

1 FERNANDO NAVARRO HERNANDEZ

2 Inmate Name

3 Prison No. 66793

4 Ely State Prison

5 P.O. Box 1989

6 Ely, Nevada 89301

7 In Propria Persona

8 **UNITED STATES DISTRICT COURT**

9 **DISTRICT OF NEVADA**

10 FERNANDO NAVARRO HERNANDEZ

11 Petitioner,

12 v.

13 E.K. McDANIEL, Warden, and
14 CATHERINE CORTEZ MASTO,
Attorney General of the State of Nevada,

15 Respondents.

Case No. _____

**PETITION FOR A WRIT OF HABEAS
CORPUS PURSUANT TO 28 U.S.C §
2254 BY A PERSON IN STATE
CUSTODY SENTENCED TO DEATH
EXECUTION IS SCHEDULED FOR**

No Execution Date Scheduled

17 1. Name and location of court, and name of judge, that entered the judgment of conviction you
18 are challenging: Eighth Judicial District Court, Clark County, Nevada, Honorable Sally
19 Loehrer.

20 2. Full date judgment of conviction was entered: 09/28/2000.

21 3. Did you appeal the conviction? X Yes ____ No.

22 Date appeal decided: 08/02/02.

23 4. Did you file a petition for post-conviction relief or petition for habeas corpus in the state
24 court? X Yes ____ No.

25 If yes, name the court and date the petition was filed: Eighth Judicial District Court, Clark
County, Nevada, 03/12/03 (Petition for Writ of Habeas Corpus) and 03/08/04 (Supplemental
Petition for Writ of Habeas Corpus).

26 Did you appeal from the denial of the petition for post-conviction relief or petition for writ
27 of habeas corpus? X Yes ____ No. Date the appeal was decided: 10/30/08. **Have all of the**
28 **grounds stated in this petition been presented to the state supreme court?**

1 Yes X No.

2 **If no, which grounds have not? 1 (part), 3 (part), 4 (part), 5 (part), 6 (part), 7 (part), 9, 12**
 3 **(part), 13, 16, 18, 19 (part), and 20.**

4 5. Date you are mailing (or handing to correctional officer) this petition to this
 5 court: / / .

6 **Attach to this petition a copy of all state court written decisions regarding this conviction.**

7 6. Is this the first federal petition for writ of habeas corpus challenging this conviction?
 8 X Yes No. If no, what was the prior case number? Not Applicable.
 9 And in what court was the prior action filed? Not Applicable.

10 Was the prior action denied on the merits or dismissed for procedural reasons (check
 11 one). Date of decision: / / . Are any of the issues in this petition raised in the prior
 12 petition? Yes No. If the prior case was denied on the merits, has the Ninth Circuit
 13 Court of Appeals given you permission to file this successive petition? Yes No.

14 7. Do you have any petition, application, motion or appeal (or by any other means) now pending
 15 in any court regarding the conviction that you are challenging in this action? Yes X No.
 16 If yes, state the name of the court and the nature of the proceedings:

17 8. Case number of judgment of conviction being challenged: C162952.

18 9. Indicate which aggravating circumstances were found by the jury (if the same circumstance
 19 was found more than once, indicate the number of times): **Aggravating Circumstances Nev.
 20 Rev. Stat. § 200.033**

- | | |
|---|--|
| 1. <u> </u> under sentence of imprisonment | 7. <u> </u> murder of peace officer or fireman |
| 2. <u> </u> prior murder or violent felony | 8. <u>X</u> torture, depravity of mind or mutilation |
| 3. <u> </u> great risk of death to more
than one person | 9. <u> </u> random and without apparent motive |
| 4. <u>X</u> violent felony murder | 10. <u> </u> victim was under 14 years of age |
| 5. <u> </u> prevent arrest or to escape | 11. <u> </u> murder: race/religion/disability/sexual
orientation |
| 6. <u> </u> murder for monetary gain | 12. <u> </u> multiple murders |

21 10. What was your plea? Guilty X Not Guilty Nolo Contendere. If you pleaded
 22 guilty or nolo contendere pursuant to a plea bargain, state the terms and conditions of the
 23 agreement:

24
 25 11. Who was the attorney that represented you in the proceedings in state court? Identify
 26 whether the attorney was appointed, retained, or whether you represented yourself *pro se*
 (without counsel).

27 Name of Attorney

Appointed

Retained

Pro se

1	arraignment and plea	<u>David M. Schieck, Esq.</u>	<u>X</u>	<u> </u>	<u> </u>
	trial/guilty plea	<u>David M. Schieck, Esq.</u>	<u>X</u>	<u> </u>	<u> </u>
2	sentencing	<u>David M. Schieck, Esq. &</u>	<u>X</u>	<u> </u>	<u> </u>
		<u>Christopher Oram, Esq.</u>	<u>X</u>	<u> </u>	<u> </u>
3	direct appeal	<u>JoNell Thomas, Esq.</u>	<u>X</u>	<u> </u>	<u> </u>
4	1st post-conviction petition	<u>Anthony Sgro, Esq.</u>	<u>X</u>	<u> </u>	<u> </u>
	appeal from post-conviction	<u>Anthony Sgro, Esq. &</u>	<u>X</u>	<u> </u>	<u> </u>
5	2nd post-conviction petition	<u>Not Applicable</u>	<u> </u>	<u> </u>	<u> </u>
6	appeal from 2nd post-conviction	<u> </u>	<u> </u>	<u> </u>	<u> </u>

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1 State concisely every ground for which you claim that the state court conviction and/or
 2 sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may
 3 attach up to two extra pages stating additional grounds and/or supporting facts. You must
 4 raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised
 5 in this petition will likely be barred from being litigated in a subsequent action.

6 **GROUND 1**

7 Mr. Hernandez's convictions and death sentence are invalid under federal constitutional
 8 guarantees of due process, equal protection, the effective assistance of counsel, a fair and
 9 impartial jury, and a reliable sentence because a biased and improperly impassioned jury
 10 determined his sentence. U.S. Const. Amends. V, VI, VIII & XIV.

11 **Supporting Facts**

12 Mr. Hernandez was convicted of first degree murder with use of a deadly weapon, sexual
 13 penetration of a dead human body, burglary and second degree kidnaping for allegedly killing his
 14 ex-wife inside her residence and taking their three and a half year old child, Ana, from the home.
 15 After having found Mr. Hernandez guilty of these crimes in the guilt/innocence phase of the trial,
 16 but before commencement of the penalty phase, two jurors and one alternate juror were so
 17 impassioned by their sympathy for the child that, against the trial court's orders, they went
 18 together and purchased a gift for the child. ROA 1778-79. This unprecedented act demonstrates
 19 that these jurors entered into the penalty phase of the trial unduly influenced by passion and
 20 biased against Mr. Hernandez. Furthermore, it appears from the record that the gift was present
 21 in the jury room throughout the jury's penalty phase deliberations. Id. It is inconceivable that
 22 the presence of a gift for the victim's small child did not improperly emphasize victim impact
 23 evidence in the jurors' minds while they decided whether Mr. Hernandez should live or die.

24 **A. The Jurors Who Sat on Mr. Hernandez's Jury Were Actually Biased Against Mr. Hernandez.**

25 During testimony in the guilt/innocence phase of Mr. Hernandez's trial, several witnesses
 26 testified as to out of court statements made by the victim's child regarding her having witnessed
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1 Mr. Hernandez kill her mother. Furthermore, over defense objection, the blown up portrait of the
2 deceased used for "identification" purposes prominently displayed the deceased holding the
3 child. TT 6/26/2000 (1:30 p.m.) p. 98. It is apparent from the actions of the jurors who
4 purchased the gift for the child that the repeated reminders that the victim's three and a half year
5 old child witnessed the crime improperly incited the passions of the jury and biased them against
6 Mr. Hernandez before any penalty phase evidence had even been presented. The jury that
7 sentenced Mr. Hernandez to death improperly considered victim impact evidence during the
8 guilt/innocence phase of his trial and did not enter into the penalty phase with the impartiality
9 and open-mindedness required of jurors by the United States Constitution.

10
11 The jurors' actions in purchasing the gift also violated their duty not to discuss the case or
12 form any opinions about the case prior to reaching their verdict and thus constituted juror
13 misconduct. The trial court properly admonished the jury after the verdicts were returned in the
14 guilt/innocence phase of Mr. Hernandez's trial as follows:

15 Ordinarily after the verdict comes in, we excuse the jurors, we thank them and give
16 them their juror checks, but because your job is not yet complete, we will simply
17 excuse you until one o'clock Tuesday afternoon. You can certainly tell your family
18 that a verdict has been rendered. However, you can't talk about the case. You can't
19 tell anyone anything about the case until after you are excused as a juror and that will
20 not happen until sometime next week. So during the weekend recess you are
21 admonished not to talk amongst yourselves or with anyone else on any subject related
22 to [sic] or read, watch or listen to any report or commentary on the trial or any person
23 connected with the trial by any medium of information including, but not limited to,
24 television radio or newspapers or form or express any opinion on any subject
25 connected with the trial until the case is finally submitted to you.

26 ROA 1565.

27 The jurors who purchased the gift implausibly denied discussing the case with each other
28 when the trial court questioned them after Mr. Hernandez's death sentence had been returned.
ROA 1790. The decision to buy the gift, however, was itself a communication about the case.
The decision to buy the gift was an expression of sympathy for the child and thus constituted an
implicit mutual acknowledgment of the weight of the victim impact evidence in Mr. Hernandez's
case. Not only was this juror misconduct, it was also a violation of the jurors' oaths not to form

1 any opinions or reach any conclusions prior to hearing all of the evidence.

2 Victim impact evidence is only admissible during the penalty phase of a capital case.

3 Even then, it is only to be considered after the jury has found the existence of aggravating
4 circumstances beyond a reasonable doubt and that the aggravating circumstances outweigh any
5 mitigating circumstances. The actions of the jurors in this case are an objective demonstration
6 that they unconstitutionally violated the law. The jurors were considering victim impact
7 evidence before the penalty phase of Mr. Hernandez's trial even began. Furthermore, they
8 clearly accorded great weight to that evidence because they took the highly unusual and
9 emotionally driven step of purchasing a gift as a gesture of sympathy for the victim's daughter.
10 This extreme display of sympathy for the victim's daughter evidences actual bias against Mr.
11 Hernandez, whom they had already found guilty of first degree murder.
12

13 **B. The Trial Court Committed Error by Refusing to Declare a Mistrial Based on the**
14 **Jurors' Misconduct.**

15 Upon being informed by the trial court of the jurors' improper actions in purchasing the
16 gift, trial counsel requested to question the jurors and then move for a mistrial. ROA 1779. The
17 trial court found it inappropriate to question the jurors during deliberations and decided to wait
18 until after the jury's verdict. Id. After the jury returned its verdict of death, the trial judge asked
19 Traci Almond (Juror No. 620) and Michelle Loren (Juror No. 624), the two jurors who, along
20 with an alternate, purchased the gift for the child to stay behind. The following colloquy then
21 took place between the trial judge and Juror Loren:

22 TRIAL COURT: Miss Loren and Miss Almond, I understand that the two of you
23 along with one of the alternates who is not with you us [sic] anymore, purchased a
24 gift for the minor child, Ana Hernandez, and if you have that, you may certainly give
25 that either to the grandmother or to the district attorney to transfer to the
26 grandmother. However we do have to know, because we give you this
admonishment that you can't talk to each other, you can't discuss the trial or any of
the facts, et cetera, et cetera, I do have to ask you how it was that you decided to go
together to purchase a present for the child.

27 JUROR LOREN: The day that we were here all day of Friday, we were walking out,
28 and I think it was Amber that said I wish we can get something for Ana. I said, why
don't we do that, and we took Traci because she had a little girl too about the same

1 age. We didn't talk about the trial at all. We just got the sizes of clothes.

2 ROA 1790.

3 Although Juror Loren represented to the trial court that the three did not discuss the trial
4 or "any subject connected with the trial," (ROA 1565), while shopping for the gift, she did so
5 only after the trial court reminded her that such discussions were impermissible. Despite Juror
6 Loren's representations that the three did not discuss the case, the actions she described were a
7 violation of her oath as a juror and demonstrate that she was motivated by sympathy and was
8 therefore biased against Mr. Hernandez. Mr. Hernandez hereby incorporates the argument set
9 forth in GROUND 1(A) as if the same were set forth fully herein.

10 After this brief inquiry by the trial court, trial counsel informed the trial court that they
11 would be filing a motion for a mistrial based upon the jurors' actions. ROA 1792. During the
12 sentencing hearing the trial court noted for the record that the motion for a mistrial had been
13 made and was denied. ROA 1880. It was constitutional error for the trial court to deny trial
14 counsel's motion for a mistrial. It was apparent from the actions of the jurors that they had
15 violated their oaths and were unduly biased against Mr. Hernandez before the penalty phase of
16 his trial even began. The trial court should have granted trial counsel's motion and declared a
17 mistrial.
18

19 **C. Trial Counsel Were Ineffective for Failing to Move the Trial Court to Question All**
20 **of the Jurors Regarding Any Conversations Concerning the Purchase of the Gift.**

21 Trial counsel were ineffective for failing to insist that the entire jury be questioned
22 regarding their knowledge of the purchase of the gift and any conversations they may have had
23 regarding it. Constitutionally effective counsel would not have depended on the word of the
24 jurors who engaged in the misconduct that they did not discuss the case. Trial counsel should
25 have insisted that the entire jury be questioned to determine if anyone could confirm or contradict
26 Juror Loren's statements that they did not discuss Mr. Hernandez's case when making the
27 decision to purchase the gift. They also should have been questioned about the impact of the gift
28

1 that sat in the room during their deliberations.

