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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RONNIE G. MILLIGAN, Petitioner, vs. E. K. McDANIEL, Warden, and CATHERINE CORTEZ MASTO, Attorney General of the State of Nevada, Respondents.	Case No. CV-N-03-0097-JCM(VPC) AMENDED PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. §2254. (Death Penalty Habeas Corpus Case)

Petitioner, Ronnie G. Milligan, by and through undersigned counsel, hereby files this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Mr. Milligan alleges he is being held in custody in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and the rights afforded him under international law enforced under the Supremacy Clause of the United States Constitution. U.S. Const., Art. VI.

Respectfully submitted this 13th day of April, 2007.

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/s/ Mike Charlton
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Procedural History

On January 22, 1981, a Humboldt County jury convicted Mr. Milligan of first degree murder and robbery by use of a deadly weapon.[1]

On January 27, 1981, the same jury sentenced Mr. Milligan to death.[2]

On July 20, 1981, the Humboldt County-Sixth Judicial District Court held a New Trial Motion Hearing. On August 17, 1981, the district court denied Mr. Milligan's new trial motion, and officially entered the judgment of conviction and sentence of death in Case No. CR0002289.

Mr. Milligan filed a timely notice of appeal to the Nevada Supreme Court, which the Court denied on October 28, 1985.[3]

On November 22, 1985, Mr. Milligan filed a petition for rehearing,[4] which the Nevada Supreme Court denied on April 3, 1986.[5]

On June 2, 1986, Mr. Milligan filed a petition for a writ of certiorari in the United States Supreme Court, which the Court denied on October 6, 1986.[6]

On May 13, 1987, Mr. Milligan filed a petition for post-conviction relief and a motion for a new penalty hearing in the Humboldt County-Sixth Judicial District Court. On October 13, 1987, he filed an amended petition for post-conviction relief in the same court and case number. The district court held an evidentiary hearing between September 19-21, 1998. On September 14, 1990, the district court denied relief.[7] Mr. Milligan appealed the district court's denial to the Nevada

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[1]NT 1/22/81, at 279-280.

[2]NT 1/22/81, at 137.

[3]Exs. 301, 302; Milligan v. State, 101 Nev. 627, 708 P.2d 289 (1985).

[4]Ex. 303.

[5]Ex. 304.

[6]Milligan v. Nevada, 479 U.S. 870 (1986).

[7]Ex. 305.

Supreme Court,[8] which the Court denied on June 17, 1991.[9]

On July 1, 1991, Mr. Milligan filed a petition for rehearing,[10] and on August 28, 1991, rehearing was denied.[11]

On October 3, 1991, Mr. Milligan field a petition for writ of certiorari in the United States Supreme Court, and on December 2, 1991, it was denied.[12]

On December 24, 1991, Mr. Milligan filed a petition for writ of habeas corpus under 28 U.S.C. §2254 in the United States District Court for the District of Nevada. Case No. 91-609ECR (later HDM). After being appointed counsel, Mr. Milligan filed an amended petition on April 22, 1992. On December 17, 1992, the United States District Court dismissed the petition with prejudice. Case No. 91-609HDM.

On December 22, 1991, Mr. Milligan filed another petition for writ of habeas corpus in the White Pine County-Seventh Judicial District in Case No. HC-0351292. On May 27, 1993, he filed an amended petition, and on May 26, 1994 the trial court dismissed the petition.[13] Mr. Milligan appealed the dismissal to the Nevada Supreme Court. On June 9, 1995, Mr. Milligan filed a pro-per motion for leave to file a petition for writ of mandate for appointment of counsel on appeal in the Nevada Supreme Court,[14] and filed a pro-per motion regarding supplement points and authorities on November 16, 1995 in Case No. 25748.[15] On July 26, 1996, the Nevada Supreme Court remanded the case to the Humboldt County-Sixth Judicial District Court with instructions to hold another

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[8]Exs. 306, 307.

[9]Ex. 308.

[10]Ex. 309.

[11]Ex. 310.

[12]Milligan v. Nevada, 502 U.S. 982 (1991).

[13]Ex. 311.

[14]Ex. 312.

[15]Ex. 313.

evidentiary hearing.[16]

The trial judge held and evidentiary hearing between November 17, 1998 through November 20, 1998. On March 14, 2001, Humboldt County-Sixth Judicial District Court denied relief.[17] Mr. Milligan appealed the denial to the Nevada Supreme Court,[18] and on July 24, 2002, the Nevada Supreme Court affirmed the district court's denial.[19]

On August 7, 2002, Mr. Milligan filed a petition for rehearing,[20] which the Nevada Supreme Court denied on August 21, 2002.[21]

On August 30, 2002, Mr. Milligan filed a petition for en banc reconsideration,[22] and the Nevada Supreme Court denied on October 1, 2002.[23]

On February 20, 2003, Mr. Milligan filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 in the United States District Court of the District of Nevada. On this same day, Mr. Milligan also filed a motion requesting the appointment of counsel. This Court subsequently appointed the Federal Public Defender's Office to represent Mr. Milligan during his federal habeas proceedings.

Mr. Milligan is currently in the custody of the State of Nevada at Ely State Prison in Ely, Nevada, pursuant to the state court judgment of conviction dated August 17, 1981. Respondent E.K. McDaniel is the warden of Ely State Prison, and Catherine Cortez Masto is the Attorney General of the State of Nevada. The Respondents are sued in their official capacities.

Statement with respect to the Procedural History of Mr. Milligan's Co-Defendants

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[16]Ex. 314.

[17]Ex. 315.

[18]Ex. 316, 317.

[19]Ex. 318.

[20]Ex. 319.

[21]Ex. 320.

[22]Ex. 321.

[23]Ex. 322.

While Mr. Milligan's three co-defendants, Terry Bonnette, Paris Leon Hale, and Katherine Orfield, were also convicted, none were sentenced to death and all were eventually paroled. In July 1982, a jury convicted Terry Bonnette of first degree murder and robbery with use of a deadly weapon on a person over the age of 65 years. The trial judge sentenced him to life imprisonment without the possibility of parole and to three consecutive five year terms. In August 1982, a jury convicted Paris Leon Hale of first degree murder with use of a deadly weapon and robbery. The trial judge sentenced him to life imprisonment with the possibility of parole, to run concurrently with a seven-and-one-half year term for robbery, and consecutively with two additional seven-and-one-half year terms for use of a deadly weapon and for committing the crime on a person over the age of 65 years. The same jury who convicted Ms. Hale also convicted Katherine Orfield of second degree murder and robbery. The trial judge sentenced her to life imprisonment with the possibility of parole in fifteen years.

The Nevada Supreme Court reversed Mr. Bonnette, Mr. Hale, and Ms. Orfield's convictions and sentences on October 28, 1995, because the trial judge quantified the reasonable doubt concept.[24] On October 22, 1986, Mr. Bonnette signed a plea agreement wherein he agreed to testify against Ms. Orfield and Mr. Hale during their re-trial.[25] In return for his testimony, the State of Nevada and the Attorney General's Office agreed to sentence Mr. Bonnette to life in prison with the possibility of parole, to "dismiss any and all remaining charges against me arising out of this incident," and to transfer Mr. Bonnette to a Florida prison so he could be closer to his family.[26] The State of Florida paroled Mr. Bonnette on July 7, 1994. On April 6, 1987, Mr. Hale pled guilty to first degree murder and robbery, and the trial judge sentenced him to life with the possibility of parole, and seven-and-one-half years to be served concurrently.[27] The State of Nevada paroled him on April 14, 2000. Ms. Orfield did not plead, and instead went to trial for a second time. In March 1987, a jury convicted

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[24]Milligan v. State, 101 Nev. 627, 629-30, 708 P.2d 289, 292 (1995).

[25]Ex. 144; NT, Bonnette (Plea), 10/22/86, at 1-17.

[26]Id.

[27]NT, Hale (Plea), 4/6/87, at 11.

her of second-degree murder and robbery, and the trial judge sentenced her to life plus fifteen years.[28] Like Mr. Bonnette, the State of Nevada transferred her to an Ohio correctional facility for females so she could be closer to her family. The State of Ohio paroled her on January 29, 1998.

Statement with respect to Exhaustion

Claims 1, 2, 3, 4, 6, 7, 11, and 12 and have been presented or arguably have been presented, to the Nevada Supreme Court. Claims 2, 3, and 4 should be deemed presented to the Nevada Supreme Court pursuant to its mandatory review under Nev. Rev. Stat. §177.055, or should be deemed presented to the Nevada Supreme Court pursuant to its sua sponte review of constitutional issues under Bejarano v. State, 106 Nev. 840, 843, 801 P.2d 1388 (1990), and Bennett v. State, 111 Nev. 1099, 1108-1109, 901 P.2d 676 (1995). Claims 5, 8, and 9 have not been presented to the Nevada Supreme Court for review.

Statement with Respect to the Adequacy of Nevada's Procedural Default Rules

Nevada's procedural default rules are inadequate to prevent this Court from substantively considering any claims which Nevada state courts have deemed procedurally defaulted.[29]

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[28]NT, Orfield (re-trial), 3/2/87, at 1622; Orfield v. State, 105 Nev. 107, 771 P.2d 148 (1989).

[29]See Appendix A.

CLAIM ONE

Mr. Milligan's conviction and death sentence are invalid under the state and federal constitutional guarantees of due process, equal protection, the effective assistance of counsel, an impartial jury, and a reliable sentence because had trial counsel conducted an adequate investigation, and the prosecutor disclosed material evidence under Brady v. Maryland, and had law enforcement officers not destroyed or failed to collect potentially exculpatory evidence, the jury would have been presented sufficient evidence to demonstrate there was reasonable doubt regarding Mr. Milligan's culpability. U.S. Const. Amends. V, VI, VIII, & XIV.

SUPPORTING FACTS

Trial counsel's investigation was abysmal; the prosecutor failed to disclose significant Brady material; and the police destroyed and failed to collect apparent and potentially exculpatory evidence. These errors prevented the jury from considering evidence which would have established reasonable doubt regarding Mr. Milligan's culpability. Mr. Milligan's trial was not an adversarial contest, but a foregone conclusion–i.e., Mr. Milligan was the person who knowingly and purposefully struck Ms. Voinski with the sledgehammer. There is reasonable doubt regarding Mr. Milligan's culpability, and he is entitled to guilt and penalty phase relief.

I. Pre-Trial Events

A. Events Leading to Mr. Milligan's Arrest

In late June 1980, Mr. Milligan left Louisiana and traveled cross country with several individuals he recently met: Terry Bonnette, Paris Hale, Katherine Orfield Sr., and Katherine Orfield Jr. Unbeknownst to Mr. Milligan, Mr. Bonnette and Mr. Hale had lengthy criminal histories. Mr. Hale's criminal history spread across several states including: Pennsylvania, North Carolina, Delaware, and Virginia. Mr. Hale and Mr. Bonnette were the group's leaders.

While traveling, the group stopped in Nebraska, where they picked up a hitch-hiking, illegal alien named Ramon Houston. Unbeknownst to the group, Mr. Houston had an extensive criminal record in Mexico which included rape, robberies, public intoxication, and physically assaulting a Mexican police officer. Mr. Houston was also deported more than a dozen times for illegally entering the United States.

Immediately after he joined the group, Mr. Houston informed the group he was good at robbing people and banks. As a result, Mr. Bonnette repeatedly asked him to steal things (i.e., food, liquor, gas, tools, etc.) throughout the trip. On more than one occasion, Mr. Houston was caught trying to steal alcohol or money from a store or an unsuspecting person at a rest stop.

Throughout the entire trip, Mr. Milligan was either drunk or passed out, and he rarely ate as well. He was too intoxicated to participate in any of the stealing.

On July 4, 1980, the group traveled from Utah to Winnemucca, Nevada. When they arrived in Winnemucca, they stopped at a rest area on I-80 West to eat, drink, and celebrate the July 4th holiday. While at the rest area, Mr. Hale and Mr. Bonnette were approached by an elderly woman named Zalihon Voinski (the victim in this case), who needed assistance with her vehicle–a VW Bug. After Mr. Hale and Mr. Bonnette briefly spoke with Ms. Voinski and quickly examined her vehicle, they invited her to join the group at their picnic table. Shortly thereafter, when the elder and younger Orfields went to the bathroom, the elder Orfield was approached by Mr. Hale and told that Mr. Hale, Mr. Bonnette, and Mr. Houston intended to rob Ms. Voinski. When the younger Orfield returned to the picnic table, only Mr. Milligan remained; the others had already gathered around Mr. Bonnette's vehicle, including Ms. Voinski. Mr. Hale and Mr. Bonnette subsequently convinced Ms. Voinski that they would give her a ride to a local gas station to get her vehicle repaired. Mr. Bonnette and Mr. Hale forced the younger Orfield into Mr. Bonnette's vehicle because if she refused to go with the group, Ms. Voinski would have refused the ride.

On July 4, 1980, Mr. Milligan consumed a large quantity of hard liquor (i.e., whiskey and wine), which ultimately affected his brain circuitry because he suffered an alcoholic blackout. As a result, Mr. Milligan has no memory of entering Mr. Bonnette's vehicle or anything after this point. More importantly, the blackout prevented him from forming short and long-term memory, and from thinking and acting rationally and willfully on July 4, 1980.

Once the group (Ms. Voinski included) departed the rest area, Mr. Bonnette drove the group to a desolate area in the desert off Interstate 80, where, unbeknownst to Mr. Milligan, the group (i.e., Mr. Bonnette, Mr. Hale, and Mr. Houston) intended to rob Ms. Voinski. At this point, *what* happened to Ms. Voinski is not at issue; certain individuals robbed her, and someone struck her in

the head with a twelve pound sledgehammer killing her on July 25, 1980. What is not clear is *who* actually inflicted the fatal blows.

After the attack, the group proceeded back to the rest area where Mr. Hale took possession of Ms. Voinski's vehicle. Once in possession of the vehicle, the group went to a bar in Golconda, Nevada. While there, Mr. Houston went into the bathroom, crawled out the bathroom window, and procured Kenneth Wolf's attention. Mr. Houston told Mr. Wolf he just witnessed three men–Mr. Milligan, Mr. Hale, and Mr. Bonnette–beat an elderly woman. Mr. Wolf called the police, who arrived shortly thereafter.

Once the police arrived, Mr. Houston directed Len Otterstrom, a Humboldt County Sheriff's Deputy, to Ms. Voinski's body, while Mr. Milligan, Mr. Hale, Mr. Bonnette, Ms. Orfield Sr., and Ms. Orfield Jr. were detained by Roger Peterson, a Winnemucca City Police Officer, and Wilburn Dorries, a Humboldt County Sheriff's Deputy. Once Ms. Voinski was located, Mr. Houston told Deputy Otterstrom it was Mr. Milligan who struck her with the sledgehammer. Deputy Otterstrom then radioed Officer Peterson and Deputy Dorries and ordered them to arrest Mr. Milligan for attempted murder, and Mr. Hale, Mr. Bonnette, Ms. Orfield Sr., and Ms. Orfield Jr. for accessories to attempted murder.

B. Failure to Take Mr. Milligan's Blood Alcohol Level

Despite obvious signs Mr. Milligan was intoxicated, neither Deputy Dorries nor Officer Peterson administered a blood alcohol test to Mr. Milligan.

Detention: Officer Peterson and Deputy Dorries arrived at the Waterhole Bar in Golconda, Nevada, at approximately 3:00 p.m., on July 4, 1980, to provide backup for Deputy Otterstrom, who was already there with Ramon Houston and Kenneth Wolf.[30]

When they arrived, Deputy Otterstrom directed Officer Peterson and Deputy Dorries to follow him, Mr. Wolf, and Mr. Houston around the corner of the Waterhole Bar, at which time Mr.

[30]NT, Prelim. Hrg., 7/25/80 at 123-24, 136-37, 174; NT, Prelim. Hrg., 8/2/80 at 327-28; NT 1/15/81 at 298-299, 333-334.

Houston observed all three co-defendants and, minutes later, Mr. Milligan.[31] At Mr. Houston's indication, Deputy Otterstrom directed Officer Peterson and Deputy Dorries to detain Mr. Milligan and the co-defendants, and left the scene with Mr. Wolf and Mr. Houston in a squad car to locate Ms. Voinski.[32]

Officer Peterson recalled that he and Deputy Dorries detained Mr. Milligan and the co-defendants solely on Deputy Otterstrom's "authority."[33] Deputy Otterstrom estimated that he was 30-40 feet away from Mr. Milligan, and spent about 10-15 seconds at the scene.[34]

Officer Peterson and Deputy Dorries conducted a "field interview," grouped the co-defendants together, and observed them for over two hours. Throughout this time, Mr. Milligan exhibited multiple signs of intoxication. Most notably, Officer Peterson testified when he first saw Mr. Milligan, he was sitting in the backseat of Terry Bonnette's vehicle "drinking a [Miller] beer[.]"[35] Deputy Dorries also testified he first observed Mr. Milligan sitting on the trunk "drinking [a] beer."[36] Deputy Dorries recalled that Mr. Milligan was drinking "Miller's High Life" and had a "fairly strong odor" of alcohol.[37]

Deputy Dorries recalled Mr. Milligan complained the sun was too hot, and he allowed Mr. Milligan to go to Mr. Bonnette's vehicle to retrieve his shirt.[38] However, rather than retrieve his

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[31]NT, Prelim. Hrg., 7/25/80 at 123-125, 138, 175; NT, Prelim. Hrg., 8/2/80 at 330-331; NT 1/15/81 at 298-299, 333-334.

[32]NT, Prelim. Hrg., 7/25/80 at 125, 128, 139, 175-176; NT, Prelim. Hrg., 8/2/80 at 331-332; NT 1/15/81 at 272-273, 298, 333.

[33]NT, Prelim. Hrg., 7/25/80 at 139, 141, 176, 187-188; NT, Prelim. Hrg., 8/22/80 at 331-332.

[34]NT, Prelim. Hrg., 8/2/80 at 331-332; NT 1/15/81 at 290-291.

[35]NT, Prelim. Hrg., 7/25/80 at 129-130, 159.

[36]NT, Prelim. Hrg., 7/25/80 at 177, 189; NT 1/15/81 at 301, 335-336.

[37]NT, Prelim. Hrg., 7/25/80 at 177; NT 1/15/80 at 302, 327.

[38]NT, Prelim. Hrg., 7/25/80 at 188-189; NT 1/15/80 at 304.

shirt, Mr. Milligan got in the back seat, and tried to lay down.[39] Deputy Dorries testified Mr. Milligan was approached and ordered to get out of the vehicle, but he "relax[ed] in the seat[,]" put his head down, and indicated he wanted to go to sleep.[40] Officer Peterson testified that they "had problems" getting Mr. Milligan out of the car, and that Mr. Milligan had to be "order[ed]" out on three separate occasions.[41]

Deputy Dorries testified that Mr. Milligan's speech was slurred, he appeared intoxicated, was "argumentative," and upon exiting the car, he complained that he "didn't want to get out of the vehicle[,]" and that he "w[anted] to rest."[42] Deputy Dorries also testified that Mr. Milligan put his shirt on inside-out without realizing it and walked back to the group.[43] Deputy Dorries testified he believed Mr. Milligan was intoxicated.[44]

Arrest: Once Deputy Otterstrom located Ms. Voinski, he ordered Officer Peterson and Deputy Dorries to arrest Mr. Milligan for attempted murder and the co-defendants for "accessory to attempted murder."[45] Officer Peterson specifically recalled that Deputy Otterstrom stated it was Mr. Milligan who was suspected–based on Mr. Houston's representations–to have "been involved in the whole thing[.]"[46] Officer Peterson Mirandized Mr. Milligan and placed him in his patrol car beside Mr. Hale.[47]

Officer Peterson testified that Mr. Milligan acted "obnoxious" throughout his entire arrest;

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[39]NT, Prelim. Hrg., 7/25/80 at 189-190, 192-193.

[40]NT, Prelim. Hrg., 7/25/80 at 190, 193.

[41]NT, Prelim. Hrg., 7/25/80 at 140, 149; NT 1/15/81 at 347-348.

[42]NT, Prelim. Hrg., 7/25/80 at 193-194.

[43]NT 1/15/81 at 307, 322.

[44]NT, Prelim. Hrg., 7/25/80, at 194 ("Q: Do you think he was intoxicated? A: Yes, sir.").

[45]NT, Prelim. Hrg., 7/25/80 at 141, 155, 162, 180; NT, Prelim. Hrg., 8/2/80 at 340; NT 1/15/81 at 308, 337.

[46]NT, Prelim. Hrg., 7/25/80 at 134, 141, 187-188.

[47]NT, Prelim. Hrg., 7/25/80 at 155, 163, 181-181.

that he "kept talking" in a loud voice and was told to be quiet, but he "wouldn't listen[,]"; and "he wouldn't do what [he was told]."[48] Mr. Milligan repeatedly asked to go to the bathroom and wanted to know why he was being detained. Mr. Milligan's questions, however, did not cease even after his initial inquiries were answered several times.[49]

Deputy Dorries testified Mr. Milligan "seemed to be on the incoherent side[,]" he "kept hollering ... [h]e didn't do anything," and he "couldn't seem to understand why he was being arrested and et. cetera."[50] Deputy Dorries also acknowledged that Mr. Milligan's repetitive and "minutely slurred[]" speech were said to be similar to how "a person under the influence [of alcohol] normally [acts]."[51]

Transportation: Officer Peterson and Deputy Dorries transported Mr. Milligan and co-defendant Paris Hale to the Sheriff's Office for booking.[52] Mr. Milligan continued to ask if he could use the bathroom and why he was being detained as he was transported to the Sheriff's Office.[53] Officer Peterson "kept telling [Mr. Milligan] to shut up[,]" but Mr. Milligan continued to ask the same questions.[54] Deputy Dorries testified that Mr. Milligan's repetitious questions "got to be an annoyance... toward the [end.]"[55] Mr. Milligan's outbursts continued "[c]lear on through the trip and up into the booking area."[56]

Once at the Sheriff's Office, Deputy Dorries and Officer Peterson elected to use the basement

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[48]NT, Prelim. Hrg., 7/25/80 at 153-54, 167.

[49]NT, Prelim. Hrg.,7/25/80 at 140, 153, 178; NT 1/15/81 at 322-323, 327, 350.

[50]NT, Prelim. Hrg., 7/25/80 at 179; NT 1/15/80 at 305-306, 309.

[51]NT, Prelim. Hrg., 7/25/80 at 178-179.

[52]NT, Prelim. Hrg., 7/25/80 at 133; NT 1/15/81 at 309.

[53]NT, Prelim. Hrg., 7/25/80 at 156-157.

[54]NT, Prelim. Hrg., 7/25/80 at 156-157.

[55]NT, Prelim. Hrg., 7/25/80 at 186.

[56]NT 1/15/81 at 311.

elevator to transport Mr. Milligan up to the jail.[57] When asked if Mr. Milligan had any problems walking, Deputy Dorries testified, "[w]e didn't walk. We placed him in the elevator and we went up the stairs."[58] Deputy Dorries and Officer Peterson only placed Mr. Milligan in the elevator. "What we did, we stuck Mr. Milligan in the elevator and he was taken up [to the booking area] by the elevator, and we [Peterson and Dorries] took Mr. Hale [up] through the stairway."[59] Years after Mr. Milligan's trial, Officer Peterson conceded: "At the time, we generally put the 'drunks' in the elevator."[60]

Intake and Booking: Deputy Dorries remained with Mr. Milligan throughout the entire booking process.[61] Officer Peterson completed Mr. Milligan's booking report, while Deputy Dorries and Deputy Theodore Snodgrass transported Mr. Milligan into a shower stall to change into jail coveralls.[62] Deputy Snodgrass testified that Mr. Milligan "obviously" upset Deputy Dorries in the booking area, and that Deputy Dorries put "his hand on Mr. Milligan's back" and was pushing Mr. Milligan.[63] Deputy Snodgrass "grabbed" Mr. Milligan and helped Deputy Dorries "escort[]" Mr. Milligan into the shower room.[64] Deputy Snodgrass then asked Mr. Milligan if there "were going to [be] problems and he [said no]."[65] Mr. Milligan did not want to change his clothes, but there were no "serious problems" getting him to comply.[66]

Mr. Milligan was "still in an argumentative type mood[]" during the booking procedure. NT

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[57]NT 1/15/81 at 311.

[58]Id. at 312.

[59]Id. at 341.

[60]Ex. 201 (Roger Peterson's declaration).

[61]NT, Prelim. Hrg., 7/25/80 at 133, 183.

[62]NT, Prelim. Hrg., 7/25/80 at 133, 152, 183; NT 1/15/81 at 342.

[63]NT, Prelim. Hrg., 8/2/80 at 388.

[64]NT, Prelim. Hrg., 8/2/80 at 388.

[65]Id.

[66]NT 1/15/81 at 315.

1/15/81 at 314. He was read questions from an intake sheet by Humboldt County Jailer, Deputy Dan James, and was said to have answered the booking questions "without any problems."[67] Deputy Dorries admitted that Mr. Milligan was asked the same question "two or three times" but attributed it to a desire to "try[] to get out of answering the [booking] questions."[68]

Deputy James acknowledged he only watched for signs of intoxication when an arrestee was charged with an alcohol related offense.[69] Deputy James admitted that none of the booking questions posed to Mr. Milligan addressed whether he might be intoxicated.[70] He also testified that alcohol related offenses were uncommon, that he never made notations of intoxication in non-alcohol related cases, and that he had no idea what the policies or procedures were in situations involving a visibly intoxicated arrestee charged with a non-alcohol related crime.[71]

Deputy James admitted he never asked if Mr. Milligan was drinking, that he was "new" on the job, that he simply "forgot" to complete the portion of Mr. Milligan's booking form titled, "Booking Officer's Visual Opinion[,]" that Mr. Milligan actually volunteered he was under the influence of drugs, and that no follow-up questions were asked.[72] Mr. Milligan was not given a breath test, even though a Breathalyzer machine was located in the jail; the arresting officer "usually" ordered breath tests, and Deputy Dorries was the arresting officer.[73]

Supplement Police Reports: Officer Peterson and Deputy Dorries' July 7, 1980 police reports failed to contain any information regarding Mr. Milligan's intoxicated state.[74] It was only after District Attorney William MacDonald issued a memorandum directing Officer Peterson and

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[67]NT, Prelim. Hrg., 7/25/80 at 183-84, 200; NT 1/15/81 at 314, 376.

[68]NT 1/15/81 at 314.

[69]NT 7/25/80 at 208, 214.

[70]NT, Prelim. Hrg., 7/25/80 at 208.

[71]NT, Prelim. Hrg., 7/25/80 at 208-209; NT 1/15/81 at 376, 385.

[72]NT, Prelim. Hrg., 7/25/80 at 213-14; Ex. 101; NT 1/15/80 at 386-89; NT 1/16/81 at 512-513.

[73]NT 1/15/81 at 377, 383.

[74]Exs. 102; 103.

Deputy Dorries to prepare a supplemental report of their observations that the real facts underlying Mr. Milligan's intoxication came to light. District Attorney McDonald's memorandum stated: "Too late for Bas on all in car but quickly as possible get everyone who saw any of them to write an alcohol influence report following NDH form where applicable."[75]

Deputy Dorries' July 9, 1980 supplemental report stated:

> All of them [Mr. Milligan and the co-defendants] became very quiet, with the exception of Ronnie Milligan. He kept asking over and over again, why he was being arrested, even after he had been told several times. In my estimation, the subject was in an intoxicated state of mind, as his rambling on and on, after being warned numerous time [sic] by myself and Officer Peterson, to be quiet, indicated as much, and when we first observed all of the subjects, they were drinking Miller High Life Beer. Also at one point, Ronnie Milligan tried to get back into their car and go to sleep but we wouldn't let him. At all times I had the suspects in my sight[.] ....[76]

Officer Peterson never drafted a supplement report. However, when Mr. Milligan's current counsel interviewed Officer Peterson, he conceded that if he had drafted a supplement report he would have incorporated the same observations Deputy Dorries incorporated into his July 9, 1980 supplement report.[77]

C. <u>Post-Arrest Events</u>

Mr. Milligan and his co-defendants were booked into Humboldt County Jail on July 4, 1980. As they were booked, their clothing was preserved for forensic testing. None of their clothing was tampered with or laundered.

When Mr. Houston was detained, he possessed Ms. Voinski's identification cards (i.e., driver's license; social security card, etc.). Mr. Houston claimed that Katherine Orfield Sr. gave him these items after she removed them from Ms. Voinski's purse. Mr. Houston also told investigators that Terry Bonnette handed him a knife and told him to stab Ms. Voinski, which Mr. Houston claimed he did. Mr. Houston also told investigators that he knew Paris Hale and Terry Bonnette

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[75]Ex. 104.

[76]Ex. 105.

