Murder conviction based on the felony murder rule. Jury Instruction No. 8 stated:

> There is a kind of murder which carry (sic) with it conclusive evidence of premeditation and malice aforethought. This class of murder is murder committed in the perpetration or attempted perpetration of Sexual Assault or Kidnapping. Therefore, a killing which is committed in the perpetration of the felony of Sexual Assault or Kidnapping is deemed to be Murder in the First Degree, whether the killing was intentional, unintentional or accidental. This is called the Felony-Murder rule.
>
> The specific intent to commit Sexual Assault or Kidnapping must be proven beyond a reasonable doubt.

Atkins' conviction for Kidnapping was upheld by the Nevada Supreme Court on direct appeal. Thus, the jury could have found that the murder was committed in the perpetration of the felony of Kidnapping. As there was overwhelming evidence the killing was committed during the course of a Kidnapping, any alleged error in the use of the Kazalyn Instruction is harmless.

13. Atkins' claims of ineffective assistance of trial and appellate counsel are, in themselves, procedurally barred.

14. In so far as Atkins may be raising claims of ineffective assistance of first post-conviction counsel, those claims are a procedurally barred as they have not been raised within a reasonable time. Remittitur issued from the Nevada Supreme Court's affirmance of the denial of Artkins' first petition on June 11, 2002. The instant petition was not filed until November 2009.

15. Actions of Atkins' counsel are attributable to Atkins.

16. Atkins' conviction became final when Remittitur issued on his direct appeal on April 3, 1997. Neither Byford nor Polk is applicable to Atkins' conviction.

17. None of allegations raised to explain the delays in bringing these claims

constitute good cause.

18. Atkins' challenge of Nevada's lethal injection protocol is not cognizable in a post-conviction petition for writ of habeas corpus.

19. To the extent that any finding of fact can also be considered a conclusion of law, it shall be so treated.

CONCLUSIONS OF LAW

1. Under NRS 34.810(1)(b) every challenge to a conviction that could have been raised at trial or on direct appeal cannot be raised in a post-conviction habeas proceeding. In addition, under NRS 34.810(2), all claims of ineffective assistance of trial and appellate counsel are required to be raised in a first petition for post-conviction relief. Failure to do so constitutes either a successive petition or an abuse of the writ. Any claims in a post-conviction petition that fail to comply with the statute are procedurally barred.

2. NRS 34.810(2) incorporates the concept that, where a subsequent petition raises new or different grounds for relief and those grounds could have been asserted in a prior petition, it is an abuse of the writ. In essence, it encompasses the same concerns as NRS 34.810(1)(b), the waiver provision, except that it applies to all petitions, not just those arising from trial. It also reflects the policy behind the Law of the Case Doctrine; rulings on previous issues cannot be avoided by a more detailed or precisely focused argument, Hogan, 109 Nev. 952, 860 P.2d 710 (1993). In other words, if the information or argument was previously available, it is an abuse of the writ to wait to assert it in a second or subsequent petition. McClesky v. Zant, 499 U.S. 457, 497-498 (1991).

3. As noted in Finding #6, all of Atkins' claims and sub-claims were either raised in previous proceedings and denied on their merits or could have been raised in previous proceedings and were not. Thus they are barred under NRS 34.810.

4. When an issue has already been decided on the merits by the Nevada Supreme Court, the Court's ruling is law of the case, and the issue will not be revisited. "The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (*quoting* Walker v.

State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Hall, 91 Nev. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001) (*citing* McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). As noted in Finding #11, all of Atkins' claims which have been previously raised and rejected by the Nevada Supreme Court are barred from reconsideration by the doctrine of law of the case.

5. Under NRS 34.726, any challenge to Atkins' conviction based upon a substantive claim of ineffective assistance of trial and/or appellate counsel was required to be filed within one year of the Remittitur from direct appeal, which was April 3, 1997. The instant petition was filed in 2009, thus, as noted in Finding #5, all claims and subclaims are untimely and procedurally barred under NRS 34.726.

6. NRS 34.726 is strictly enforced. In Gonzales v. State, 118 Nev. 61, 590 P.3d 901 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two days late, pursuant to the "clear and unambiguous" mandatory provisions of NRS 34.726(1).

7. Besides the provisions of NRS 34.726, NRS 34.800 recognizes that a post-conviction petition should be dismissed when delay in presenting issues would prejudice the State in responding to the petition or in retrial. NRS 34.800(1)(a)(b).

8. NRS 34.800(2) creates a rebuttable presumption of prejudice to the State where a period of five years has elapsed between the filing a decision on direct appeal of a Judgment of Conviction and the filing of a petition challenging the validity of a Judgment of Conviction. To invoke the presumption, the statute requires that the State plead laches in its motion to dismiss the petition. NRS 34.800(2). Once the presumption is invoked, the petitioner has the burden of pleading specific facts to overcome the presumption.

9. The decision on direct appeal was rendered in 1996. The instant petition was filed in 2009. The State pleaded laches in its motion to dismiss; therefore the presumption of prejudice applies.