2 **D. The Presence of Biased Jurors on Mr. Hernandez's Jury Constituted Structural**
3 **Error.**

4 The bias of these jurors deprived Mr. Hernandez of his Sixth and Fourteenth Amendment
5 rights to a fair and impartial jury and due process in the penalty phase of his trial. The presence
6 of even one biased juror constitutes structural error. Mr. Hernandez's sentence must therefore be
7 reversed and he is entitled to a new trial before a fair and impartial jury. In the alternative, Mr.
8 Hernandez is entitled to a new trial if a reasonable probability exists that the misconduct of the
9 jurors could have affected the verdict. The state has the burden of proving that the error was
10 harmless beyond a reasonable doubt. Mr. Hernandez respectfully submits that the state cannot do
11 so in this case.

12 **E. Ineffective Assistance of Appellate and State Post-Conviction Counsel**

13 To the extent that Mr. Hernandez's appellate counsel failed to fully raise this issue on
14 direct appeal she was ineffective. There could be no reasonable appellate strategy, reasonably
15 calculated to further Mr. Hernandez's best interests, for failing to raise any of the claims
16 contained herein. To the extent that Mr. Hernandez's state post-conviction counsel failed to raise
17 this issue, they were ineffective. There could be no reasonable strategy, reasonably calculated to
18 further Mr. Hernandez's best interests, for post-conviction counsel to fail to raise any of the
19 claims contained herein.

20 **Exhaustion of state court remedies regarding Ground 1:**

21 **► Direct Appeal:**

22 Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

23 X Yes No. (Partially)

24 If no, explain why not: To the extent that direct appeal counsel failed to raise this claim, they were
25 ineffective.
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1 **► First Post Conviction:**

2 Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

3 ___ Yes X No.

4 If no, explain why not: State post-conviction counsel were ineffective for failing to raise this claim.

5 If yes, name of court:

6 Did you receive an evidentiary hearing? ___ Yes ___ No. Did you appeal to the Nevada Supreme
7 Court? ___ Yes ___ No.

8 If no, explain why not: _____
9 _____.

10 If yes, did you raise this issue? ___ Yes ___ No.

11 If no, explain why not: _____
12 _____.
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14 **► Second Post Conviction:**

15 Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas
16 corpus? ___ Yes ___ No.

17 If yes, explain why: _____
18 _____.

19 If yes, name of court: _____ date petition filed
20 ___ / ___ / ___.

21 Did you receive an evidentiary hearing? ___ Yes ___ No.

22 Did you appeal to the Nevada Supreme Court? ___ Yes ___ No. If no, explain why not:
23 _____
24 _____.

25 If yes, did you raise this issue? ___ Yes ___ No.

26 If no, explain why not: _____
27 _____.
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1 **► Other Proceedings:**

2 Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence
3 overturned based on this issue (such as administrative remedies)? ____ Yes X No.

4 If yes, explain: _____.

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GROUND 2

Mr. Hernandez's convictions and death sentence are invalid under federal constitutional guarantees of due process, equal protection, and a reliable sentence because it was legally impossible for him to kidnap his own daughter. Because Mr. Hernandez could not legally commit kidnaping, he could not be guilty of first degree felony murder predicated on the felony of kidnaping. U.S. Const. Amends. V, VIII & XIV.

Supporting Facts

Mr. Hernandez was charged with first degree murder pursuant to three alternative theories. These three theories were: 1) premeditated and deliberate murder; 2) felony murder pursuant to NRS 200.030(1)(b); and 3) murder by torture. Mr. Hernandez was also convicted of second degree kidnaping pursuant to NRS 200.310(2) for taking his daughter, over whom he had joint legal custody pursuant to a divorce decree, after the crime occurred.

There was no special verdict form in the guilt/innocence stage of Mr. Hernandez's trial and it is therefore impossible to determine which theory of murder the jury convicted him under. Mr. Hernandez contends that it was legally impossible for him to be guilty of second degree kidnaping under the facts of this case. To the extent that his conviction for first degree murder may have been predicated on the felony of kidnaping, Mr. Hernandez's conviction must be reversed and he is entitled to a new trial.

A. It is Legally Impossible for Mr. Hernandez to be Guilty of Kidnaping.

It is legally impossible for Mr. Hernandez to be guilty of kidnaping for two reasons. First, Nevada law provides for a specific offense addressing cases where a parent takes a child from the physical custody of the other parent thereby making the general offense of kidnaping inapplicable. Second, at the time of the deceased's death, Mr. Hernandez became the sole custodial parent of his daughter and he could therefore not be guilty of the kidnaping offense.

It is an axiomatic rule of statutory construction that the terms of a more specific statute must be applied when a more general statute speaks to the same general concern. NRS 125.510

1 provides that orders establishing custody of a child must contain the
2 following provision:

3 PENALTY FOR VIOLATION OF ORDER: THE ABDUCTION, CONCEALMENT
4 OR DETENTION OF A CHILD IN VIOLATION OF THIS ORDER IS
5 PUNISHABLE AS A CATEGORY D FELONY AS PROVIDED IN NRS 193.130.
6 NRS 200.359 provides that every person having a limited right of custody to a child
7 or any parent having no right of custody to the child who willfully detains, conceals
8 or removes the child from a parent, guardian or other person having lawful custody
to or a right of visitation of the child in violation of an order of this court, or removes
the child from the jurisdiction of the court without the consent of either the court or
all persons who have the right to custody or visitation is subject to being punished
for a category D felony as provided in NRS 193.190.

9 NRS 200.359 specifically addresses the removal of a child from one parent by the other parent in
10 violation of a court order. A violation of NRS 200.359 involves the crime of detaining,
11 concealing or removing a child from a person having lawful custody. At the time of the crimes
12 for which Mr. Hernandez was convicted he had joint custody of the child with his ex-wife
13 pursuant to a court order. ROA 1153, 1341. Therefore, NRS 200.359 applied under the facts of
14 Mr. Hernandez's case. Mr. Hernandez was so notified by court order.

15 Rather than charge Mr. Hernandez with violation of NRS 200.359, the state improperly
16 charged him with kidnaping pursuant to NRS 200.310. NRS 200.310, unlike NRS 200.359,
17 defines the crimes of first and second degree kidnaping in general terms and does not speak to
18 the situation where one person having legal custody of a child removes the child from another
19 person having legal custody in violation of a court order. Since NRS 200.359 specifically
20 addresses the circumstances in Mr. Hernandez's case, it, and not NRS 200.310, applied and it
21 was constitutionally impermissible to convict him of kidnaping.
22

23 Applying the kidnaping statute after Mr. Hernandez had been specifically put on notice
24 that a violation of his custody order would be deemed a violation of NRS 200.359 was a
25 retroactively applied change in law. Application of the kidnaping statute in Mr. Hernandez's
26 case violated the doctrine of equitable estoppel because he had specifically been told by a court
27 of competent jurisdiction that NRS 200.359 would apply if he unlawfully took his child.
28

1 Application of the kidnaping statute was a violation of Mr. Hernandez's rights to due process,
 2 equal protection and a fair trial. It was also a violation of the prohibition against the application
 3 of ex post facto laws.

4 **B. Since Mr. Hernandez's Conviction of Kidnaping is Constitutionally Invalid He is**
 5 **Actually Innocent of Felony Murder Predicated on Kidnaping.**

6 Under Nevada law a person is not guilty of felony murder simply because someone is
 7 killed during a perpetration of all felonies. The Nevada legislature determined that unplanned
 8 murder should be elevated to first degree only when the murder occurs during the commission or
 9 attempted commission of specific felonies. These felonies are set forth in NRS 200.030(1)(b)
 10 and are as follows: "...sexual assault, kidnaping, arson, robbery, burglary, invasion of the home,
 11 sexual abuse of a child, sexual molestation of a child under the age of 14 years, child abuse or
 12 abuse of an older person or vulnerable person pursuant to NRS 200.5099."

13 As set forth in GROUND 2(A) Mr. Hernandez could only be guilty of the crime of
 14 detention, concealment or removal of a child from a person having lawful custody under NRS
 15 200.359 under the facts of this case. He could not legally be guilty of kidnaping. Since he could
 16 not be guilty of kidnaping he could not be guilty of first degree murder under NRS
 17 200.030(1)(b).

18 **C. Ineffective Assistance of State Post-Conviction Counsel**

19 To the extent that Mr. Hernandez's state post-conviction counsel failed to raise this issue they
 20 were ineffective. There could be no reasonable strategy, reasonably calculated to further Mr.
 21 Hernandez's best interests, for post-conviction counsel to fail to raise any of the claims contained
 22 herein.
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24 **Exhaustion of state court remedies regarding Ground 2:**

25 **► Direct Appeal:**

26 Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

27 X Yes No.
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1 If no, explain why not:

2 ► **First Post Conviction:**

3 Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

4 ___ Yes X No.

5 If no, explain why not: State habeas corpus counsel were ineffective in failing to fully raise this
6 meritorious constitutional claim.

7 If yes, name of court:

8 Did you receive an evidentiary hearing? ___ Yes ___ No. Did you appeal to the Nevada Supreme
9 Court? ___ Yes ___ No.

10 If no, explain why not: _____
11 _____
12 _____.

13 If yes, did you raise this issue? ___ Yes ___ No.

14 If no, explain why not: _____
15 _____.

16 ► **Second Post Conviction:**

17 Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas
18 corpus? ___ Yes ___ No.

19 If yes, explain why: _____
20 _____.

21 If yes, name of court: _____ date petition filed
22 ____/____/____.

23 Did you receive an evidentiary hearing? ___ Yes ___ No.

24 Did you appeal to the Nevada Supreme Court? ___ Yes ___ No. If no, explain why not:
25 _____
26 _____
27 _____.

28 If yes, did you raise this issue? ___ Yes ___ No.

1 If no, explain why not: _____

2 _____.

3 ▶ **Other Proceedings:**

4 Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence
5 overturned based on this issue (such as administrative remedies)? ____ Yes X No.

6 If yes, explain:

7 _____.

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GROUND 3

Mr. Hernandez's convictions and death sentence are invalid under federal constitutional guarantees of due process, equal protection, the effective assistance of counsel, a fair and impartial jury, and a reliable sentence because trial counsel were ineffective in developing and presenting their state of mind defense. U.S. Const. Amends. V, VI, VIII & XIV.

Supporting Facts

A. Trial Counsel Were Ineffective in their Development and Presentation of a State of Mind Defense.

Mr. Hernandez's trial counsel chose to admit that Mr. Hernandez killed his ex-wife, but argue that the crime was second degree murder rather than first degree murder. Trial counsel did not properly develop this defense, however, and presented little evidence to the jury from which it could conclude that Mr. Hernandez lacked the necessary mens rea to commit the crime of first degree murder. This admission to the killing without adequately developing evidence to support a state of mind defense relieved the state of its burden to prove each and every element of the crime of first degree murder and essentially left Mr. Hernandez with no defense at all.

During closing argument in the guilt/innocence phase of Mr. Hernandez's trial, trial counsel argued to the jury, "...that's what this case is about then, that is murder of the second degree, not murder of the first degree." TT 7/14/2000 p. 109. Trial counsel's entire argument focused on convincing the jury that the killing was the result of some extreme and sudden passion and that it was not the result of premeditation and deliberation. Trial counsel did not contradict any of the evidence presented by the state, but instead tried to raise the inference that Mr. Hernandez's actions were inconsistent with first degree murder and that he should be convicted of second degree murder instead.

Trial counsel's failure to investigate and develop evidence to support the state of mind defense fell below an objective standard of reasonable professional conduct. Trial counsel should have fully investigated all aspects of Mr. Hernandez's emotional state prior to and at the

1 time of the killing. Reasonably effective trial counsel would have interviewed and presented
2 witnesses who were knowledgeable about Mr. Hernandez's relationship with his ex-wife and the
3 emotional effect their divorce had on Mr. Hernandez. In light of evidence that Mr. Hernandez
4 was highly intoxicated at the time of the killing, reasonably effective trial counsel would have
5 retained and called an expert to explain to the jury the effects that extreme intoxication would
6 have had on Mr. Hernandez's emotional state and inability to reason and form the necessary
7 intent to commit first degree murder.

8 Trial counsel's presentation of the state of mind defense was also ineffective because Mr.
9 Hernandez was charged under the alternative theories of: 1) premeditated and deliberate murder;
10 2) felony murder; and 3) murder by torture. Trial counsel's defense strategy went only to the
11 theory of premeditated and deliberate murder. Even if the jury believed trial counsel's argument
12 that the killing was not premeditated and deliberate it could still find Mr. Hernandez guilty of
13 first degree murder under one of the two alternative theories given the instructions the jury was
14 given.
15

16 Finally, especially in light of their failure to develop Mr. Hernandez's defense through
17 witnesses and expert testimony, trial counsel were ineffective for failing to call Mr. Hernandez to
18 testify. No one would be in a better position to explain to the jury Mr. Hernandez's state of mind
19 at the time of the killing than Mr. Hernandez himself. Trial counsel's ineffective development
20 and presentation of evidence to support the state of mind defense relieved the state of its burden
21 to prove each and every element of first degree murder beyond a reasonable doubt. Trial
22 counsel's ineffective presentation of the state of mind defense left Mr. Hernandez with
23 essentially no defense at all other than the unsupported arguments of trial counsel and was thus
24 an abdication of their professional and constitutional duties to zealously represent Mr.
25 Hernandez's best interests.
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1 **B. Trial Counsel Failed to Communicate Effectively With Mr. Hernandez and**
2 **Conceded His Culpability Without His Informed Consent.**

3 Trial counsel failed to adequately communicate with Mr. Hernandez throughout their
4 representation. In fact, Mr. Hernandez twice moved to have his counsel replaced, but his
5 motions were wrongfully denied. Trial counsel repeatedly tried to coerce Mr. Hernandez into
6 accepting a guilty plea and, apparently because they were convinced of his guilt, made no real
7 efforts to develop a guilt phase defense.

8 Trial counsel admitted to second degree murder on behalf of Mr. Hernandez, and by
9 conceding Mr. Hernandez's guilt, trial counsel ensured that an adversarial proceeding would not
10 be conducted. Any consent to trial counsel's strategy was unknowing and involuntary. Trial
11 counsel's failure to effectively communicate with Mr. Hernandez prevented him from
12 understanding their trial strategy and any alleged consent to the strategy was not knowing.