[77]Ex. 201.

intended to rob Ms. Voinski once they left the rest area with Ms. Voinski.[78]

On July 4th and 5th, 1980, Mr. Houston told investigators Mr. Milligan struck Ms. Voinski five to six times in the head with a twelve pound sledgehammer.[79] Dr. John Snatic's July 26, 1980 autopsy report, however, only identified one skull fracture behind Ms. Voinski's right ear, which measured 2.5 inches in diameter.[80]

Mr. Houston was booked into Humboldt County Jail on July 4, 1980. Despite the fact there was significant evidence which implicated Mr. Houston in Ms. Voinski's attack, Stanley Rorex, a Humboldt County Sheriff's investigator, and Dan James, a Humboldt County jailer, ordered William Reynolds, a jail trustee, to launder Mr. Houston's clothing on July 4, 1980. Before he laundered the clothing, Mr. Reynolds notified Deputy James of "red spots" on the clothing, and asked whether the clothing should be laundered because it might contain critical forensic evidence. Deputy James instructed Mr. Reynolds to disregard the "red spots" and to launder Mr. Houston's clothing. The laundering destroyed the potentially exculpatory "red spots" on Mr. Houston's clothing.[81]

The Nevada State Public Defender's Office was appointed to represent Mr. Milligan. Thomas Perkins was Mr. Milligan's lead trial attorney.

On July 11, 1980, the Justice of the Peace of Union Township declared Mr. Houston a material witness pursuant to Nev. Rev. Stat. § 178.494 because he was an undocumented alien. Bail was set at $25,000 and Mr. Houston was committed to the custody of the Humboldt County Sheriff's Office pending final disposition of the proceedings in which his testimony was needed.

D. <u>Preliminary Hearing and Other Pre-Trial Proceedings</u>

The preliminary hearing took place on July 24-25, 1980, August 2,1980, and September 30, 1980. During the preliminary hearing, Mr. Houston testified he had an insignificant criminal history

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[78]Exs. 106; 107; 108; 109 As noted *infra*, Mr. Houston's subsequent statements and testimony substantially deviated from his statements made on July 4th and 5th, 1980.

[79]Exs. 106, 107, 108, 109.

[80]Ex. 110.

[81]NT, Prelim. Hrg., 8/1/80, at 288; NT, Hale/Orfield, 8/25/82, at 658-670; NT, Milligan Evid. Hrg., 11/16/98, at 189-215.

in Mexico, which included a few robbery convictions and a conviction for stabbing a detective.[82] Mr. Houston also testified that Mr. Milligan struck Ms. Voinski in the head five times with the sledgehammer.[83] Dr. Snatic, the prosecutor's forensic pathologist, testified that Mr. Voinski's death was caused by a blunt instrument–presumably the sledgehammer. Dr. Snatic also testified he only identified one skull fracture behind Ms. Voinski's right ear.[84] Mr. Perkins (defense counsel) failed to ask Dr. Snatic whether Ms. Voinski's limited skull injuries were consistent with Mr. Houston's testimony.

Mr. Houston also testified he repeatedly provided false information to investigators on July 4th and 5th, 1980. For instance, Mr. Houston lied when he told investigators that Terry Bonnette handed him a knife and ordered him to stab Ms. Voinski, as he originally claimed.[85] Similarly, Mr. Houston conceded that Katherine Orfield Sr. never forced him to carry Ms. Voinski's identification cards, and admitted he obtained them at the crime scene.[86] Furthermore, Mr. Houston conceded he lied when he told investigators he knew Terry Bonnette and Paris Hale intended to rob Ms. Voinski before the group left the rest area with Ms. Voinski. According to Mr. Houston, he was not aware of the intended robbery.[87]

On August 1, 1980, Robert Milby, an investigator for the Nevada Division of Investigation, testified that Mr. Houston's clothing was laundered on July 4, 1980 by a Humboldt County Jail employee before they were submitted to the crime laboratory for examination.[88] Mr. Milby, however, failed to explain who laundered the clothing, why the clothing was laundered, who ordered the laundering, when the clothing was laundered, and what evidence was destroyed or potentially

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[82]NT, Prelim. Hrg., 8/2/80, at 4-b; NT, Prelim. Hrg., 9/30/80, at 401-402, 457-460.

[83]NT, Prelim. Hrg., 8/2/80, at 18-b.

[84]NT, Prelim. Hrg., 8/1/80, at 300-321.

[85]NT, Prelim. Hrg., 9/30/80 at 435-436.

[86]NT, Prelim. Hrg., 9/30/80 at 451.

[87]NT, Prelim. Hrg., 9/30/80 at 415-16, 421.

[88]NT, Prelim. Hrg., 8/1/80, at 288.

destroyed as a result of the laundering. After Mr. Perkins learned of the laundering, he "didn't consider it further."[89]

Mr. Milligan and his co-defendants were arraigned on October 20, 1980. Mr. Milligan was charged with "robbery with a deadly weapon" under Nev. Rev. Stat. §§ 200.380, 193.165, and first-degree murder under Nev. Rev. Stat. §§200.010, 200.030. Prosecutors alleged Mr. Milligan fatally and feloniously struck Ms. Voinski with the sledgehammer. Mr. Milligan pled not guilty. The trial judge severed his trial from that of his co-defendants' and set a January 6, 1981 trial date. Mr. Milligan was the first defendant scheduled to go to trial.

On October 7, 1980, a visiting district judge again declared Mr. Houston a material witness pursuant to Nev. Rev. Stat. § 178.494 and lowered bail to $2,500. Unable to pay the bail, Mr. Houston was once again committed to the custody of the Humboldt County Sheriff's Office.

On October 24, 1980, the trial judge held an ex-parte immunity hearing for Mr. Houston.[90] During the hearing, the prosecutor requested that the trial judge grant Mr. Houston complete, transactional immunity. The prosecutor stated:

> ... Your Honor, based on NRS 178.572 to grant or, in this case, release Ramon Mendez Houston from all liability to be prosecuted or punished on account of his testimony or other evidence he may be required to produce. NT 10/24/80, at 4 (emphasis added).
>
> The last paragraph in my affidavit I would like to read.
>
> > "That affiant believes that the said Ramon Mendez Houston was not an accomplice to the robbery and murder of Zolihan Voinski but believe that the said Ramon Mendez Houston should be granted immunity from prosecution or punishment based upon his testimony at the Justice Court of Union Township and the anticipated testimony before the above-entitled Court." [91]

The prosecutor also emphasized the importance of Mr. Houston's testimony:

> The State would like to continue Mr. Houston on the material witness bond for that time for a couple of reasons...
>
> Additionally, if he did leave and go to his home in Mexico... the State would

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[89]NT, Milligan Evid. Hrg., 9/19/88, at 43-44, 108.

[90]NT, Immunity Hrg., 10/24/80, at 1-11.

[91]Id. at 5.

> have a difficult time seeking his attendance in court... if he gets down there and for some reason can't get back into the country legally, or things like that, we would then be without the key witness that the State needs in the prosecution.[92]

The prosecutor also informed the trial judge that he and fellow law enforcement officers provided (and will continue to provide) Mr. Houston with monetary benefits:

> Also, Your Honor, I would like the record to reflect that everyone that I've contacted who has dealt with Mr. Houston has been very cooperative in assisting him. We've been able to get him books in Spanish and Spanish newspapers and magazines and we're continuing to supply him with those types of goods. I think it is routine practice that many of the law enforcement officers, including myself, have donated a small amount of funds to make sure he has cigarettes and coca-cola money and things of that sort.[93]

Trial counsel was never notified of the immunity hearing and was not present. Trial counsel stated: "I can't understand why we weren't given notice of a chance to be present at the time of this hearing... I have to tell you that even after all these years, something like that makes me extremely angry."[94] Trial counsel was never informed that Mr. Houston was provided monetary benefits in exchange for his testimony.

On December 6, 1980, Mr. Perkins filed a motion to continue because he was not prepared to defend Mr. Milligan against capital murder charges. Mr. Perkins stated:

> I'm worried that Ronnie won't have competent counsel at trial because I'm recovering from one capital case and trying to prepare for another one.
>
> I'm concerned as far as a lot of paperwork and drudgery and paper that we have to do in anticipation of the case of this nature that I would be unable to do it, and that's the reason I'm moving to continue. I'm not interested in delay... I'm worried that Ron won't have the kind of defense that he's entitled to if we go to trial on January 6th.
>
> If the Court orders me to go to trial on January 6th, I will be there and I will be prepared. There is no doubt about that, but... I'm concerned about what's going to happen to Ron.[95]

Despite the fact Mr. Milligan waived his right to a speedy trial on October 20, 1980, the trial

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[92] Id. at 7-8 (emphasis added).

[93] Id. at 10.

[94] NT, Milligan Evid. Hrg., 11/17/98, at 410.

[95] NT, Motions Hrg., 12/6/80, at 10.

judge denied Mr. Perkins' request because he thought a continuance would violate Mr. Milligan's right to a speedy trial.

Pre-trial motions were resolved on January 6, 1981. During the motions hearing, Mr. Perkins asked the prosecutor whether he granted immunity to anyone besides (the younger) Katherine Orfield. The prosecutor stated he had not:

The Court:	What's the next motion?
Mr. Perkins:	Your Honor, the motion to discover grants of immunity. Mr. Bullock already served on us his copy of the motion and order granting immunity. This involved particularly Katherine Orfield, but any other immunity.
The Court:	Any other immunity been given?
Prosecutor:	No, your Honor. There's been no formal immunity granted to any other witness. Mr. Perkins was aware and has been as to the status of Miss Orfield. He has a copy of her statement that was given to law enforcement, and the first few photographs of that statement outlines the arrangement with the District Attorney with that young lady.
....	
Mr. Perkins:	Thank you, Judge.
The Court:	Now, that takes care of that then. Would you say that was granted or denied.
Prosecutor:	I don't know. Whatever you want to do, Judge.
The Court:	Well, I guess actually the State complied with it, so I guess the motion was granted.
Prosecutor:	Okay.[96]

The prosecutor's statement was false because Mr. Houston was granted transactional immunity on October 24, 1980.[97] Moreover, the trial judge failed to inform Mr. Perkins of Mr. Houston's grant of immunity, despite the fact he knew of the grant of immunity because he was the

[96]NT 1/6/81, at 41, 43.

[97]NT, Immunity Hrg., 10/24/80, at 1-11.

trial judge who granted the prosecutor's request for immunity.

E. Trial Counsel's Pre-Trial Investigation

Mr. Milligan was represented by Thomas Perkins, Virginia Shane, and Tony Axam. Individually and collectively, Mr. Perkins, Ms. Shane, and Mr. Axam's representation fell well below what is expected of trial attorneys who are representing a defendant facing the death penalty.

Thomas Perkins: Mr. Perkins lacked the experience and resources to adequately investigate and prepare for his death penalty trial. His failure to adequately investigate and prepare for his case substantially prejudiced Mr. Milligan.[98]

Mr. Perkins was Mr. Milligan's lead trial attorney, and as noted, was appointed to represent Mr. Milligan in July 1980. At the time, Mr. Perkins worked as an Assistant Public Defender for the Nevada State Public Defender's Office (NSPD), and was the only Assistant Public Defender assigned to the NSPD's Winnemucca, Nevada office.[99]

Mr. Perkins graduated from the University of Denver College of Law in 1978–only two years before he was appointed to represent Mr. Milligan. During law school, Mr. Perkins did not enroll in any clinical law classes which focused exclusively on death penalty defense.[100]

Prior to his employment with the NSPD, Mr. Perkins served as an Assistant District Attorney for Washoe County from September 1978 to April 1979. Mr. Perkins joined the NSPD's Winnemucca office in April 1979. Thus, he had been a criminal defense attorney for only fifteen months when he was appointed to represent Mr. Milligan.[101] Moreover, he never attended a criminal defense death penalty seminar. Finally, while he second-chaired two or three homicide cases, one of which was a capital case, this was the first death penalty case where he served as lead counsel.[102]

During his representation of Mr. Milligan, Mr. Perkins' workload at the NSPD was extremely

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[98]Mr. Perkins testified at Mr. Milligan's 1988 and 1998 state evidentiary hearings. NT, Milligan Evid. Hrg., 9/19/88, at 25-159; NT, Milligan Evid. Hrg., 11/17/98, at 373-450.

[99]NT, Milligan Evid. Hrg., 11/17/98, at 374.

[100]NT, Milligan Evid. Hrg., 9/19/88, at 25.

[101]NT, Milligan Evid. Hrg., 9/19/88, at 25.

[102]NT, Milligan Evid. Hrg., 9/19/88, at 27.

heavy–at least 150 cases which ranged between misdemeanors and serious felonies. Mr. Perkins was responsible for defending cases in three (rather large) counties: Humboldt, Pershing, and Lander. Mr. Perkins' caseload forced him to prepare for several trials immediately before Mr. Milligan's trials. Mr. Perkins stated:

> There was a tremendous amount of litigation going on at the time in this area. I had probably about one jury trial a month between the time I was appointed to this case until I went to trial. We had a homicide case in Lovelock and one in Battle Mountain at the time and the Battle Mountain case was also a capital case and I was also involved as co-counsel in a capital case in White Pine County and I just felt like I needed some more time to get prepared for trial...
>
> During [December 1980]... we had preliminary hearings in three homicide cases in July and August of 1980 and the trials that I was involved in, one was attempted murder... Two were attempted murder cases in Lander County, one was a first degree kidnapping case in Pershing County... there was just a lot of work. It was overwhelming. There was all kinds of kidnapping and robbery cases where we went to extensive preliminary hearings that also settled before trial.[103]

Mr. Perkins could not get additional assistance from the NSPD's main office in Carson City, Nevada. Mr. Perkins stated: "[T]he other lawyers in the public defender's office were carrying about the same case load [as Perkins] at the time... it was real busy. [There were] capital cases going in Nye County, White Pine County, and Churchill County."[104]

Mr. Perkins did not have an investigator because the NSPD's Winnemucca, Nevada office did not employ one. Mr. Perkins failed to petition the trial judge for funding to hire an investigator,[105] until December 6, 1980, when the trial judge granted Mr. Perkins $1,000 to hire an investigator. Trial counsel failed to hire an investigator with this funding.[106]

Mr. Perkins conceded he failed to conduct an "independent investigation" because of his heavy caseload and lack of investigative resources. Mr. Perkins conceded that his theory of defense was premised entirely (and only) on the verbal and written reports provided by Nevada investigators

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[103]NT, Milligan Evid. Hrg., 9/19/88, at 31; see also NT, Milligan Evid. Hrg., 11/17/98, at 381. ("[There was] an abnormal amount of crime in Lander, Pershing, and Humboldt County, which [I] was responsible for.").

[104]NT, Milligan Evid. Hrg., 9/19/88, at 33.

[105]NT, Milligan Evid. Hrg., 11/17/98, at 378; NT, Milligan Evid. Hrg., 9/19/88, at 81.

[106]NT 12/6/80, at 10; NT, Milligan Evid. Hrg., 9/19/88, at 81.

and the prosecutor.[107]

Mr. Perkins knew the prosecutor's case rested entirely on Ramon Houston's testimony. Mr. Perkins failed to investigate any aspect of Mr. Houston (i.e., his statements, his clothing, and his criminal history):

- He failed to file a formal discovery motion requesting all exculpatory and impeachment information regarding Mr. Houston's statements, clothing, and criminal history.
- He failed to contact the INS and the American Embassy in Mexico to obtain documents retaining to Mr. Houston's criminal history and deportation history.
- He failed to have Mr. Houston's clothing and boots independently tested by forensic examiners.
- He failed to have Mr. Houston's statements examined by independent forensic experts to determine whether they were supported by the physical evidence.
- He failed to investigate the circumstances surrounding the laundering of Mr. Houston's clothing, despite being informed of this information five months before Mr. Milligan's trial.

Mr. Perkins stated: "The only thing we ever did was request that the Government produce evidence, or information" regarding Mr. Houston's criminal history.[108] Mr. Perkins, however, never received any written reports regarding Mr. Houston's criminal history. Instead, the prosecutor only provided verbal reports. Mr. Perkins failed to investigate whether these verbal reports accurately reflected Mr. Houston's criminal history.[109]

Mr. Perkins stated his theory of defense was that Mr. Milligan suffered an alcoholic blackout and could not have acted willfully, knowingly, or purposefully on July 4, 1980. Mr. Perkins conceded he erred when he hired Dr. John Chappel to discuss whether Mr. Milligan suffered an alcoholic blackout because Dr. Chappel's expertise was alcohol addiction; he had no experience with

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[107]NT, Milligan, Evid. Hrg., 11/17/98, at 379, 387; NT, Milligan Evid. Hrg., 9/19/88, at 81-82.

[108]NT, Milligan Evid. Hrg., 11/17/98, at 383, 387 ("I don't think I did anything independent of asking the Government to produce" records pertaining to Mr. Houston's criminal history).

[109]NT, Milligan Evid. Hrg., 11/17/98, at 382, 387, 389.

alcoholic blackouts. Mr. Perkins also conceded that Dr. Chappel's guilt phase alcohol addiction testimony substantially prejudiced Mr. Milligan because the jury was led to believe Mr. Milligan was fully capable of acting willfully, knowingly, and purposely on July 4, 1980, despite the fact he was very inebriated.[110]

Mr. Perkins conceded he failed to collect mitigation evidence (i.e., school, military, hospital records) to substantiate Mr. Milligan's life history and chronic battle with alcoholism.[111] The only evidence presented during Mr. Milligan's penalty hearing was so-called "good guy" evidence (i.e., "Mr. Milligan is a nice guy so please don't sentence him to death"). Mr. Perkins stated:

> [W]e called members of his family... to try and demonstrate to the jury that he had people that loved him in spite of what had happened and that he was a human being. We were trying to convince them that he had some humanity that was worth saving. I can't recall the other evidence that we put on the penalty hearing. It wasn't very much. <u>It was a short hearing</u>. ...
>
> [W]hat our presentation was during the penalty hearing... was to emphasize [Mr. Milligan's] humanity.[112]

Mr. Perkins left the NSPD in late December 1980 because the "[main] office did not send anybody else up to help" him prepare for Mr. Milligan's case. Mr. Perkins informed Mr. Milligan's family he would continue to represent Mr. Milligan if the family compensated him at the same rate the NSPD compensated him. Mr. Milligan's family agreed and handsomely paid Mr. Perkins to remain as Mr. Milligan's lead counsel. Mr. Milligan's family made it clear to Mr. Perkins that they would pay for any expenses needed to adequately defend Mr. Milligan. Despite the family's financial assurances, Mr. Perkins still failed to hire an investigator.[113]

Mr. Perkins was Mr. Milligan's lone defense attorney from July 1980 to December 1980. Mr. Perkins contacted Tony Axam, an experienced death penalty litigator from Atlanta, Georgia, in late December 1980 after the trial judge denied his motion to continue. Mr. Axam agreed to fly to Winnemucca, Nevada shortly before trial to offer pre-trial and trial assistance to Mr. Perkins. Mr.

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[110]NT, Milligan Evid. Hrg., 9/19/88, at 119, 63.

[111]NT, Milligan Evid. Hrg., 9/19/88, at 60.

[112]NT, Milligan Evid. Hrg., 9/19/88, at 122, 123 (emphasis added).

[113]NT 11/17/98, at 376.

Axam conducted no pre-trial interviews or investigations.[114]

Mr. Axam left Winnemucca, Nevada immediately after Mr. Milligan was convicted and never returned for the penalty hearing. Mr. Perkins cannot explain why Mr. Axam never returned for the penalty hearing: "I think we were really stunned by the rapidity of the verdict and I just can't recall why the decision was made for Mr. Axam not to return."[115] Mr. Perkins conceded Mr. Milligan was substantially prejudiced by Mr. Axam's absence: "If an attorney appears for a client in front of a jury they should be there at all times whether they're directly participating in the argument or just sitting at the table... [his absence] may have created an appearance to the jury that Axam had abandoned his client."[116]

Mr. Perkins requested Virginia Shane's services in early January 1981–approximately a week before Mr. Milligan's trial. Ms. Shane was a recent law school graduate who was hired by the NSPD to be the second Assistant Public Defender in the Winnemucca, Nevada office. Ms. Shane had never tried a serious felony case before Mr. Milligan's case. Ms. Shane did not conduct pre-trial interviews or investigations.

Mr. Perkins' previous testimony does not reveal or support any explanation that the errors and omissions alleged herein were the result of a strategic decision after an adequate investigation. Instead, Mr. Perkins' testimony demonstrates that he, Mr. Axam, and Ms. Shane were unable to investigate and prepare Mr. Milligan's case for trial.

Tony Axam: Mr. Axam knew so little about Mr. Milligan's case he was unable to provide effective representation. His unfamiliarity with Mr. Milligan's case substantially prejudiced Mr. Milligan.

As noted, Mr. Perkins contacted Mr. Axam in late December 1980 because he (Perkins) was in dire need of assistance. Prior to Mr. Milligan's case, Mr. Axam was involved in dozens of capital cases all across the country. Mr. Axam's expenses were paid by Mr. Milligan's family.

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[114]NT, Milligan Evid. Hrg., 9/19/88, at 29-30.

[115]NT, Milligan Evid. Hrg., 9/19/88, at 57.

[116]Id. at 59.

Mr. Axam arrived in Winnemucca, Nevada approximately five days before Mr. Milligan's trial. Mr. Axam stated: "[M]ost death penalty cases I usually treat them as an emergency situation. The shorter the time period the more there is an emergency. Because I didn't live with this case for a year or two years, then the time created a different, inordinate amount of pressure. And I was well aware that Mr. Perkins had not tried a death penalty case before that time."[117]

Mr. Axam conducted no pre-trial interviews or investigation and did not participate in any pre-trial discovery. He failed to review Mr. Perkins' entire case file because he simply did not have the time. Despite this, Mr. Perkins relied on Mr. Axam to identify which witnesses should testify, how to prepare these witnesses, and how to cross-exam the prosecutor's witnesses.[118]

Mr. Axam drafted pre-trial motions which focused on death penalty issues. The motions, however, were premised on the very limited information Mr. Perkins received through discovery.[119]

Mr. Axam conceded Mr. Milligan's case was inadequately investigated: "I would have... talked to every defense lawyer that was involved with one of the co-defendants... I would have investigated the chief accuser, who was of Mexican or Latin descent, more thoroughly."[120] Mr Axam added:

> In a death case, that's the sort of case that I think everything should be done. There are more things that could have been done.
>
> So I don't think that it meets the standards that I would create for myself or for folks that are in my office. If the case were being tried here from Atlanta there are more things that I would have been able to have done in this case. As I mentioned, I would have investigated Houston, Mr. Houston.[121]

Mr. Axam conceded that the defense team's theory of defense (i.e., intoxication) was not the product of an adequate investigation, but instead was the only defense which the defense team could

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[117] NT, Axam Dep., 7/29/88, at 5. Mr. Axam was deposed by Mr. Milligan's first state post-conviction counsel in July 1988.

[118] Id. at 7, 8, 18.

[119] Id. at 7.

[120] Id. at 9.

[121] Id. at 10.

realistically argue given the limited amount of information it possessed prior to trial.[122]

Mr. Axam conceded that the prosecutor's case was premised entirely on Mr. Houston's testimony. Consequently, Mr. Axam conceded the defense should have thoroughly investigated Mr. Houston's background, and forensically tested Mr. Houston's clothing and boots.[123]

Mr. Axam conceded Dr. John Chapple's guilt phase alcohol addiction testimony was more damaging than helpful because Dr. Chapple was unable to opine whether Mr. Milligan suffered an alcoholic blackout.[124] Mr. Axam cannot explain why the defense would present an alcohol expert who was unable to opine whether Mr. Milligan suffered alcoholic blackout when the entire defense was premised on the theory Mr. Milligan suffered an alcoholic blackout.

Once Mr. Milligan was convicted of first-degree murder, Mr. Axam flew back to Atlanta, Georgia and never returned for Mr. Milligan's penalty hearing. Mr. Axam cannot explain why he did not return for Mr. Milligan's penalty hearing. Mr. Axam conceded he should have attended Mr. Milligan's penalty hearing, particularly in light of the fact Mr. Perkins had never conducted a penalty hearing.[125]

Mr. Axam cannot recall what evidence Mr. Perkins intended to present at the penalty hearing because Mr. Axam never conducted any mitigation interviews or investigations.

Virginia Shane: Ms. Shane served as a third trial attorney on Mr. Milligan's defense team.[126] She graduated from McGeorge School of Law in May 1980, and became licensed in Nevada in September 1980. She joined the NSPD's Winnemucca office in October 1980. She interned with

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[122]Id. at 29 (the intoxication defense "was the only defense available from the information that he had that they could advance").

[123]Id. at 9, 10, 55 ("But you have to test the things that the State has in order to make sure that what their conclusions are are valid with their conclusions, wither it's handwriting, fingerprints, anything of that sort.").

[124]Id. at 61.

[125]Id. at 31, 32, 34.

[126]Ms. Shane testified at Mr. Milligan 1988 state evidentiary hearing. NT, Milligan Evid. Hrg., 9/20/88, at 260-291; NT, Milligan Evid. Hrg., 9/21/88, at 358-388.

the Sacramento Public Defender's Office during law school.[127]

Ms. Shane and Mr. Perkins worked together at the NSPD between October 1980 and December 1980. She and Mr. Perkins defended cases in Humboldt, Pershing, and Lander County. When Mr. Perkins left the NSPD in December 1980, she inherited his heavy caseload.[128]

Ms. Shane joined Mr. Milligan's defense team in January 1981–approximately one week before Mr. Milligan's trial. Mr. Perkins asked her boss if she could sit-in and assist him with Mr. Milligan's case. The trial judge appointed her to Mr. Milligan's defense team because he thought it would be a good learning experience for her.[129]

At the time, Ms. Shane had an active caseload of 85 felony cases. The maximum should have been between 35 and 50 cases. She never received training or experience in defending capital cases. She received two-weeks of in-house training when she started with the NSPD, none of which addressed how to adequately defend a death penalty case.[130]

Ms. Shane did not draft the pre-trial motions, and she did not read or review the preliminary hearing testimony or any of the discovery.[131] She knew next to nothing about the case.

Ms. Shane conceded that Mr. Milligan's case was woefully investigated: "I had never seen a case of this dimension go to trial without an investigation from the defense side as well as one from the prosecution."[132] She felt the defense's mitigation investigation was inadequate:

> There are a lot of things I would have done had I been either lead counsel or second counsel and had been asked to really participate other than just at the trial.
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> When I was with the public defender in Sacramento I worked extensively with records of people for the statements in mitigation, records that would show hospitalization for alcoholic blackouts such as Ronnie had and background checks and I think a lot of that which should have been done

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[127]NT, Milligan Evid. Hrg., 9/20/88, at 261-263.

[128]Id. at 263.

[129]Id. at 265.

[130]Id. at 264.

[131]Id. at 267.

[132]Id. at 271.

> wasn't done and of course I didn't know that because I hadn't seen any of the discovery, I hadn't seen any of the mitigating materials or anything.[133]

Ms. Shane stated that Mr. Perkins had neither the time nor resources to adequately investigate Mr. Milligan's case when he was with the NSPD office:

> Oh, he was busy all the time. As he had stated, he didn't have a full-time secretary. Gail Krug who worked there was half time, I think 20 hours a week, and she–there were questions about her competence, you know, at doing what she did, but she didn't get that much done. Although she was very conscientious you just can't get it done in 20 hours.
>
> He would send me to Lovelock when he had to be in Battle Mountain or he'd send me to Battle Mountain and he had to be in Lovelock and it was very hectic with his caseload, as I was, and my coming in knowing virtually knowing and trying to learn it all at once.[134]

Ms. Shane stated that Mr. Axam's absence at the penalty hearing substantially prejudiced Mr. Milligan because it forced Mr. Perkins to ask her to present the closing penalty phase arguments: "We really had no choice. Tony didn't come back and it was either to make it alone or Tom and myself."[135] Mr. Perkins asked her to present the argument the day before the penalty hearing. Ms. Shane had never given a closing penalty phase argument. This task proved overwhelming: "It was pretty overwhelming. I mean, I wanted to do whatever I could to help Ronnie and didn't know really where to begin. I had—I think I had only done one jury trial prior to this... but I think the only trial that I had done was a gross misdemeanor... and that was a battery, spousal battery."[136] She could not think of anyone less prepared to deliver the closing argument: "The only person less prepared would have been myself in law school. I wasn't past that stage at that time."[137]

II. Trial–Guilt Phase

A. Jury Selection

Jury selection took place between January 7-9, 1981. During jury selection, trial counsel

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[133] Id. at 270.

[134] Id. at 282-283.

[135] Id. at 370.

[136] Id. at 279, 280-281.