10. Because Atkins failed to plead or prove factual allegations to overcome the presumption of prejudice all claims, with the exception of Claim 7, are procedurally barred under NRS 34.800.

11. To overcome the procedural bars under NRS 34.726, NRS 34.800 and NRS 34.810, Atkins must show either: 1) Show good cause and prejudice for the delay, or 2) Manifest injustice.

12. Good cause means an impediment external to the defense that prevented petitioner from complying with the state procedural default rules. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); *citing* Pellegrini v. State, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001); Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994); Passanisi v. Director, 105 Nev. 63, 66, 769 P.2d 72, 74 (1989); see also Crump v. Warden, 113 Nev. 293, 295, 934 P.2d 247, 252 (1997); Phelps v. Director, 104 Nev. 656, 764 P.2d 1303 (1988).

13. An external impediment exists if the factual or legal basis for a claim was not reasonably available to counsel, or where some interference by officials' made compliance impracticable. Hathaway, 71 P.3d at 506; *quoting* Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645 (1986); see also Gonzales, 118 Nev. at 595, 53 P.3d at 904; *citing* Harris v. Warden, 114 Nev. 956, 959-60 n. 4, 964 P.2d 785 n. 4 (1998).

14. Fault of the petitioner encompasses not only a petitioner's own actions, but also actions of a petitioner's counsel or agents. For example, trial counsel's failure to forward a copy of the file to a petitioner is not good cause for excusing a delay in filing. See Phelps, 104 Nev. at 660; Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995). Other than implying that any "fault" in the delay was that of his attorneys, Atkins presented no evidence of an external impediment.

15. Atkins had a right to effective assistance of counsel in his first post-conviction proceeding, so he may raise claims of ineffective assistance of post-conviction counsel in a successive petition. See McNelton v. State, 115 Nev. 296, 416 n.5, 990 P.2d 1263, 1276 n.5 (1999); Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997). However, he must

raise these matters in a reasonable time to avoid application of procedural default rules. See Pellegrini v. State, 117 Nev. 860, 869-70, 34 P.3d 519, 525-26 (2001) (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506-07 (2003) (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing).

16. A claim of ineffective assistance of counsel that is procedurally barred cannot constitute good cause for excusing the procedural bars, for itself or any other claim. State v. District Court (Riker), 121 Nev. 225, 112 P.3d 1070 (2005). See also Edwards v. Carpenter, 529 U.S. 446, 453 (2000) (procedurally barred ineffective assistance of counsel claim is not good cause). See generally Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506-07 (2003) (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing).

17. As Atkins fails to show good cause for not bringing his ineffective assistance of counsel claims in a timely manner, they are procedurally barred and cannot constitute good cause for overcoming the procedural bars. Moreover, as to the claims of ineffective assistance of counsel that were brought in prior petitions and decided on their merits, these claims would be successive and new arguments in support of the claims would be an abuse of the writ, so they are also procedurally barred under NRS 34.810 and cannot constitute good cause for delay. Any claims that were not previously raised in the first post-conviction petition would be waived and barred under NRS 34.810(1)(b) and likewise cannot establish good cause for delay.

18. Atkins claims Polk v. Sandoval constitutes good cause for the delay in raising his challenge to the Kazalyn Instruction. As noted in Nika v. State, 198 P.3d 839 (2008), Polk v. Sandoval misconstrues the Nevada Supreme Court's decision in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). Further Nika notes that Byford would only apply to cases that were not final when Byford was issued. Atkins' case was final in 1997, and Byford was issued in 2000. Thus Byford and Polk are not applicable to Atkins and cannot constitute

good cause for the delay in raising the Kazalyn issue in the instant petition.

19. Pursuit of federal remedies does not constitute good cause to overcome state procedural bars. Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989). As such, Atkins' need to exhaust his state remedies for several grounds in his Federal Petition does not constitute good cause to overcome the procedural bars.

20. Atkins has not demonstrated he is actually innocent of either the crime or the death penalty, therefore he has not demonstrated manifest injustice to overcome the procedural bars.

21. Atkins' challenge of Nevada's lethal injection protocol is not cognizable in a post-conviction petition for writ of habeas corpus. McConnell v. State, 212 P.3d 307, 311 (Nev. 2009).

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus (Post-Conviction) shall be, and it is, hereby dismissed.

DATED this 21st day of March, 2012.

DISTRICT JUDGE

STEVEN B. WOLFSON
DISTRICT ATTORNEY
Nevada Bar #001565

BY
NANCY A. BECKER
Deputy District Attorney
Nevada Bar #00145

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of Findings of Fact, Conclusions of Law and Order Dismissing Atkins' Second State Post-Conviction Petition for Writ of Habeas Corpus, was made this 19th day of March, 2012, by facsimile transmission to:

MARC P. PICKER, ESQ.
FAX #(775) 324 - 5444

Eileen Davis

Employee, District Attorney's Office

NAB/ed

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