13 **C. Trial Counsel Were Ineffective for Failing to Properly Challenge the State's**
14 **Scientific Evidence.**

15 Trial counsel never challenged the qualifications of the state's witnesses or the reliability
16 of their testing. Trial counsel should have challenged the state's scientific evidence and required
17 the state to prove that their experts were qualified and that their testing was accurate. Because
18 they did not, constitutional procedures, standards, and protocols were not followed. Mr.
19 Hernandez's rights were violated by the lack of standards and trustworthiness of the evidence
20 admitted against him.

21 **D. Cumulative Effect of Ineffective Assistance of Trial Counsel**

22 Multiple errors of trial counsel, when their cumulative nature are considered, also
23 deprived Mr. Hernandez of his constitutional right to a fair trial. Here, trial counsel failed, inter
24 alia, to (1) communicate in any meaningful fashion with Mr. Hernandez, (2) failed to adequately
25 investigate the crime and consult with expert witnesses, (3) failed to ask for a competency
26 determination, (4) failed to file many appropriate and necessary motions, (5) failed to insist upon
27 the use of appropriate scientific evidentiary standards and legal procedures, (6) failed to object to
28

1 many instances of prosecutorial misconduct, (7) failed to properly object to erroneous proposed
 2 jurors, conduct sufficient inquiry of jurors, and properly select jurors, (8) failed to ensure that all
 3 bench conferences were properly recorded, and, most importantly, (9) improperly conceded the
 4 guilt of Mr. Hernandez without Mr. Hernandez's consent.

5 Mr. Hernandez hereby also incorporates the claims set forth in Ground 4 of this petition,
 6 regarding ineffective assistance of counsel during the penalty phase of his trial, as if the same
 7 were set forth fully herein. When these cumulative errors of trial counsel are considered in their
 8 stark totality, it is clear that Mr. Hernandez was provided ineffective assistance by his counsel,
 9 and his convictions and death sentence must be reversed.

10 **E. Ineffective Assistance of State Post-Conviction Counsel**

11 To the extent that Mr. Hernandez's state post-conviction counsel failed to raise these
 12 issues they were ineffective. There could be no reasonable strategy, reasonably calculated to
 13 further Mr. Hernandez's best interests, for post-conviction counsel to fail to raise any of the
 14 claims contained herein.

15 **Exhaustion of state court remedies regarding Ground 3:**

16 **► Direct Appeal:**

17 Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

18 Yes X No.

19 If no, explain why not: Under Nevada law Mr. Hernandez could not raise claims of ineffective
 20 assistance of trial counsel on direct appeal.

21 **► First Post Conviction:**

22 Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

23 X Yes No. (Partially)

24 If no, explain why not: State habeas corpus counsel were ineffective in failing to fully raise this
 25 meritorious constitutional claim.

26 If yes, name of court: Eighth Judicial District Court. Date petition filed: 3/12/03.

1 Did you receive an evidentiary hearing? X Yes ___ No. Did you appeal to the Nevada Supreme
2 Court? X Yes ___ No.

3 If no, explain why not: _____
4 _____.

5 If yes, did you raise this issue? X Yes ___ No.

6 If no, explain why not: _____
7 _____.

8 **► Second Post Conviction:**

9 Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas
10 corpus? ___ Yes ___ No.

11 If yes, explain why: _____

12 If yes, name of court: _____ date petition filed
13 _____/_____/_____.
14

15 Did you receive an evidentiary hearing? ___ Yes ___ No.

16 Did you appeal to the Nevada Supreme Court? ___ Yes ___ No. If no, explain why not:

17 _____
18 _____.

19 If yes, did you raise this issue? ___ Yes ___ No.

20 If no, explain why not: _____
21 _____.

22 **► Other Proceedings:**

23 Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence
24 overturned based on this issue (such as administrative remedies)? ___ Yes X No.

25 If yes, explain:
26
27
28

GROUND 4

Mr. Hernandez's convictions and death sentence are invalid under federal constitutional guarantees of due process, equal protection, the effective assistance of counsel, a fair and impartial jury, and a reliable sentence because trial counsel were ineffective in failing to investigate and present mitigation in the penalty phase of Mr. Hernandez's trial. U.S. Const. Amends. V, VI, VIII & XIV.

Supporting Facts

A. Trial Counsel Were Ineffective in Failing to Investigate and Present Mitigation Evidence in the Penalty Phase of Mr. Hernandez's Trial.

The only witnesses called by trial counsel in the penalty phase of Mr. Hernandez's trial were general character witnesses. Their testimony was limited to superficial observations regarding Mr. Hernandez's work ethic, positive qualities and love for his family. No expert witnesses were called and no investigation was done into Mr. Hernandez's background, mental condition, substance use or any other factor that may have had a bearing on mitigation. Trial counsel and the one expert they consulted relied entirely upon Mr. Hernandez's self-reporting to assess mitigating factors.

Trial counsel's failure to investigate mitigating evidence fell below an objective standard of reasonable professional conduct as set forth in clearly established federal constitutional law. Constitutionally effective trial counsel would have conducted a thorough investigation into all aspects of Mr. Hernandez's life to determine whether mitigating factors existed that might explain Mr. Hernandez's actions in a way that might cause the jury to find him deserving of a sentence of less than death. Constitutionally effective trial counsel would have interviewed Mr. Hernandez's friends and family to obtain a complete life history of Mr. Hernandez and identify any psychological or behavioral issues that might help explain his actions at the time of the crime.

Constitutionally effective trial counsel would have obtained Mr. Hernandez's educational,

1 health, employment and mental health records to ascertain if there were any learning disabilities,
2 cognitive dysfunctions or behavioral problems that might be of use to psychological experts.
3 Given that Mr. Hernandez is an immigrant from Mexico, constitutionally effective trial counsel
4 would have retained an expert to determine whether there were any cultural influences that might
5 have helped to explain Mr. Hernandez's actions. Constitutionally effective trial counsel would
6 also have retained a Spanish speaking neuropsychologist to administer a psychological
7 examination in Mr. Hernandez's native language and thus obtain more accurate results. In
8 addition, since Mr. Hernandez was intoxicated at the time of the crime, trial counsel should have
9 retained a psychopharmacologist to explain to the jury the effects of alcohol on a person's ability
10 to make reasoned decisions.

11
12 There could be no reasonable trial strategy, reasonably calculated to protect Mr.
13 Hernandez's best interests, for trial counsel to fail to conduct any mitigation investigation. As a
14 result of trial counsel's failure to investigate and present mitigating evidence, the jury that
15 sentenced Mr. Hernandez to die heard no evidence in Mr. Hernandez's penalty phase that might
16 help explain, in a way the jury could understand, the crime for which they had already convicted
17 him. Indeed, cumulative testimony that Mr. Hernandez was hardworking, apparently normal and
18 a generally good person could only leave the impression in the jurors' minds that there was no
19 explanation for Mr. Hernandez's crime other than the prejudicial arguments set forth by the state.
20 Upon appointment of counsel, Mr. Hernandez will supplement this claim with details of how
21 trial counsel's ineffectiveness prejudiced him.

22 **B. Cumulative Effect of Ineffective Assistance of Trial Counsel**

23 Multiple errors of trial counsel, when their cumulative nature is considered, also deprived
24 Mr. Hernandez of his constitutional right to a fair trial. In addition to failing to present
25 mitigating evidence during Mr. Hernandez's penalty phase, trial counsel was also ineffective
26 during the guilt phase of the proceedings. Mr. Hernandez hereby incorporates the claims set forth
27 in Ground 3 of this petition, regarding ineffective assistance of counsel during the guilt phase of
28

1 his trial, as if the same were set forth fully herein.

2 When these cumulative errors of trial counsel are considered in their stark totality, it is
3 clear that Mr. Hernandez was provided ineffective assistance by his counsel, and his convictions
4 and death sentence must be reversed.

5 **C. Ineffective Assistance of State Post-Conviction Counsel**

6 To the extent that Mr. Hernandez's state post-conviction counsel failed to raise this issue
7 they were ineffective. There could be no reasonable strategy, reasonably calculated to further
8 Mr. Hernandez's best interests, for post-conviction counsel to fail to raise any of the claims
9 contained herein.

10 **Exhaustion of state court remedies regarding Ground 4:**

11 **► Direct Appeal:**

12 Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

13 Yes X No.

14 If no, explain why not: Under Nevada law Mr. Hernandez could not raise claims of ineffective
15 assistance of trial counsel on direct appeal.

16 **► First Post Conviction:**

17 Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

18 X Yes No. (Partially)

19 If no, explain why not: State habeas corpus counsel were ineffective in failing to fully raise this
20 meritorious constitutional claim.

21 If yes, name of court: Eighth Judicial District Court. Date petition filed: 3/12/03

22 Did you receive an evidentiary hearing? X Yes No. Did you appeal to the Nevada Supreme
23 Court? X Yes No.

24 If no, explain why not: _____

25 _____
26 If yes, did you raise this issue? X Yes No. (Partially)
27
28

1 If no, explain why not: _____

2 _____.

3 ► **Second Post Conviction:**

4 Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas
5 corpus? ___ Yes ___ No.

6 If yes, explain why: _____

7 _____.

8 If yes, name of court: _____ date petition filed

9 ____/____/____.

10 Did you receive an evidentiary hearing? ___ Yes ___ No.

11 Did you appeal to the Nevada Supreme Court? ___ Yes ___ No. If no, explain why not:

12 _____

13 _____

14 _____.

15 If yes, did you raise this issue? ___ Yes ___ No.

16 If no, explain why not: _____

17 _____.

18 ► **Other Proceedings:**

19 Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence

20 overturned based on this issue (such as administrative remedies)? ___ Yes X No.

21 If yes, explain:

22 _____

23 _____

24 _____

25 _____

26 _____

27 _____

28 _____

GROUND 5

Mr. Hernandez's sentence of death is invalid under the federal and state constitutional guarantees of due process and equal protection, the right to effective assistance of counsel, the right to a fair trial and fair penalty hearing, and the right to be free from cruel and unusual punishment because of trial court error and ineffective assistance of counsel during voir dire. U.S. Const. Amends. V, VI, VIII, XIV.

Supporting Facts

Mr. Hernandez's constitutional rights were violated because the trial court failed to grant his counsel's challenge for cause of a juror who could not follow the law concerning mitigation evidence in the penalty phase of a capital trial. Potential Juror Graham testified that there "is only one punishment for taking a life" and that punishment is the death penalty. ROA 607-08. Following questioning by the state, he stated that he could weigh all four punishments, but that he would start with the death penalty. *Id.* He affirmed that he would lean more for the death penalty. *Id.*

Voir dire also revealed that he had been the victim of a burglary. ROA 609. He explained that he had previously served on a capital jury and that he would rather rely on the facts of the case than the defendant's background in deciding punishment. ROA 610. Specifically, he declared that he did not think mitigation evidence should be considered: "In the past, they brought up a lot of bad childhood experiences. I don't think that has anything to do with what you're doing as an adult." ROA 610-11. He then elaborated on his position: "I didn't like the business of, you know, the bad childhood and all of that stuff. I don't think that had anything to do with the killing." *Id.* He further explained that although he would try to follow the judge's instructions, it would be difficult to do so if he was instructed that he should consider factors beyond the crime itself. ROA 612. He admitted that if they got to the penalty phase, his determination would be based upon the circumstances surrounding the crime and nothing else. *Id.*

1 Despite his acknowledgment that he would not consider mitigating circumstances that
2 were unrelated to the offense, the trial court denied the defense challenge for cause of this juror.
3 Id. The trial court's failure to dismiss this juror was constitutional error. Graham demonstrated
4 that he was unwilling to follow the law because he would not consider mitigating evidence that
5 was not directly related to the offense. Under these circumstances, he should have been
6 dismissed from the panel by the trial court. Graham's refusal to consider mitigating evidence is
7 especially egregious in light of the fact that he had already served on a capital jury and therefore
8 should have been fully aware of the requirement that he consider mitigating evidence in making
9 the decision concerning whether the defendant should be sentenced to death. The trial court's
10 denial of the defense challenge for cause was erroneous and Mr. Hernandez's sentence of death
11 must be reversed.
12

13 Mr. Hernandez alleges that trial counsel were ineffective for not asking all of the seated
14 jurors whether they could consider a sentence of life with parole for a person convicted of murder
15 involving the stabbing and strangulation of a woman. At the point that the state was allowed to
16 inform the jury about the nature of their allegations against Mr. Hernandez, effective trial counsel
17 would have used that information offensively to remove persons from the venire who could not
18 consider imposing a sentence of life with parole under the facts of the case. Trial counsel's
19 failure to ask specific questioning on voir dire of each of the seated jurors prevented them from
20 raising meritorious challenges for cause to remove jurors who could not consider a sentence of
21 life with parole in the factual circumstances of Mr. Hernandez's case. Trial counsel's failure to
22 ask specific questions also prevented them from intelligently exercising their peremptory
23 challenges. There is a reasonable probability of a more favorable outcome at the penalty phase of
24 Mr. Hernandez's trial if trial counsel had asked each of the jurors whether they were qualified
25 under federal law to sit as jurors in his case.
26

27 Mr. Hernandez alleges that trial counsel were ineffective in failing to ask the jury about
28 their ability to consider the mitigation evidence that would be presented by counsel in the penalty

1 phase. Mr. Hernandez alleges that there is a reasonable probability of a more favorable outcome
 2 in the penalty phase of trial if counsel had asked the jury about their ability to consider the
 3 mitigating circumstances that they intended to present. Mr. Hernandez hereby incorporates the
 4 allegations of Claim Four regarding trial counsel's failure to investigate and present mitigating
 5 evidence as if fully set forth herein. Upon appointment of counsel, Mr. Hernandez will further
 6 develop the prejudice aspect of this claim.