[137] Id. at 385.

failed to strike several prospective jurors, who ultimately served on Mr. Milligan's jury, who testified that they would automatically vote for death or were predisposed to vote for death and their predisposition prevented or substantially impaired their ability to be fair and impartial to Mr. Milligan.[138] Trial counsel also failed to strike prospective jurors, who ultimately served on Mr. Milligan's jury, who refused to consider sentences less than death.[139] Trial counsel also failed to question prospective jurors, who ultimately served on Mr. Milligan's jury, whether they were capable of considering sentences less than death.[140] Likewise, trial counsel failed to strike prospective jurors, who ultimately sat on Mr. Milligan's jury, whose beliefs prevented or substantially impaired their ability to adhere to the trial judge's instructions regarding intoxication and how it could affect the mental element of first-degree murder and robbery.[141] A reasonably competent attorney, who was defending a capital case, and whose entire guilt phase defense was premised on intoxication,[142] would have moved to disqualify or peremptorily strike these jurors. Instead of peremptorily striking the aforementioned jurors, trial counsel waived Mr. Milligan's last four peremptory challenges.[143]

More importantly, trial counsel repeatedly conceded Mr. Milligan's role in the offense during jury selection. Of the twelve jurors selected to determine Mr. Milligan's culpability, trial counsel conceded Mr. Milligan's guilt to four of them. When trial counsel questioned Richard Braun he asked the following question:

> Q: In this particular case would the fact that Ron was the person that struck Mrs. Voinski in the head, would that cause you to automatically think that he should be put to death?

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[138]NT 1/9/81, at 527-534 (Orville Looper); NT 1/9/81, at 389-391, 407 (Thomas F. Ormachea); NT 1/13/81, at 553-556 (Charles L. Smith); NT 1/7/81, at 277-278, 282 (Leonard R. Timm).

[139]NT 1/8/81, at 274-275 (Leonard Timm).

[140]NT 1/9/81, at 527-539 (Orville C. Lopper); NT 1/8/81, at 257-268 (Fred L. Hummel); NT 1/7/81, at 42-55 (Richard Braun); NT 1/7/81, at 226 (Edyth Hascall); NT 1/8/81, at 244-255 (Elizabeth Stickley); NT 1/9/81, at 467-480 (Norris L. Swope).

[141]NT 1/7/81, at 79 (Beth Arruti); NT 1/7/81, at 51 (Richard Braun).

[142]NT 9/19/88, at 119; NT1/20/81, at 22-102.

[143]NT 1/9/81, at 539-540, 543.

A: No.[144]

Mr. Braun served on Mr. Milligan's jury.

Trial counsel submitted a similar question to Thomas Ormachea:

> Q: Would the fact that Ron Milligan, this defendant, is the one who struck Mrs. Voinski on the head with the sixteen pound hammer and caused her death, would that cause you to automatically find him guilty of first degree murder?
>
> A: Not if the facts don't prove it.[145]

Mr. Ormachea served on Mr. Milligan's jury.

Trial counsel asked Kirk Studebaker the following question:

> Q: Would the fact that Ron struck Mrs. Voinski on the head with a hammer and brought about her death, would that automatically cause you to vote for death in this case?
>
> A: No.[146]

Mr. Studebacker served on Mr. Milligan's jury.

Trial counsel submitted the following question to Leonard Timm:

> Q: Would the fact that [Mr. Milligan is] the one that struck Mrs. Voinski in the head with the hammer and caused her death, would that in itself cause you to vote for first degree murder conviction?
>
> A: Not unless it was proven.[147]

Mr. Timm served on Mr. Milligan's jury.

B. <u>Trial Counsel's Opening Statements</u>

Mr. Milligan's trial began on January 13, 1981. During opening statements, trial counsel conceded that Mr. Milligan struck Ms. Voinski with the sledgehammer:

> There are a lot of things that we will have to deal with to come to that conclusion. We will have to talk about alcohol and alcoholism. We'll have to talk about what happened that day. We will have to be very careful about the conclusion we draw from what people did. We will have to remember

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[144]NT 1/7/81, at 47.

[145]NT 1/9/81, at 389.

[146]NT 1/8/81, at 372.

[147]NT 1/8/81, at 274.

> from the start that Ronnie Milligan is also a human being, because that fact alone will come out in the evidence will explain why some of these things happened.[148]
>
> ...
>
> I'm not going to tell you that Ron uses alcohol as a crutch or excuse. I'm not coming in here next week and saying you ought to excuse him for what he did because he was drunk. These are things I want to tell you now so you will know what happened.[149]
>
> ...
>
> Mr. Houston will tell you that Ron drank most of a quart of wine and most of the quart of brandy on this day...
>
> You can't decide at this point... that they acted as a group. You have to see the evidence, and the reason I tell you that you have to see the evidence is that Ronnie didn't act with the other people as a group.
>
> At the conclusion of the evidence, I'm confident that you'll find, because of the amount of alcohol he had that day and the way that it affected him, and this will be from the witnesses, that you'll believe, after you listen to the testimony, that he had no part in the plan to rob this woman, that he had no part in the plan to kill her before the act itself occurred.[150]
>
> ...
>
> It's hard to believe, I agree, and we're willing to face that, but, ladies and gentlemen, what we're going to tell you and what the evidence is going to show in this case is no more hard to believe, it's not more hard to swallow than to think this man would plan to kill that woman with a twelve pound sledge hammer.[151]

C. <u>Ramon Houston</u>

The prosecutor's case against Mr. Milligan rested entirely on Ramon Houston's testimony.[152] The prosecutor conceded this point when he argued: "This case primarily hinges on the testimony of Ramon Houston; without him there probably would be very little evidence, as you can

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[148]NT 1/13/81, at 60.

[149]<u>Id.</u> at 62.

[150]<u>Id.</u> at 63.

[151]<u>Id.</u> at 63-64.

[152]NT, Immunity Hrg., 10/24/80, at 3-12; NT 1/13/81, at 65-120; NT 1/14/81, at 131-152; 174-204.

imagine."[153] Notably, Mr. Houston testified that Mr. Milligan struck Ms. Voinski a "couple times" with the sledgehammer.[154]

The prosecutor finally disclosed Mr. Houston's grant of immunity during Mr. Houston's direct examination.[155] Mr. Houston initially testified he was not given immunity,[156] but subsequently testified he was merely told he "wasn't being accused of any crime."[157] Trial counsel failed to object the late disclosure of Mr. Houston's immunity grant under Nev. Rev. Stat. 174.295. Under Nev. Rev. Stat. 174.295 (1):

> If, after complying with the provisions of NRS 174.235 or 174.295, inclusive, and before or during trial, a party discovers additional material previously requested which is the subject to discovery or inspection under those sections, he shall promptly notify the other party... or the court of the existence of the additional material.

Likewise, under Nev. Rev. Stat. 174.295 (2):

> if trial counsel learned "during the course of the proceedings" that the prosecutor "failed to comply with" his discovery obligation under state and federal constitutional law, trial counsel could motion the court to "grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.

Trial counsel failed to move for a mistrial under Nev. Rev. Stat. 174.295 (2),[158] despite the fact Mr. Milligan's theory of defense was premised on the assumption Mr. Houston was not granted

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[153]NT 1/22/81, at 205.

[154]NT 1/14/81, at 91.

[155]As noted *supra*, trial counsel was never informed of Mr. Houston's grant of immunity.

[156]NT 1/13/81, at 68.

[157]Id. at 69.

[158]A mistrial request would fall under the last portion of section (2): trial counsel can motion the court to "enter such other order as it deems just under the circumstances." A continuance would not rectify the substantial prejudice Mr. Milligan suffered when trial counsel partially conceded his guilt during jury selection or opening statements. After the continuance, Mr. Milligan's fate would still be determined by the same twelve jurors.

immunity.[159] Trial counsel also failed to petition the trial judge to bar Mr. Houston's testimony in its entirety under Nev. Rev. Stat. 174.295 (2). Finally, trial counsel failed to cross-exam Mr. Houston regarding his grant of immunity.

Mr. Houston's testimony regarding his criminal history was even more insignificant than his preliminary hearing testimony;[160] he stated he was only convicted of stealing a pig and stabbing a detective.[161] On cross-examination, trial counsel failed to impeach Mr. Houston with his preliminary hearing testimony.

Mr. Houston also testified he voluntarily chose to testify against Mr. Milligan, and that he was not coerced into testifying.[162] As noted *infra*, had the prosecutor disclosed all Brady evidence, trial counsel could have undermined Mr. Houston's claim because the undisclosed evidence proves Mr. Houston's testimony was coerced.

Mr. Houston also testified he did not receive any benefits in exchange for his testimony.[163] In particular, Mr. Houston initially testified that investigators originally informed him that the prosecutor could possibly secure a work permit for him if he testified.[164] The prosecutor replied: "[D]o you understand that [a work permit] is not possible?" To which Mr. Houston replied: "Yes,

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[159]Trial counsel premised his trial strategy on the limited information provided by the prosecutor regarding Mr. Houston's background and credibility. Trial counsel stated: "certainly the theory and the defense that we presented to the jury was framed to some extent by the information that we had about Mr. Houston." NT, Milligan Evid. Hrg., 11/17/98, at 410. Trial counsel added: "I'm sure our theory would have been different if we would have had that information." Id. at 448. Notably, if trial counsel was timely informed about Mr. Houston's immunity, he would not have pursued a trial strategy wherein he conceded Mr. Milligan was the person who struck Ms. Voinski with the sledgehammer. Id.

[160]At the preliminary hearing, Mr. Houston stated he had an insignificant criminal history in Mexico, which included a few robbery convictions and a conviction for stabbing an detective. NT, Prelim. Hrg., 8/2/80, at 4-b; NT, Prelim. Hrg., 9/30/80, at 401-402, 457-460.

[161]NT 1/13/81, at 66-67.

[162]Id. at 69.

[163]Id. at 66-67.

[164]Id. at 67.

I do understand that it is not possible."[165] As noted *infra*, had the prosecutor disclosed all Brady evidence, trial counsel could have undermined Mr. Houston's claim because the undisclosed evidence proves Mr. Houston was financially rewarded and provided a work permit after he testified against Mr. Milligan.

D. The Physical Evidence

The Blood Evidence: The prosecutor's blood expert was Richard Berger–a criminalist for the Washoe County Crime Laboratory. Mr. Berger testified that Mr. Milligan's shoes and pants tested positive for the possible presence of human blood.[166] Mr. Berger failed to adequately document these alleged "red stains" on Mr. Milligan's shoes and pants when he failed to photograph the "red stains" before he performed his destructive presumptive blood tests.

Mr. Berger testified he identified human blood on only one of Mr. Hale's socks and on each of his shoes. Mr. Berger could not perform more discriminatory blood testing because the samples were too small.[167] Mr. Berger never mentioned whether blood was identified on Mr. Hale's pants which was enzymatically similar to Ms. Voinski's blood. Mr. Berger's testimony was false and misleading because his reports, which trial counsel possessed, indicated there was a large bloodstain identified on Mr. Hale's pants, enzymatically similar to Ms. Voinski's blood.[168] On cross-examination, however, trial counsel failed to elicit this information from Mr. Berger:

Q: And you also tested some pants on Mr. Hale; correct?

A: Yes, that's correct.

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[165] Id.

[166] NT 1/16/81, at 464-466, 470, 476. Presumptive testing only indicates whether a substance is possibly present. It cannot definitively determine whether a substance is actually present. Consequently, because various substances share certain qualities witnessed in blood, the probative value of a presumptively positive blood test is very limited. Mr. Berger could not conduct confirmatory blood tests because "[t]here was not a sufficient sample to proceed." NT 1/16/81, at 466. See also PETER DEFOREST ET AL., FORENSIC SCIENCE: AN INTRODUCTION TO CRIMINALISTICS 248 (1983) ("Most authorities agree that positive presumptive tests alone should not be taken to mean that blood is definitely present. A positive tests suggests that the sample could be blood... .") (emphasis in original); id. at 249 ("Once a specimen has been identified as blood, it is necessary to find out whether it is human or not.").

[167] Id. at 459.

[168] Exs. 111, 112.

Q: And you found on those pants that after the presumptive test and the further tests that there was human blood on the pants?...

A: Right... Yes. I see there was a stain of human blood found on the blue trousers.

Q: Blue trousers, right.

A: Blue trousers from Hale.

....

Q: Number 19, and it was on the left leg; correct, lower front left pant leg?

A: That's correct, yes.

Q: So, we have on Hale, Bonnette, Orfield, we have human blood on some parts of the clothing?

A: That's correct.

Q: And none on the clothing of Mr. Milligan has human blood?

A: That's correct.[169]

Mr. Berger testified he received Mr. Houston's clothing (trousers, a plaid shirt, and a red t-shirt) and boots on August 4, 1980.[170] Mr. Berger testified he was unable to identify human blood on Mr. Houston's clothing and boots.[171] Mr. Berger stated that when he received Mr. Houston's clothing from Agent Milby, Agent Milby failed to inform him that Mr. Houston's clothing (not his boots) was laundered on July 4, 1980.[172] Mr. Berger explained that the laundering quite "possibly washed out or eradicated any blood" on Mr. Houston's clothing.[173]

Mr. Berger testified he identified a single hair from the sledgehammer which he removed, placed in a paper bindle, and forwarded to David Atkinson–Washoe County Crime Laboratory's hair

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[169]NT 1/16/81, at 477.

[170]Id. at 469; Ex. 111.

[171]Ex. 111 ("There was no blood detected on the articles of clothing from HOUSTON.") (emphasis in original).

[172]Id. at 475 ("I can't recall having been told."); NT, Bonnette, 6/29/82, at 466 ("I was not apprised of any possible circumstances of laundering.").

[173]Id. at 475, 479 ("laundering does have a detrimental effect on examination beyond the presumptive test.").

expert. Mr. Berger also recovered a single hair from Mr. Milligan's right shoe, which he placed in a paper bindle, and forwarded to Mr. Atkinson.[174] Mr. Berger failed to adequately document the hair recovered from Mr. Milligan's shoe when he failed to photograph the hair before he removed it from Mr. Milligan's shoe.

Mr. Berger's blood testing was inherently unreliable. Trial counsel would have easily exposed his unreliability had he conducted an adequate and complete investigation.

It is unacceptable for any expert to fail to meticulously document his findings. Science is premised on reproducibility.[175] Unless an expert adequately documents his or her findings and explains how these findings support the conclusion, other experts are precluded from reviewing the analysis and determining whether the evidence and findings support that conclusion. As one forensic scientist wrote:

> ... for our work to be valid, it must be verifiable to other examiners. This means that other examiners must be able to repeat the work and come to the same conclusions. Therefore, the data that we gather should provide a well-defined "roadmap" as to what experiments we performed to answer the question(s) posed, what data was gathered, and a clear demonstration of the evidence from which we supported our conclusion(s). This mechanism of communication among scientists is a substantial part of the process of verification.[176]

Another requirement adopted by the American Society of Crime Laboratory Directors requires documentation "to be such that in the absence of the examiner, another competent examiner or supervisor could evaluate what was done and interpret the data."[177] Acceptable "ways to

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[174]Id. at 463, 467.

[175]It is common knowledge in all scientific disciplines that "[r]eproducibility is an essential component of scientific reliability."United States v. Green, 405 F. Supp.2d 104, 121 (D.Mass. 2005); see also Daubert v. Merrell Dow Pharmaceutical, 509 U.S. 579, 593 (1993) ("key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested."); CARL HEMPEL, PHILOSOPHY OF NATURAL SCIENCE 49 (1966) ("The statements constituting a scientific explanation must be capable of empirical test"); KARL POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 37 (5th ed. 1989) ("The criterion of the scientific status of a theory is its falsifiability, or refutability, or testability") (emphasis deleted).

[176]Bruce Moran, *Photo Documentation of Toolmark Identifications–An Argument in Support*, 35 ASS'N FIREARM & TOOLMARK EXAMINERS J. 174, 181 (2003) (emphasis added).

[177]AMERICAN SOCIETY OF CRIME LABORATORY DIRECTORS, LABORATORY ACCREDITATION BOARD MANUAL 31 (2003).

document the basis for conclusions derived from evidence examinations, include, but are not limited to: a narrative description of the examination process and observations made, photographs, photocopies, diagrams, drawings, worksheets which provide spaces or sections for the insertion of data or other observations made during various steps of the examination process, or a combination of two or more of these approaches."[178] Two preeminent forensic scientists also wrote:

> Any opinion rendered by a forensic scientist in a written report or in court testimony must have a basis in fact and theory. Without such a basis, any conclusions reached are bereft of validity and should be treated with derision.
>
> The forensic scientist must always bear the burden of responsibility of justifying an opinion, and the work that has led to that opinion. If this work is not properly documented, it deserves to be rejected... Notetaking and other forms of documentation are as important to the forensic scientist as a proper grounding in chemistry, biology or other discipline. In general, documentation to support conclusions must be such that in the absence of the original examiner, another competent examiner could evaluate what was done and interpret the data.[179]

Mr. Berger ignored the reporting requirements adopted by scientists in his field when he simply summarized his conclusions in two brief paragraphs:

> 10: A single hair was recovered from near the laces on the right shoe, its examination will be covered in another report. Several small red-brown stains in the toe area of each of the shoes gave positive results in presumptive testing for blood, the amount of sample available from each was not sufficient to proceed with further analyses.
>
> 11: A small stain on the front of the right cuff of the pants gave positive results in presumptive testing for blood, the sample size was not sufficient to proceed with further analyses. Hair examination for this article will be covered in another report.[180]

Mr. Berger's report are so tersely written that even an experienced forensic scientist would be unable to decipher what type of presumptive testing was performed; how large were the red-brown stains; what substances besides blood produce positive presumptive results (i.e., false positive); how much sample is needed to perform this type of presumptive testing; how much sample is needed to proceed with further analyses; and that type of further analyses were contemplated.

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[178] Id.

[179] Thornton & Peterson, *The General Assumptions and Rationale of Forensic Identification, in* Science in the Law: Forensic Science Issues 24 (Faigman et al. eds., 2002).

[180] Ex. 113

Most notably, Mr. Berger failed to identify the likelihood that the substance was NOT blood. Presumptive blood tests are nonspecific; "[f]alse positives have been reported with samples from apple, cabbage, radish, grass, lettuce, celery, potato, tomato, corn, onion, rust, and bleach."[181] The absence of this information prevented the jury from accurately determining whether the substances identified on Mr. Milligan's shoes and pants were in fact human bloodstains or some other non-incriminatory substance.

Mr. Berger also failed to photograph Mr. Milligan's shoes and pants before he performed his destructive presumptive testing. Instead, he simply highlighted those areas of the shoes and pants which tested positive. No other expert, especially Mr. Milligan's jury, could examine his shoes and pants to determine whether the highlighted areas actually contained "reddish-brown" stains.[182]

Mr. Berger never identified his error rate because the Washoe County Crime Laboratory did not require its examiners to undergo mandatory proficiency testing. In a post-conviction interview, Mr. Berger conceded that the Washoe County Crime Laboratory did not have a mandatory proficiency testing program in 1980.[183] He stated that proficiency testing was voluntary, and that he vaguely remembers whether he participated in any proficiency testing. If he participated, the lab never disclosed his results to criminal defense attorneys. Likewise, he did not recall trial counsel filing a formal discovery motion requesting his results. "Without information about error rates, the initial factfinder, this Court, and the ultimate one, the jury, have no accurate way of evaluating the testimony."[184]

The Hair Evidence: The prosecutor's hair expert, Mr. Atkinson, evaluated the following items:

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[181] 1 Scientific Evidence §17-3, at 801 (Giannelli & Imwinkelried eds., 3d 1999). See also Lee, *Identification and Grouping of Bloodstains, in* Forensic Science Handbook 267, 275 (Safterstein ed. 1982); DE FOREST, GAENSSLEN, & LEE, FORENSIC SCIENCE: AN INTRODUCTION TO CRIMINALISTICS 247 (1983) (presumptive tests "are not specific for blood. Other things besides hemoglobin can cause the color changes.").

[182] NT 1/16/81, at 465-466.

[183] Ex. 202

[184] See United States v. Green, 405 F.3d at 121 (D. Mass. 2005).

> There was item number 8 which was hair from [the] scene; item 9 which was hair from sledge hammer; 10, hair from the shoe of suspect named Milligan; item 11, hair and fibers from the Levis of Mr. Milligan; number 12, hair from the shirt of Mr. Milligan; hair from slacks of someone name Orfield; and 16, hair from blue trunks of Hale; 17, hair from T-shirt of Bonnette; 81, hair–perhaps these were known head hair samples, hair from Bonnette; 82, hair from Hale; 83, hair from Orfield; and 84 hair from Milligan.[185]

Mr. Atkinson testified he recovered hair samples from Ms. Voinski's head prior to her death at the Washoe County Medical Center.[186] Mr. Atkinson testified that the hair recovered from the sledgehammer was "virtually identical" to Ms. Vonski's head hair.[187] More importantly, Mr. Atkinson's most damaging testimony concerned the hair Mr. Berger supposedly recovered from Mr. Milligan's shoe. According to Mr. Atkinson, this hair was the "same" as Ms. Voinski's hair. Mr. Atkinson testified:

> On the basis of those same examinations... the same similarities are there. In all the things I related before, it's color, pigment and all the other characteristics, the sample from the shoe is the <u>same</u> as the three white hairs that I got from the victim.[188]

On cross-examination, Mr. Atkinson accentuated his damaging testimony when he opined that hair identification was more probative than blood testing:

> Q: So, you are trying to put in categories the same way we try to type blood systems and put certain class characteristics on the hair that you see under the microscope?
>
> A: I think the principle is much the same, sir. <u>The degree of variation between a hair makes it a far more meaningful variation</u> than saying this is different from this person and this is different from this person than in the ABO blood type because all your breakdown is in very large percentages.[189]

Mr. Atkinson added that Mr. Bonnette, Ms. Hale, and Ms. Orfield's hair samples were "[e]xtremely dissimilar" and "totally different" from Ms. Voinski's hair or the hair recovered from

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[185] <u>Id.</u> at 485-486.

[186] <u>Id.</u> at 486.

[187] <u>Id.</u> at 491-492.

[188] <u>Id.</u> at 493 (emphasis added).

[189] <u>Id.</u> at 498-499 (emphasis added).

Mr. Miligan's shoe.[190]

Mr. Atkinson's hair identification testimony was inherently unreliable.[191] Trial counsel could have easily exposed his unreliability had he conducted an adequate and complete investigation.

Mr. Atkinson ignored the reporting requirements adopted by scientists in his field, when he simply summarized his conclusions in three short sentences:

> The hair from the sledgehammer and the hair from MILLIGAN's shoe have the same macroscopic and microscopic characteristics as the victim's head hairs. They are consistent with having originated from her or another individual with the same hair characteristics. They are not consistent with any of the samples from the suspects.[192]

There is no explanation, no photographs, no diagrams, and no description of the macroscopic and microscopic characteristics which were supposedly consistent. He failed to discuss what standards he used to determine how the samples were consistent, how many persons could be expected to share this same combination of characteristics, whether he followed generally accepted scientific methods, and how he arrived at his conclusions that the hair lifted from Mr. Milligan's shoe matched Ms. Voinski's hair.

Mr. Atkinson also failed to photograph, sketch, or diagram any identifiable marks on the examined hairs. Without adequate documentation, he could not explain what characteristics were actually consistent with one another.[193] Mr. Atkinson's failure to properly document his findings and conclusions rendered his identification unverifiable and inherently unreliable.

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[190] Id. at 494.

[191] The prosecutor subsequently relied on the (unreliable) hair evidence to bolster his claim that Mr. Houston's testimony was corroborated by the physical evidence:

> The hair found on the clothing and the hammer... those are circumstantial evidence.... As with the hair... she had silver-white hair. The same type of hair was found on the hammer. That is the circumstantial inference you can make that that was her hair. You can judge from the testimony of the expert as to how identical that is. As we told you... it was consistent in all respects with the victim's hair, and inconsistent with the hair of any of the other participants.

NT 1/22/81, at 203-204.

[192] Ex. 113 (Emphasis added.)

[193] NT 1/16/81, at 491 ("It's hard to describe"); id. at 494 ("It's hard to describe verbally.").

Mr. Atkinson also failed to inform the jury of his error rate. In a post-conviction interview, Mr. Atkinson conceded that the Washoe County Crime Laboratory did not have a mandatory proficiency testing program in 1980.[194] He stated that proficiency testing was voluntary, and that he vaguely remembers whether he participated in any proficiency testing. If he participated, the laboratory never disclosed his results to criminal defense attorneys. Likewise, Mr. Atkinson did not recall trial counsel filing a formal discovery motion requests his results. The lack of error rate data rendered Mr. Berger's identification inherently unreliable.

Hair identification is entirely subjective and susceptible to "unintentional" errors.[195] Mr. Atkinson's methodology likely produced an unintentional error. First, he failed to compare the hair recovered from Mr. Milligan's shoe with the hair from those individuals who came in contact with Mr. Milligan's shoes through the chain of custody–i.e., NDI Agent Robert Milby, Jailer Deputy Dan James, Jailer Deputy Dewey Huckaba, Officer Roger Peterson, Deputy Wilburn Dorries.[196] Trial counsel presented evidence that Deputy Huckaba came into contact with Mr. Milligan's shoes, and that Deputy Huckaba had a similar hair color (grayish white) as Ms. Voinski.[197] Second, he knew that the unknown hair he examined was recovered from Mr. Milligan–the prosecutor's primary suspect. Finally, he failed to adequately document his findings.

There is no consensus among hair examiners about the number of so-called similar characteristics which are needed before an examiner can opine whether an unknown hair is

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[194]Ex. 203

[195]E.g., See Bisbing, *The Forensic Identification and Association of Human Hair, in* 1 Forensic Science Handbook 419 (Saferstein ed., 2d. 2002) ("The conclusions drawn from a forensic hair comparison are subjective"); Kirk &. Kingston, *Evidence Evaluations and Problems in General Criminalistics*, 9 J. Forensic Sci. 434, 435 (1964) ("Subjective opinions, however well based in personal experience, are still subject to several factors such as… a mental bias of which its possessor may be totally unaware."); Miller, *Procedural Bias in Forensic Science Examinations of Human Hair*, 11 Law & Human Behav. 157, 157-58 (1987).

[196]NT 1/16/81, at 500.

[197]Id.

"consistent with" or "matches" a known hair sample.[198] Likewise, there are no probability standards to determine how many persons could be expected to share certain hair characteristics.[199] Without this information, hair identification has no probative value but is extremely prejudicial.

There is "an apparent scarcity of scientific studies regarding the reliability of hair comparison testing."[200] Moreover, the "few available studies" conducted "tend to point to the method's unreliability."[201] As noted *supra*, the 1978 LEAA study revealed that crime laboratories had significant trouble with hair analysis. The error rates on hair analysis were as high as 67% on individual samples, and the majority of the crime laboratories were incorrect on four out of five hair samples analyzed.[202]

Hair identification is the most discredited of the forensic identification sciences because it has played a role in more wrongful convictions than any other forensic identification science.[203] In

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[198]E.g., Aitken & Robertson, *The Value of Microscopic Features in the Examination of Human Head Hairs: Statistical Analysis of Questionnaire Returns*, 31 J. Forensic Sci. 546 (1986); Robertson & Aitken, *The Value of Microscopic Features in the Examination of Human Head Hairs: Analysis of Comments in Questionnaire Returns*, 31 J. Forensic Sci. 563 (1986).

[199]E.g., Bisbing, *supra*, at 419 ("Outside of personal observation acquired through the accumulated experiences of thousands of hair examinations, little data exist to aid the examiner in assessing the significance of hair comparison."); Williamson v. Reynolds, 904 F.Supp. 1529, 1556 (E.D. Okla. 1995) ("Although probability standards for fingerprint and serology evidence have been established and recognized by the courts, no such standards exist for human hair identification."). Mr. Atkinson conceded this during cross-examination. NT 1/16/81, at 499 ("And while we can numerically say this is one point five percent of the populous [for blood typing], we can't say that [with hair analysis].").

[200]Williamson v. Reynolds, 904 F.Supp. at 1556.

[201]Id.

[202]See Imwinkelried, Forensic Hair Analysis: The Case Against the Underemployment of Scientific Evidence, 39 Wash. & Lee L. Rev. 41, 41-44 (1982).

[203]E.g., Michael J. Saks & Jonathan J. Koehler, *The Coming Paradigm Shift in Forensic Identification Science*, 309 SCI. 892 (Aug. 2005); THE INNOCENCE PROJECT (21 of first 70 persons exonerated based on DNA evidence had been convicted based, in part, on microscopic hair comparisons), available at http://www.innocenceproject.org; EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE After Trial (1996) (out of twenty-eight erroneous convictions, six had hair comparison testimony supporting the original conviction); Stephanie L. Smith & Charles A. Linch, *A Review of Major Factors Contributing to Errors in Human Hair Association by Microscopy*, 20 Am. J. Forensic Med. & Pathology 269 (1999) (discussing two incorrect inclusion cases); See generally Clive A. Stafford Smith and Patrick D. Goodman, *Forensic Hair Comparison Analysis: Nineteenth*

many of these cases, the hair examiners offered virtually testimony to that of Mr. Atkinson's. These cases establish that Mr. Atkinson's testimony was inherently unreliable.

Numerous state and federal courts prohibit hair testimony because its prejudicial impact greatly outweighs its minimal probative value.[204] Other judges, in dissent, have expressed their skepticism about the current state of scientific speculation regarding hair comparison testimony.[205] These cases support Mr. Milligan's claim that hair identification is inherently unreliable.

The Washoe County Crime Laboratory: The Washoe County Crime Laboratory was unreliable in 1980 because it was not accredited and because of the results of a national crime laboratory proficiency program. Trial counsel could have easily accessed this information had he conducted an adequate and complete investigation.

The Washoe County Crime Laboratory was not accredited by ANY state or federal agencies

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Century Science or Twentieth Century Snake Oil, 27 Colum. Hum. Rts. L. Rev. 227 (1996); Frank Green, *Hair Analysis Use Faulted; Critics Say It's Bad Way to Make Identifications*, Richmond Time-Dispatch, Oct. 19, 2002, at B1 ("Of the first 70 inmates cleared by DNA testing, 21 were convicted in part on faulty hair analysis"); Diane Struzzi, *New Test Casts Doubt on Old Evidence; Convict's Rape Case Pits DNA Analysis Against Microscopic Hair Comparison*, Hartford Courant, Dec. 29, 2002, A1 ("[M]icroscopic hair comparison matches and mistaken identification were among the most common factors leading to wrongful convictions in the first 70 DNA exonerations."); Mark Wrolstad, *Hair-matching Flawed As a Forensic Science: DNA Testing Reveals Dozens of Wrongful Verdicts Nationwide*, Dallas Morning News, Mar. 31, 2002, at A1 ("no division of forensic science has come under more withering attack or faced greater discrediting in the DNA age than the age-old practice of microscopic hair comparison."); Diana Baldwin & Ed Godfrey, *Hair Analysis Under Scrutiny*, Daily Oklahoman, June 3, 2001, at A1 ("six people were convicted of crimes in Oklahoma based in part on hair analysis by a police expert. All six have since been exonerated by DNA testing."); Steve Mills & Ken Armstrong, *Convicted By a Hair*, Chi. Trib., Nov. 18, 1999, at A1 (describing hair identification as "ignorance masquerading as science"); Diana Baldwin, *Experts Disagreed On Hair Analysis*, Daily Oklahoman, May 27, 2001, at A1 (discussing wrongful convictions associated with hair misidentification); *Criminal Science: The Legacy of Hair Evidence*, Dallas Morning News, Mar. 31, 2002, at A18 (same).

[204]E.g., Williamson v. Reynolds, 904 F.Supp. 1529, 1554-1559 (E.D. Okla. 1995); State v. Caplin, 592 A.2d 188, 191-92 (N.H. 1991); State v. Faircloth, 394 S.E.2d 198, 202 (N.C. Ct. App. 1990); State v. Johnson, 338 S.E.2d 584, 587 (N.C. Ct. App. 1986); State v. Stallings, 334 S.E.2d 485, 486 (N.C. Ct. App. 1985); State v. Wheeler, No. 80515-CR, 1981 WL 139488, at *4 (Wis. Ct. App. Feb. 8, 1981); State v. Kersting, 623 P.2d 1095, 1101 (Or. Ct. App. 1981); People v. Roff, 413 N.Y.S.2d 43, 44-45 (N.Y. App. Div. 1979); State v. Holt, 246 N.E.2d 365 (Ohio 1969).

[205]E.g., Crawford v. State, 597 S.E.2d 403, 408, 412 (Ga. 2004) (Fletcher, C.J., dissenting); People v. Kosters, 467 N.W.2d 311, 313 (Mich. 1991) (Cavanagh, C.J., dissenting).

when it examined the evidence in Mr. Milligan's case.[206] Crime lab accreditation is critical to the integrity and accuracy of the criminal justice system. Accreditation establishes that a crime lab's "management, operations, personnel, procedures, equipment, physical plant, security, and health and safety procedures meet established procedures."[207] The laboratory's unaccredited status alone casts significant doubt as to the accuracy and reliability of Mr. Berger and Mr. Atkinson's examinations and conclusions.

Crime laboratories were not reliable during the late 1970s and early 1980s. For instance, a 1978 crime laboratory proficiency testing program concluded: "A wide range of proficiency levels among the nation's laboratories exists, with several evidence types posing serious difficulties for the laboratories... 65 percent of the laboratories had 80 percent or more of their results fall into the acceptable category. At the other end of the spectrum, 3 percent of laboratories had less than 50 percent of their responses considered acceptable."[208] Similarly, certain examinations produced very high error rates:

Test Sample	Evidence Type	Rate
1	Controlled substance	7.8%
2	Firearms	28.2%
3	Blood	3.8%
4	Glass	4.8%
5	Paint	20.5%
6	Drugs	1.7%
7	Firearms	5.3%
8	**Blood**	**71.3%**
9	Glass	31.3%
10	Paint	51.4%
11	Soil	35.5%
12	Fibers	1.7%
13	Physiological Fluids (A)	2.3%

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[206]The Washoe County Crime Laboratory did not receive its accreditation until 1994. Ex. 114

[207]A MERICAN SOCIETY OF CRIME LABORATORY DIRECTORS, LABORATORY ACCREDITATION BOARD MANUAL 1 (2003); American Bar Association Section of Criminal Justice, *Report to the House of Delegates* 7 (Aug. 2004) ("The Committee... recommend[s]... that rigorous accreditation standards should be mandated, and regulation of crime laboratories is the best way to accomplish this goal.").

[208]Joseph Peterson, *The Crime Lab, in* THINKING ABOUT POLICE 184, 195, 188-191 (Charles Klockars ed. 1983) (citing See JOSEPH PETERSON ET AL., CRIME LABORATORY PROFICIENCY TESTING RESEARCH PROGRAM (Law Enforcement Assistance Administration Oct. 1978)) (emphasis added).

		(B)	1.6%
14	Arson		28.8%
15	Drugs		18.2%
16	Paint		34.0%
17	Metal		22.1%
18	**Hair**	**(A)**	**50.0%**
		(B)	**27.8%**
		(C)	**54.4%**
		(D)	**67.8%**
		(E)	**35.6%**
19	Wood		21.5%
20	Questioned Documents	(A)	5.4%
		(B)	18.9%
21	Firearms		13.6%

Over 200 crime laboratories participated in the proficiency study. According to Mr. Atkinson and Mr. Berger, the Washoe County Crime Laboratory participated in the LEAA study.[209]

Another proficiency testing program, administered by the Forensic Science Foundation, concluded: "From 1978 to 1989, the number of laboratories making one or more errors... ranged from 7%... to 78%... with an average of 25%... ."[210] Another survey of the proficiency tests from 1979 through 1983 "show[ed] a 6.3 percent rate of error in ABO determinations of bloodstains. The rate of error in ABO typing of secretion stains (semen, saliva, mixtures of body fluids) [was] 8.4 percent. The rates of error in the electrophoretic determination of genetic markers in bloodstains are as follows: PGM (2.8 percent), EsD (3.2), EAP (2.1), ADA (0.3), AK (0.7), GLO (5.2), and HP (3.4)."[211]

This evidence is significant because the Washoe County Crime Laboratory participated in a large study which produced an unnerving number of errors.[212] More significantly, the error rate data is significant because the two forms of physical evidence with the highest error rates were the

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[209]Exs. 202, 203 (Emphasis added.)

[210]Randolph N. Jonakait, *Forensic Science: The Need For Regulation*, 4 HARV. J. LAW & TECH. 109, 118-119 (1991); see also Douglas M. Lucas et al., *An American Proficiency Testing Program*, 27 FORENSIC SCI. INT'L 71, 74 (1985).

[211]Barry Grunbaum, *Physiological Stain Evidence–Assuring Quality Analysis,* CAL. DEFENDER, Spring, 1985, at 20, 20.

[212]The ever-increasing number of DNA exonerations only reinforce this point, as many of these cases were prosecuted during the 1980s with faulty forensic evidence–particularly hair and blood typing evidence. See Michael J. Saks & Jonathan J. Koehler, *The Coming Paradigm Shift in Forensic Identification Science*, 309 SCI. 892 (Aug. 2005).

two forms of evidence which supposedly linked Mr. Milligan to Ms. Voinski's murder: blood analysis and hair identification.

E. Lack of Blood Alcohol Evidence

As noted, law enforcement officers failed to administer a blood alcohol test to Mr. Milligan after he was detained and arrested on July 4, 1980, despite obvious signs he was intoxicated. Trial counsel's defense strategy was that Mr. Milligan was too intoxicated (i.e., he suffered an alcoholic blackout) to form the requisite specific intent to be guilty of first-degree murder or robbery.[213] Consequently, the blood alcohol evidence would have been the linchpin of Mr. Milligan's intoxication defense. Without the blood alcohol evidence, however, trial counsel's defense strategy was effectively eradicated because it forced trial counsel to rely on Officer Peterson and Deputy Dorries' testimony to prove that Mr. Milligan was too intoxicated to have acted willfully and rationally on July 4, 1980. This testimony, though, was anything but helpful, in that Officer Peterson and Deputy Dorries (as well as other law enforcement officers) made it quite clear that, while Mr. Milligan may have been inebriated on July 4, 1980, he was fully capable of thinking and acting willfully, purposely, and deliberately.

Deputy Dorries testified that Mr. Milligan did not have difficulty exiting Officer Peterson's patrol car, standing, or walking; he walked to Terry Bonnette's vehicle normally and put on his t-shirt with no problems; he did not have a problem entering Officer Peterson's patrol car; he did not have difficulty walking to and entering the elevator at the jail; and he had no difficulties taking off his clothes and changing into jail garb.[214] Deputy Dorries' most damaging testimony occurred during the following colloquy with the prosecutor:

> Q: Do you have an opinion as to whether or not the defendant was under the influence of intoxicating liquor?
>
> A: In my opinion, yes, to a certain degree.
>
> ...
>
> Q: If you had observed the defendant walking on the street, would you have stopped him for any reason?

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[213]NT, Milligan Evid. Hrg., 9/19/88, at 119-120.

[214]NT 1/15/81, at 305; 307, 310, 312, 315.

A: Walking on the street, no.

Q: Was he in such a state of intoxication that you would have noticed it if he had been walking on the street based upon what you told us here?

A: Based upon the actions I seen, no. I wouldn't have. He would have been walking fairly normal.

Q: Based upon your experience to distinguish between someone being under the influence of intoxicating liquor and someone being drunk?

A: Yes?

Q: Which would be the more severe to you in degree?

A: Well, the drunk.

Q: The drunk would be more intoxicated than the person merely under the influence?

A: Yes.

Q: Was the defendant under the influence of intoxicating liquor or drunk?

A: Under the influence.[215]

The prosecutor's final question to Deputy Dorries also substantially prejudiced Mr. Milligan:

Q: Deputy Dorries, if you had been at the Golconda Bar area... and you observed all the things that you described to us already, and then instead of detaining the defendant, saw him get into a vehicle and start to drive away, would you have stopped him as being under the influence of intoxicating liquor to such a degree that he would be unable to drive a car?

A: I would have to say no on that.[216]

Officer Peterson testified that Mr. Milligan did not have any problems walking to or entering his patrol car; he walked normally and did not stagger when he walked toward Terry Bonnette's vehicle; he did not encounter any problems walking to and entering the jail elevator; and he correctly answered the booking questions without slurring his words.[217].

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[215] Id. at 318-319.

[216] Id. at 330.

[217] NT 1/15/81, at 336, 338, 341, 342.

The prosecutor also elicited similar damaging testimony from Ramon Houston,[218] Keith Wolf,[219] Deputy Theodore Snodgrass,[220] and Deputy James.[221] Consequently, the prosecutor was able to repeatedly capitalize on the fact that Mr. Milligan could not definitively prove, with scientific certainty, his blood alcohol level on July 4, 1980.

F. Mr. Milligan's Defense

Trial counsel conceded that Mr. Milligan struck Ms. Voinski with the sledgehammer,[222] but contested the issue of whether he possessed the requisite specific intent to be guilty of first-degree murder and robbery because of Mr. Milligan's intoxication. In particular, trial counsel's theory was that Mr. Milligan could not have acted willfully, purposely, or knowingly on July 4, 1980 because he suffered from an alcoholic blackout.[223]

Trial counsel conceded Mr. Milligan's guilt during his case-in-chief. For instance, when trial counsel cross-examined Mr. Houston, he asked the following question:

> Q: Ramon, it's a fact, isn't it, that you don't know why Ron hit the woman?
>
> A: I don't know. I don't really know what's in his mind.
>
> Q: You don't think it was part of the robbery, do you?
>
> A: I don't think so because the only one who spoke about money was Leon.
>
> Q: So, you don't think that Ron hit the woman because of the robbery?
>
> A: I don't know.[224]

Likewise, during a colloquy with the prosecutor and the trial judge, trial counsel conceded

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[218]NT 1/13/81, at 73; NT 1/14/81, at 199, 201, 203, 204.

[219]NT 1/15/81, at 260.

[220]NT 1/15/81, at 361, 362, 365, 369.

[221]NT 1/15/81, at 376-380.

[222]Trial counsel pursued this strategy despite the fact he conducted absolutely no investigation to determine whether the strategy was reasonable. See *supra*.

[223]NT, Milligan Evid. Hrg., 9/19/88, at 119, 63.

[224]NT 1/14/01, at 188.

to the trial judge, in the jury's presence, that the defense was not contesting the prosecutor's claim that Mr. Mr. Milligan struck Ms. Voinski with the sledgehammer: "Your Honor, we have never contested the fact of anything to do with the hammer. We're talking about a state of mind."[225]

Prior to trial, trial counsel hired Dr. John N. Chappel–a psychiatrist from the University of Nevada-Reno to establish that Mr. Milligan suffered from an alcoholic blackout. Dr. Chappel's expertise, however, was limited to alcohol addiction (i.e., identifying, diagnosing, and treating alcoholism) and did not encompass alcoholic blackouts (i.e., how alcoholic blackouts affect the brain's neuropathways which create, store, and retrieve memory). Trial counsel hired an expert who was incapable of determining whether Mr. Milligan experienced an alcoholic blackout, and if so, whether his neurophysiological functioning prevented him from acting willfully, purposefully, and knowingly on July 4, 1980.

Dr. Chappel's testimony supports Mr. Milligan's claim. Dr. Chappel diagnosed Mr. Milligan as an alcoholic.[226] Trial counsel repeatedly asked Dr. Chappel whether Mr. Milligan was an alcoholic, to which Dr. Chappel answered in affirmative.[227] However, when trial counsel asked Dr. Chappel the all-important question of whether Mr. Milligan suffered an alcoholic blackout on July 4, 1980, and whether he was capable of acting willfully, purposefully, and knowingly, Dr. Chappel's inexperience with alcoholic blackouts prevented him from answering the question:

Trial Counsel:	Do you know whether Mr. Milligan had regressed on July 4th, 1980 someplace in the mid-afternoon? Do you know from any of your findings right now whether he had regressed at that point?
Dr. Chappel:	No, I don't. He certainly displayed regressed behavior as he became intoxicated with me.[228]

Dr. Chappel's only testimony which even remotely supported trial counsel's claim that Mr. Milligan suffered an alcoholic blackout on July 4, 1980, was his testimony regarding impulsivity and

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[225]NT 1/14/01, at 200.

[226]NT 1/20/81, at 28, 29-32. ("It is my opinion that Mr. Milligan meets the criteria set out alcohol dependence.").

[227]Id. at 37, 39, 43, 44.

[228]Id. at 47 (emphasis added).

intoxication:

> Well, there is generally less systematic thinking of the kind that occurs to us in a sober way, where if we have an impulse to do something we consider it, think about what the consequences will be and then either modify it or don't do it or go ahead and do it.
>
> In addition to the impairment of thinking there often is a release of impulse, and a person may experience anger or may experience fear or they may experience something that they ordinarily don't allow themselves to experience in a sober state, and those impulses then are expressed with much less control.[229]

Dr. Chappel's cross-examination testimony only aggravated the problem:

> Prosecutor: Now, isn't it a fact, doctor, that nowhere in the diagnostic criteria for alcohol dependence... does it say that one of the criteria is that the defendant did not intend what he did during the course of his periods of intoxication; isn't that correct.
>
> Dr. Chappel: That's correct.
>
> Prosecutor: So what he does at the time that he is intoxicated has no bearing at this point anyway, as far as your diagnosis?
>
> Dr. Chappel: That's correct.[230]
>
> ...
>
> Prosecutor: You said he had blackouts. What is your opinion as to whether or not the defendant at the time of the commission of the acts for which he blacked out could have formed the intent to do those acts?
>
> Dr. Chappel: Well, it would depend on the level of intoxication at the time.
>
> Prosecutor: If I may stop you. Isn't it a fact that you don't know?
>
> Dr. Chappel: Yes.[231]
>
> ...
>
> Prosecutor: Is it your opinion that you know what he was thinking or whether he could intend to do an act at that time, or is it your opinion that you don't know?
>
> Dr. Chappel: I don't know what was going on in his mind at that time. I can form an that has to be speculative or based on inferences.

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[229] Id. at 48.

[230] Id. at 55.

[231] Id. at 63 (emphasis added).

Prosecutor: Let's hear it, please.

Dr. Chappel: If Mr. Milligan was as intoxicated as he became with me, it would be my opinion that it would be very difficult for him to formulate an intent...

So I would have to say that depending upon the degree of his intoxication there would be an increasing lessening of his ability to form an intent or to think about what he was doing.[232]

Dr. Chappel's opinion, that it would have been "very difficult" for Mr. Milligan to form specific intent, further aggravated the situation because it plainly suggested to the jury that Mr. Milligan had the capacity to think and act willfully, purposely, and knowingly–even if extremely intoxicated.[233]

Dr. Chappel's cross-examination testimony also demonstrated he was unqualified to opine whether Mr. Milligan suffered an alcoholic blackout on July 4, 1980:

Prosecutor: Now, doctor, isn't it true that the blackout effect is an after-effect... of the intoxicated state that you normally do not observe; isn't that correct?

Dr. Chappel: Well, as we understand it it is a direct effect of the alcohol. We don't understand how it happens or why it happens.

Prosecutor: You don't know a lot of the details about it?

Dr. Chapel: We can only diagnosis it after it has occurred, not at the time.

Prosecutor: But you are saying, though, is that at the time that the person was committing or doing acts that he no longer remembers, that he made an active impression on his brain as to what he was doing, and that only after the alcohol wears off does he no longer have a memory of that; is that correct?

Dr. Chappel: That's what we don't know. That's what is so confusing. Is the blackout a problem in registration, for example? Does the person not remember because none of the things that they were involved in really registered and were retained in their mind, or is it because they registered in that particular situation, but when they become sober they cannot recall

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[232] Id. at 63-64 (emphasis added).

[233] As explained *infra*, Dr. Chappel's testimony was incorrect and very prejudicial. Individuals who suffer from alcoholic blackouts are completely incapable of acting willfully, purposely, and knowingly because the neuropathways in the brain are so altered that they cannot develop short or long-term memory. A person cannot act willfully, purposefully, knowingly, or rationally without knowledge of recent or past events.

them? That is the dilemma that we are in the blackout.

Prosecutor: You are telling us not that you don't know which of the two?

Dr. Chappel: That's correct.[234]

...

Prosecutor: if a person is observing in taping, so to speak, these observations, is not the blackout effect like someone coming in after the fact and erasing part of the tape? Can you answer that yes or no for just a moment, and bear with my analogy?

Dr. Chappel: It's possible.

Prosecutor: So if you had an 18 minute gap in the tape, would that not mean that it's erased, but it doesn't mean there wasn't something there to begin with that was recorded?

Dr. Chappel: Right.[235]

...

Prosecutor: Doctor, haven't you established, as a psychiatrist, that the blackout syndrome, that we have been talking about, merely relates to that area of the brain where the memory center is or the recall portion of the brain; isn't that correct?

Dr. Chappel: Well, but that is what we don't know. We don't know whether it is a defect in registration or a defect in recall; you can have a blackout either way.[236]

...

Dr. Chappel: As I said, we don't understand blackouts that well, and they tend to occur at some point in the period of intoxication and then they end either after the person wakes up when they have been asleep, or at some point when the blood alcohol is coming down, and there is no fixed point for either of those that we have ever been able to demonstrate.[237]

Dr. Chappel was the only expert who testified during the guilt phase of Mr. Milligan's trial.

G. The Prosecutor's Closing Arguments

During closing arguments, the prosecutor emphasized three critical points. First, Mr.

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[234] Id. at 56.

[235] Id. at 57.

[236] Id. at 61.

[237] Id. at 62 (emphasis added).

Milligan was guilty of first-degree murder because, while he might have been intoxicated on July 4, 1980, the intoxication did not prevent him from acting willfully, purposefully, and knowingly. Second, Mr. Houston was not an accomplice, but instead an innocent bystander. And third, Mr. Houston was credible. To bolster Mr. Houston's credibility, the prosecutor repeatedly (yet impermissibly) vouched for his credibility, and falsely argued that Mr. Houston could still be prosecuted for his preliminary hearing testimony.

Mr. Milligan is Guilty: On the first point, the prosecutor argued Mr. Milligan was "the man... responsible for the robbery and murder."[238] Significantly, the prosecutor repeatedly referred to the blood and hair evidence to support his argument.[239] After he argued Mr. Milligan was the perpetrator who fatally struck Ms. Voinski with the sledgehammer, the prosecutor turned his attention to the fundamental issue in Mr. Milligan's trial–i.e., whether Mr. Milligan had the requisite specific intent to be guilty of first-degree murder and robbery. The prosecutor hammered home this point when he stated: "Ladies and gentlemen, that is the only issue before you, whether or not [Mr. Milligan] had... [specific] intent."[240] Once he highlighted the fundamental issue, the prosecutor once

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[238]NT 1/13/81, at 53.

[239]NT 1/22/81, at 203 ("The hair found on the clothing and the hammer, the blood found on the clothing and the hammer, those are pieces of circumstantial evidence."); NT 1/22/81, at 204 ("As with the hair evidence,... she had silver-white hair. The same type of hair was found on the hammer. That is the circumstantial inference you can make that that was her hair."); id. ("You can judge from the testimony of the expert as to how identical it is. As we told you, it cannot be perfectly matched to the head of a particular person, but it was consistent in all respects with the victim's hair... ."); id. at 209 ("Ladies and gentlemen, the other things we have are blood, the hair, photos, and the hammer with the blood and the hair."); id. at 272 ("At the scene of the crime how do we connect the people there? We have the sledge hammer. What is on the sledge hammer? Some blood and hair. The hair is consistent with that of Zalli, and the blood is consistent with that of Zalli, the same type."); id. at 272-273 ("How do we connect the defendant... to the scene? We have blood on his pants, and it is just tested for presumptive blood, but at least it is maybe, and that is enough, it doesn't have to be proven possible, just proven enough to convince you."); id. at 273 ("We also have the hair, consistent with Zalli's, and on the relatively isolated location. It would be different if it was on his shirt, we might say he was out necking with a lady with silver hair... But on his shoe, or his tennis shoe?"). Mr. Bullock made similar comments in Mr. Milligan's co-defendants' trials. E.g., NT, Hale/Orfield, 8/26/82, at 707 ("Look at Milligan. We have hair on his shoes, blood on his shoes, blood on his pants. The hairs on his shoes was compared with the victim's hair and according to the stipulation that we have it was found to be consistent with her hair.").

[240] NT 1/22/81, at 214 (emphasis added). This was the only issue for the jury because trial counsel repeatedly conceded that Mr. Milligan was the person who fatally struck Ms. Voinski with the sledgehammer.

again capitalized on the lack of scientific evidence regarding Mr. Milligan's blood alcohol level when he argued that Mr. Milligan was not so intoxicated he was prevented from acting knowingly, purposefully, and rationally on July 4, 1980:

> How can we prove [Mr. Milligan had specific intent]... We have Ramon Houston's testimony that he told you [Mr. Milligan] wa acting normal at the Valmy rest stop on the 4th of July, 1980, and he was playing with the witch stick, that he helped two little girls get a drink of water, that he talked to the Philippino lady.[241]
>
> ...
>
> We now have other observations, professional observations of law enforcement officials, men who are trained to look at people... what they [told] you is extremely important, that the defendant was walking normally, talking normally... He was thinking, he recognized that they were law enforcement officers, and he went through his wallet looking for his driver's license, he responded to their questions, he even asked them if he could get his shirt to cover himself in the sun.
>
> He doesn't remember the booking process, but we have testimony of the other officers that there were nothing out of the ordinary, no stumbling, no off balance, no slurred speech. The jailer even told you they asked the defendant a lot of questions.
>
> He had to sign the documents three times, and his signature shows up on this. He had to respond to the questions of where he was born, what occupation did he have, his last employer, which was Chemical Express. He responded just like you and I would.[242]
>
> ...
>
> The State submits... that the testimony of Dr. Chappel [where he opined Mr. Milligan was highly intoxicated]... should be given no weight whatsoever. The reason being, five jailers testified on rebuttal said that the defendant–no problem, didn't recognize any medical problem, or no one told them of any medical problem. The defendant never mentioned any medical problem.[243]
>
> ...
>
> If he would have been that drunk so that he couldn't have formed intent, he would have been falling down out at Golconda or in the back seat sound asleep...
>
> ... If we use the test Dr. Chappel gave as an indicator, that is not enough time for the defendant to come down from the state of intoxication where he is walking normally. Common sense tells you it cannot happen.[244]

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[241] Id. at 214-215.

[242] Id. at 215-216.

[243] Id. at 217.

[244] Id. at 218.

> ...
>
> You heard Dr. Chappel testify that at his stage of intoxication at .277 blood alcohol the defendant might have had some serious problems of wheeling this hammer, and yet he walked a distance to the car to where the hammer is, he retrieved it, he walked back to where Zalli is lying on the desert floor, and not once but possibly twice and more he wheels this hammer like a mallet into her skull. Ladies and gentlemen, that is premeditated, willful, and deliberate murder.[245]

Ramon Houston is Innocent and Credible: The prosecutor also argued that Mr. Houston was an innocent bystander who did not participate in Ms. Voinski's attack.[246] The prosecutor supported his argument when he repeatedly referenced the lack of physical evidence which linked Mr. Houston to Ms. Voinski's attack.[247] In particular, the prosecutor emphasized the fact Mr. Berger failed to identify any blood on his boots (the only clothing not laundered).[248]

Vouching for Mr. Houston's Credibility: To bolster Mr. Houston's credibility in the jury's eyes, and to prove he was an "innocent bystander," the prosecutor repeatedly vouched for Mr. Houston's credibility:

> This case primarily hinges on the testimony of Ramon Houston; without him there probably would be very little evidence, as you can imagine... What kind of person is Ramon Houston? Is he credible? Can you give his testimony weight sufficient to convict the defendant? Ladies and gentlemen, the State thinks that you can, that there is no reasonable doubt.[249]
> ...
>
> You may take into consideration such things as his conduct, his attitude and

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[245]Id. at 223.

[246]NT 1/22/81, at 202 ("Ladies and gentlemen, we [the State]... suggest that all of the participants, save Ramon Houston, had similar motives... Ramon was mainly a hitchhiker... [who] spoke very little English."); id. at 207 ("The State contends he is not an accomplice... ."); id. at 275-276 ("The State submits that it is illogical to think that Mr. Houston was involved... and to do the things that he did.").

[247]NT 1/22/81, at 276; NT, Bonnette, 7/2/82, at 705 ("Mr. Houston's testimony is credible, there's not going to be anything on the clothing because he's not close enough to have anything on his clothing."); id. at 753 ("the defendant himself corroborates or substantiates the position of Ramon that he wasn't anywhere close to where the blood was. There would not be any blood on there").

[248]NT 1/22/81, at 275-276; NT, Bonnette, 7/2/82, at 753 ("we do have his boots, and his boots weren't washed and they were examined. Mr. Berger... examined the boots and he didn't find anything, no hair, no blood stains.").

[249]NT 1/22/81, at 205 (emphasis added).

> manner while testifying. Let's focus in on that. Ramon did not give you any indication that he was lying. He wasn't squirming on that stand, he wasn't nervous. He may have been inside, as most people are when they do testify, but he didn't show any outward sign of trying to lie.[250]
> ...
>
> Ladies and gentlemen, that man risked a lot by calling law enforcement. The State submits he maybe even risked his life, because if he had been caught prior to law enforcement arriving, there is no telling what could have happened.[251]
> ...
>
> If the facts were different and Ramon was a primary actor in this episode, what reason would he have for calling law enforcement, risking his own future and risking conviction for that crime? Those are circumstances, ladies and gentlemen... that you can look at and determine whether or not Mr. Houston is credible. The State contends that he is credible right down the line. There is nothing in his testimony that would cause you to think that he was lying to you in Court when he testified.[252]

The prosecutor also vouched for Mr. Houston's credibility during his rebuttal as well:

> [Ramon Houston]... is not the best witness because he doesn't speak English, but he is a witness and he did tell you what happened and it is credible.[253]
> ...
>
> [Ramon Houston] was given a grant of immunity after he had testified at the preliminary hearing. That testimony could have been used against him. That, ladies and gentlemen, tells you also whether he is credible.[254]
> ...
>
> The State submits that it is illogical to think that Mr. Houston was involved as the defense, as they think he was, and to do the things that he did. That makes no sense to the State, and I hope it doesn't make sense to you.[255]

Falsely Describing Mr. Houston's Grant of Immunity: The prosecutor falsely argued that Mr. Houston was credible because the State could have prosecuted Mr. Houston if his trial testimony deviated from his preliminary hearing testimony. The prosecutor's comments were false because Mr. Houston was given complete transactional immunity regarding his preliminary hearing and trial

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[250] Id. at 206.