7 **Ineffective Assistance of Appellate and State Post-Conviction Counsel**

8 To the extent that Mr. Hernandez's appellate counsel failed to fully raise this issue on
 9 direct appeal she was ineffective. There could be no reasonable appellate strategy, reasonably
 10 calculated to further Mr. Hernandez's best interests, for failing to raise any of the claims
 11 contained herein. To the extent that Mr. Hernandez's state post-conviction counsel failed to raise
 12 this issue, they were ineffective. There could be no reasonable strategy, reasonably calculated to
 13 further Mr. Hernandez's best interests, for post-conviction counsel to fail to raise any of the
 14 claims contained herein.
 15

16 **Exhaustion of state court remedies regarding Ground 5:**

17 **► Direct Appeal:**

18 Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

19 X Yes No. (Partially).

20 If no, explain why not: To the extent that appellate counsel did not fully raise this issue they were
 21 ineffective.

22 **► First Post Conviction:**

23 Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

24 Yes X No.

25 If no, explain why not: State post-conviction counsel were ineffective for failing to raise this
 26 meritorious constitutional claim.

27 If yes, name of court: Eighth Judicial District Court. date petition filed 3/12/03.
 28

1 Did you receive an evidentiary hearing? ____ Yes ____ No. Did you appeal to the Nevada
2 Supreme Court? ____ Yes ____ No.

3 If no, explain why not: _____
4 _____

5 If yes, did you raise this issue? ____ Yes ____ No.

6 If no, explain why not: _____
7 _____

8 **► Second Post Conviction:**

9 Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas
10 corpus?

11 ____ Yes ____ No.

12 If yes, explain why: _____
13 _____
14 _____

15 If yes, name of court: _____ date petition filed
16 ____/____/____.

17 Did you receive an evidentiary hearing? ____ Yes ____ No. Did you appeal to the Nevada
18 Supreme Court? ____ Yes ____ No.

19 If no, explain why not: _____
20 _____

21 If yes, did you raise this issue? ____ Yes ____ No.

22 If no, explain why not: _____
23 _____

24 **► Other Proceedings:**

25 Have you pursued any other procedure/process in an attempt to have your conviction and/or
26 sentence overturned based on this issue (such as administrative remedies)? ____ Yes X No.

27 If yes, explain: _____
28 _____

GROUND 6

Mr. Hernandez's sentence of death is invalid under the federal and state constitutional guarantees of due process and equal protection, the right to a fair trial and fair penalty hearing, and the right to be free from cruel and unusual punishment because neither the guilt phase jury instruction on "murder by torture" nor the penalty phase jury instruction on torture sufficiently narrowed the class of defendants eligible for the death penalty. U.S. Const. Amends. V, VI, VIII, XIV.

Supporting Facts

Neither the guilt phase jury instruction on "murder by torture"¹ nor the penalty phase jury instruction on torture sufficiently narrowed the class of persons eligible for the death penalty as required by McConnell v. State, 120 Nev. 1043, 1069, 102 P.3d 606, 624 (2004). This error violated Mr. Hernandez's United States Constitutional rights, and thereby requires that Mr. Hernandez's sentence of death be vacated. U.S. Const. Amends. V, VI, VIII, XIV.

A. The Murder by Torture Jury Instruction Failed to Narrow the Class of Persons Eligible for the Death Penalty.

States must implement carefully drafted statutes that direct the discretion of juries and limit that discretion in such a way that the majority of murder cases, where the death penalty is not appropriate, can be identified and separated from the small minority of murder cases where the death penalty is appropriate. In conformance with the United States and Nevada Constitutions, the class of death eligible defendants must be statutorily narrowed so that the sentencing jury's discretion is limited as a jury will have had little, if any, previous experience in sentencing, and therefore any murder may seem horrendous to a group of people not experienced

¹ The state prosecuted Mr. Hernandez for first degree murder under three theories: (1) murder by torture; (2) deliberate and premeditated murder; and (3) murder during the perpetration of a felony (felony-murder). When they returned their general verdict, the jury did not specify which theory of first degree murder applied. As a result, it must be presumed that they found Mr. Hernandez guilty under all three theories, including murder by torture in violation of Mr. Hernandez's United States Constitutional rights.

1 in evaluating killings. Realistically, the only way that the jury's discretion can be "limited" is
2 either for the capital statute (defining the specific types of murder) or the penalty statute (defining
3 the aggravating circumstances that allow for death eligibility) to sufficiently narrow the class of
4 persons eligible for the death penalty. The Constitutional concern at issue is to avoid the
5 inconsistent, arbitrary and capricious imposition of the death penalty.

6 The Nevada Supreme Court specifically held that "Nevada's felony-murder statute was
7 too broad to provide sufficient narrowing because it did not require the defendant to have the
8 intent to kill. Rather, the intent simply to commit the underlying felony [i.e. burglary] is
9 'transferred to supply the malice necessary to characterize the death as murder. [citation].'"
10 Hernandez v. State, 194 P.3d 1235, 1239 (2008) citing Collman v. State, 116 Nev. 687, 714-15, 7
11 P.3d 426, 443-44 (2000).

12 The Nevada Supreme Court found, in contrast, that the murder by torture statute as
13 construed by Domingues v. State, 112 Nev. 683, 702 & n. 6, 917 P.2d 1364, 1377 & n.6 (1996)
14 "performs a constitutionally satisfactory narrowing function and does not implicate the concerns"
15 expressed in McConnell that the statute failed to require that the defendant have the "intent to
16 kill." Hernandez, 194 P.3d. at 1240. In Domingues, the Nevada Supreme Court ruled that in
17 order to be convicted of murder by torture, it must be demonstrated that the defendant acted with
18 "calculated intent to inflict pain for revenge, extortion, persuasion, or for any sadistic purpose
19 and to inflict pain beyond the killing itself. Hernandez, 194 P.3d 1235, 1239 citing Domingues,
20 112 Nev. at 702 & n.6, 917 P.2d at 1377 & n. 6.

21 The Nevada Supreme Court, however, failed to address whether the jury instruction given
22 in Mr. Hernandez's case violated Dominguez, Collman and McConnell by failing to inform the
23 jury that they had to find that Mr. Hernandez acted with the requisite "intent to kill." To the
24 contrary, Mr. Hernandez's jury was instructed that the "crime of murder by torture does not
25 necessarily require any proof that the defendant intended to kill the deceased nor does it
26 necessarily require any proof that the deceased suffered pain." Jury Instruction No. 27, ex. 5.
27
28

1 Contrary to the Nevada Supreme Court's ruling in Coleman and McConnell, the jury was
2 expressly instructed that no "intent to kill" was necessary to convict Mr. Hernandez of murder by
3 torture.

4 Furthermore, the penalty phase jury instruction on torture, Jury Instruction No. 10, was
5 the same as the guilt phase jury instruction in that it expressly informed the jury that the
6 defendant need not have any intent to kill the victim. The penalty phase instruction of torture,
7 therefore, also failed to narrow the class of defendants eligible for the death penalty.

8 The absence of adequate narrowing torture jury instructions was exacerbated by the
9 prosecution's closing arguments. In the guilt phase closing argument, the prosecution expressly
10 told the jury that the elements of willfulness, premeditation, and deliberation "don't apply to
11 torture and felony murder, just this one theory of felony murder." 7/10/00 TT at 70. In response
12 to the defense's closing argument that Mr. Hernandez did not have the intent to premeditate or
13 deliberate the killing, 7/10/00 TT at 84-113, the prosecution specifically exploited the invalid
14 jury instructions to argue to the jury that they did not need to find premeditation or deliberation
15 to convict Mr. Hernandez of first-degree murder by means of torture: "this could be a rash act,
16 that there could be no deliberation and could be no premeditation. It is still first degree by means
17 of torture because those elements are not required for torture." Id. at 118-19. The prosecution
18 further argued that "there is no requirement that you find that he acted wilfully or deliberately or
19 with premeditation when you convict him [of] first degree murder by means of torture." Id. at
20 121. The prosecution asserted that the defense's argument that the elements of malice and first-
21 degree murder must each be met as a matter of law in the instant case was "disingenuous." Id.
22 Finally, the prosecution specifically highlighted the faulty jury instructions and told the jury that
23 they did not need to find that Mr. Hernandez had an intent to kill the victim:
24

25 The crime of murder by torture does not require proof that he intended to kill the
26 deceased. So when we talk about premeditation and wilfulness and deliberation it
27 is of no significance. When we talk about first degree murder by means of torture,
28 he need not even intend to kill her so long as you find he intended to commit the acts
that caused her death, that is; the stabbing and the choking and the strangulation and

1 the insertion of the butter knife, he is guilty of first degree murder by means of torture
2 and you can stop your discussion right there.

3 7/10/00 TT at 122.

4 In penalty phase closing arguments, the prosecution repeatedly argued that the jury's
5 finding of torture in the guilt phase ipso facto established the existence of the torture aggravating
6 circumstance. 7/19/00 TT at 84, 94 ("you have already concluded that two of them [aggravating
7 circumstances] are present by virtue of your verdicts . . ."). 7/19/00 TT at 128 (Vol. II) ("You
8 already found beyond a reasonable doubt the existence of at least two aggravators in this case . . .
9 .").

10 The jury instructions in Mr. Hernandez's case therefore permitted the prosecution to
11 argue not only that they did not need to prove premeditation and deliberation, but also that they
12 did not need to prove malice to find the torture aggravating circumstance.

13 As the Nevada Supreme Court has previously acknowledged, torture, by itself, like the
14 other enumerated means of first-degree murder "do not denote crimes." Collman, 116 Nev. at
15 717, 7 P.3d at 445 (2000). It follows that the elements of torture as contained in the statutory
16 scheme do not sufficiently narrow the death eligibility of defendants because "it is conceivable
17 that torture, like other enumerated means, can be done without legal malice." Id. at 718, 7 P.3d
18 at 446. The Nevada Supreme Court's reaffirmation of Collman in the instant case must also
19 carry with it Collman's implication that the crime of murder by torture – stripped of malice and
20 the other intent elements required for first-degree murder – fails to sufficiently narrow the class
21 of persons eligible for the death penalty when used as an aggravating circumstance when the state
22 proceeds on a torture theory during the guilt phase of trial.

23 **Exhaustion of state court remedies regarding Ground 6:**

24 ▶ Direct Appeal:

25 Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

26 X Yes No. (Partially).
27
28

1 If no, explain why not: To the extent that appellate counsel did not fully raise this issue on direct
 2 appeal she was ineffective.

3 ▶ First Post Conviction:

4 Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

5 X Yes No. (Partially)

6 If no, explain why not: While Mr. Hernandez's Appeal from Denial of State Post-Conviction
 7 Relief was pending, the Nevada Supreme Court issued its opinion in Bejarano v. State, 122 Nev.
 8 1066, 146 P.3d 265 (2006), holding that its previous decision in McConnell v. State, 121 Nev.
 9 25, 107 P.3d 1287 (2005), holding that the aggravator of murder committed during the
 10 commission of a felony could not be based on the same predicate felony used to establish first
 11 degree murder was retroactive. Mr. Hernandez requested briefing on this issue and the Nevada
 12 Supreme Court granted Mr. Hernandez's request. Mr. Hernandez, however, did not fully brief the
 13 issue as presented here, and to that extent, was ineffective.

14 If yes, name of court: Supreme Court of the State of Nevada. Date supplement was filed

15 2/22/2007.

16 Did you receive a hearing? X Yes No. Did you appeal to the Nevada Supreme Court?

17 N/A Yes No.

18 If no, explain why not: _____

19 _____
 20
 21 If yes, did you raise this issue? NA Yes No.

22 If no, explain why not: _____

23 _____
 24 ▶ Second Post Conviction:

25 Did you raise this issue in a second petition for post conviction relief or state petition for habeas
 26 corpus?

27 Yes No.
 28

1 If yes, explain why: _____

2 _____.

3 If yes, name of court: _____ date petition filed

4 ____/____/____.

5 Did you receive an evidentiary hearing? ____ Yes ____ No. Did you appeal to the Nevada
6 Supreme Court? ____ Yes ____ No.

7 If no, explain why not: _____

8 _____

9 If yes, did you raise this issue? ____ Yes ____ No.

10 If no, explain why not: _____

11 _____

12 _____

13 ▶ Other Proceedings:

14 Have you pursued any other procedure/process in an attempt to have your conviction and/or
15 sentence overturned based on this issue (such as administrative remedies)? ____ Yes X No.

16 If yes, explain: _____

17 _____

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GROUND 7

Mr. Hernandez's death sentence is invalid under the federal constitutional guarantees of due process, equal protection, right to a jury determination of every element of the capital offense, and a reliable sentence due to the Nevada Supreme Court's purported "re-weighing" and "re-sentencing" after invalidating an aggravating circumstance, and to its failure to properly consider the effect of the erroneous penalty phase jury instructions in its harmless error assessment. U.S. Const. Amends. V, VIII, XIV.

Supporting Facts

Mr. Hernandez alleges that he was deprived of his federal constitutional rights when the Nevada Supreme Court affirmed his death sentence after striking an invalid aggravating circumstances. The Sixth Amendment provides that Mr. Hernandez is entitled to a jury determination beyond a reasonable doubt of every fact which has the effect of increasing his sentencing exposure. Mr. Hernandez's rights under the Sixth Amendment were violated when the Nevada Supreme Court purported to "reweigh" Mr. Hernandez's eligibility for the death penalty after striking an aggravating circumstance, which is itself an element of the offense that must be submitted to the jury and proven beyond a reasonable doubt.