[251] Id. at 207.

[252] Id. at 207 (emphasis added).

[253] Id. at 273 (emphasis added).

[254] Id. at 273 (emphasis added).

[255] Id. at 278.

testimony on October 24, 1980.

For instance, when trial counsel argued during closing arguments, "Why do you offer immunity to a man who is not an accomplice? Immunity means you will not prosecute him for a crime if he has done no crime. Why do you offer him immunity"[256] the prosecutor objected and stated: "That is an incorrect statement of the law. The Court was the one that granted immunity, and if you would like to refer to the Court file on that issue you can. But that is an inaccurate statement."[257] The trial judge conceded he granted Mr. Houston's immunity (at the prosecutor's request), but was unsure as to the exact parameters of Mr. Houston's immunity:

> The Court: There was immunity granted
> ...
> Mr. Perkins: He used immunity for his testimony.
> The Court: From prosecution of these cases?[258]

To clarify the trial judge's uncertainty, the prosecutor argued that Mr. Houston was not afforded complete transactional immunity because he could still be prosecuted for his preliminary hearing testimony:

> The Court: From prosecution of these cases?
> Mr. Bullock: For just what he says on the stand.
> The Court: You still can prosecute him for this?
> Mr. Bullock: You can't use what he says on the stand against him.
> The Court: That is the type of immunity?
> Mr. Bullock: That's correct, your Honor.[259]

During his rebuttal, the prosecutor again argued that Mr. Houston's grant of immunity was not transactional: "he was given a grant of immunity after he had testified at the preliminary hearing.

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[256]NT 1/22/81, at 246.

[257] Id.

[258]Id. at 247.

[259]Id.

That testimony could have been used against him."[260] The prosecutor argued this point to support his claim that Mr. Houston was credible because, if his trial testimony deviated from his preliminary hearing testimony (or vice versa), he would be prosecuted.[261] Thus, the jury was mistakenly led to believe Mr. Houston had a powerful incentive to testify honestly at trial–i.e., if he did not, he could be prosecuted, and thrown in jail.

H. Trial Counsel's Closing Arguments

During closing arguments, trial counsel frequently conceded Mr. Milligan struck Ms. Voinski's with the sledgehammer:

> I admit it would be easier if Ron was staggering when he was found and arrested on July 4th, 1980. It would be easier for each of us to say, yes, that man is intoxicated and he is drunk, but I cannot really help it if the prosecutor doesn't understand [what our alcohol expert] says, I can't help that. I hope you don't have the same problem.[262]
> ...
>
> Now what did Ramon Houston tell us? Ramon Houston, the State's material witness, who Mr. Bullock believes implicitly, the man that says he watched what happened, he doesn't know [why Mr. Milligan struck Ms. Voinski]. He doesn't know that Ron struck her for money. He told us from the stand that he wasn't sure. If the man that watched it happen isn't sure then, ladies and gentlemen, how can you be sure [Mr. Milligan has the requisite intent]?[263]
> ...
>
> The hammer and the picture. Let me tell you something. Every time I looked at the picture I believe myself, and I am his lawyer, that he is guilty because I looked at the picture. That is interesting.
>
> You look at a picture and that makes you believe he is guilty. I don't flash the picture in front of you, you have seen it several times. You know the woman was beat. You know she was hit in the back of the head. We understand that. The picture is graphic.[264]

I. Verdict

The jury deliberated for less than three hours before it convicted Mr. Milligan of first-degree

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[260]NT 1/22/81, at 273 (emphasis added).

[261]Id. ("That, ladies and gentlemen, tells you also whether he is credible").

[262]NT 1/22/81, at 227.

[263]Id. at 230.

[264]Id. at 243.

murder with a deadly weapon and robbery on January 22, 1981.

III. Trial–Penalty Phase

Mr. Milligan's penalty hearing lasted a single day–January 27, 1981. Although trial counsel presented evidence on Mr. Milligan's behalf, the evidence only consisted of "good character" evidence presented by four witnesses: Mr. Milligan's mother (Naomi Friedman), the Humboldt County Sheriff (Steven Bishop), a Humboldt County Jailer (John Thorson), and a recovering alcoholic who never interviewed Mr. Milligan or reviewed the substantial records documenting his battle with alcoholism (Lucille Etchegoyhen).[265]

As noted, Mr. Perkins conceded he failed to collect mitigation evidence (i.e., school, military, hospital records) to substantiate Mr. Milligan's life history and chronic battle with alcoholism.[266] He also conceded that the only evidence presented during Mr. Milligan's penalty phase was so-called "good guy" evidence:

> [W]e called members of his family... to try and demonstrate to the jury that he had people that loved him in spite of what had happened and that he was a human being. We were trying to convince them that he had some humanity that was worth saving. I can't recall the other evidence that we put on the penalty hearing. It wasn't very much. It was a short hearing. ...
>
> [W]hat our presentation was during the penalty hearing... was to emphasize [Mr. Milligan's] humanity.[267]

Mr. Milligan was sentenced to death on January 27, 1981.

IV. Post-Conviction Developments and Investigation

After Mr. Milligan was convicted and sentenced to death, his state and federal post-conviction attorneys uncovered substantial evidence which, if introduced at trial, would have established reasonable doubt regarding Mr. Milligan's culpability. This evidence failed to reach Mr. Milligan's jury for three primary reasons: (1) trial counsel's ineffectiveness;(2) prosecutorial misconduct; and (3) bad faith destruction of potentially exculpatory evidence. Had trial counsel even minimally performed their duties and adequately investigated Mr. Milligan's case, he would have

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[265]NT 1/27/81, at 5-85.

[266]NT, Milligan Evid. Hrg., 9/19/88, at 60.

[267]Id. at 122, 123 (emphasis added).

uncovered a wealth of evidence which would have established reasonable doubt. Likewise, the prosecutor failed to disclose material exculpatory and impeachment evidence which, if presented to the jury and combined with the evidence trial counsel failed to develop, would have established reasonable doubt. Moreover, had the newly discovered evidence been presented to the jury during the penalty hearing, it is reasonably likely that Mr. Milligan would have received a sentence less than death because the new evidence would established reasonable doubt regarding his moral culpability.

A. Discrediting and Incriminating Ramon Houston

Significant evidence has surfaced which undermines Ramon Houston's testimony and aggravates his culpability.

Exculpatory Letter: At trial, Mr. Houston testified he voluntarily chose to testify against Mr. Milligan, and that he was not coerced into testifying.[268] He also testified that Mr. Milligan was the person who struck Ms. Voinski with the sledgehammer.[269] Mr. Houston's testimony was false. While incarcerated at the Humboldt County Jail, and prior to or during Mr. Milligan's trial, Mr. Houston wrote a letter to Paris Hale which stated:

> Like I tried to tell you it is not that way that Bullock making it to be. He are keeping me here in jail to make me testify. No I never had any real intentions to go through with any of this. All I wanted to do after our fight was to try and get out of town and I had no way out we both had navaja and one of us would had to die, so I thought of the best way out, to do what I did. I thought they would just hold everybody, that way I could get money from them and leave town. When I seen they would not let me go, I tried to tell the truth that Ron was not involved with taking or beating the senorita, because Ron was not there, we kicked him out from traveling with us for being stone.
>
> Bullock call Ron and his folks nigger lovers, that he was going to put Ron on death row and me also if I did not cooperate with him. I told you how the cops put that gun to my head before the hearing if I did not tell everyone was involved they was going to shoot me in the head pulling the trigger.[270]

The letter was originally written in Spanish, but jail officials intercepted it and translated it into English. The above quote is the English translation of Mr. Houston's statements.

Mr. Houston exculpated Mr. Milligan when he wrote: "Ron was not involved with taking or

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[268]NT 1/13/81, at 69.

[269]NT 1/14/81, at 90-91.

[270]Ex. 115

beating the senorita, because Ron was not there[.]" Id.[271] Likewise, Mr. Houston's mock execution claim plainly contradicts his claim that he testified voluntarily and free from coercion.[272] The prosecutor failed to disclose this letter.

Forensic Evidence I: Ms. Voinski's Blood on Mr. Houston's Boots: Mr. Berger testified he failed to identify any blood on Mr. Houston's clothing and boots.[273] Trial counsel received a copy of Mr. Berger's report prior to trial,[274] never contested his conclusions or methodology. As a result, trial counsel failed to have Mr. Houston's boots and clothing examined by an independent forensic expert to determine whether Mr. Berger's results were correct.[275] Mr. Berger's testimony was critical

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[271]Mr. Houston's claim that Mr. Milligan was not with the group when Ms. Voinski was attacked and struck with the sledgehammer, is virtually identical to Mr. Hale's 1987 affidavit, which read, in part:

> That it was not Ronnie G. Milligan who hit Mrs. Zalihon Voinski in the head with the sledgehammer;
>
> That Ronnie G. Milligan took or played no part in the crime period as set forth above, as a matter of fact Ronnie Milligan was kicked out from traveling with us because of his continued drunkenness was a nuisance and he was repeatedly being assaulted and knocked unconscious by both Ramon Houston and Terry Bonnette... we decided to kick Ronnie Milligan out of the group, because no one wanted Ronnie riding in the car... .

Ex. 204.

[272]In May 1982, after being released from custody, Mr. Houston re-affirmed his "mock execution" allegation in his civil rights lawsuit against Humboldt County, the prosecutor, Deputy Fox, and the State of Nevada. Mr. Houston's lawsuit read, in pertinent part:

> Plaintiff, while imprisoned as a material witness, was subjected to two or more mock executions by defendant Fox, who pointed a pistol at plaintiff's head and led plaintiff to believe that Fox would shoot and kill plaintiff.

Ex. 116.

Robert Hager represented Mr. Houston during his civil rights litigation. At Mr. Milligan's 1998 state evidentiary hearing, Mr. Hager testified he spoke with Deputy Fox years after Mr. Milligan's trial, and that Deputy Fox admitted performing the mock executions on Mr. Houston. NT, Milligan Evid. Hrg., 11/17/98, at 561 ("Mr. Fox admitted it to me. He found Jesus.").

[273]NT 1/16/81, at 477, 479; Ex. 111.

[274]NT, Milligan Evid. Hrg., 9/18/88, at 113.

[275]NT, Milligan Evid. Hrg., 11/17/98, at 401 ("I can't tell you why I didn't do that. We received the lab reports from the Washoe County Crime Lab. And at the time, I relied on them.").

because it supported Mr. Houston and the prosecutor's innocent bystander claim.[276] Mr. Berger's testimony was incorrect.

For reasons unbeknownst to Mr. Milligan, the prosecutor re-submitted Mr. Houston's boots to Mr. Berger on August 13, 1982 immediately before Paris Hale and Katherine Orfield's trial.[277] Mr. Berger's "re-examination of the boots showed the presence of small spots in two areas on the left side of the left boot which gave positive results in presumptive testing for blood."[278] Mr. Berger was unable to pursue more discriminatory testing because the sample sizes were supposedly too small.[279] However, when Paris Hale's attorney, Donald Coppa, requested and was granted access to Mr. Houston's boots, he had them examined by an independent forensic laboratory. Unlike Mr. Berger, the independent laboratory identified a sufficient quantity of blood, conducted more discriminatory blood typing tests, and determined that the blood stains were human blood type "O"–the same blood type as Ms. Voinski.

Subsequent to this finding, the prosecutor entered into a written stipulation with Mr. Coppa and Katherine Orfield's attorney, John McCormick. The stipulation, in pertinent part, read:

> 8. Exhibit 53, the boots of Ramon Houston, were found to have several red-brown stains on the left boot which were determined to be as follows:
>
> > a. One stain gave positive results in presumptive testing for blood, the amount of sample available was not sufficient to proceed with further analysis;
> >
> > b. One stain was determined to be human blood, the amount of sample was not sufficient for blood grouping analysis; and
> >
> > c. One stain, on the sole portion of the boot, was determined to be human blood of the ABO group, Type O, the amount of sample was insufficient to proceed with further blood groupings as was performed

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[276]This was significant because had physical evidence surfaced, which linked Mr. Houston to Ms. Voinski's attack, it could and likely would have transformed Mr. Houston into an accomplice or even the actual killer. Had this transpired, the prosecutor's case against Mr. Milligan would have crumbled because there was no independent evidence to corroborate Mr. Houston's testimony.

[277]Ex. 117.

[278]Id.

[279]Id. ("there was insufficient sample available to pursue further analysis.").

on Exhibit 56.[280]

After the new blood tests surfaced, the prosecutor's perception of Mr. Houston significantly changed. For instance, during Mr. Milligan's trial, the prosecutor repeatedly proclaimed Mr. Houston's innocence, calling it "illogical" to think he participated in Ms. Voinski's attack.[281] During Mr. Hale and Ms. Orfield's trial, however, the prosecutor argued:

> Now, at this point I probably ought to interject that it's true, Mr. Houston had blood on his shoes and he was there. He hasn't said he wasn't there and he's connected himself by his own testimony to being at the scene. He very easily could have been close enough to get blood on his shoes if he's an accomplice, he very well may have participated in this event,... .[282]

Moreover, had trial counsel retained a bloodstain expert, he would have developed additional evidence to undermine the "innocent bystander" claim. The bloodstain patterns on Mr. Houston's boots are not transfer patterns.[283] The bloodstains were not produced when Mr. Houston threw the sledgehammer out the passenger's side window of Mr. Bonnette's vehicle.[284] Instead, the bloodstains are spatter stains, which could only have been produced if Mr. Houston was very near Ms. Voinski when she was struck by the sledgehammer, or if he was the person who actually struck Ms. Voinski with the sledgehammer.[285]

Forensic Evidence II: Laundering of Mr. Houston's Clothing: At the preliminary hearing, Agent Milby informed trial counsel that Mr. Houston's clothing was laundered on July 4, 1980 by a jail "employee."[286] Agent Milby, however, never identified who laundered the clothing, why the clothing was laundered, who ordered the laundering, when the clothing was laundered, and what evidence was destroyed or potentially destroyed as a result of the laundering. After trial counsel

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[280]Ex. 118; see also NT, Hale/Orfield, 8/24/82, at 528-529.

[281]NT 1/22/81, at 275-276.

[282]NT, Hale/Orfield, 8/26/82, at 707 (emphasis added).

[283]See TOM BEVEL & ROSS GARDNER, BLOODSTAIN PATTERN ANALYSIS: WITH AN INTRODUCTION TO CRIME SCENE RECONSTRUCTION (2d ed. 2001).

[284]NT 1/14/81, at 102-104.

[285]See Bevel & Gardner, *supra*.

[286]NT, Prelim. Hrg., 8/1/80, at 288.

learned of the laundering, he "didn't consider it further."[287]

At trial, Mr. Berger–the prosecutor's blood expert–testified he never identified blood on Mr. Houston's clothing.[288] On cross-examination, he testified that he was not informed of the laundering prior to or after his examination. He also testified that the laundering would have "washed out or eradicated any blood evidence" on Mr. Houston's clothing.[289] Moreover, because trial counsel "didn't consider" the issue any further after learning of the laundering, the jury was never presented evidence regarding the circumstances surrounding the laundering of Mr. Houston's clothing. Had trial counsel adequately investigated or the State adequately documented the circumstances, and disclosed them to trial counsel, the jury would have learned that the police washed Mr. Houston's clothing in bad faith.

According to testimony from Ms. Orfield and Mr. Hale's trial, the alleged "jail employee" who laundered Mr. Houston's clothing was actually a jail trustee named William Reynolds Jr.[290] On July 4, 1980, Mr. Reynolds saw Mr. Houston when he was first brought into the jail.[291] Mr. Houston had on blue jeans, a red t-shirt, a plaid button down shirt, and hiking boots. After being booked, Mr. Houston was placed into a separate cell away from Mr. Milligan and the other co-defendants.[292]

Mr. Reynolds testified that Humboldt County Investigator Stanley Rorex ordered him to retrieve a plastic bag for Mr. Houston's clothing, as well as bedding material, and jail clothing, so Mr. Houston "could [be put] in a cell."[293] Mr. Rorex explained to Mr. Reynolds that Mr. Houston

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[287]NT, Milligan Evid. Hrg., 9/19/88, at 43-44, 108.

[288]NT 1/16/81, at 475, 477, 479.

[289]Id. at 475, 479.

[290]NT, Hale/Orfield, 8/17/82, at 30; NT, Milligan Ev. Hrg., 11/16/98, at 190-191. Mr. Reynolds also testified at Mr. Milligan's 1998 state evidentiary hearing.

[291]NT, Hale/Orfield, 8/17/82, at 30; NT, Milligan Ev. Hrg., 11/16/98, at 192.

[292]NT, Hale/Orfield, 8/17/82, at 31; NT, Milligan Ev. Hrg., 11/16/98, at 194.

[293]NT, Milligan Ev. Hrg., 11/16/98, at 192; NT, Hale/Orfield, 8/17/82, at 30.

"had been wearing [the clothes] for a few days and he wanted them washed,"[294], or that he "wanted to change, or had to get some clean clothes on."[295]

Mr. Reynolds testified he retrieved the plastic bag, the bedding materials, and some jail clothes for Mr. Houston, and stood outside Mr. Houston's cell.[296] Mr. Reynolds passed each article of bedding and clothing to Mr. Houston through Mr. Rorex, who stood inside the doorway of Mr. Houston's cell.[297] Mr. Reynolds held open the plastic bag which Mr. Rorex requested, and watched Mr. Rorex place Mr. Houston's worn clothing inside.[298]

Mr. Reynolds testified that after Mr. Rorex placed Mr. Houston's clothing inside the bag, he stated: "Okay, Junior, you need to go wash them clothes."[299] Mr. Reynolds walked to the jail laundry room, reached inside the plastic bag, and felt that the clothing was wet.[300] Mr. Reynolds testified he "didn't want to grab [the clothes], because [he] didn't know what they were wet from."[301]

Mr. Reynolds "thought it was strange that [Houston's clothes] were wet."[302] Mr. Reynolds removed the clothes from the bag and noticed that Mr. Houston's jeans were wet or damp throughout the legs, waist, pockets, and crotch area.[303] Mr. Reynolds noticed that it "looked like at one time the pants, the whole pants might have been wet."[304] At this point, Mr. Reynolds began to think Mr. Houston "could be involved" with Ms. Voinski's attack.

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[294]NT, Hale/Orfield, 8/17/82, at 36, 38.

[295]NT, Milligan Ev. Hrg., 11/16/98, at 193.

[296]NT, Hale/Orfield, 8/17/82, at 31; NT, Milligan Evid. Hrg., 11/16/98 at 193.

[297]NT, Milligan Evid. Hrg., 11/16/98 at 193, 196.

[298]NT, Hale/Orfield, 8/17/82, at 32; NT, Milligan Evid. Hrg., at 193, 196-198.

[299]NT, Milligan Evid. Hrg., 11/16/98, at 193, 197; NT, Hale/Orfield, 8/17/82, at 30.

[300]NT, Hale/Orfield, 11/17/82, at 32-33; NT, Milligan Evid. Hrg., at 198, 203.

[301]NT, Milligan Evid. Hrg., 11/16/98, at 198.

[302]NT, Milligan Evid. Hrg., 11/16/98, at 199.

[303]NT, Hale/Orfield, at 33, 39-40; NT, Milligan Evid. Hrg., 11/16/98, at 200.

[304]NT, Hale/Orfield, 8/17/82, at 39.

Mr. Reynolds testified Mr. Houston's t-shirt was wet from the torso area downward.[305] Mr. Reynolds notices "three or four spot... [on] the lower part of [Mr. Houston's] shirt."[306] Mr. Reynolds testified he put the shirt in the washer and "thought maybe,... there [were] spots of something [which] could have been on it, some red blood spots."[307] Mr. Reynolds was unsure as to what the spots were, but "thought maybe I shouldn't" wash Mr. Houston's clothing. Mr. Reynolds approached Dan James, the Humboldt County jailer on duty at the time, and inquired whether the clothing should be washed because of what he discovered.[308]

Mr. Reynolds told Mr. James that Mr. Houston's clothing was wet, and "maybe they would want [the clothing] to be kept for evidence."[309] Mr. James told Mr. Reynolds: "No, just throw them in there because [Mr. Houston is] going to need them tomorrow to go out to the scene of the crime."[310]

Mr. Reynolds returned to the laundry room and proceeded to machine wash and dry Mr. Houston's clothing for approximately one hour.[311] During this time, he saw Mr. Houston in the kitchen drinking coffee, and talking to Sheriff's Deputies in English. Mr. Reynolds retrieved Mr. Houston's clothing, folded it, placed it in a bag, and handed it to Mr. James.[312]

Mr. Reynolds saw Mr. Houston leave and return to the jail with two Sheriff's Deputies for about "four, five hours[]" on July 5, 1980, and that Mr. Houston wore the clothes he (Mr. Reynolds) laundered the previous day.[313] Neither the Humboldt County District Attorney's, nor the Sheriff's

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[305]NT, Milligan Evid. Hrg., 11/16/98, at 200-201.

[306]NT, Hale/Orfield, 8/17/82, at 34-35; NT, Milligan Evid. Hrg., 11/16/98, at 202.

[307]NT, Milligan Evid. Hrg., 11/16/98, at 201.

[308]NT, Hale/Orfield, 8/17/82, at 35-36; NT, Milligan Evid. Hrg., 11/16/98, at 199.

[309]NT, Hale/Orfield, 8/17/82, at 36.

[310]NT, Milligan Evid. Hrg., 11/16/98, at 199; NT, Hale/Orfield, 8/17/82, at 36.

[311]NT, Milligan Evid. Hrg., 11/16/98, at 203-204.

[312]Id. at 204-205.

[313]NT, Hale/Orfield, 8/17/82, at 36, 38.

Office, ever asked Mr. Reynolds to provide a statement regarding the events which occurred on July 4, 1980.[314]

The prosecutor's stipulation at Terry Bonnette's trial buttresses Mr. Reynolds' credibility and testimony. That stipulation provides, in relevant part:

> A trustee of the Humboldt County Jail was inadvertently directed by a member of the Humboldt County Sheriff's Office to wash and dry the clothing of Ramon Houston within two days following July 4, 1980. The direction was given without the intent to destroy any evidence that might have been on the clothing.[315]

Forensic Evidence III: Discrediting Mr. Houston's Statements: Mr. Houston repeatedly stated that Mr. Milligan hit Ms. Voinski in the head with the twelve pound sledgehammer several times–i.e., between four and six times.[316] The prosecutor emphasized this aspect of Mr. Houston's testimony when he told the jury that Mr. Milligan struck Ms. Voinski "several times."[317] During closing arguments, the prosecutor elicited the jury's sympathy and angst when he argued: "Ramon also told you all the events... how the defendant took this hammer and more than once wheeled it against the head of Zalli and crushed her skull."[318]

Had trial counsel retained an independent forensic pathologist to compare Mr. Houston's statements with Ms. Voinski's pattern of injuries to her skull and to opine whether Ms. Voinski's injuries supported Mr. Houston's statements, the pathologist would have opined that Ms. Voinski's pattern of injuries did not support Mr. Houston's testimony. If Ms. Voinski was struck with a twelve pound sledgehammer five to six times, her skull would have exhibited several skull fractures and substantially more damage.[319]

A pathologist would have also advised trial counsel to elicit a detailed description from Mr.

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[314]NT, Milligan Evid. Hrg., 11/16/98, at 207.

[315]NT, Bonnette, 7/1/82 at 645-646.

[316]Exs. 106-109; NT, Prelim. Hrg., 8/2/80, at 18-b.

[317]NT 1/13/81, at 57.

[318]NT 1/22/81, at 215.

[319]See DOMINICK J. DIMAIO & VINCENT J.M. DIMAIO, FORENSIC PATHOLOGY 141-146 (1993).

Houston of how the blows were inflicted, what kind of a swing was used (i.e., right handed only, left handed only, both hands over the head, or both hands from the side), and the directionality of the swing.[320] These questions would have produced answers which could have been tested against Ms. Voinski's pattern of injuries. In a post-conviction interview, Mr. Houston was unable to re-enact how Mr. Milligan struck Ms. Voinski–i.e., he was unable to say whether Mr. Milligan used his right or left hand; whether he used two hands; whether he stood to Ms. Voinski's side or over the top of her when he struck her; and whether he swung from right to left or vice versa.[321]

Criminal History: At trial, Mr. Houston testified he was only convicted of stealing a pig and stabbing a detective.[322] On cross-examination, trial counsel failed to impeach Mr. Houston with his preliminary hearing testimony.[323] Mr. Houston's testimony was false.

An adequate investigation would have revealed: (a) Mr. Houston was deported from the United States numerous times before July 4, 1980;[324] (b) Mr. Houston was convicted of rape in Mexico in 1979;[325] and (c) Mr. Houston had several public intoxication/disorderly conduct convictions in Mexico.[326]

The rape and public intoxication/disorderly conduct convictions would have impeached Mr. Houston's testimony regarding his insignificant criminal history. More importantly, the rape conviction would have demonstrated Mr. Houston's propensity to attack unsuspecting, innocent

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[320] See MEDICOLEGAL INVESTIGATION OF DEATH: GUIDELINES FOR THE APPLICATION OF PATHOLOGY TO CRIME INVESTIGATION 511-524 (Werner U. Spitz 4th Ed. 2006); Lankford v. Arave, 468 F.3d 578, 2006 U.S. App. LEXIS 27466, at *35-36 (9th Cir. Nov. 7, 2006).

[321] Ex. 205.

[322] NT 1/13/81, at 66-67.

[323] Id. at 190-197. At the preliminary hearing, Mr. Houston testified that his criminal history in Mexico included a few robbery convictions and a conviction for stabbing an detective. NT, Prelim. Hrg., 8/2/80, at 4-b; NT, Prelim. Hrg., 9/30/80, at 401-402, 457-460.

[324] Ex. 119. Note also: Mr. Hagar testified that he worked with INS, NDI, and Bullock and that, "they had come up with some kind of plan, whereby Houston could remain in the country, despite the fact he had been deported... 13 times before." (1998 evid. hrg. at 556).

[325] Ex. 120.

[326] Exs. 120, 121.

women like Ms. Voinski. The disorderly conduct convictions would have established Mr. Houston's propensity to engage in criminal activity when intoxicated. Mr. Houston testified he drank approximately three glasses of wine and two glasses of brandy at the rest stop before they drove Ms. Voinski out to the desert.[327] Finally, Mr. Houston's numerous deportations would have established a clear motive as to why he would falsely implicate Mr. Milligan–i.e., to avoid deportation.[328]

Money & Work Permit: Mr. Houston and the prosecutor both claimed that it would be impossible for Mr. Houston to secure a work permit, and that Mr. Houston did not or would not receive financial benefits in exchange for his testimony against Mr. Milligan.[329] This testimony was false because Mr. Houston received financial benefits and a work permit in exchange for his testimony against Mr. Milligan.

When Mr. Houston was detained as a material witness in July 1980, he was an undocumented alien who did not have a work permit. During Mr. Houston's October 1980 immunity hearing–a hearing in which trial counsel was never notified about and was not present for–the prosecutor informed the trial judge that he was trying to secure employment for Mr. Houston, but was having difficulty "due to the nature of the publicity stemming from this incident."[330] Moreover, after Mr. Houston testified against Mr. Milligan, the prosecutor arranged for the INS to grant Mr. Houston a work permit. According to a June 1981 Nevada Division of Investigation report:

> On April 30, 1981, Humboldt County Deputy District Attorney Jack Bullock contacted Investigator Moots and requested Investigators Moots and Milby to contact Bob Parks, at the U.S. Immigration Service... Bullock informed investigator Moots that he had been in contact with Parks and learned that... a work permit could be arranged for Houston.[331]

When Mr. Houston was released from custody in August 1981, the INS provided him a

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[327]NT 1/14/81, at 180-182.

[328]NT 1/22/81, at 180-181 (Guilt Phase Instruction #6) ("In determining the credibility of a witness, you may consider anything which tends in reason to prove or disprove the truthfulness of his testimony, such as:.. whether or not there was any bias, interest or other motive for him not to tell the truth").

[329]NT 1/13/81, at 66-67.

[330]NT, Immunity Hrg., 10/24, 81, at 7.

[331]Ex. 122.

worked permit, which enabled him to land jobs at Boomtown Casino and MGM Casino in Reno, Nevada. According to an August 19, 1981 report by Agent Milby: "Mr. Houston... has obtained employment in Reno and will soon begin his new job within [the Reno] jurisdiction."[332] Another August 19, 1981 report written by Agent Milby notes: "On August 19, 1981, Investigator Milby contacted attorney Robert Hagers [sic] office in Reno, Nevada, at which time Investigator Milby was advised that Ramon Houston has obtained a job with Boomtown Hotel and Casino, located 7 miles west of Reno on Highway I-80." [333] Another report indicates Mr. Houston worked the "swing" shift as a "dish washer" at the Boomtown Casino, and the "7 am-3pm" shift as a "kitchen helper" at the MGM Casino.[334]

Mr. Houston also received financial benefits before and after he testified against Mr. Milligan. During Mr. Houston's immunity hearing, the prosecutor informed the trial judge that he and fellow law enforcement officers provided Mr. Houston with monetary benefits:

> Also, Your Honor, I would like the record to reflect that everyone that I've contacted who has dealt with Mr. Houston has been very cooperative in assisting him. We've been able to get him books in Spanish and Spanish newspapers and magazines and we're continuing to supply him with those types of goods. I think it is routine practice that many of the law enforcement officers, including myself, have donated a small amount of funds to make sure he as cigarettes and coca-cola money and things of that sort.[335]

The prosecutor's testimony is supported by jail records which document the money placed in Mr. Houston's jail account before and after he testified against Mr. Milligan.[336] So to does an August 19, 1981 Nevada Division of Investigation report, which clearly documents that the State of Nevada and Humboldt County financially supported Mr. Houston before and after Mr. Milligan's trial, until he was released in August 1981. The report stated:

> Mr. Hager also showed concern for Ramon receiving some type of assistance, either from the State of Nevada or Humboldt County. Investigator Milby

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[332]Ex. 123.

[333]Ex. 124.

[334]Ex. 125.

[335]NT, Immunity Hrg., 10/24/81, at 10.

[336]Ex. 126.

> advised Mr. Hager there was no assistance available through the DMV Investigations Division and according to Deputy District Attorney Jack Bullock, when Ramon Houston was released, the State of Nevada was also released of any financial responsibilities.[337]

In a post-conviction interview with Mr. Milligan's current counsel, Mr. Houston conceded that the prosecutor agreed to secure a work permit and a green card for him after he testified against Mr. Milligan.[338]

The aforementioned records and testimony were not disclosed to trial counsel.

Inconsistent Testimony: Mr. Houston's testimony was so inherently unreliable it rendered Mr. Milligan's trial fundamentally unfair. The unreliability of Mr. Houston's testimony was exposed throughout Mr. Milligan's trial, his co-defendants' trials, and Mr. Houston's August 1981 deposition. For instance, the trial judge who presided over Mr. Milligan and his co-defendants' trial made the following comment at Katherine Orfield's second sentencing hearing:

> Had Ramon Houston testified the same in all of the trials as he did the first one, I think you would have had a much more severe penalty imposed in this case. He seemed to moderate as time went on. He was the most severe in the Milligan trial and less severe in each of the other trials.[339]

For example, Mr. Houston conceded Terry Bonnette never handed him a knife and ordered him to stab the victim,[340] as he originally claimed during his July 4, 1980 interrogation.[341]

Mr. Houston has also conceded Katherine Orfield never forced him to carry the Ms. Voinski's identification cards, and admitted he obtained them at the murder scene.[342]

Mr. Houston also repeatedly lied under oath. For example, he testified inconsistently at the

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[337]Ex. 124.

[338]Ex. 205.

[339]NT, Orfield, 3/2/87 at 1621-1623.

[340]NT, Prelim. Hrg., 9/30/80 at 435-436; 1/14/81 at 191-192; NT, Bonnette, 6/23/82 at 148; NT, Hale/Orfield, 8/18/82 at 113; NT, Houston Dep., 8/13/81 at 15-17; NT, Houston Dep., 8/14/81 at 156-60, 171-173.

[341]Exs. 106-108.

[342]NT, Prelim. Hrg., 9/30/80 at 451; NT 1/14/81 at 191; NT, Bonnette, 6/22/82 at 71, 72, 138, 189; Hale/Orfield, 8/18/82 at 113; NT, Houston Dep., 8/13/81 at 17; NT, Houston Dep., 8/14/81 at 159-160.

preliminary examination and at Mr. Milligan's trial that his criminal history was limited to two or three robberies and a stabbing involving a detective.[343] However, after Mr. Milligan's trial, Mr. Houston admitted he was charged or convicted of numerous additional crimes involving assault, theft, illegal reentry, fighting and public drunkenness, and rape.[344] Mr. Houston has also lied under oath about receiving immunity in Mr. Milligan's trial, despite testifying he understood the meaning of immunity.[345] He did not have a similar lapse of memory at any of the co-defendants' trials or at his own deposition.[346]

Additionally, Mr. Houston's record of statements and testimony are rife with inconsistent statements concerning the role of Mr. Milligan and the co-defendants in Ms. Voinski's death. For instance, Mr. Houston told investigators he left the rest area with the group in Terry Bonnette's vehicle because he knew Ms. Voinski would be robbed.[347] Mr. Houston has since testified in great detail that he had no idea that a robbery would occur.[348]

Mr. Houston never told investigators Mr. Milligan assisted Mr. Hale as he struck Ms. Voinski with a screwdriver. However, at the preliminary examination, Mr. Houston testified Mr. Milligan held the victim's arm.[349] Then, at Mr. Milligan's trial, Mr. Houston testified Mr. Milligan held the victim's shoulders from behind to assist Mr. Hale.[350]

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[343]NT, Prelim. Hrg., 8/2/80 at 5-b, 6-b; NT, Prelim. Hrg., 9/30/80 at 401-402, 459-60; NT 1/13/81 at 66; NT 1/14/81 at 191.

[344]Exs. 106-109; NT, Bonnette, 6/22/82 at 66-68, 136-37, NT, Bonnette, 6/23/82 at 199-202; NT, Hale/Orfield, 8/18/82 at 111-13; NT, Hale/Orfield, 8/19/82 at 259-60; NT, Houston Dep., 8/13/81 at 14-15, 115; NT, Houston Dep., 8/14/81 at 137, 154, 156, 216.

[345]NT 1/13/81 at 68-69.

[346]NT, Bonnette, 6/22/82 at 64-65; NT, Hale/Orfield, 8/18/82 at 111; NT, Houston Dep., 8/13/81 at 13; NT, Houston Dep., 8/14/81 at 256, 300.

[347]Exs. 106-108.

[348]NT, Prelim. Hrg., 9/30/80 at 415-16, 421, 424; NT 1/14/81 at 184; NT, Bonnette, 6/22/82 at 88, 96-97; NT, Bonnette, 6/23/82 at 152, 154-56; NT, Hale/Orfield, 8/18/82 at 113-114, 127, 193; NT, Houston Dep., 8/13/81 at 37; NT, Houston Dep., 8/14/81 at 163-64, 222, 271.

[349]NT, Prelim. Hrg., 9/30/80 at 474.

[350]NT, 1/13/81 at 93-94; NT 1/14/81 at 197.

Mr. Houston told investigators that Mr. Milligan, Mr. Hale, and Mr. Bonnette kicked Ms. Voinski in the face after she fell to the ground.[351] At Mr. Milligan's trial, however, Mr. Houston admitted he was unsure whether anyone kicked Ms. Voinski.[352]

On July 4, 1980, Mr. Houston told investigators Mr. Milligan struck Ms. Voinski five to six times in the head with the sledgehammer.[353] On July 5, 1980, Mr. Houston told investigators Mr. Milligan struck Ms. Voinski approximately three to four times.[354] During the preliminary hearing, Mr. Houston testified that Mr. Milligan struck Ms. Voinski five times with the sledgehammer.[355] At Mr. Milligan's trial, Mr. Houston testified Mr. Milligan struck Ms. Voinski a "couple times."[356] Mr. Houston's testimony, however, is not supported by Ms. Voinski's pattern of injuries. At Mr. Milligan's trial, the prosecutor's forensic pathologist testified he only identified single hole on the right side of Ms. Voinski's skull.[357] Had Mr. Milligan struck Ms. Voinski between three and six times in the head with the sledgehammer, her skull would have exhibited a devastating pattern of injuries.

Mr. Houston initially testified that Katherine Orfield struggled to take something from Ms. Voinski's hands during the attack.[358] However, by Ms. Orfield's second trial, Mr. Houston maintained that she tried to take a purse, a pair of glasses, a white beaded necklace, a gold necklace, and a black plastic box filled with antique coins away from Ms. Voinski, seemingly at the same

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[351]Exs. 106-109.

[352]NT 1/13/81 at 91; NT, Houston Dep., 8/14/81 at 172-173.

[353]Exs. 106-108.

[354]Ex. 109.

[355]NT, Prelim. Hrg., 8/2/80, at 18-b.

[356]NT 1/4/81, at 91.

[357]NT 1/14/81, at 163.

[358]NT, Prelim. Hrg., 9/30/80 at 488, 490.

time.[359]

Mr. Houston testified Ms. Orfield wiped blood from the head of the sledgehammer on the front seat cover of Mr. Bonnette's vehicle after the attack, but the forensic examination revealed no blood.[360]

Mr. Houston testified he watched the attack, horrified, at a safe distance from the back of Mr. Bonnette's vehicle door. However, a forensic examination of Mr. Houston's boots after Mr. Milligan's trial revealed human blood type "O"–the same blood type as Ms. Voinski.[361]

Mr. Houston testified that, at great risk to himself, he carefully hid Ms. Voinski's purse to mark its location so he could alert law enforcement.[362] Yet, Agent Milby testified that the purse was not found for two days, and that it was "stuffed down into the base of the weeds[]" alongside Interstate 80.[363]

The prosecutors also made statements about Mr. Houston which raise substantial questions about his culpability. For instance, the prosecutor acknowledged that Mr. Houston had a questionable background and that he was "no Angel."[364] More importantly, the prosecutor who re-tried Ms. Orfield at her second trial also acknowledged that Mr. Houston was "no Angel," that he made numerous prior inconsistent statements, that he may have been "coloring his testimony" and was more involved than previously thought, that the prosecution did not know the extent of his involvement, and that the prosecution "d[id not] support [Mr. Houston] as far as being an innocent

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[359]NT 1/13/81 at 89-90, 95-96; NT 1/14/81 at 187-188; NT, Bonnette, 6/22/82 at 90; NT, Hale/Orfield, 8/18/82 at 130-131, 195, 198-200, 202, 244; NT, Houston Dep., 8/13/81 at 41-44; NT, Houston Dep., 8/14/81 at 228-231, 235-236.

[360]NT 1/13/81 at 102; NT, Bonnette, 6/25/82 at 192, 217-218; NT, Hale/Orfield, 8/20/82 at 529; NT, Houston Dep., 8/13/81 at 53; NT, Houston Dep., 8/14/81 at 212, 240-41, 293-294; NT, Orfield, 11/17/86 at 1229.

[361]NT, Hale/Orfield, 8/20/82 at 528; NT, Orfield, 11/17/86 at 1228.

[362]NT 1/13/81 at 103; NT, Bonnette, 6/22/82 at 100-101; NT, Hale/Orfield, 8/18/82 at 141, 200; NT, Houston Dep., 8/13/81 at 56; NT, Houston Dep., 8/14/81 at 203-205.

[363]NT, Orfield, 11/14/86 at 967; NT, Orfield, 11/20/86 at 1445.

[364]NT 1/21/81 at 206, 273; NT, Bonnette, 7/2/82 at 694, 754; NT, Hale/Orfield, 8/19/82 at 702-703, 722, 774.

person."[365]

B. Katherine Orfield's Exculpatory Statements

The prosecutor failed to disclose exculpatory statements made by (the elder) Katherine Orfield prior to Mr. Milligan's trial.

Letter: While in jail awaiting trial, Ms. Orfield wrote a letter to a family member prior to Mr. Milligan's trial. In the letter, she stated she did not know who killed Ms. Voinski, but surmised it was Mr. Houston because he was the one who retrieved the sledgehammer from Terry Bonnette's vehicle.[366]

Deputy Lyle Mattice's Report: On July 11, 1980, Ms. Orfield told Humboldt County Sheriff's Deputy Lyle Mattice: "I don't know why we are locked up–we had nothing to do with the beating–it was that Mexican hitchhiker–he did it all and we were afraid to try to stop him."[367] Mr. Mattice drafted a report on July 11, 1980 which outlined the above statement. Mr. Mattice's report also noted that Ms. Orfield's statement "was strictly voluntary on her part, as I had asked no questions of any kind."[368]

Stanley Rorex's Report: While detained in the Humboldt County Jail, Ms. Orfield was briefly housed with an individual named Terri Hood. Before being extradited from Humboldt County, Investigator Rorex interviewed Ms. Hood on December 24, 1980 to ascertain whether Ms. Orfield made any statements regarding Ms. Voinski's death. Investigator Rorex memorialized his interview in a report. The report, in pertinent part, stated:

> Terry Bonnette will tell anybody anything to try and get out of the crime. Mr. Bonnette is a lier [sic] and Mrs. Orfield is somewhat afraid of Mr. Bonnette. R/O asked if Mrs. Orfield had anything to say about the homicide. Mr. Orfield said the Mexican is the one who swung the hammer, but she didn't see the Mexican hit the old lady. Mrs. Orfield told her that the Mexican took

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[365]NT, Orfield, 11/20/86 at 1428, 1430, 1469, 1471-1473 (emphasis added).

[366]Ex. 127 ("I thank [sic] the mexican did it.... he was the one who took the sledgehammer out of the car.").

[367]Ex. 128

[368]Id.

the old lady's papers and Mrs. Orfield took the papers from him.[369]

C. Ms. Voinski's Blood on Paris Hale's Pants

Mr. Berger testified, on direct examination, that he only identified human blood on Paris Hale's socks and both his shoes, and that more discriminatory testing could not be performed because the samples were too small.[370] On cross-examination, Mr. Berger conceded he also identified a blood stain on Mr. Hale's pants.[371] Mr. Berger's cross-examination testimony was false and/or misleading because he failed to inform the jury that the bloodstain on Mr. Hale's blue jeans was type "O" and enzymatically similar to Ms. Voinski's blood.

During Terry Bonnette's trial, Mr. Berger testified he identified a bloodstain on Mr. Hale's jeans which was type "O" and enzymatically similar to Ms. Voinski's blood.[372] During Paris Hale and Katherine Orfield's trial, the following stipulation was entered into the record:

> [Trial] Ex. 56, the blue pants of Paris Leon Hale was found to have a red-brown stain on the lower front of the left pant leg which was determined to be human blood. The sample was of sufficient amount to further determine that the blood was found to be of ABO groups, Type O. Further, blood grouping tests determined that the blood stain on the pants was consistent with that of the victim's blood and inconsistent with the blood of the other individuals.[373]

Mr. Berger's testimony at Mr. Milligan's trial not only supported the prosecutor's theory, it created a false impression because it minimized, in the jury's eyes, Mr. Hale's culpability.[374] Mr.

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[369]Ex. 129 (027-TR015172).

[370]NT 1/16/81, at 458-459.

[371]Id. at 477.

[372]NT, Bonnette, 6/29/82, at 462.

[373]Ex. 118.

[374]E.g., *Code of Ethics*, California Association of Criminalistics, III.G ("It is not the object of the criminalist's appearance in court to present only that evidence which supports the view of the side which employs him. He has a moral obligation to see to it that the court understands the evidence as it exists and to present it in an imparital manner."); *Code of Ethics*, California Association of Criminalistics, III.G ("The criminalist will not by implication, knowingly or intentionally, assist the contestants in a case through such tactics as will implant a false impression in the minds of the jury."); *Good Forensic Practice Guidelines*, American Academy of Forensic Sciences, Guideline 9 ("In their efforts to communicate effectively, forensic scientists should strive to be as accurate as possible and avoid distortion."); *Code of Ethics*, American Board of Criminalistics, Guideline 10 (forensic examiners shall "[t]estify in a clear, straightforward manner

Berger was legally and ethically obligated to disclose this information to Mr. Milligan's jury.

D. Alcohol Blackout Expert

Trial counsel tried to negate the specific intent element of first-degree murder–premeditation or felony-murder by arguing that Mr. Milligan suffered an alcoholic blackout. As a result, trial counsel had a duty to adequately investigate the alcoholic blackout issue, and to identify, consult with, and present an expert who could opine, first, whether Mr. Milligan suffered an alcoholic blackout on July 4, 1980, and second, if so, whether that blackout prevented him from acting willfully, purposely, and knowingly. Trial counsel failed to adequately investigate the alcoholic blackout issue, and failed to consult with an alcoholic blackout expert. Dr. Chappel, as noted, was an alcohol addiction expert–NOT an alcoholic blackout expert. Consequently, Dr. Chappel could not determine whether Mr. Milligan suffered from an alcoholic blackout on July 4, 1980. Moreover, had trial counsel adequately prepped Dr. Chappel before he testified, he would have realized this and not presented him because he could not provide the critical evidence which formed the foundation of his defense strategy.

Mr. Milligan suffered substantial prejudice because the jury mistakenly believed that he was fully capable of thinking and acting willfully on July 4, 1980. This was the exact opposite of what trial counsel intended to argue. Rather than argue it was difficult for Mr. Milligan to form specific intent because he was highly intoxicated, trial counsel intended to argue that it was categorically impossible for Mr. Milligan to form specific intent because he suffered an alcoholic blackout. Dr. Chappel's testimony clearly supported the former ("difficult to form"), rather than the latter ("impossible to form").[375] In reality, Dr. Chappel's testimony provided more support for the

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and refuse to... phras[e] their testimony in such a manner so that the results are not misinterpreted."). Notably, Mr. Berger was a member of the American Academy of Forensic Science and the California Association of Criminalistics when he testified in January 1981.

[375]The prosecutor emphasized this point in his closing guilt phase argument:

> What about his blackout? The defendant very conveniently comes up here and tells you he doesn't remember. What he doesn't remember is that small point in time that is the ultimate issue before you.
>
> He remembers most everything else, most everything else that was proved by Ramon Houston. The blackout doesn't affect a person's intent, and Dr.

prosecutor's theory (i.e., Mr. Milligan could and did act with specific intent) than the defense's theory.

Additionally, had trial counsel adequately investigated the alcoholic blackout issue, he would have uncovered a plethora of research articles which clearly explained the alcoholic blackout phenomenon, and why alcoholic blackouts sufferers cannot act willfully, purposefully, and knowingly. The major premise of these articles, which date back to the late 1960s and early 1970s,[376] is that short and long-term memory cannot be created during an alcoholic blackout because the neuropathways in the brain, which create short and long-term memory, are deactivated by the high level of alcohol. With no short or long-term memory, alcoholic blackout sufferers are neurologically incapable of developing and executing a plan, developing forethought, or contemplating consequences of his or her actions.

Trial counsel failed to identify and consult with a qualified alcoholic blackout expert. Had trial counsel adequately investigated the alcoholic blackout issue, he could have hired an expert like Dr. Donald Sweeney–a board certified medical doctor who specializes in alcoholic blackout research.[377]

Dr. Sweeney evaluated Mr. Milligan, reviewed the police reports, and read the trial transcripts. Dr. Sweeney concluded that Mr. Milligan suffered an alcoholic blackout on July 4, 1980,

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> Chappel said that. A blackout only means that he doesn't remember what happened, that his memory center was so inundated with alcohol that it short circuited... .

NT 1/22/81, at 216

[376]Ex. 206 ("The studies of blackouts which are the basis of scientific knowledge regarding blackouts were largely performed in the 1960s and 1970s. These studies, and the understanding of blackouts that they offer, were available to mental health processionals during the early 1980s."); e.g., Goodwin et al., *Alcoholic "blackouts"; a review and clinical study of 100 alcoholics*, 126 Am. J. Psychiatry, 191 (1969); Goodwin et al., *Loss of short term memory as a predictor or alcoholic "blackouts"*, 227 Nature 201 (1969); Goodwin et al., *Phenomenological aspects of the alcoholic "blackout"*, 115 Br. J. Psychiatry 1033 (1969); Ryback, *The continuum and specificity of the effects of alcohol on memory: a review*, 32 Q. J. Stud. Alcohol 995 (1971); Ryback, *Alcohol amnesia; observations in seven drinking impatient alcoholics*, 31 Q. J. Stud. Alcohol 616 (1970); Ryback, *Alcohol amnesia*, 212 J. Am. Med. Ass. 1524 (1970).

[377]Dr. Donald Sweeney provided a written report for consideration which is attached hereto as Ex. 206, and incorporated by reference as if fully copied and set forth at length.

which prevented him from thinking and acting willfully, purposefully, and knowingly. Dr. Sweeney's opinion is premised on statements and observations made by Mr. Milligan, his co-defendants, and Ramon Houston, which clearly indicate:

- Mr. Milligan drank excessively the entire week leading up to July 4, 1980.
- Mr. Milligan ate very little during the week.
- Mr. Milligan drank until he passed out or fell asleep.
- Once awake, Mr. Milligan immediately started drinking again until he passed out.
- Mr. Milligan's choice of alcohol was hard liquor (i.e., Brandy, wine).
- Mr. Milligan was grossly intoxicated on July 4, 1980 because he drank an entire bottle of Brandy in a short time period and then consumed nearly a bottle of wine.

Dr. Sweeney stated:

> Any person that drinks consistently for days on end is susceptible to a blackout. The chances of blacking out are significantly elevated if a person drinks alcohol for four days consecutively without sufficient quantities of food. Food slows the absorption of alcohol and may inhibit blackouts. The chances of a blackout are also elevated by fatigue and the rate of rise of blood alcohol. I can only believe that traveling in a car with four to five adults all day to be fatiguing. The amount of alcohol Mr. Milligan consumed, combined with the lack of sufficient food and fatigue compel the conclusion that the symptoms he later describes are the result of a blackout.[378]

Dr. Sweeney's opinion is also supported by observations made by law enforcement officers which clearly indicate:

- Mr. Milligan had a strong odor of alcohol on his breath when he was detained
- Mr. Milligan tried to fall asleep in Terry Bonnette's vehicle after being detained
- Mr. Milligan acted belligerently and frequently repeated the same questions
- Mr. Milligan did not understand why he was being arrested
- Mr. Milligan had difficulty answering questions during booking

Dr. Sweeney stated:

> One sign that a person is in a blackout is the person repeating a joke, story or question, over and over while not recalling they had just asked the question or told the story. I have seen hundreds of anecdotal tales of blackouts involving a person telling the same joke or story over and again without realizing they had just told the joke or story.

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[378]Ex. 206.

> ...
> The repetitious nature of the questions asked by Mr. Milligan at arrest are highly indicative of a blackout. Mr. Milligan's asking over and over again why he was arrested, after being answered, or asking over and over to go to the bathroom after being told 'no,' indicates that he was not processing the information that was being offered him. A person in a blackout would not be neurologically capable of processing information and might repeatedly ask the same question regardless of being answered. The description of Mr. Milligan's behavior at arrest confirms that he was in blackout.[379]

Dr. Sweeney's opinion is also supported by statements and observations made by Mr. Milligan and his co-defendants which clearly indicate Mr. Milligan could not (and still cannot) recall what happened to Ms. Voinski. Dr. Sweeney stated:

> A person during a blackout does not create memories for the period of the blackout. That Mr. Milligan was experiencing a true, total blackout, that he created no memory of the period in question best describes his persistent, consistent, lack of ability to recall the events surrounding the murder.[380]

Dr. Sweeney considered all of these factors and opined: "Given the amount of alcohol consumed immediately before and in the days before the incident, the amount of food consumed, the persistent lack of memory, and the behavior at arrest, I conclude to a high degree of medical certainty that Mr. Milligan was in a blackout on July 04, 1980."[381]

According to Dr. Sweeney, Mr. Milligan's alcoholic blackout prevented him from thinking and acting willfully, purposefully, and knowingly on July 4, 1980. Dr. Sweeney's opinion is premised on the effect high levels of alcohol have on the brain's neuropathways and its ability to produce short and long-term memory. Dr. Sweeney stated:

> A person in an alcohol blackout, even though quite drunk, possesses senses; hearing, sight, touch, in a diminished state. A person in a blackout forms thoughts based upon the senses but the thoughts are entirely fleeting, an awareness lasting only until the next thought or sensation occurs. The link between the thought and past knowledge, known as short-term or working memory, is not functioning during a blackout, leaving the blackout person functioning only in an impulsive and superficial manner.[382]

High levels of alcohol inhibit certain neuropathways in the brain from communicating with

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[379] Id.

[380] Id.

[381] Id.

[382] Id.

one another, which in turn prevents the development of short and long-term memory. Dr. Sweeney stated:

> An immediate memory is formed after a sensation is recognized. Normally after the sensation is recognized, the immediate memory is processed. Neurons in the hippocampal area of the brain release a transmitter called glutamate. The glutamate is received by the NMDA receptor in another neuron. When activated by glutamate, the NMDA will open a calcium channel in a receptive neuron to release an electrical impulse that will assist in creating and processing working / short-term memory. Short-term memory most likely is stored above the hippocampus in the temporal lobe. Immediate sensation or immediate memory can last as long as twenty seconds then dissipates.
>
> Alcohol in sufficient quantities prevents the NMDA receptors in the hippocampus from reacting to the glutamate neurotransmitters, blocking the formation of new short-term/working memory so the new immediate memory will not be processed.
>
> Memories pass from short-term to long-term by a process not relevant here. All long-term memories pass through the short term memory or hippocampal process first. When information is held in the short-term memory, other memories flow from long-term memory in the cerebral cortex influencing thought, creating judgment.
>
> Because alcohol blocks the reception of glutamate by NMDA, a person in an alcoholic blackout does not form short-term memories during the blackout. A blacked out person does not 'send' information through the hippocampus for processing by the short-term memory.[383]

Dr. Sweeney added: "In the early 1980s it was not debatable in scientific communities whether a person in blackout had memories of the period or not. A blackout was understood as a period in which a subject created no memories."[384]

The inability to create, store, and rely on short and long-term memory prevented Mr. Milligan from thinking and acting willfully, purposefully, and knowingly. Dr. Sweeney stated:

> A person in blackout has no capacity to plan, no forethought, no sense of consequences, and no awareness of how his impulses relate to effects. He is neurologically incapable of forming such judgments, because the short-term memory, where this judgment would take place, is not receiving information with which the function of judgment would take place. The lack of short-term memory leaves a person wholly susceptible to impulsive and irrational actions.[385]

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[383] Id.

[384] Id.

[385] Id.

Dr. Sweeney added: "During the blackout, the link between the thought and past knowledge, known as short-term or working memory, [was] not functioning for Mr. Milligan. During the blackout, Mr. Milligan [functioned] only in an impulsive and superficial manner. He had little or no capacity for rational thought during the blackout."[386]

Additionally, had trial counsel presented Dr. Sweeney (or a similarly qualified expert), he could have explained and undermined various arguments made by the prosecutor regarding Mr. Milligan's level of intoxication and his ability to think and act with specific intent. For instance, the prosecutor repeatedly elicited testimony from police, jailers, and Mr. Houston that Mr. Milligan walked fine and did not stagger when he was initially arrested or when he was booked into the Humboldt County Jail, and he did not have trouble answering the booking questions. [387]

Trial counsel failed to rebut these arguments, which substantially prejudiced Mr. Milligan because the jury mistakenly believed he could act and think with specific intent, and that he simply faked his memory loss to avoid prosecution and punishment. Had trial counsel retained Dr. Sweeney (or a similarly qualified expert), he would have testified:

> Mr. Milligan's ability to put on a shirt or walk when directed to walk does not contraindicate a blackout. Persons in a blackout rely on and exercise procedural memory and remember what they sense for a matter of seconds. I have spoken with or heard from thousands of people describing blackouts. It is common for such persons to describe driving a car, attending a party, or functioning socially in many ways during a blackout and not recalling any of their actions.[388]

He would have also stated:

> During a blackout a person can drive a car but would not recall where he was going or why. He could put on a shirt but not realize it was inside out. He could follow orders in being arrested but not understand why he was arrested. A person in a blackout may be able to talk in a superficially rational way for a short period of time, sometimes called bantering. He remembers everything in his long-term memory, all his schooling, language, where he lives but

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[386] Id.

[387] NT 1/13/81, at 69, 73 (Ramon Houston's testimony); NT 1/14/81, at 199, 201, 203-204 (Ramon Houston's testimony); NT 1/15/81, at 260 (Keith Wolf's testimony); NT 1/15/81, at 303-308, 311-314, 315-319, 320-321, 329-330 (Wilburn Dorries's testimony); NT 1/15/81, at 336, 338, 341-342, 344 (Roger Peterson's testimony); NT 1/15/81, at 361-362, 365, 369 (Ted Snodgrass's testimony); NT 1/15/81, at 376-380 (Dan James' testimony).

[388] Ex. 206.

> nothing that happened a minute ago. He may not be aware of where he is on the planet or what day it is.[389]

He would have also opined that a person "in a blackout may appear inebriated but not staggering drunk" because the "process of blacking out curtails drinking and possibly gradually diminishes the blood alcohol content."[390]

Finally, he would have testified that faking memory loss for such a prolonged period of time (July 1980 to January 1981) is nearly impossible: "Faking a blackout would be difficult for a short period of time. Continuing a charade about a blackout when repeatedly questioned about an incident over months or years would be more difficult. An expression or a statement of factual recall would seem somewhat unavoidable during all the discussion of the blackout period."[391]

H. Mitigation Evidence Regarding Mr. Milligan Alcoholism

Trial counsel failed to introduce substantial evidence documenting Mr. Milligan's severe addiction to alcohol.