Under state law, Mr. Hernandez possesses the right to a jury determination beyond a reasonable doubt regarding: (1) the presence of statutory aggravating circumstances; and (2) whether those aggravating circumstances outweigh any mitigation evidence. As elements which expose Mr. Hernandez to the greater crime of capital eligible murder, both elements must, under state law, be submitted to a jury and found beyond a reasonable doubt. On appeal from the denial of post-conviction relief, the Nevada Supreme Court placed itself in the position of a sentencer thereby invading the province of the jury. The Nevada Supreme Court itself reweighed the mitigation evidence presented at Mr. Hernandez's penalty hearing and came to its own determination that "the jury would have sentenced Hernandez to death in the absence of the erroneous aggravating circumstance." Hernandez v. State, ___ Nev. ___, 194 P.3d 1235, 1241

(2009). The Nevada Supreme Court could do no more than speculate as to whether the actual jury that sentenced Mr. Hernandez to death made the same assessment of the mitigation evidence presented because the jury was never asked to designate what weight they attached to any mitigating circumstances found. The court's attempt to quantify the mitigation evidence presented in Mr. Hernandez's case based on a cold record without any relevant jury findings, and its subsequent attempt to balance that evidence against the remaining aggravating circumstances constituted an improper invasion of the jury's role to find every element of the capital offense beyond a reasonable doubt.

The "re-weighing" and appellate sentencing of Mr. Hernandez on appeal is per se prejudicial, which requires the reversal of Mr. Hernandez's death sentence. The Nevada Supreme Court's failure to perform appropriate harmless error analysis after invalidating an aggravating circumstance had a substantial and injurious effect on its affirmance of Mr. Hernandez's death sentence. Had the Nevada Supreme Court properly considered Mr. Hernandez's challenge to the invalid penalty phase instructions, it could not have concluded that the invalid aggravating circumstance was harmless error. Mr. Hernandez's death sentence is therefore necessarily invalid.

Ineffective Assistance of State Post-Conviction Counsel

To the extent that Mr. Hernandez's state post-conviction counsel failed to raise this issue they were ineffective. There could be no reasonable strategy, reasonably calculated to further Mr. Hernandez's best interests, for post-conviction counsel to fail to raise any of the claims contained herein.

Exhaustion of state court remedies regarding Ground 7:

► Direct Appeal:

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

___ Yes X No.

If no, explain why not: The Nevada Supreme Court did not strike the invalid aggravating

1 circumstance until the post-conviction appeal.

2 ▶ **First Post Conviction:**

3 Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus? _

4 _Yes X No.

5 If no, explain why not: The "reweighing" of Mr. Hernandez's death eligibility did not occur until
6 Mr. Hernandez's case was on appeal before the Nevada Supreme Court. Mr. Hernandez was not
7 in a position at the time of the filing of his petition and appellate briefs to protest to a
8 constitutional violation that had not yet occurred.

9 If yes, name of court:

10 Did you receive an evidentiary hearing? ___ Yes ___ No. Did you appeal to the Nevada
11 Supreme Court? ___ Yes ___ No.

12 If no, explain why not: _____

14 If yes, did you raise this issue? ___ Yes ___ No.

16 If no, explain why not:

17 ▶ **Second Post Conviction:**

18 Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas
19 corpus?

20 ___ Yes ___ No.

21 If yes, explain why:

22 If yes, name of court: _____ date petition filed

23 ____/____/____.

24 Did you receive an evidentiary hearing? ___ Yes ___ No. Did you appeal to the Nevada
25 Supreme Court? ___ Yes ___ No.

26 If no, explain why not: _____

1 If yes, did you raise this issue? ____ Yes ____ No.

2 If no, explain why not: _____

3

4 ▶ **Other Proceedings:**

5 Have you pursued any other procedure/process in an attempt to have your conviction and/or
6 sentence overturned based on this issue (such as administrative remedies)? ____ Yes __X__ No.

7 If yes, explain: _____

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GROUND 8

Mr. Hernandez's convictions and death sentence are invalid under federal constitutional guarantees of due process, confrontation, effective assistance of counsel, equal protection, and a reliable sentence due to the substantial and injurious effect of prosecutorial misconduct throughout various parts of Mr. Hernandez's trial. U.S. Const. Amends. V, VI, VIII & XIV.

Supporting Facts

A. The State Made Several Improper Arguments During the Guilt Phase of Mr. Hernandez's Trial.

During the guilt/innocence phase of Mr. Hernandez's trial the state made several improper arguments. The state asked the jurors to make personal promises regarding their verdicts, improperly introduced victim impact evidence, made highly inflammatory and prejudicial remarks, and made erroneous statements concerning the law. Considered singly and cumulatively, the state's pervasive misconduct prejudiced Mr. Hernandez and deprived him of his right to a fair trial. To the extent that they failed to object to this misconduct, trial counsel were ineffective and Mr. Hernandez was therefore denied his Sixth Amendment rights to counsel and to confrontation.

1. The State Committed Misconduct by Asking Jurors to Make Personal Promises and by Personalizing Its Arguments.

Several times throughout voir dire the state asked the prospective jurors whether they would "promise me" that they would convict Mr. Hernandez in the event that they were convinced beyond a reasonable doubt or that they would return a verdict of death if they concluded that he had committed a horrendous crime. See, e.g., ROA 570, 590, 607, 696, 714. During closing arguments, the state emphasized that the jurors had made this "promise," that the state had kept its promise, and that the jurors were required to do the same. "On behalf of the State of Nevada, we have kept our promise to you, and now I ask you to keep your promise to us and find this man guilty of all the counts, and, most importantly, first degree murder with use of a deadly weapon." ROA 1558.

1 The state's solicitations of personal promises during voir dire and its emphasis of these
2 promises during closing arguments constituted prosecutorial misconduct. The state's conduct
3 improperly personalized the jury's fact-finding and decision making functions and invited the
4 jurors to set aside their objectivity.

5 **2. The State Committed Misconduct by Making Highly Inflammatory**
6 **and Prejudicial Arguments.**

7 The state's arguments during the guilt/innocence phase of Mr. Hernandez's trial were
8 replete with rhetoric and attempts to prejudice the jury. The state described the crime as "brutal"
9 and "horrific." ROA 1482, 1484. The state called the crime "overkill" and argued that Mr.
10 Hernandez was motivated by "pure sadistic evil revenge." ROA 1486-87, 1498-99. The state
11 also improperly emphasized that a child allegedly witnessed the crime and described the victim
12 as having been "terrorized" by Mr. Hernandez prior to her death. ROA 1486, 1513. In addition,
13 the state repeatedly introduced improper victim impact testimony concerning both the victim and
14 her child such as by emphasizing that the child had seen the crime occur. ROA 1482, 1486.

15 The state is constitutionally obligated to desist from the use of pejorative language and
16 inflammatory rhetoric. Such comments violate the right to due process of law and to a fair and
17 impartial jury. They also violate the rule forbidding prosecutors from asserting personal opinion
18 and from alluding to facts not in the record.

19 **3. The State Committed Misconduct by Making Erroneous Statements**
20 **Concerning the Law.**

21 The state made several misstatements of the law to the effect that the jury did not need to
22 find premeditation or deliberation in order to convict Mr. Hernandez of first degree murder.
23 ROA 1493, 1498-99, 1513, 1551. At one point the state specifically told the jury "there is no
24 requirement that you find that [Mr. Hernandez] acted wilfully or deliberately or with
25 premeditation when you convict him [of] first degree murder by means of torture with use of a
26 deadly weapon." ROA 1551. This was an incorrect assertion as murder by torture does require
27 premeditation and deliberation. These improper arguments relieved the state of its burden of
28

1 proving each element of the crime beyond a reasonable doubt.

2 **B. The State Made Several Improper Arguments During the Penalty Phase of Mr.**
3 **Hernandez's Trial.**

4 During the penalty phase of Mr. Hernandez's trial the state made several improper
5 arguments. The state made "eyes of the victim" and "eyes of the victim's family" arguments,
6 appealed to passion and prejudice, expressed personal opinion, argued incorrect legal standards,
7 made "no more holidays" arguments and argued that Mr. Hernandez failed to show remorse.
8 Considered singly and cumulatively the state's pervasive misconduct prejudiced Mr. Hernandez
9 and deprived him of his right to a fair trial. To the extent they failed to object to this misconduct,
10 trial counsel were ineffective and Mr. Hernandez was therefore denied his Sixth Amendment
11 right to counsel and to confrontation.

12 **1. The State Improperly Made "No More Holidays" Arguments.**

13 The state improperly argued during the penalty phase of Mr. Hernandez's trial that Mr.
14 Hernandez failed to show remorse because he had not apologized to the victim's family because
15 they would never have another holiday with the victim. ROA 1733. Holiday arguments are
16 meant only to appeal to jurors' emotions and arouse their passions. It has long been the law that
17 arguments concerning holidays that will not be enjoyed by the deceased are highly improper.
18 This argument also violated Mr. Hernandez's Fifth Amendment privilege against self-
19 incrimination by improperly commenting on his failure to testify or to show remorse.
20

21 **2. The State Improperly Appealed to Passion and Prejudice and**
22 **Expressed Personal Opinion that Mr. Hernandez Deserved the Death**
23 **Penalty.**

24 During penalty phase closing arguments, the state repeatedly and improperly asked the
25 jurors to view the crime through the eyes of the victim and the victim's family. ROA 1766-68.
26 The state also characterized the crime with terms such as "unspeakable," "vengeful and
27 desecrating," and "horrific." ROA 1572, 1728-29, 1765. In addition, the state expressed the
28 personal opinion that Mr. Hernandez was the "worst of the worst" criminals and implied that the

1 jury was obligated to sentence him to death to “ensure justice” was done. ROA 1572, 1575,
 2 1729, 1737-38, 1769; 1772. These arguments were calculated only to inflame the passions of the
 3 jury and were highly improper and prejudicial.

4 **3. The State Improperly Informed the Jury that it Could Consider**
 5 **Uncharged Acts of Domestic Violence in Determining Whether Mr.**
 6 **Hernandez was Death Eligible.**

7 The state argued to the jury that it could consider allegations of uncharged domestic abuse
 8 in considering the existence of aggravating and mitigating circumstances. The state’s arguments
 9 misstated the law and were therefore erroneous. “Other matter evidence” is only to be
 10 considered by the jury in determining sentence after it has determined that the defendant is death
 11 eligible.

12 **C. Ineffective Assistance of State Post-Conviction Counsel**

13 To the extent that Mr. Hernandez’s state post-conviction counsel failed to raise this issue they
 14 were ineffective. There could be no reasonable strategy, reasonably calculated to further Mr.
 15 Hernandez’s best interests, for post-conviction counsel to fail to raise any of the claims contained
 16 herein.

17 **Exhaustion of state court remedies regarding Ground 8:**

18 **► Direct Appeal:**

19 Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

20 X Yes No.

21 If no, explain why not:

22 **► First Post Conviction:**

23 Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

24 Yes X No.

25 If no, explain why not: State habeas corpus counsel were ineffective in failing to fully raise this
 26 meritorious constitutional claim.

27 If yes, name of court: _____. Date petition filed:
 28

1 Did you receive an evidentiary hearing? ☐ Yes ☐ No. Did you appeal to the Nevada Supreme
2 Court? ☐ Yes ☐ No.

3 If no, explain why not: _____
4 _____.

5 If yes, did you raise this issue? ☐ Yes ☐ No.

6 If no, explain why not: _____
7 _____.

8 **► Second Post Conviction:**

9 Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas
10 corpus? ☐ Yes ☐ No.

11 If yes, explain why: _____
12 _____.

13 If yes, name of court: _____ date petition filed
14 _____/_____/____.

15 Did you receive an evidentiary hearing? ☐ Yes ☐ No.

16 Did you appeal to the Nevada Supreme Court? ☐ Yes ☐ No. If no, explain why not:
17 _____
18 _____
19 _____.

20 If yes, did you raise this issue? ☐ Yes ☐ No.

21 If no, explain why not: _____
22 _____.

23 **► Other Proceedings:**

24 Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence
25 overturned based on this issue (such as administrative remedies)? ☐ Yes ☒ No.

26 If yes, explain:
27 _____
28 _____

GROUND 9

Mr. Hernandez's sentence of death is invalid under the federal and state constitutional guarantees of due process and equal protection, the right to a fair trial and fair penalty hearing, confrontation and cross examination, and the right to be free from cruel and unusual punishment because the trial court erroneously allowed the introduction of evidence of hearsay statements made by a child. U.S. Const. Amends. V, VIII, XIV.

Supporting Facts

The state sought to introduce several hearsay statements during the guilt phase of trial made by Mr. Hernandez's three and a half year old child implicating Mr. Hernandez in the murder of the victim. ROA 218-38. These statements included statements made to the arresting officers, two of the state's witnesses and to a therapist during psychological counseling. ROA 220, 221. The trial court held an evidentiary hearing on June 26, 2000, to rule on the motion. ROA 374.

At the evidentiary hearing, both the state and trial counsel informed the trial court that they did not intend to call the child as a witness. ROA 382. Instead, the state wanted to introduce the child's hearsay statements through the testimony of other witnesses. The trial court expressed concern over whether the child would be competent to testify given her young age. The trial court expressed further concern about allowing hearsay statements to be introduced as evidence if the child who made the statements was not a competent witness. ROA 381-85. Ultimately, the trial court allowed the state to call their proposed witnesses at an evidentiary hearing to determine the admissibility of each hearsay statement based on their testimony. At the end of the hearing the trial court ruled that many of the statements would be allowed at trial as: 1) excited utterances; or 2) present sense impressions. ROA 455-59. The trial court never made a determination as to the child's competency even though the trial court expressed concerns about this issue.

Mr. Hernandez alleges that the statements did not fall within any accepted hearsay

1 exception. Even if they did, however, admission of the hearsay statements under the
 2 circumstances of Mr. Hernandez's case violated his Sixth Amendment rights of cross-
 3 examination and confrontation. Mr. Hernandez could not conduct any meaningful cross-
 4 examination of the police officers or other state's witnesses concerning the child's statements
 5 and was therefore unable to confront the evidence presented against him. Moreover, the
 6 statements did not bear adequate indicia of reliability and particularized guarantees of
 7 trustworthiness as they were made by a three and a half year old child. If the child was
 8 incompetent to testify, the statements were completely unreliable. It was error for the trial court
 9 to rule on the admissibility of these statements without first examining the child in order to make
 10 a competency determination.