Hospital Stays Regarding Alcoholism: Mr. Milligan was hospitalized twice for alcoholism. His first hospitalization occurred in December 1977 when he voluntarily admitted himself into the Veterans Administration (VA) Hospital in Murfreesboro, Tennessee. Doctors diagnosed Mr. Milligan with "acute and chronic alcohol abuse."[392] A summary report stated: "This 27-year-old male veteran was admitted for the first time to VAH Murfreesboro on 12-12-77 seeking treatment for alcoholism. He has a history of having been drinking ethanol since the age of 18. On admission he bore stigmata of recent and distant overuse of ethanol."[393]

When Mr. Milligan admitted himself, he recently separated from his wife and was living with his father in Chattanooga, Tennessee. Mr. Milligan drank excessively because his marriage fell apart. On December 12, 1977, he drank so much his muscles cramped and he thought he suffered

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[389] Id.

[390] Id.

[391] Id.

[392] Ex. 130.

[393] Id.

a stroke. Worried and scared, Mr. Milligan admitted himself. The VA Hospital released Mr. Milligan on December 16, 1977, but he returned shortly thereafter on December 20, 1977.

On December 21, 1979, approximately six months before his July 1980 arrest in Nevada, Mr. Milligan admitted himself into Charity Hospital in New Orleans, Louisiana. The doctors diagnosed Mr. Milligan with chronic alcoholism, and enrolled him into a week long treatment program, which he completed. Doctors subsequently enrolled Mr. Milligan into a month long "detox" program, which he completed on January 28, 1980.[394]

Trial counsel knew of these hospitalizations, but failed to introduce these records during the penalty hearing. This evidence would have explained the severity of Mr. Milligan's alcohol addiction and what factors caused him to drink excessively. More significantly, trial counsel failed to introduce these records via an appropriate neurological expert who could have relied on this information to determine whether Mr. Milligan's chronic alcohol abuse damaged his brain and impaired his cognitive thinking abilities.[395]

Public Intoxication Arrests: Trial counsel was obligated to explain to the jury why Mr. Milligan committed his capital violence. The capital violence took place because Mr. Milligan's highly intoxicated state prevented him from thinking and acting rationally. Thus, trial counsel had an obligation to introduce evidence demonstrating that Mr. Milligan's decision-making became substantially impaired when intoxicated. Trial counsel failed to introduce several arrest reports which detailed Mr. Milligan's impaired decision-making when intoxicated:

- He was arrested in Jacksonville, Florida on April 25, 1970 for running a stop sign, drinking and driving, and alcohol possession by a minor.[396]
- He was arrested in Chattanooga, Tennessee on January 24, 1978 for public drunkenness. Mr. Milligan was arrested after "he was observed passed out" in front of a restaurant.[397]
- He was arrested in Chattanooga, Tennessee on February 15, 1978 for drunk driving.

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[394]Ex. 131.

[395]See *infra*.

[396]Ex. 132.

[397]Ex. 133.

According to the police report, Mr. Milligan was pulled over because he "was weaving very badly."[398] Mr. Milligan failed the field sobriety test and was placed under arrest.

- He was arrested in East Ridge, Tennessee on April 4, 1978 for public intoxication. Mr. Milligan was arrested after he was found "sitting in the middle of the road past-out in the front seat with lights on."[399]
- He was arrested in New Orleans, Louisiana on October 8, 1979 for theft. Mr. Milligan attempted to steal three bottles of Budweiser beer when he was intoxicated.[400]
- He was arrested in Morgan City, Louisiana on October 12, 1979 for public intoxication. The police report stated: "Received complaint of a subject sleeping by the power plant. The subject was asked to get up by officers. He was found to be highly intoxicated."[401]
- He was arrested in Morgan City, Louisiana on February 2, 1980 for public intoxication. The police report stated: "Subject was arrested for annoying individuals in the public. The subject was in the public urinating."[402]

Had trial counsel introduced these reports through a medical or psychiatric expert, the jury would have learned how Mr. Milligan's higher-level thinking became severely impaired when he became moderately or excessively intoxicated.

The Effects of Alcohol on the Human Brain: Trial counsel failed to address two issues regarding Mr. Milligan's chronic alcoholism: (1) whether he was genetically predisposed to alcoholism; and (2) whether his chronic alcohol abuse damaged his brain. Trial counsel failed to have Mr. Milligan neurologically evaluated to answer these two critical questions, which, if established, would have provided the jury with powerful evidence to explain why Mr. Milligan committed this capital violence.[403]

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[398]Ex. 134.

[399]Ex. 135.

[400]Ex. 136.

[401]Ex. 137.

[402]Id.

[403]This failure is particularly damaging in Mr. Milligan's case because the optimum period for such an evaluation was at a time near the commission of the offense. Certainly, any evaluation which occurred less than twenty-six years after the offense would be more telling. More importantly, a neuropsychological examination after such a long period of time is particularly troublesome. Research explains that chronic alcohol abuse damages the brain. However, the

Had trial counsel adequately investigated Mr. Milligan's social history, he would have uncovered evidence that his father abused alcohol. With this information, trial counsel could have introduced scientific evidence demonstrating that the genetic inheritability of alcohol abuse is very likely.[404]

An appropriate neurological expert could have testified regarding the effects of chronic alcohol abuse. Such abuse causes brain injury, interferes with neurological development, and interferes with the development of personality. As a result, young people who chronically abuse alcohol characteristically display problems with personality development, and with neurological, cognitive, intellectual and psychological maturation. Furthermore, chronic alcohol abuse impairs that portion of the brain involving memory, abstract thinking, and problem-solving.[405]

Trial counsel failed to adequately investigate this issue and did not consult with an expert who could have explained to the jury that alcoholism is an illness for which Mr. Milligan's propensity was predetermined by genetics. Such an expert would have explained that Mr. Milligan's chronic alcoholism damaged his brain, which substantially affected his ability to perceive, think, and

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damaged brain is capable of repairing itself with long periods of abstinence. E.g., Rosenbloom, Pfefferbaum, & Lim, *Longitudinal Changes in Cognition, Gait, and Balance in Abstinent and Relapsed Alcoholic Men: Relationships to Changes in Brain Structure*, 14 Neuropsychology 178 (2000). Trial counsel's failure to seek a neurological examination of Mr. Milligan precluded the assessment of the extent of brain damage Mr. Milligan suffered as a result of his chronic alcohol abuse. While such evidence was readily available to trial counsel, such evidence no longer exists.

State post-conviction counsel further had an opportunity to assess the extent of Mr. Milligan's brain damage. Although such an assessment would have been less accurate than that which was available to trial counsel, it still would have provided a more credible assessment of Mr. Milligan's brain damage than is currently available. State post-conviction counsel failed in their obligations to investigate all potential claims because no such assessment was conducted.

[404]E.g., Hrubec & Omenn, *Evidence of genetic predisposition to alcohol cirrhosis and psychosis: twin concordances for alcoholism and its biological endpoints by zygosity among male veterans*, 5 Alcoholism Clin. Exp. Res. 207 (1981); Shuckit, Goodwin, & Wonokur, *A half-sibling study of alcoholism*, 128 Am. J. Psychiatry 1132 (1972).

[405]E.g., Rosenbloom, Pfefferbaum, & Lim, *supra* ("Neuropsychological studies of individuals with chronic alcoholism have consistently shown that, as a group, recently detoxified alcoholics have significant deficits in a number of cognitive abilities... ."); Fabian &Parsons, *Differential improvement of cognitive functions in recovering alcoholic women*, 92 J. Abnormal Psychology 87 (1983); Peterson et al., *Acute alcohol intoxication and cognitive functioning*, 51 J. Stud. Alc. 114 (1990); Unklestein & Bowden, *Predicting the course of neuropsychological status in recently abstinent alcoholics*, 5 Clin. Neuropsychologist 24 (1991); Brandt et al., *Cognitive loss and recovery in long-term alcohol abusers*, 40 Arch. Gen. Psychiatry 435 (1983).

react appropriately.

V. Constitutional Violations–Guilt Phase

As noted, the jury never heard any of the evidence described above due to trial counsel's ineffectiveness, prosecutorial misconduct, and bad faith destruction of potentially exculpatory evidence. Individually and collectively, each of these constitutional violations prevented the jury from considering a substantial quantum of evidence which would have clearly demonstrated reasonable doubt pertaining to Mr. Milligan's culpability. Mr. Milligan is entitled to relief.

A. Ineffective Assistance of Counsel

_____Trial counsel's abysmal advocacy transformed Mr. Milligan's trial from an adversarial contest to a foregone conclusion–i.e., Mr. Milligan willfully and knowingly struck Ms. Voinski with the sledgehammer.

Conceding Guilt Without An Adequate Investigation: Trial counsel repeatedly conceded an essential element of the prosecutor's first-degree murder case (i.e., the actus reus), when he repeatedly informed jurors that Mr. Milligan struck Ms. Voinski with the sledgehammer. Trial counsel's decision was objectively unreasonable and cannot be deemed strategic or tactical because it was premised on absolutely no investigation. Trial counsel's deficient performance violated Mr. Milligan's clearly established state and federal constitutional rights. Mr. Milligan suffered substantial prejudice because, had trial counsel adequately investigated Mr. Houston's background, Mr. Houston's statements, the forensic evidence, and the circumstances surrounding the laundering of Mr. Houston's clothing, a reasonably competent trial attorney would not have conceded Mr. Milligan's guilt.

Trial counsel failed to investigate any aspect of Mr. Houston (i.e., his statements, criminal history, clothing etc.), despite the fact he represented the only evidence implicating Mr. Milligan. Had trial counsel conducted an adequate and complete investigation he would have uncovered the following evidence:

- Ms. Voinski's blood type was on Mr. Houston's boots.
- The bloodstains on Mr. Houston's boots establishes that he had to be very near Ms. Voinski during the attack or was the actual assailant who struck Ms. Voinski.

- Ms. Voinski's head injuries did not support Mr. Houston's claim that Mr. Milligan struck her approximately four to six times with the twelve pound sledgehammer.
- There were "red spots" all over Mr. Houston's clothing before it was laundered.
- Mr. Houston lied about his criminal history–making it appear more insignificant than it was in reality.
- Mr. Houston made several statements at Mr. Milligan's trial which were inconsistent with his initial statements to investigators and his preliminary hearing testimony.

Armed with this information alone, a reasonably competent attorney would not have conceded that Mr. Milligan fatally struck Ms. Voinski with the sledgehammer because the issue of who actually struck Ms. Voinski was far from a foregone conclusion.

Moreover, trial counsel knew the following information before he decided to concede Mr. Milligan's guilt:

- Mr. Houston possessed Ms. Voinski's identification cards when taken into custody.
- Mr. Houston tried to steal money from Ms. Voinski at the rest area.
- The forensic experts failed to definitively identify human blood on Mr. Milligan.
- The forensic experts failed to identify Mr. Milligan's fingerprints on the sledgehammer.
- Mr. Houston made several false statements to investigators.

When this evidence is coupled with the evidence trial counsel failed to uncover, it is obvious that the issue of who actually struck Ms. Voinski with the sledgehammer was (and still is) not a foregone conclusion. A reasonably competent attorney, who knew all of this information, would have challenged every element of the prosecutor's case. Mr. Perkins conceded that, had he uncovered the aforementioned information, he would have "definitely" pursued a different defense.[406] Mr. Axam also conceded: "Oh, it would be extremely important to impeach Houston. If I could have destroyed Houston then... then Milligan is not–then I could have denied him ever

[406]NT, Milligan Evid. Hrg., 11/17/98, at 448 ("I'm sure our theory would have been different if we would have had that information."); NT, Milligan Evid. Hrg., 9/19/88, at 150.

holding the hammer or even hitting someone with the hammer."[407]

Had trial counsel uncovered the aforementioned evidence, and presented it to the jury, the jury would have acquitted Mr. Milligan.

Crime Lab and Forensic Experts: Trial counsel failed to thoroughly investigate the Washoe County Crime Laboratory and the physical evidence. Trial counsel simply assumed that Mr. Berger and Mr. Atkinson's results and opinions were correct. Trial counsel's actions were objectively unreasonable and fell below that which is expected of an attorney representing a person facing the death penalty. Capital defense attorneys are obligated to reasonably investigate the prosecutor's case, review the procedures used by the prosecutor's forensic experts, and investigate the accuracy of its local crime laboratory. Had trial counsel conducted an adequate and complete investigation, he would have uncovered evidence which raised significant questions about the accuracy of Mr. Berger and Mr. Atkinson's damaging blood and hair testimony.[408] For instance, an adequate investigation would have revealed:

- The Washoe County Crime Laboratory participated in a national crime lab proficiency program which produced extremely high error rates for blood testing and hair identification.
- The Washoe County Crime Laboratory was not accredited in 1980 or 1981.
- Mr. Berger and Mr. Atkinson were not required to undergo proficiency testing at the Washoe County Crime Laboratory.
- Mr. Berger and Mr. Atkinson failed to adequately document their findings, which prevented another expert for independently verifying whether their results were accurate.

Had trial counsel uncovered this information, trial counsel would have tested Mr. Houston's boots and clothing. Had this occurred, trial counsel would have learned that Mr. Houston's boots

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[407]NT, Axam Dep., 7/29/88, at 28.

[408]Hair evidence is particularly susceptible to unintentional errors because it is very subjective. See, e.g., Itiel E. Dror & David Charlton, *Why Experts Make Errors*, 56 J. Forensic Identification 600 (2006); Larry S. Miller, *Procedural Bias in Forensic Science Examinations of Human Hair*, 11 Law & Hum. Behav. 157 (1987).

were covered with Ms. Voinski's blood. Had this occurred, trial counsel would not have conceded Mr. Milligan's guilt, because the blood evidence contradicted Mr. Houston's pre-trial testimony, and implicated him.

Prejudice: Mr. Milligan suffered substantial prejudice from trial counsel's abysmal advocacy because, had trial counsel even minimally performed his constitutional duties, he would have uncovered significant evidence demonstrating reasonable doubt regarding Mr. Milligan's culpability. Likewise, he would not have pursued a defense strategy wherein he conceded Mr. Milligan's guilt.

Mr. Milligan is entitled to relief.

B. Brady and Giglio Violations

The prosecutor failed to comply with his Brady and Gigilo obligations when he failed to disclose, prior to trial, exculpatory and impeachment evidence provided by Ramon Houston, Katherine Orfield, and forensic experts. The prosecutor's inability to comply with his discovery obligations rendered Mr. Milligan's trial fundamentally unfair because the undisclosed evidence would have fundamentally altered trial counsel's defense strategy and exposed the jury to exculpatory evidence relating to Mr. Milligan's culpability. Had this evidence been presented, the jury would have acquitted Mr. Milligan because this evidence clearly established reasonable doubt.

Ramon Houston's Immunity: The prosecutor failed to timely disclose Mr. Houston's grant of immunity, which was awarded on October 24, 1980. On January 6, 1981, the prosecutor lied in open court when he informed trial counsel Mr. Houston did not receive immunity.[409] The prosecutor finally disclosed Mr. Houston's immunity agreement at Mr. Milligan's trial–after trial counsel already conceded Mr. Milligan's guilt during jury selection and opening statements. Under Giglio, the prosecutor was required to disclose Mr. Houston's immunity agreement prior to trial

Ramon Houston's Exculpatory Letter: The prosecutor failed to disclose Mr. Houston's letter, despite the fact it contained obvious exculpatory and impeachment evidence. Mr. Houston exculpated Mr. Milligan when he wrote: "Ron was not involved with taking or beating the senorita,

[409]NT, Motions Hrg., 1/16/81, at 41-43.

because Ron was not there[.]"[410] Likewise, Mr. Houston's claim that he was subjected to several mock executions before he testified, plainly contradicts his testimony that he testified voluntarily and free from coercion.

The prosecutor was obligated to disclose any exculpatory or impeachment evidence which it or its agents possessed prior to or during Mr. Milligan's trial. The prosecutor had an affirmative duty to learn of any favorable evidence known to those acting on the prosecutor's behalf, including state and county police officers. The sheriff's deputies who intercepted and translated the letter were county police officers acting on the prosecutor's behalf. Consequently, the prosecutor was obligated to learn of any exculpatory or impeachment evidence possessed by the Humboldt County Sheriff's Department, and disclose such evidence to Mr. Milligan. Any impeachment or exculpatory evidence known to the Humboldt County Sheriff's Department was imputed to the prosecutor.

Ramon Houston's Benefits: The prosecutor failed to disclose financial benefits which Mr. Houston received prior to testifying against Mr. Milligan.[411] The monetary benefits, which would have impacted the jury's assessment of Mr. Houston's credibility, should have been disclosed under Giglio.

Laundering of Ramon Houston's Clothing: The prosecutor failed to disclose information surrounding the laundering of Mr. Houston's clothing. While the prosecutor disclosed the laundering during the preliminary hearing,[412] he failed to disclose the fact that Mr. Reynolds destroyed evidence which potentially incriminated Mr. Houston and exculpated Mr. Milligan. Trial counsel never received any reports regarding the laundering.[413]

The prosecutor had an affirmative duty to learn of all exculpatory and impeachment evidence possessed by those acting on his behalf. Investigator Rorex and Deputy James of the Humbolt County Sheriff's Department were acting on the prosecutor's behalf when they ordered the

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[410]Ex. 115.

[411]Ex. 126.

[412]NT, Prelim. Hrg., 8/1/80, at 288.

[413]NT, Milligan Evid. Hrg., 9/19/88, at 43-44.

laundering of Mr. Houston's clothing. The prosecutor knew Mr. Reynolds washed Mr. Houston's clothing. Consequently, he had an obligation to learn about any potentially exculpatory evidence which may have been destroyed as a result of the laundering, and to report this to trial counsel. The "red spots" would have clearly constituted potentially exculpatory evidence to a reasonable and ethically sound prosecutor. The prosecutor, however, failed to disclose this potentially exculpatory information.

Katherine Orfield's Exculpatory Statements: The prosecutor failed to disclose reports or letters which documented Katherine Orfield's exculpatory statements regarding Mr. Milligan's culpability. Ms. Orfield's letter written from the Humboldt County Jail clearly exculpated Mr. Milligan because she stated that Mr. Houston struck Ms. Voinski with the sledgehammer.[414] Deputy Mattice's July 11, 1980 report also exculpated Mr. Milligan because she told Deputy Mattice that Mr. Houston killed Ms. Voinski.[415] Finally, Investigator Rorex's December 24, 1980 report also exculpated Mr. Milligan because Terri Hood verified that Ms. Orfield told her that Mr. Houston "was the one who swung the hammer[.]"[416]

The prosecutor was obligated to disclose any exculpatory or impeachment evidence which it or its agents possessed prior to or during Mr. Milligan's trial. The prosecutor had an affirmative duty to learn of any favorable evidence known to those acting on the prosecutor's behalf, including state and county law enforcement officials. The Sheriff's Deputies who intercepted Ms. Orfield's letter were county law enforcement officers acting on the prosecutor's behalf. Likewise, so too were Deputy Mattice and Investigator Rorex. Consequently, the prosecutor was obligated to learn of any exculpatory or impeachment evidence possessed by the Humboldt County Sheriff's Department, and disclose such evidence to Mr. Milligan. Any impeachment or exculpatory evidence known to the Humboldt County Sheriff's Department was imputed to the prosecutor.

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[414]Ex. 127.

[415]Ex. 128.

[416]Ex. 129. Investigator Rorex's report was disclosed to trial counsel, but it was not disclosed until 14, 1981–after trial counsel conceded Mr. Milligan's guilt during jury selection and opening statements.

Prejudice: Individually and collectively, each Brady or Giglio violation substantially prejudiced Mr. Milligan.

First and foremost, had this information been timely disclosed, trial counsel would have pursued a fundamentally different trial strategy by attacking every element of the prosecutor's case and arguing that reasonable doubt existed regarding Mr. Milligan's culpability. During Mr. Milligan's 1998 state evidentiary hearing, trial counsel stated: "certainly the theory and the defense that we presented to the jury was framed to some extent by the information that we had about Mr. Houston."[417] More importantly, trial counsel added: "I'm sure our theory would have been different if we would have had [all of this] information."[418] .

Second, this evidence significantly undermined Mr. Houston's credibility because it plainly contradicted his direct examination testimony. And third, this evidence clearly exculpated Mr. Milligan.

Had the jury been presented this information, the jury would have acquitted Mr. Milligan because reasonable doubt existed regarding his culpability.

Mr. Milligan is entitled to relief.

C. Napue Violations

Prosecutors are obligated to take corrective action when they learn that a conviction was premised on false and evidence. The prosecutor in Mr. Milligan's case failed to take any corrective action to rectify the prejudicial impact of false testimony. The prosecutor's failure to rectify the damage substantially prejudiced Mr. Milligan.

Blood Evidence on Mr. Houston's Boots: At trial, Mr. Berger testified that Mr. Houston's boots were void of any blood. The prosecutor repeatedly emphasized this fact when he argued that Mr. Houston was not an accomplice. Mr. Berger's testimony was false. Post-conviction testing revealed that Mr. Houston's boots were covered with Ms. Voinski's blood. Had the jury considered this evidence, it would have acquitted Mr. Milligan because the evidence undermined Mr. Houston's

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[417]NT, Milligan Evid. Hrg., 11/17/98, at 410.

[418]Id. at 488.

"innocent bystander" claim, and amplified his culpability. Consequently, the prosecutor had an obligation to take the necessary corrective actions to rectify the damage caused by this false testimony. Neither the prosecutor, nor the State, have ever initiated proceedings to correct the injustice caused by Mr. Berger's false testimony.

Mr. Milligan is entitled to relief.

Mr. Houston's Work Permit: The prosecutor and Mr. Houston claimed that Mr. Houston would and could not receive a work permit. The prosecutor emphasized this point to bolster Mr. Houston's credibility (i.e., Mr. Houston testified freely and did not receive benefits in exchange for his testimony). The prosecutor and Mr. Houston's testimony was false. After Mr. Houston testified against Mr. Milligan, the prosecutor and Nevada investigators worked in conjunction with the INS to secure a work permit for Mr. Houston. Mr. Houston used the work permit to obtain employment at several casinos in Reno, Nevada after he was released as a material witness in August 1981.

This information would have unquestionably affected the jury's assessment of Mr. Houston's credibility, and trial counsel's defense strategy. Consequently, the prosecutor was obligated to rectify the damage caused by this false testimony. Neither the prosecutor, nor the State, have ever initiated proceedings to correct the injustice caused by the prosecutor and Mr. Houston's false testimony.

Mr. Milligan is entitled to relief.

D. Improper Closing Arguments

The prosecutor made several improper statements during closing arguments which rendered Mr. Milligan's trial fundamentally unfair and substantially prejudiced him.

Vouching for Ramon Houston's Credibility: The prosecutor's entire case was premised on Ramon Houston's testimony and credibility. To bolster Mr. Houston's credibility, and to prove he was an "innocent bystander," the prosecutor repeatedly vouched for his credibility.[419] The prosecutor comments were improper and substantially prejudiced Mr. Milligan.

Vouching consists of placing the prestige of the government behind a witness through

[419]NT 1/22/81, at 205, 206, 207, 273, 278.

personal assurances of the witness's veracity, or suggesting that information not presented to the jury supports the witness's testimony. Vouching is impermissible precisely because a jury may be inclined to give weight to the prosecutor's opinion in assessing the credibility of witnesses, instead of making the independent judgment of credibility to which the defendant is entitled. It is up to the jury–not the prosecutor–to determine a witness's credibility.[420] The prosecutor's statements are improper and substantially prejudicial because they skewed the jury's ability, to Mr. Milligan's detriment, to fairly and accurately determine Mr. Houston's credibility.

Mr. Milligan is entitled to relief.

Misrepresenting the Facts Regarding Ramon Houston's Immunity: The prosecutor knowingly provided false testimony when he argued that Mr. Houston could still be prosecuted for his preliminary hearing testimony when in fact he could not.[421] The prosecutor's testimony was false because Mr. Houston received complete transactional immunity on October 24, 1980.[422] The prosecutor's false testimony substantially prejudiced Mr. Milligan.

The prosecutor's case, as noted, rested entirely on Mr. Houston's testimony. As a result, the jury needed to be provided with accurate information regarding potential motives or variables which could undermine Mr. Houston's credibility. Had the jury been accurately informed that Mr. Houston would never be prosecuted or punished for any of his testimony (preliminary hearing or trial), this would have impacted its assessment of his credibility because he could present false or misleading testimony minimizing his culpability, and aggravating Mr. Milligan's culpability without any consequences. The prosecutor's comments skewed the jury's ability, to Mr. Milligan's detriment, to fairly and accurately determine Mr. Houston's credibility. Neither the prosecutor, nor the State,

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[420]NT 1/22/81, at 180 ("You are the exclusive judges of the credibility of witnesses in this case, which means that you must decide which witnesses are to be believed and how much weight, if any, is to be given to the testimony of each witness.") (Guilt Phase Instruction #6).

[421]NT 1/22/81, at 246-247, 273.

[422]NT, Immunity Hrg., 10/24/81, at 5-7. Furthermore, the prosecutor's own statements from his closing guilt phase argument discredits his claim that Mr. Houston could in fact be prosecuted in the future. The prosecutor stated: "The State contends he is not an accomplice, because he is not liable to the same prosecution as the defendant is. He doesn't stand in the same types of shoes." NT 1/22/81, at 208 (emphasis added).

has yet to rectify the substantial damage caused by the prosecutor's false and misleading comments.

Mr. Milligan is entitled to relief.

Misrepresenting the Forensic Evidence: During closing arguments, the prosecutor argued that forensic evidence proved Mr. Milligan's guilt: "The hair found on the clothing and on the hammer, the blood found on the clothing and on the hammer, those are pieces of circumstantial evidence."[423] The prosecutor added: "Ladies and gentlemen, the other things we have are blood, the hair, photos, and the hammer with the blood and hair."[424] The prosecutor's blood evidence comments are false.

At trial, Mr. Berger testified he could not definitively determine whether the "red stains" on Mr. Milligan's jeans and shoes were human blood.[425] All he could say is that the stains might be human blood.[426] In both situations, Mr. Berger's presumptive examinations tested positive results for the possible presence of blood (human or animal).[427]

The prosecutor comments substantially prejudiced Mr. Milligan because the jury mistakenly believed blood evidence–the "gold standard" of scientific evidence in 1981–linked Mr. Milligan to Ms. Voinski's death. The prosecutor's blatant mischaracterization is doubly prejudicial when coupled with the fact Mr. Berger mistakenly failed to identify ANY blood on Mr. Houston's boots.[428] Individually and collectively, both of these facts impacted, to Mr. Milligan's detriment, the jury's

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[423]NT 1/22/81, at 203 (emphasis added).

[424]Id. at 209 (emphasis added).

[425]NT 1/16/81, at 465 ("I was not able to detect any substance that I could confirm as having been blood.").

[426]Presumptive testing only indicates whether a substances is possibly present. It cannot definitively state whether a substance is actually present. Consequently, because various substances share certain qualities witnessed in blood, the probative value of a presumptively positive blood test is very limited. Mr. Berger could not conduct confirmatory blood tests because "[t]here was not a sufficient sample to proceed." NT 1/16/81, at 466. See also PETER DEFOREST ET AL., FORENSIC SCIENCE: AN INTRODUCTION TO CRIMINALISTICS 248 (1983) ("Most authorities agree that positive presumptive tests *alone* should not be taken to mean that blood is definitely present. A positive tests suggests that the sample could be blood... .") (emphasis in original); id. at 249 ("Once a specimen has been identified as blood, it is necessary to find out whether it is human or not.")

[427]Id. at 464-466, 470, 476.

[428]NT 1/16/81, at 465-466.

assessment of Mr. Milligan's culpability and Mr. Houston's credibility.

Mr. Milligan is entitled to relief.

Misstating the Law Regarding the Presumption of Innocence: Mr. Milligan testified during the guilt phase of his trial.[429] During closing arguments, the prosecutor argued:

> I think it is probably appropriate at this point to also tell you when the defendant takes the stand the presumption of innocence... while it still remains with him still suffers the same risk of credibility as any other witness... His protection for a moment are removed, he is standing in the place of a witness just like any other witness, and so the shroud of the rights of the defendant have been relieved a little bit.[430]

The prosecutor's comments violated Mr. Milligan's clearly established state and federal constitutional rights and substantially prejudiced him.

Under clearly established state and federal law, a criminal defendant is presumed innocent throughout his entire trial, regardless of whether he testifies or not. Likewise, it is clearly established, under state and federal constitutional law, that a criminal defendant may testify on his behalf is he so wishes. Finally, it is clearly established state and federal constitutional law that the trial judge or prosecutor may not minimize or withdraw a clearly established state or federal constitutional right if the defendant wishes to exercise, or does in fact exercise, another clearly established state or federal constitutional right. In short, a defendant may not be punished for exercising a clearly established state and federal constitutional right.

The prosecutor's argument violated all three of these clearly established constitutional principles. In effect, the prosecutor argued that if a defendant exercises his clearly established constitutional right to testify on his behalf, the defendant's clearly established constitutional right to be presumed innocent is automatically minimized or suspended during and after his testimony. The prosecutor's argument and logic are not supported by clearly established state or federal constitutional law.