11
 12 To the extent that Mr. Hernandez's appellate and state post-conviction counsel failed to
 13 raise this issue they were ineffective. There could be no reasonable strategy, reasonably
 14 calculated to further Mr. Hernandez's best interests, for post-conviction counsel to fail to raise
 15 any of the claims contained herein.

16 **Exhaustion of state court remedies regarding Ground 9:**

17 **► Direct Appeal:**

18 Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

19 ☐ Yes ☒ No. (Attempted)

20 If no, explain why not: Mr. Hernandez raised this claim in his original Opening Brief on direct
 21 appeal submitted to the Nevada Supreme Court on April 23, 2001. The Court returned the Brief
 22 unfiled due to its length and limited Mr. Hernandez's Brief to 80 pages. Given the page
 23 limitation Mr. Hernandez was forced to abandon this claim.

24 **► First Post Conviction:**

25 Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

26 ☐ Yes ☒ No.

27
 28 If no, explain why not: State post-conviction counsel were ineffective for failing to raise this

1 meritorious constitutional claim.

2 If yes, name of court:

Date petition filed:

3 Did you receive an evidentiary hearing? ____ Yes ____ No. Did you appeal to the Nevada
4 Supreme Court? ____ Yes ____ No.

5 If no, explain why not: _____
6 _____

7 .If yes, did you raise this issue? ____ Yes ____ No.

8 If no, explain why not: _____
9 _____

10 **► Second Post Conviction:**

11 Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas
12 corpus?

13 ____ Yes ____ No.

14 If yes, explain why: _____
15 _____

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17 If yes, name of court: _____ date petition filed
18 ____/____/____.

19 Did you receive an evidentiary hearing? ____ Yes ____ No. Did you appeal to the Nevada
20 Supreme Court? ____ Yes ____ No.

21 If no, explain why not: _____
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23 If yes, did you raise this issue? ____ Yes ____ No.

24 If no, explain why not: _____
25 _____

26 **► Other Proceedings:**

27 Have you pursued any other procedure/process in an attempt to have your conviction and/or
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1 sentence overturned based on this issue (such as administrative remedies)? ____ Yes X No.

2 If yes, explain: _____

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GROUND 10

Mr. Hernandez's convictions and death sentence are invalid under federal constitutional guarantees of due process, equal protection, and a reliable sentence because the trial court erroneously allowed the introduction of evidence of prior uncharged bad acts. U.S. Const. Amends. V, VIII & XIV.

Supporting Facts

On May 26, 2000, the state filed a motion to admit statements concerning alleged prior bad acts committed by Mr. Hernandez against the victim. ROA 123. The evidence sought to be introduced by the state included hearsay allegations of prior threats made by Mr. Hernandez and accusations made by the victim in obtaining restraining orders against Mr. Hernandez. ROA 123-39. Trial counsel opposed the state's motion, noting that Mr. Hernandez denied the allegations and that the state could not prove by clear and convincing evidence that they were true. ROA 192, 194. Over trial counsel's objection the trial court erroneously ruled that the hearsay statements would be admissible during the guilt phase of Mr. Hernandez's trial for the purpose of establishing the relationship between the parties and Mr. Hernandez's motive. ROA 500.

Evidence of prior bad acts is impermissible in the guilt phase of a capital case and in this case was highly prejudicial to Mr. Hernandez. The trial court's error was compounded in Mr. Hernandez's case because the evidence consisted of hearsay statements regarding disputed facts and was therefore untrustworthy and unreliable. Mr. Hernandez could not challenge the veracity of the hearsay statements because doing so would have required Mr. Hernandez to testify. Placing Mr. Hernandez in the position of choosing between testifying or allowing the highly prejudicial statements to go unchallenged was a violation of his Fifth Amendment right against self-incrimination.

The admission of the unsupported hearsay statements was also prejudicial because trial counsel's strategy was to argue that the murder was second degree rather than first degree. The

1 improperly admitted evidence was used by the state to support its argument that the killing was a
 2 premeditated and deliberate act. Without being able to refute the truth of the hearsay evidence,
 3 trial counsel had no way of effectively supporting their theory of defense. The trial court's error,
 4 in essence, deprived Mr. Hernandez of the right to defend himself against the state's allegations
 5 and impermissibly inflamed the passions of the jury.

6 **Ineffective Assistance of State Post-Conviction Counsel**

7 To the extent that Mr. Hernandez's state post-conviction counsel failed to raise this issue,
 8 they were ineffective. There could be no reasonable strategy, reasonably calculated to further
 9 Mr. Hernandez's best interests, for post-conviction counsel to fail to raise any of the claims
 10 contained herein.

11 **Exhaustion of state court remedies regarding Ground 10:**

12 **► Direct Appeal:**

13 Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

14 X Yes No.

15 If no, explain why not:

16 **► First Post Conviction:**

17 Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

18 Yes X No.

19 If no, explain why not: State habeas corpus counsel were ineffective in failing to fully raise this
 20 meritorious constitutional claim.

21 If yes, name of court:

22 Date petition filed:

23 Did you receive an evidentiary hearing? Yes No. Did you appeal to the Nevada Supreme
 24 Court? Yes No.

25 If no, explain why not: _____

26 _____
 27 If yes, did you raise this issue? Yes No.
 28

1 If no, explain why not: _____

2 _____

3 **Second Post Conviction:**

4 Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas
5 corpus? ____ Yes ____ No.

6 If yes, explain why: _____

7 _____

8 If yes, name of court: _____ date petition filed

9 ____/____/____.

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11 Did you receive an evidentiary hearing? ____ Yes ____ No.

12 Did you appeal to the Nevada Supreme Court? ____ Yes ____ No. If no, explain why not:

13 _____

14 _____

15 If yes, did you raise this issue? ____ Yes ____ No.

16 If no, explain why not: _____

17 _____

18 ▶ **Other Proceedings:**

19 Have you pursued any other procedure/process in an attempt to have your conviction and/or
20 sentence

21 overturned based on this issue (such as administrative remedies)? ____ Yes X No.

22 If yes, explain:

23 _____

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GROUND 11

Petitioner's sentence of death is invalid under the federal and state constitutional guarantees of due process and equal protection, the right to a fair trial and fair penalty hearing, and the right to be free from cruel and unusual punishment because the undue influence of publicity on Petitioner's trial denied him his right to due process. U.S. Const. Amends. V, VI, VIII, XIV.

Supporting Facts

Mr. Hernandez's trial and sentencing hearing took place in an unfairly prejudicial atmosphere, which rendered a fair trial impossible. That prejudicial atmosphere was created by the fact that the victim was a family court clerk who worked in the Eighth Judicial District Court. Massive publicity surrounded this case as evidenced by the fact that the family court created a battered women's shelter, named "Donna's House," in honor of the victim, Donna Hernandez. A fair trial could not be rendered under these circumstances, thereby requiring that Mr. Hernandez's conviction and death sentence be reversed.

The juror misconduct which ultimately resulted in this case demonstrates that it was impossible to obtain an impartial jury in Las Vegas, and that even if the jury was initially impartial, they eventually became intimidated and overawed by public demonstrations against Mr. Hernandez. Trial counsel were ineffective in failing to file a motion for a change of venue under these circumstances. The trial court erred by failing to sue sponte order a change of venue. The publicity swirling around this crime was unconstitutionally allowed to fester and infect the trial proceedings which should have been earlier moved to a fair location.

The juror misconduct which took place when two jurors bought a present for the child of the victim and left the present in the jury room during deliberations, evidences that Mr. Hernandez was actually prejudiced by the failure to change venue.

Because Mr. Hernandez was forced to stand trial in Las Vegas where he was unable to receive a fair trial, his due process rights were violated, and his convictions and death sentence

1 must be reversed.

2 **Ineffective Assistance of Appellate Counsel**

3 This claim is of obvious merit. To the extent that Mr. Hernandez's appellate counsel
4 failed to raise this issue on direct appeal she was ineffective. There could be no reasonable
5 appellate strategy, reasonably calculated to further Mr. Hernandez's best interests, for appellate
6 counsel to fail to raise this issue.

7 **Exhaustion of state court remedies regarding Ground 11:**

8 **► Direct Appeal:**

9 Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

10 Yes X No.

11 If no, explain why not: Mr. Hernandez's appellate counsel was ineffective for failing to raise this.

12 **First Post Conviction:**

13 Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

14 X Yes No.

15 If no, explain why not:

16 If yes, name of court: Eighth Judicial District Court. Date petition filed 3/12/03.

17 Did you receive an evidentiary hearing? X Yes No. Did you appeal to the Nevada

18 Supreme Court? X Yes No.

19 If no, explain why not: _____

20 _____
21 _____
22 If yes, did you raise this issue? X Yes No.

23 If no, explain why not: _____

24 _____
25 **► Second Post Conviction:**

26 Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas
27 corpus?
28

1 ____ Yes ____ No.

2 If yes, explain why: _____
3 _____.

4 If yes, name of court: _____ date petition filed
5 ____/____/____.

6 Did you receive an evidentiary hearing? ____ Yes ____ No. Did you appeal to the Nevada
7 Supreme Court? ____ Yes ____ No.

8 If no, explain why not: _____
9 _____.

10 If yes, did you raise this issue? ____ Yes ____ No.

11 If no, explain why not: _____
12 _____.

13
14 ▶ **Other Proceedings:**

15 Have you pursued any other procedure/process in an attempt to have your conviction and/or
16 sentence overturned based on this issue (such as administrative remedies)? ____ Yes X No.

17 If yes, explain: _____
18 _____.

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GROUND 12

Mr. Hernandez's first degree murder conviction and death sentence are invalid under the federal and state constitutional guarantees of due process and equal protection, the right to a fair trial and fair penalty hearing, the right to effective assistance of counsel and the right to be free from cruel and unusual punishment because the trial court gave the jury erroneous and unconstitutional jury instructions during Mr. Hernandez's trial. U.S. Const. Amends. V, VI, VIII, XIV.

Supporting Facts

Several jury instructions given by the trial court were unconstitutional and erroneous misstatements of the applicable law. Mr. Hernandez alleges that his first degree murder conviction and death sentence are invalid because the jury instructions used in his case misstated the law, or would have led a reasonable juror to determine guilt and impose death in an unconstitutional manner.

A. The Reasonable Doubt Instruction Was Unconstitutional.

The jury was instructed on the meaning of reasonable doubt in Instruction No. 47 during the trial phase and Instruction No. 15 of the penalty phase:

A reasonable doubt is one based on reason. It is not mere possible doubt but 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.

ROA 1419, 1636, Ex. 5, 20.

This instruction inflates the constitutional standard of doubt necessary for acquittal, and giving this instruction created a reasonable likelihood that Mr. Hernandez's jury would convict and sentence based on a lesser standard of proof than the constitution requires.

The principal defect of the above-referenced instruction is the second sentence which defines reasonable doubt as "not mere possible doubt, but is such a doubt as would govern or

1 control a person in the more weighty affairs of life.” This instruction is an appropriate
2 characterization of the degree of certainty required to find proof beyond a reasonable doubt, but it
3 does not define the reasonable doubt standard. This language of the reasonable doubt instruction
4 is also an historical anomaly because as far as can be discerned no other state currently uses this
5 language in its instruction, and the few states that previously used it have since disapproved it.

6 The final sentence of the instruction wherein it states “[d]oubt to be reasonable must be
7 actual, not mere possibility or speculation” is also constitutionally infirm. The language of this
8 instruction is functionally identical to language condemned by the United States Supreme Court
9 and, when read in combination with the “govern or control” language, created a reasonable
10 likelihood that it misled Mr. Hernandez’s jury to convict him of first degree murder and sentence
11 him to death on a lesser standard of proof than the federal and state constitutions require.

12 The characterization of the proof standard as an “abiding conviction of the truth of the
13 charge” does not cure the defects of the trial court’s inaccurate statements about the reasonable
14 doubt standard. That term is not linked to any language suggesting a proper definition of the
15 proof standard, and the immediately preceding reference to the unconstitutional “govern or
16 control” standard in fact links the “abiding conviction” language to a standard of proof that is
17 impermissibly low. In short, the instruction does nothing to dispel the false notion that the jurors
18 could have an “abiding conviction” as to guilt if the reasonable doubts they harbored were not
19 sufficient to “govern or control” their actions.

20 The reasonable doubt instruction permitted the jury to convict and sentence Mr.
21 Hernandez based on a lesser quantum of evidence than the federal and state constitutions
22 require. This structural error is per se prejudicial, and no showing of specific prejudice is
23 required.

24 **B. The Malice Instructions Were Unconstitutional.**

25 The jury was instructed on the malice element in Instructions 13, 14 and 15 as follows:

26 13. Murder is the unlawful killing of a human being, with malice aforethought,
27
28

1 whether express or implied. The unlawful killing may be effected by any of the
2 various means by which death may be occasioned. ROA 1385.

3 14. Malice aforethought means the intentional doing of a wrongful act without legal
4 cause or excuse or what the law considers adequate provocation. The condition of
5 mind described as malice aforethought may arise not alone from anger, hatred,
6 revenge, or from particular ill will, spite, or grudge toward the person killed, but may
7 result from any unjustifiable or unlawful motive or purpose to injure another which
8 proceeds from a heart fatally bent on mischief or with reckless disregard of
9 consequences and social duty. Malice aforethought does not imply deliberation or
10 the lapse of any considerable time between the malicious intention to injure another
11 and the actual execution of the intent but denotes rather an unlawful purpose and
12 design in contradistinction to accident and mischance. ROA 1386.

13 15. Express malice is that deliberate intention unlawfully to take away the life of a
14 fellow creature which is manifested by external circumstances capable of proof.
15 Malice may be implied when no considerable provocation appears or when all the
16 circumstances of the killing show an abandoned and malignant heart. ROA 1387.

17 Ex. 5, 20. Trial counsel objected to these definitions and offered alternative instructions:

18 Malice may be express or implied. Express malice is that deliberate intention to
19 unlawfully take away the life of a fellow creature, which is manifested by external
20 circumstances capable of proof.

21 Implied malice may be found by, one, the actual killing resulted from an intentional
22 act. Two, natural consequences of the act are dangerous to human life, and three, the
23 act was deliberately performed with knowledge of the danger to and with conscious
24 disregard for human life.

25 When it is shown that the killing resulted from an intentional act with express or
26 implied malice, no other mental state need be shown to establish the mental state of
27 malice aforethought.

28 ROA 1434-35. The state opposed trial counsel's proffered instruction. When asked why, the
state responded, "I think our instruction is the state of the law in Nevada." *Id.* The trial court
ruled that it would give the instruction proffered by the prosecution because it had been approved
by the Nevada Supreme Court. *Id.* The trial court explained, however, that it believed the
instruction proffered by Mr. Hernandez's counsel to be a better instruction:

However, I must state that I believe that the instruction that Mr. Schieck has
proposed has a great deal of merit and would do away with an abandoned and
malignant heart which is language which we have used for a long, long time but
which may be subject to different interpretations, and certainly the Court would find
nothing wrong with the proposed instruction by Mr. Schieck. *Id.*

The instructions given at Mr. Hernandez's trial provided for an impermissible and

1 unconstitutional presumption and therefore deprived Mr. Hernandez of his right to a fair trial, to
2 equal protection, to due process of law and to be free from cruel and unusual punishment.
3 Moreover, these instructions acted to interfere with the presumption of innocence and relieved
4 the state of its burden to prove guilt of each of the elements of the offense beyond a reasonable
5 doubt. The portion of the instruction prescribing when malice “may be implied” could have been
6 reasonably interpreted as imposing an impermissible mandatory presumption. Elimination of the
7 “implied malice” language was necessary to avoid federal and state constitutional problems.

8 These instructions also posed substantial problems with respect to the specified “basic
9 facts” —lack of provocation or an “abandoned and malignant heart” – from which malice may be
10 implied. The given instruction stated that malice may be implied “when all the circumstances of
11 the killing show an abandoned and malignant heart.” This language is so vague and pejorative
12 that it is meaningless without further definition, and it should have been eliminated in favor of
13 fewer archaic terms which reasonably define the conscious disregard for life from which malice
14 may be implied.
15

16 The problem with a jury instruction containing vague language referring to an
17 “abandoned and malignant heart” is that the jury in a close case may convict because it believes
18 the defendant a ‘bad man’ who has an evil disposition or a despicable character. There is also the
19 danger that the language may encourage the jury to apply a subjective standard in determining
20 whether the defendant acted with conscious disregard of life, thereby entirely obliterating the line
21 which separates murder from involuntary manslaughter.

22 The problems arising on this point are complicated by Nevada’s substantive law which is
23 both confusing and inconsistent regarding malice. The Nevada Supreme Court has held that state
24 statutory provisions significantly narrow the situations in which malice can be negated. These
25 analytical difficulties are the vestiges of the common law rule which presume malice from the
26 unlawful killing itself, and put the burden of negating malice upon the defendant. This vestige
27 explicitly appears in the Nevada statute providing that “the killing of the deceased . . . by the
28

1 defendant being proved, the burden of proving circumstances of mitigation, or justify or excuse
2 the homicide, will devolve on the accused. . .” NRS 200. 170. Under current federal and state
3 constitutional standards, however, it is clear that the state cannot enforce such a rule. As long
4 as malice remains an element of murder, the state must prove it beyond a reasonable doubt; and it
5 cannot lighten its burden by imposing a presumption, mandatory or rebuttable, which requires the
6 defendant to disprove its existence. There should be no quarrel that the state must prove all
7 elements of the charged crime beyond a reasonable doubt. The language of NRS 200.170 cannot
8 constitutionally be included in a jury instruction.

9
10 Moreover, the decisions of the Nevada Supreme Court have defined malice negatively,
11 that is, by reference to the statutory indications of what it is not. This leads to one of two
12 possible arguable unconstitutional situations: (1) malice is irrebuttably presumed in all cases
13 other than those specified in the statutory definitions of justifiable or excusable homicide; or (2)
14 the state is required to prove malice, but the defendant cannot present evidence showing that the
15 required mental state did not in fact exist, except in support of the statutory exceptions to malice.
16 Ultimately, the courts will have to decide whether the malice requirement of NRS 200.020, and
17 the definition of voluntary manslaughter under NRS 200.040(1)(a), as an unlawful killing
18 without malice, creates a category of residual manslaughter, where malice is not shown, but
19 provocation does not exist either. This would require a reading of the provocation provisions,
20 NRS 200.040(2), 200.060, as defining one theory by which malice can be negated, but not all
21 possible theories. Such a reinterpretation of the statutory scheme would require considerable
22 effort; but the alternative is that the malice element of murder, as construed by the court in the
23 statutory scheme, is either without any constitutionally-adequate definition at all or is the subject
24 of a mandatory presumption.

25 **C. The Felony-Murder Instruction Was Unconstitutional.**

26 Instruction No. 26 failed to fully define the offense of felony-murder:

27 There is a kind of murder which carries with it conclusive evidence of premeditation
28

1 and malice aforethought. This class of murder is murder committed in the
2 perpetration or attempted perpetration of Burglary or Kidnaping. Therefore, a killing
3 which is committed in the perpetration of the felony of Burglary or Kidnaping is
deemed to be Murder in the First Degree, whether the killing was intentional,
unintentional or accident. This is called the Felony-Murder rule.

4 ROA 1398, Ex. 5.

5 This instruction erroneously failed to inform the jury that in order to establish a felony-
6 murder, the homicide must occur during the course of the commission of the felony and not vice-
7 versa. The felony-murder theory was not established in Mr. Hernandez's case because the
8 felonies were incidental to the homicide.

9
10 **D. The Murder By Torture Instruction Was Unconstitutional.**

11 Instruction No. 27, which defined murder by torture, failed to fully define the offense:

12 The essential elements of murder by means of torture are (1) the act or acts which
13 caused the death must involve a high degree of probability of death, and (2) the
defendant must commit such act or acts with the calculated intent to cause cruel pain
and suffering for the purpose of revenge, persuasion or for any other sadistic purpose.

14 The crime of murder by torture does not necessarily require any proof that the
15 defendant intended to kill the deceased nor does it necessarily require any proof that
the deceased suffered pain.

16 ROA 1399, Ex. 5.

17 Murder by torture is not analogous to felony murder and the state must prove that the
18 defendant acted with malice before he may be convicted of first-degree murder. Murder by
19 poison, lying in wait and torture are not separate statutory offenses, but all are consistent with
20 deliberate, premeditated action. Unlike felony murder pursuant to NRS 200.030(1)(b), to
21 establish that a killing is murder under subsection (1)(a), the state must prove that the killer acted
22 with malice aforethought, i.e., with the deliberate intention unlawfully to take life or with an
23 abandoned and malignant heart. It is a bedrock, axiomatic and elementary constitutional
24 principle that the Due Process Clause protects the accused against conviction except upon proof
25 beyond a reasonable doubt of every fact necessary to constitute the crime with which he is
26 charged. The instruction given at Mr. Hernandez's trial omitted these critical elements and
27
28

1 permitted the jury to find Mr. Hernandez guilty under a lesser standard of proof. Mr.
2 Hernandez's conviction is therefore unconstitutional under both federal and state standards.

3 **E. The Instructions On Voluntary Manslaughter Acted To Reduce The State's Burden**
4 **of Proving The Elements Of Murder.**

5 The state's burden of proof for the offense of first-degree murder was unconstitutionally
6 lessened through the trial court's instructions on voluntary manslaughter. In Instruction Nos. 30
7 and 31, the jury was instructed as follows:

8 Voluntary Manslaughter is the unlawful killing of a human being, without malice
9 aforethought and without deliberation and premeditation. It is a killing upon a
10 sudden quarrel or heat of passion, caused by a provocation sufficient to make the
11 passion irresistible.

12 The provocation required for Voluntary Manslaughter must either consist of a serious
13 and highly provoking injury inflicted upon the person killing, sufficient to excite an
14 irresistible passion in a reasonable person, or an attempt by the person killed to
15 commit a serious personal injury on the person killing.

16 For the sudden, violent impulse of passion to be irresistible resulting in a killing,
17 which is Voluntary Manslaughter, there must not have been an interval between the
18 assault or provocation and the killing sufficient for the voice of reason and humanity
19 to be heard; for, if there should appear to have been sufficient time for a cool head
20 to prevail and the voice of reason to be heard, the killing shall be attributed to
21 deliberate revenge and determined by you to be murder. The law assigns no fixed
22 period of time for such interval but leaves its determination to the jury under the facts
23 and circumstances of the case.

24 The heat of passion which will reduce a homicide to manslaughter must be such a
25 passion as naturally would be aroused in the mind of an ordinarily reasonable person
26 in the same circumstances. A defendant is not permitted to set up his own standard
27 of conduct and to justify or excuse himself because his passions were aroused unless
28 the circumstances in which he was placed and the facts that confronted him were
such as also would have aroused the passion of reasonable man if likewise situated.
The basic inquiry is whether or not, at the time of the killing, the reason the accused
was obscured or disturbed by passion to such an extent as would cause the ordinarily
reasonable person of average disposition to act rashly and without deliberation and
reflection, and from such passion rather than from judgment.

ROA 1402 -1403, Ex. 5. These erroneous instructions permitted the jury to find Mr. Hernandez
guilty of murder without establishing the elements of murder established in NRS 200.010. There
is one statute which defines the offenses of first and second-degree murder, and that statute
requires that the state prove that there was an "unlawful killing of a human being with malice

1 aforethought, whether expressed or implied.” NRS 200.010. The jury instructions given here,
2 however, erroneously suggested that the state was not required to prove that Mr. Hernandez acted
3 with malice in order to be convicted of murder.

4 Intent without malice is the defining characteristic of voluntary manslaughter. The state
5 was obligated to prove each of the elements of murder in order to obtain a valid conviction, and
6 cannot establish a murder conviction by proving or arguing that the defendant is not guilty of
7 voluntary manslaughter. Rather, it has an affirmative obligation to prove the element of malice
8 and if it fails to do so, a conviction of murder cannot be supported. The courts have correctly
9 recognized that in order to sustain a verdict of guilty on the charge of murder the state must
10 establish the element of malice beyond a reasonable doubt. Mr. Hernandez should not have had
11 to bear the burden of proving the absence of malice; instead, the state must prove the presence of
12 malice beyond a reasonable doubt. The trial court’s erroneous instructions improperly relieved
13 the state of their burden in this case.
14

15 **F. The Deadly Weapons Enhancement Instruction Was Unconstitutionally Vague.**

16 The jury was instructed in Instruction No. 25 about the use of a deadly weapon:

17 The intention to kill may be ascertained or deduced from the facts and circumstances
18 of the killing, such as the use of a weapon calculated to produce the death, the
19 manner of its use, and the attendant circumstances characterizing the act. ROA 1397.

20 “Deadly Weapon” means any instrument which, if used in the ordinary manner
21 contemplated by its design and construction, will or is likely to cause substantial
22 bodily harm or death; or, any weapon, device, instrument, material or substance
23 which, under the circumstances in which it is used, attempted to be used or
24 threatened to be used, is readily capable of causing substantial bodily harm or death.
25 ROA 1416.

26 Trial counsel objected to this instruction as vague and ambiguous. ROA 1447, Ex. 5. NRS
27 193.165 explicitly defines “firearms” as deadly weapons, but does not conclusively identify other
28 objects as being subject to the statute. Rather than providing an explicit and well-defined list, the
29 legislature has provided a vague and elusive definition of what constitutes a “deadly weapon.” A
30 criminal statute must be strictly construed against the imposition of a penalty when it is uncertain

1 or ambiguous. Moreover, courts have concluded that statutes providing for penalties for crimes
2 must be construed in a manner which avoids unreasonable results. Public policy does not
3 support a finding that the legislature intended all instrumentalities to be considered deadly
4 weapons. Id. In this case, where there is no question that a death occurred, use of the given
5 deadly weapon definition was nonsensical and violated the federal and state constitutions.

6 **G. The Voluntary Intoxication Instruction Was Unconstitutional.**

7 The jury instruction concerning voluntary intoxication was unconstitutional because it
8 failed to apprise the jury that intoxication could be considered in determining whether the
9 defendant acted with premeditation and deliberation. Jury Instruction No. 32 provided:

10 No act committed by a person while in a state of voluntary intoxication shall be
11 deemed less criminal by reason of his condition, but whenever the actual existence
12 of any particular purpose, motive or intent is a necessary element to constitute a
13 particular species or degree of crime, evidence of intoxication may be taken into
consideration in determining such purpose, motive or intent.

14 Mere intoxication cannot reduce murder to voluntary manslaughter.

15 ROA 1404, Ex. 5. Trial counsel objected to this instruction and noted that voluntary intoxication
16 could negate the element of intent in a first-degree murder case. ROA 1445. The trial court
17 agreed that the jury would not appreciate the difference between general intent and specific intent
18 offenses, but nonetheless ruled that the instructions need to satisfy the Nevada Supreme Court's
19 standard, even though the jury probably would not understand them. ROA 1444-45. Mr.
20 Hernandez herein complains of the trial court's erroneous assertions that instructions need not be
21 understandable to the jury, and are for the reviewing court's benefit rather than for the benefit of
22 the jurors. Mr. Hernandez also disagrees with the assertion that intoxication is irrelevant to the
23 jury's decision concerning the elements of murder.

24 **H. The Jury Penalty Phase Unanimity Instruction Was Unconstitutional.**

25 At the penalty phase of Mr. Hernandez's trial, the jury was given the following jury
26 instruction regarding the weighing of aggravating and mitigating circumstances:
27

28 A mitigating circumstance itself need not be agreed to unanimously; that is, any one

1 juror can find a mitigating circumstance without the agreement of any other jurors.
2 The entire jury must agree unanimously, however, as to whether the aggravating
3 circumstances outweigh the mitigating circumstances or whether the mitigating
4 circumstances outweigh the aggravating circumstances.

5 Instruction No. 8, Ex. 20.

6 The penalty phase jury instruction given in Mr. Hernandez's trial incorrectly informed the
7 jury that they had to be unanimous in order to find that the mitigating circumstances outweighed
8 the aggravating circumstances. A rational juror would have reasonably understood this penalty
9 phase instruction to require that the jury had to be unanimous in finding that mitigation
10 outweighs aggravation. Thus, the given instruction prevented each individual juror from giving
11 effect to the mitigating evidence in the process of weighing it against the aggravating
12 circumstances.

13 Mr. Hernandez further alleges that the prejudice from the invalid penalty phase
14 instruction was exacerbated by the anti-sympathy instruction that was given to the jury. The
15 Nevada Supreme Court has acknowledged that the type of mitigation instruction given in Mr.
16 Hernandez's case "included an incorrect implication regarding the consideration of mitigating
17 circumstances", Rippo v. State, 123 Nev. 1086, 146 P.3d 279, 285 (2006), which undermines
18 any conclusion that the anti-sympathy instruction, discussed infra, was harmless beyond a
19 reasonable doubt. Mr. Hernandez alleges that, in combination, the invalid penalty phase
20 instruction on mitigating circumstances and the anti-sympathy instruction would have been
21 interpreted by the jury as precluding the consideration of constitutionally relevant mitigation
22 evidence in (1) finding mitigating circumstances, and in (2) weighing the mitigation against the
23 aggravating circumstances. Mr. Hernandez further alleges that the anti-sympathy instruction
24 itself constituted a violation of federal constitutional rights. See infra.

25 This jury instruction also violated the Eighth Amendment and federal and state
26 constitutional due process and equal protection principles because it "would lead a reasonable
27 juror to conclude that the only way to get a life verdict is if the jury unanimously finds that the
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1 aggravating circumstances do not outweigh the mitigating circumstances” Davis v.
2 Mitchell, 314 F.3d 682, 689 (6th Cir. 2003). The jury instruction also deprived Mr. Hernandez
3 of a constitutionally protected liberty interest in the application of state law which permits an
4 individual juror to find that the aggravating circumstances do not outweigh the mitigating
5 circumstances, even in the complete absence of mitigation. Finally, the invalid instruction
6 prevented the Nevada Supreme Court from concluding that the invalid aggravating circumstance
7 found by the jury was in fact harmless beyond a reasonable doubt. Therefore, the use of the
8 improper jury instruction renders Mr. Hernandez’s death sentence invalid.

9
10 To the extent that trial counsel failed to object to these unconstitutional jury instructions,
11 trial counsel were ineffective. There could be no reasonable trial strategy, reasonably calculated
12 to effectuate Mr. Hernandez’s best interests, to allow Mr. Hernandez’s jury to deliberate on his
13 fate pursuant to legally incorrect and unconstitutional instructions. To the extent that Mr.
14 Hernandez’s state post-conviction counsel failed to raise these claims in his state post-conviction
15 proceedings, they too performed ineffectively.

16 **I. The “Anti-Sympathy” Instruction Was Unconstitutional.**

17 The jury was instructed during the penalty phase that “a verdict may never be influenced
18 by sympathy, prejudice or public opinion. Your judgment should be the product of sincere
19 judgment and sound discretion in accordance with these rules of law.” ROA 1640, Ex. 20. By
20 prohibiting the jury from taking sympathy into account, this language precluded the jury from
21 either considering mitigating factors or concluding that a death sentence was not warranted even
22 if the aggravating circumstances did outweigh the mitigating factors.

23 Further, the instruction precluded consideration of all sympathy, including any sympathy
24 warranted by the evidence. Because the jury in this case was told not to consider any sympathy,
25 rather than “mere” sympathy, it is reasonably likely that the jury at Mr. Hernandez’s trial
26 understood that when making a moral judgment about his culpability, it was forbidden to take
27 into account any evidence that evoked a sympathetic response. The giving of the
28

1 unconstitutional "anti-sympathy" instruction substantially and injuriously affected the process to
2 such an extent as to render Mr. Hernandez's sentence fundamentally unfair and unconstitutional.
3 The state cannot show that this instruction did not affect the sentence.

4 To the extent that trial counsel failed to object to these unconstitutional jury instructions,
5 trial counsel were ineffective. There could be no reasonable trial strategy, reasonably calculated
6 to effectuate Mr. Hernandez's best interests, to allow a Mr. Hernandez's jury to deliberate on his
7 fate pursuant to legally incorrect and unconstitutional instructions. To the extent that Mr.
8 Hernandez's state post-conviction counsel failed to raise these claims in his state post-conviction
9 proceedings, they too performed ineffectively.

10 **J. The Jury Guilt Phase Unanimity Instruction Was Unconstitutional.**

11 The jury was instructed that they need not be unanimous on whether Mr. Hernandez
12 committed premeditated murder or felony murder. Instruction No. 35 provided:

13 Although your verdict must be unanimous as to the charge of Murder of the First
14 Degree, you do not have to agree on the theory of guilt. Therefore, even if you
15 cannot agree on whether the facts establish (1) premeditated murder, (2) felony
16 murder, or (3) murder by means of torture, so long as all of you agree that the
17 evidence establishes the Defendant's guilt of murder in the first degree, your verdict
18 shall by Murder of the First Degree. ROA 1407, Ex. 5.

19 In death penalty cases, it is a violation of due process not to require the jury to be
20 unanimous on the theory of criminality. Mr. Hernandez recognizes that the Supreme Court has
21 concluded that the Fourteenth Amendment does not require a unanimous jury in state cases if a
22 statute is structured in such a manner that the legislature's intent is clear that it intended to create
23 a single offense and specified different means of committing the offense within that statute. The
24 Nevada Supreme Court has ruled on several occasions that a jury need not be unanimous in
25 determining under which theory of criminality the state proved its case. Nonetheless, Nevada's
26 statute defining first degree murder sets forth two separate offenses and as a matter of due
27 process, fundamental fairness, and the right to a jury trial under the federal and state
28 constitutions, this Court should overrule this line of cases by ruling that a jury must be

1 unanimous as to whether the state has proven first degree murder through either premeditation
2 and deliberation or felony murder.

3 **K. The “Equal and Exact Justice” Instruction Was Unconstitutional.**

4 The trial court instructed the jury in Instruction No. 55 at the conclusion of its instructions
5 during the innocence/guilt phase of the trial and No. 22 during the penalty phase:

6 [Y]ou will bear in mind that it is your duty to be governed in your deliberations by
7 the evidence as you understand it and remember it to be and by the law as given to
8 you in these instructions, with the sole, fixed and steadfast purpose of doing equal
9 and exact justice between the Defendant and the State of Nevada. ROA 1427, 1643,
10 Ex. 5, 20.

11 By informing the jury that it must do “equal and exact justice between the defendant and
12 the State of Nevada,” this instruction created a reasonable likelihood that the jury would not
13 apply the presumption of innocence in favor of Mr. Hernandez, and would convict and sentence
14 based on a lesser standard of proof than the constitution requires.

15 The defect in this instruction is in the final clause: jurors are told to deliberate “with the
16 sole, fixed and steadfast purpose of doing equal and exact justice between the defendant and the
17 State of Nevada.” This “equal and exact” language improperly quantifies the proportion of
18 “justice” to be allocated between the defendant and the state. While it would be proper to
19 instruct the jury that it should attempt to do justice between the parties by following the burden
20 of proof instructions, the qualitative element of justice injected by “equal and exact” language
21 creates a reasonable likelihood that a juror will ignore the constitutionally mandated imbalance
22 between the burdens placed upon the parties in a criminal prosecution which requires the state to
23 bear the burden of proof beyond a reasonable doubt and affords the defendant the presumption of
24 innocence, and instead view the parties on “equal” footing, as if this were a civil case. An
25 instruction to do “equal and exact justice” to both parties fundamentally corrupts the sentencing
26 determination and constitutes structural error that is prejudicial per se.

27 **L. The Instruction Defining “Mutilation” Was Unconstitutional.**

28 The jury was instructed as follows on the aggravating circumstance of mutilation:

1 You are instructed that the term "mutilate" means to cut off or permanently destroy
2 a limb or essential part of the body or to cut off or alter radically so as to make
imperfect.

3 In order for mutilation to be found as an aggravating circumstance, there must be
4 mutilation of the victim beyond the act of killing. ROA 1632, Ex. 20.

5 Trial counsel objected to this instruction and argued that it was vague, ambiguous and overbroad.
6 ROA 1649. They further contended that the instruction was so broad that it covered every death
7 and was therefore an improper aggravating circumstance. ROA 1650.

8 The offense in this case took place in October 1999. It was not until February 2000 that
9 the Nevada Supreme Court concluded that postmortem mutilation falls within the definition of
10 NRS 200.033(8). See Byford v. State, 116 Nev. 215, 241, 994 P.2d 700, 717 (2000).

11 Retroactive application of this new and unforeseeable application of this new definition of the
12 mutilation aggravating circumstance violated Mr. Hernandez's right to due process of law, right
13 to notice of prohibited conduct, right to a fair penalty hearing, right to be free from cruel and
14 unusual punishment, right to equal protection, and right against the use of ex post facto laws.

15 It is a basic principle that a criminal statute must give fair warning of the conduct that
16 makes it a crime. A statute which either forbids or requires the doing of an act in terms so vague
17 that men of common intelligence must necessarily guess at its meaning and differ as to its
18 application, violates the first essential of due process of law. No one may be required at peril of
19 life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be
20 informed as to what the state commands or forbids. While these principles are generally applied
21 to statutes that are vague in the language of the statute itself, they are equally applicable to cases
22 where a statute that is precise on its face has been unforeseeably and retroactively expanded by
23 judicial construction. Construction of a statute which unexpectedly broadens its application
24 operates precisely like an ex post facto law and is therefore barred from retroactive application to
25 pending cases under the due process clause. The judicial expansion of this aggravating
26 circumstance to include post-mortem mutilation did not occur until after the offense at issue here
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1 and it is unconstitutional to apply that newly expanded interpretation of the statute to this case.

2 In addition, the aggravating circumstance of "mutilation" is vague on its face and its
3 application in this case. The statute fails to provide any meaningful definition of the term and the
4 jury instruction given here failed to define essential terms such as "essential part of the body" or
5 "to cut off or alter radically so as to make imperfect" and it is therefore unconstitutionally vague.
6 A statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance
7 for the choice between death and a lesser penalty. Moreover, in a 'weighing' state, where the
8 aggravating and mitigating factors are balanced against each other, it is constitutional error for
9 the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other valid
10 aggravating factors apply.

11 Moreover, application of the aggravating circumstance to the facts presented here was not
12 foreseeable. There does not appear to be any prior case in this jurisdiction in which the
13 mutilation aggravating circumstance has been held applicable to perforation of a uterus.
14 Likewise, there appears to be no authority defining the uterus as an "essential part of the body."
15 Unlike other cases, no testimony was presented in this case in support of the proposition that a
16 uterus is an essential part of the body. As set forth above, it is Mr. Hernandez's contention that
17 the aggravating circumstance of mutilation is unconstitutionally vague because it fails to define
18 the term "essential part of the body." There appears to be no statutory definition limiting its
19 scope. Thus, application of this aggravating factor was unconstitutional under the facts of this
20 case because Mr. Hernandez was not given notice that it would be applied to the act of
21 perforating the uterus and because the uterus has not previously been defined as an essential part
22 of the body. Judicial expansion of this aggravating circumstance and application of an expanded
23 definition to this case violated Mr. Hernandez's rights to due process and equal protection, his
24 right to be free from cruel and unusual punishment, and his right to be free from the application
25 of ex post facto laws.
26

27 Finally, under the facts of this case, the "mutilation" aggravating circumstance was
28

1 duplicative of the "sexual penetration of a dead body" aggravating circumstance. Both
 2 aggravators were premised on the same conduct. The state may not seek duplicative aggravators
 3 when they are based on the same facts.

4 **M. The Jury Instructions Prejudiced Mr. Hernandez.**

5 Singly and cumulatively, the jury instructions failed to instruct a reasonable juror on the
 6 proper application of the law. The jury instructions given to the jury in Mr. Hernandez's case,
 7 therefore, violated Mr. Hernandez's constitutional rights, and the error was not harmless.

8 **Exhaustion of state court remedies regarding Ground 12:**

9 **► Direct Appeal:**

10 Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

11 X Yes No. (Partially)

12 If no, explain why not: Direct Appeal counsel raised some of the claims presented herein. To the
 13 extent they did not raise them all, they were ineffective.

14 **► First Post Conviction:**

15 Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

16 X Yes No. (Partially)

17 If no, explain why not: State post-conviction counsel raised some of the claims presented herein.
 18 To the extent they did not raise them all, they were ineffective.

19 If yes, name of court: Eighth Judicial District Court for the District of Nevada. Date petition
 20 filed: 3/12/2003.

21 Did you receive an evidentiary hearing? X Yes No. Did you appeal to the Nevada
 22 Supreme Court? X Yes No.

23 If no, explain why not: _____
 24 _____
 25 _____

26 If yes, did you raise this issue? X Yes No. (Partially)

27 If no, explain why not: State post-conviction counsel raised some of the claims presented herein.
 28

1 To the extent they did not raise them all, they were ineffective.

2 ► **Second Post Conviction:**

3 Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas
4 corpus?

5 ____ Yes ____ No.

6 If yes, explain why: _____
7 _____.

8 If yes, name of court: _____ date petition filed
9 ____/____/____.

10 Did you receive an evidentiary hearing? ____ Yes ____ No. Did you appeal to the Nevada
11 Supreme Court? ____ Yes ____ No.

12 If no, explain why not: _____
13 _____
14 _____.

15 If yes, did you raise this issue? ____ Yes ____ No.

16 If no, explain why not: _____
17 _____.

18 ► **Other Proceedings:**

19 Have you pursued any other procedure/process in an attempt to have your conviction and/or
20 sentence overturned based on this issue (such as administrative remedies)? ____ Yes X No.

21 If yes, explain: _____
22 _____.

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