The prosecutor's misleading comments substantially prejudiced Mr. Milligan because the jury mistakenly believed that the presumption of innocence no longer protected Mr. Milligan once

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[429]NT 1/16/81, at 533-564; NT 1/20/81, at 1-17.

[430]NT 1/22/81, at 274.

he testified. The jury's mistaken belief lowered the prosecutor's burden of proof and rendered Mr. Milligan's trial fundamentally unfair.

Mr. Milligan is entitled to relief.

E. Youngblood Violation I: Laundering of Mr. Houston's Clothing

The laundering of Mr. Houston's clothing in bad faith rendered Mr. Milligan's trial fundamentally unfair.

a. **Investigator Rorex and Deputy James failed to follow generally accepted investigative practices when they requested that Mr. Houston's clothing be laundered**

Humboldt County Sheriff's Office did not have a policies and procedures manual which officially promulgated how and when certain forms of physical evidence were to be collected and preserved. Investigator Rorex and Deputy James, however, received substantial police training, prior to July 4, 1980, regarding evidence collection and preservation, wherein they learned which evidence and preservation collection practices were generally accepted and which were not.[431] Investigator Rorex and Deputy James failed to follow generally accepted investigative practices when they requested and approved the laundering of Mr. Houston's clothing.

When Mr. Houston's clothing was laundered, it was far from clear whether he was an accomplice or simply a material witness (i.e., innocent bystander). A reasonable investigator, however, would have considered Mr. Houston an accomplice because he had Ms. Voinski's identification when taken into custody, and he told investigators that he stabbed Ms. Voinski with a letter opener during the attack.[432] Moreover, in 1980 (as it is now), it was general investigative practice to collect and preserve the clothing of all individuals–suspects and material witnesses–who were present at a homicide scene. The preeminent crime investigation textbook of the 1970s and early 1980s noted:

> The most important evidence obtainable from a [suspect or witness] will usually be found on his clothing. The first step is to ascertain if the clothing he is wearing was being worn at the time of the commission of the crime. If

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[431]NT, Rorex Dep., 6/12/06, at 6 ("I've been to several investigator schools. I've investigated numerous homicides, including a triple homicide."); Ex. 207.

[432]Exs. 106-108.

> so, all of it should be taken as evidence immediately. The best practice is to have the [suspect or witness] stand on a large piece of wrapping paper, shedding to it each piece of clothing as it is removed... This is particularly important if the suspect is apprehended immediately after or at the time of the crime.[433]

The textbook added: "When a suspect is taken into custody by authorized law-enforcement personnel who have good reason for believing him to be the sought-for criminal, at that moment all the care depends upon the collection and preservation of evidence which begins to pay dividends."[434]

Investigator Rorex was fully aware of this generally accepted investigative principle. During a post-conviction deposition, Investigator Rorex stated: "I doubt I told anybody to wash [Houston's] clothing because in a homicide case you don't wash anything."[435] Deputy James was also fully aware of this generally accepted investigative principle. During a post-conviction interview, Deputy James stated: "From my training and education, I knew it was standard law enforcement practice to properly collect and preserve evidence from people closely connected to or implicated in any crime–particularly a violent crime. This was necessary to preserve potential exculpatory or incriminating evidence."[436] Deputy James added: "I don't recall a trustee asking me whether he should launder Houston's clothing. If he would've asked me, I would've said absolutely not because as I said before it was standard law enforcement practice never to wash a material witness' clothing. Because Houston was at the scene his clothing might have contained incriminating or exculpatory forensic evidence."[437]

Agent Milby's testimony also supports Mr. Milligan's claim that Investigator Rorex and Deputy James acted contrary to generally accepted investigatory procedures.[438] At Paris Hale's and Katherine Orfield's trial, Agent Milby testified he "would never ask for anybody's clothing to be

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[433] CRIME INVESTIGATION 46 (Thornton ed., 2d 1974).

[434] Id. at 46.

[435] NT, Rorex Dep., 6/12/06, at 8.

[436] Ex. 207.

[437] Id.

[438] Agent Milby was an investigator with the Nevada Division of Law Enforcement who assisted Humboldt County investigators with their investigation.

washed, because this could destroy any evidence that may be on the clothing."[439] Agent Milby also acknowledged that he was taught never to launder evidence used in homicide cases.[440]

It was imperative to collect and preserve Mr. Houston's clothing to determine whether Mr. Houston's version of events was supported by the physical evidence. In 1980 (as it is now) it was generally accepted that "[p]hysical-evidence analysis [could] often indicate conclusively whether a person's verison of a set of events [was] credible or whether the person might be lying."[441] Consequently, as another leading crime scene investigation textbook noted:

> Nothing should ever be altered until its original condition, position, and so forth, have been recorded in sufficient detail... Every major case scene, and the associated evidence, should be thoroughly documented, even if a suspect is in custody and has confessed. In these situations, investigators sometimes assume that the case is solved and conclude that only cursory documentation is needed. During the initial stages of an investigation, there is no such thing as an 'open-and-shut case.' To assume otherwise is wrong. If incorrect decisions are made at this point, there probably will not be an opportunity to rectify them.[442]

As explained *supra*, Investigator Rorex and Deputy James' assumption that Mr. Houston was an innocent bystander was proved incorrect by subsequent forensic testing. Their mistake, however, substantially prejudiced Mr. Milligan because it has forever barred him from definitively ascertaining Mr. Houston's true culpability.

b. **The potentially exculpatory nature of the physical evidence on Mr. Houston's clothing was apparent to Investigator Rorex and Deputy James**

Investigator Rorex's deposition testimony plainly indicates that he was aware that Mr. Houston's clothing contained potentially exculpatory evidence.[443] According to Investigator Rorex, collecting and preserving a homicide suspects or witness' clothing is a generally accepted investigative practice because it may contain evidence which incriminates or exonerates the

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[439]NT, Hale/Orfield, 8/20/82 at 494 (emphasis added).

[440]Id.

[441]D E FOREST, GAENSSLEN, & LEE, FORENSIC SCIENCE: AN INTRODUCTION TO CRIMINALISTICS 30 (1983).

[442]Id. at 39 (emphasis added).

[443]NT, Rorex Dep., 6/12/06, at 7-8.

individual. Evidence which incriminates one individual, has the power to exonerate another individual. For instance, in Mr. Milligan's case, had Mr. Houston's clothing been properly preserved and tested, it is reasonably likely the testing would have revealed physical evidence which linked Mr. Houston to Ms. Voinski's attack.[444] This evidence would have been exculpatory for Mr. Milligan because it would have transformed Mr. Houston into an accomplice and prevented the prosecutor from obtaining a conviction which is only premised on uncorroborated accomplice testimony.

Deputy James was aware of the exculpatory nature of Mr. Houston's clothing. Mr. Reynolds clearly notified Deputy James that Mr. Houston's clothing was damp and covered with "red spots." [445] A reasonable law enforcement officer in 1980 would have immediately realized that the "red spots" presumably represented blood, and that blood testing could provide inculpatory or exculpatory results depending on the circumstances. The State cannot legitimately argue Deputy James did not recognize the exculpatory value of potential blood evidence. The proposition that a law enforcement officer does not recognize such a fundamental truth is an incredible one, and one which this Court should reject.

Because the "blood spots" on Mr. Houston's clothing could have yielded both exculpatory (i.e., the "spots" are human blood and type "O")[446] and insignificant results (i.e., the "spots" were not human blood), a law enforcement officer could only conclude that Mr. Houston's clothing lacked exculpatory value by assuming that the "red spots" were insignificant (i.e, not human blood or the victim's blood type). This is not a reasonable predicate for a law enforcement officer to use to destroy evidence, and it certainly would not logically support a conclusion that the "red spots" did not possess potentially exculpatory value.

The potentially exculpatory value of the "red spots" on Mr. Houston's clothing was apparent

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[444]This assertion is supported by the fact that subsequent serological testing established that Ms. Voinski's blood type was identified on Mr. Houston's shoes. NT, Hale/Orfield, 8/24/82, at 528-529.

[445]NT, Hale/Orfield, 8/17/82, at 34-35; NT, Milligan Evid. Hrg., 11/16/98, at 202.

[446]Ms. Voinski's blood type of type "O". Thus, if Mr. Houston's shirt had blood type "O" on it, this would have constituted exculpatory evidence for Mr. Milligan because it would have transformed Mr. Houston from an innocent bystander to an accomplice or even, perhaps, the person who swung the sledgehammer.

to Investigator Rorex and Deputy James.

c. **Laundering has a detrimental effect on blood evidence**

At Mr. Milligan's trial, Criminalist Richard Berger testified he was unable to find any physical evidence (i.e., blood, hair, etc.) on Mr. Houston's clothing. Mr. Berger's presumptive testing, however, was strictly limited to visually examining the clothing with no magnifying instrument (i.e., microscope or magnifying glass).[447]

Mr. Berger acknowledged that laundering has a "detrimental effect" on presumptive blood testing, depending on a number of factors such as the size of the stain, the extent of the washing, the heat intensity of the drying machine, etc.[448] The significance of Mr. Berger's testimony was overlooked by trial counsel. Had trial counsel asked, Mr. Berger would have testified that the "detrimental effect" is substantial in situations involving laundered clothing because presumptive test results are dependent upon an examiner's ability to make positive visual observations of potential blood, or "red-brown staining." NT, Bonnette, 6/29/82 at 446. At Terry Bonnette's trial, Mr. Berger testified:

> Basically, the protocol that I follow in examining an article that is submitted to me, to detect the possible presence of blood is to, first of all, make a visual examination of the particular article and see if there is any obvious signs of red-brown staining present. If there is, I proceed with what is known as a presumptive test for blood. ... If on obtaining a positive result in the presumptive test, I will proceed further to identify if the stain is indeed blood and if so from what species the blood may have come from.[449]

Mr. Berger also testified about the link between laundering clothing and obtaining a visual match for blood on presumptive testing:

> Counsel: Suppose that something were submitted, a piece of clothing were submitted to you that had been laundered and dried in a dryer, would that aid in your search to determine if there were blood stains present and if so, what they were, or would it hinder that?
>
> Mr. Berger: I would say it would hinder.

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[447]NT, Bonnette, 6/29/82, at 465-466.

[448]NT 1/16/81, at 479.

[449]Id. (emphasis supplied).

> Counsel: Number one, you can wash a blood stain out to where you could almost not see it?
>
> Mr. Berger: That could happen.
>
> Counsel: And if that happens, you wouldn't know where to pour your stuff to get the color test [referring to the presumptive test]?
>
> Mr. Berger: That's correct.[450]

Mr. Berger's testimony also established that he was not informed that Mr. Houston's clothes had been laundered prior to his examination.[451] Agent Milby collected Mr. Houston's clothing from Deputy Dewey, a jailer at the Humboldt County Jail, on July 6, 1980. On August 1, 1980, during the preliminary hearing, Agent Milby disclosed to the trial judge and trial counsel that Mr. Houston's clothing was laundered sometime after he was taken into custody.[452] Agent Milby failed to identify who laundered the clothing, why the clothing was laundered, who ordered the laundering, and when the clothing was laundered.

Agent Milby submitted Mr. Houston's clothing to the Washoe County Crime Laboratory on August 4, 1980. In his submission request, however, Agent Milby failed to inform Mr. Berger that Mr. Houston's clothing was laundered. The submission request read: "Request examination for Hair and Blood."[453] As indicated by the sequence of events, Agent Milby knew about the laundering before he submitted the clothing.[454]

Agent Milby's actions were contrary to generally accepted investigative practices. In 1980 (as it is now), it was generally accepted and imperative that investigators inform forensic examiners of any post-crime actions which could have possibly deteriorated or altered critical physical evidence. In a post-conviction interview, Mr. Milby stated:

> In July 1980, it was general investigative practice for NDI investigators to notify the crime lab examiners, who were assigned to examine the physical

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[450] Id. at 464-65.

[451] NT 1/16/81, at 475; NT, Bonnette, 6/29/82, at 466.

[452] NT 8/1/80, at 288.

[453] Ex. 138.

[454] NT 1/15/81 at 449, 451; NT, Hale/Orfield 8/20/82 at 494.

> evidence, whether the submitted evidence was tampered with or laundered. This was the general practice because it put the crime lab examiners on notice that they may want to perform certain non-destructive tests before they performed destructive testing.[455]

Mr. Berger also conceded this point during a post-conviction interview:

> I don't recall Bob Milby ever notifying me that Ramon Houston's clothing had been laundered. Back in 1980, it was normal procedure for the submitting investigators to inform the examiners of whether the submitted evidence was tampered with, altered, or even laundered. Basically, it was best when the examiners knew everything about the physical evidence, like who collected it, where was it collected, when was it collected, where was it stored prior to being submitted, and whether it was tampered with or altered.[456]

Mr. Milby's actions substantially prejudiced Mr. Milligan. Had Mr. Milby informed Mr. Berger of the laundering, Mr. Berger would not have relied on his own visual observations during his presumptive testing. At Terry Bonnette's trial, Mr. Berger testified:

> Counsel: ... Suppose that you are submitted an item of clothing that has no readily apparent stains, can you do anything beyond that? Is there a test to - - suppose you throw the whole thing in a washing machine ...
>
> Mr. Berger: Basically if a stain is not visible, it is very difficult to proceed with the particular presumptive test that I did. There is, however, one additional test that could be employed if a suspect article was thought to have been altered or laundered or something of this nature that may have possibly eradicated the stain to the point where it is no longer visible, but still may not be brought up by this particular test.
>
> Counsel: Did you use that other particular test?
>
> Mr. Berger: No, I did not.[457]

Mr. Berger testified that luminol is the alternative form of presumptive testing:

> Counsel: The other matter that you have testified about concerning the presence of blood that was not visible, would you please explain that to the jury, please?
>
> Mr. Berger: This particular test is called an illuminal [sic] test and it is again a presumptive test for blood. The particular advantage of this technique in regards to articles that may have been

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[455]Ex. 208.

[456]Ex. 202.

[457]NT, Bonnette, 6/29/82 at 463.

laundered is that it is a good deal more sensitive than other presumptive tests for blood, thus enabling possibly the production of a positive result where one would not be necessarily obtained in one of the other presumptive tests for blood.

Counsel: How often do you use it in your work?

Mr. Berger: I would say perhaps a couple times a year.

Counsel: For what purposes?

Mr. Berger: Examining articles that were submitted to me where circumstances suggest that laundering may have been a possibility and the person requesting the examination indicates that to me.

Counsel: Why didn't you do that test in this particular case.

Counsel: It is probably irrelevant. The fact is that he didn't do it.

Mr. Bullock: I think the question was raised by Mr. Woodbury that it might should have been done and I think he's entitled on redirect to say why he didn't.

Court: You may answer.

Mr. Berger: Basically, here, I was not apprised [sic] of any possible circumstances of laundering.[458]

The record establishes Mr. Berger should have been informed that Mr. Houston's clothing had been laundered so he could employ alternative, more advantageous, presumptive testing to determine the existence of potentially exculpatory blood evidence. Mr. Milligan suffered substantial prejudice from the laundering and Agent Milby's actions.

d. **Post-Conviction forensic testing indicates that had Mr. Houston's clothing not been laundered, forensic examinations would have likely revealed inculpatory blood evidence on his clothing**

Forensic tests, which were performed well after Mr. Milligan's conviction and death sentence, supports Mr. Milligan's claim that had Mr. Houston's clothing not been laundered, forensic

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[458] Id. at 465-66. E.g., RICHARD SAFTERSTEIN, CRIMINALSTICS: AN INTRODUCTION TO FORENSIC SCIENCE 370 (6th ed. 1998) ("Another important presumptive identification test for blood is the luminol test... By spraying luminol reagent onto a suspect item, large areas can be quickly screened for the presence of bloodstains... The luminol test is extremely sensitive–it is capable of detecting bloodstains diluted up to 10,000 times. For this reason, spraying large areas... may reveal blood traces or patterns that would have gone unnoticed under normal lighting conditions.").

examinations would have likely revealed inculpatory blood evidence.

The blood on Mr. Houston's boots clearly demonstrates Mr. Milligan suffered substantial prejudice when Mr. Houston's clothing was laundered. Had his clothes not been laundered, it is very likely forensic tests would have identified type O blood on Mr. Houston's shirt and pants. This blood evidence, like the new blood evidence discovered prior to Paris Hale and Katherine Orfield's trial, would have fundamentally altered the prosecutor and the jury's perception of Mr. Houston's culpability.

e. **Mr. Houston's clothing would have played a significant role in Mr. Milligan's defense because the prosecutor's case rested entirely on Mr. Houston's testimony**

_____Mr. Milligan suffered substantial prejudice when Mr. Houston's clothing was laundered because he was effectively prevented from presenting evidence which proved that Mr. Houston was an accomplice or the actual perpetrator who struck Ms. Voinski with the sledgehammer.

The prosecutor's case was premised entirely on Mr. Houston's testimony. The prosecutor even conceded: "without him there probably would be very little evidence, as you can imagine."[459]

To obtain a first-degree murder conviction against Mr. Milligan, the prosecutor had to prove that Mr. Houston was not an accomplice, and did not participate in Ms. Voinski's attack (i.e., Mr. Houston was an "innocent bystander"). Thus, had trial counsel introduced physical evidence–particularly type O blood evidence–which linked Mr. Houston to Ms. Voinski's attack, this would have significantly crippled the prosecutor's argument "innocent bystander."

Moreover, had Mr. Houston's clothing not been laundered, trial counsel could have had his clothing examined by a bloodstain analyst to determine whether the bloodstains on his clothing supported or discredited his "innocent bystander" statements.

If Mr. Houston was considered an accomplice, the prosecutor's case would have crumbled because there was no evidence to corroborate Mr. Houston's testimony. In effect, had the jury deemed Mr. Houston an accomplice, it is reasonably likely Mr. Milligan would not have been convicted of first-degree murder and sentenced to death.

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[459]NT 1/22/81, at 205.

Accordingly, the prosecutor's case was substantially bolstered when Mr. Houston's clothing was laundered because it destroyed physical evidence which could have linked Mr. Houston to Ms. Voinski's attack, and transformed him into an accomplice or the actual killer. The prosecutor capitalized on this fact when he repeatedly emphasized to the jury that there was no physical evidence linking Mr. Houston to Ms. Voinski's attack.[460]

g. **There Was No Comparable Evidence Which Could Have Transformed Mr. Houston Into An Accomplice or the Actual Killer**

When Investigator Rorex and Deputy James ordered Mr. Reynolds to launder Mr. Houston's clothing, they destroyed the only physical/scientific evidence which could have transformed Mr. Houston into an accomplice or Mr. Voinski's actual killer. Moreover, even if Mr. Houston's boots had been accurately examined by Mr. Berger before Mr. Milligan's trial, and the type "O" blood identified, this evidence could not be considered comparable to the potential blood evidence on Mr. Houston's clothing because it would have only provided a partial picture of Mr. Houston's true level of culpability.

Additionally, Mr. Milligan could not present testimony from his co-defendants to establish Mr. Houston's true culpability because his co-defendants invoked their constitutional right to remain silent, and were, as a result, unavailable for Mr. Milligan's trial. Notably, had the prosecutor disclosed the exculpatory letters written by Katherine Orfield while in jail, Mr. Milligan's trial counsel could have presented this evidence to argue that Mr. Houston struck Ms. Voinski with the sledgehammer. The laundering of Mr. Houston's clothing, however, would have still blunted the impact of these letters because Ms. Orfield's claim that Mr. Houston struck Ms. Voinski could not have been substantiated by the available physical evidence.

Mr. Milligan suffered substantial prejudice because there was no other comparable evidence.

g. **The uncertainty as to what the "red spots" might have been and proved was not turned to Mr. Milligan's advantage**

A reasonably competent trial attorney would have requested a guilt phase jury instruction which read in part: "If you find that the State has allowed to be destroyed or lost any evidence whose

[460]NT 1/22/81, at 202, 203, 207, 275-276; NT, Bonnette, 7/2/82, at 705, 709, 753.

content or quality are in issue, you may infer that the true fact is against the State's interest."

Trial counsel failed to litigate the destruction of evidence issue. Trial counsel failed to request such a jury instruction during the guilt phase. As a result, the jury was not required to make an adverse inference against the State as it decided Mr. Milligan's guilt or innocence.

Trial counsel did not have a strategic or tactical reason for not requesting such an instruction.

Trial counsel's failure fell below that what is expected of a person representing a criminal defendant facing the death penalty.

Mr. Milligan suffered substantial prejudice because the uncertainty as to what the "red spots" might have been and proved was not turned to his advantage. It is reasonably likely that, had trial counsel requested such a jury instruction, Mr. Milligan would not have been convicted of first-degree murder because the jury would have learned that the State purposely destroyed potentially exculpatory evidence to bolster its own case.

h. **Mr. Houston's Clothing Was Laundered In Bad Faith**

Clearly established state and federal constitutional law does not require Mr. Milligan to prove that Investigator Rorex or Deputy James subjectively intended to foreclose a defense or deliberately deny Mr. Milligan his state and federal constitutional rights when they ordered the laundering of Mr. Houston's clothing.[461] Instead, to prove bad faith, Mr. Milligan need only demonstrate that the aforementioned law enforcement officers (a) appreciated the potentially exculpatory value of the "red spots" on Mr. Houston's clothing, and (b) failed to adhere to a generally accepted investigate practice which required them to collect and preserve potentially exculpatory evidence from an individual who was intimately involved with an attempted murder.[462]

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[461]Acting contrary to generally accepted practices is bad faith whether measured objectively or subjectively. The circumstances which are adequate to prove bad faith are not confined to the circumstances in which a law enforcement officer deliberately says unto himself: "I shall deprive the defendant of due process or hurt his case." If that were the standard, there would be no check on the destruction of evidence because law enforcement agents would be able to defend the destruction of evidence by lying about subjective intent or by violating, with impunity, the rules and procedures they are obligated to follow.

[462]See Arizona v. Youngblood, 488 U.S. 51, 56, n.* (1988) ("The presence of absence of bad faith by the police... must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed."). "Attempted murder" is emphasized because at the time Investigator Rorex and Deputy James ordered the laundering, Ms. Voinski had yet to pass

Mr. Milligan has satisfied these two factors. As a result, he has demonstrated that his clearly established state and federal constitutional rights were violated.

i. **The chain of custody logs bolsters Mr. Milligan's bad faith claim**

Mr. Reynolds' testimony reveals specific information which further supports Mr. Milligan's claim that Investigator Rorex ordered the laundering of Mr. Houston's clothes in bad faith. His testimony establishes that the chain of custody forms on record do not list the names of any of the individuals which had custody of Mr. Houston's clothing at the Humboldt County Jail on July 4, 1980.

There are four chain of custody forms for Mr. Houston's clothing: one for his "boots [and] socks," one for his red "t-shirt," one for his "plaid" button down shirt, and one for his "trousers[.]"[463] All four forms were presumably created to establish that Humboldt County Sheriff's Deputy "Dewey Hackabaw" signed for receipt of the abovementioned items on July 4, 1980, that Agent Milby signed for receipt of the items on July 6, 1980, and that Mr. Berger signed for receipt of the items on August 6, 1980.[464] In addition, all four were presumably created to establish that Humboldt County Sheriff's Deputy "Dewey Hackabaw" was the "Recovering Officer" of Mr. Houston's clothing, and that the clothing was recovered at "Humboldt Co. Booking[.]"[465]

The record shows, however, that Deputy Dewey "Hackabaw" did not recover or preserve Mr. Houston's clothing at the Humboldt County Jail on July 4, 1980. The booking sheet for Mr. Houston indicates that Deputy James received his property on July 4, 1980, at 11:10 p.m.[466] The booking sheet is also signed by both Mr. Houston and Deputy James. This is consistent with Mr. Reynolds'

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away. Ms. Voinski passed away on July 25, 1980.

[463]Ex. 139. The attached forms appear to be court related chain of custody forms, and comprise the only known law enforcement documentation of the chain of custody of Mr. Houston's clothing between July 4, 1980, the date of his intake into the jail, and August 5, 1980, the date his clothes were submitted to Washoe County Criminalistics Laboratory for forensic examination.

[464]Id.

[465]Id.

[466]Ex. 140. Assuming Mr. Reynolds' testimony to be credible, the booking form signed by Dan James would establish that Mr. Houston's clothes were laundered before 11:00 p.m. on July 4, 1980.

testimony that he was present when Mr. Houston was brought into the jail, he obtained Mr. Houston's clothing from Investigator Rorex, he laundered the clothing at Mr. Rorex's request, he placed the clothing in a plastic bag, and he handed the bag to Deputy James.[467]

Further, the record of Mr. Milligan and his co-defendants' proceedings reflects only a Humboldt County Sheriff's Office Jailer named Dewey H-u-c-k-a-b-a.[468] Aside from the spelling of his last name, Mr. Huckaba's testimony reveals he worked a series of shifts beginning in the early morning hours on July 5, 1980.[469]

Lastly, the chain of custody forms are undated, contain fatal misspellings, are printed in the same handwriting, and do not list the names of Mr. Reynolds, Investigator Rorex, or Deputy James.

Therefore, the fact that the chain of custody forms conceal the identities of those individuals who had contact with Mr. Reynolds provides significant support for Mr. Milligan's claim that Investigator Rorex and Deputy James were aware of the potentially exculpatory value of Mr. Houston's clothing, yet had them laundered in bad faith.

Mr. Milligan is entitled to relief.

F. Youngblood Violation: Failure to Collect Mr. Milligan's Blood Alcohol Level

Mr. Milligan's trial was rendered fundamentally unfair when law enforcement officers failed to collect and preserve Mr. Milligan's blood alcohol level on July 4, 1980.

a. Officer Peterson and Deputy Dorries knew Mr. Milligan was intoxicated when he was detained, arrested, and booked on July 4, 1980

Mr. Milligan would show that the arresting officers knew Mr. Milligan was intoxicated on July 4, 1980 when they detained, arrested, and booked him for attempted murder.

Wilburn Dorries' Declaration: Mr. Milligan's current counsel interviewed Wilburn Dorries. After his interview, Mr. Dorries executed a written declaration which is attached hereto as Ex. 209 and incorporated by reference as if fully copied and set forth at length. According to Mr.

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[467]NT, Hale/Orfield 8/17/82 at 32-36; NT, Milligan Evid. Hrg., 11/16/98 at 192-93, 197, 199, 205.

[468]NT, Prelim. Hrg., 7/25/80 at 216; NT 1/21/81 at 112.

[469]NT 1/21/81 at 112, 123.

Dorries, he "knew Mr. Milligan was definitely intoxicated" when he and Officer Peterson "arrested him and the others on July 4, 1980."[470] Mr. Dorries added: "He was intoxicated enough that I wouldn't have allowed him to operate a motor vehicle."[471] Mr. Dorries' opinion was premised on the following observations:

- Milligan and the others were detained in front of an establishment which sells alcoholic beverages.
- Milligan was the only one of the group who was drinking when we arrived. He was drinking a Miller High Life. When I first approached him, he had about a third of a bottle left.
- Milligan kept repeating himself as a person under the influence normally does. He was repetitious.
- Milligan's speech was slurred.
- Milligan asked me if he could lay down in the back of Peterson's patrol car because he wanted to take a rest.
- Milligan was argumentative when Peterson and I tried to move him from the back of the patrol car.
- Milligan kept asking over and over again why he was being arrested, even after he was told several times why. Milligan continued to ask the same questions over and over even as Peterson and I transported him and Hale to jail.[472]

Roger Peterson's Declaration: Mr. Milligan's current counsel interviewed Roger Peterson. After his interview, Mr. Peterson executed a written declaration which is attached hereto as Ex. 201 and incorporated by reference as if fully copied and set forth at length. Mr. Peterson, like Mr. Dorries, knew Mr. Milligan was intoxicated when he was detained and arrested on July 4, 1980. Mr. Peterson's opinion was premised on the following observations:

- Milligan and the others were detained in front of an establishment which sells alcoholic beverages.
- Milligan was drinking a Miller High Life beer when Deputy Dorries and I initially approached the group. Milligan was the only person of the group who was drinking when we arrived.

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[470] Ex. 209.

[471] Id.

[472] Id.

- Milligan was the loudest and the most obnoxious because he repeatedly asked Deputy Dorries and I if he could use the bathroom.
- Milligan didn't seem to understand why he was being detained because he repeatedly asked Deputty Dorries and I why he was being detained.
- Milligan was the only one of the group to ask if he could lay down in the back of my patrol car.
- The only person out of the group who was drunk was Milligan.[473]

The abovementioned testimony, reports, and affidavits clearly supports Mr. Milligan's claim that Officer Peterson and Deputy Dorries knew Mr. Milligan was intoxicated on July 4, 1980 when they detained, arrested, and transported him to the Humboldt County Jail.

b. **Officer Peterson and Deputy Dorries failed to adhere to general investigative practices when they failed to administer a breathalyzer test to Mr. Milligan**

Deputy Dorries and Officer Peterson failed to request that a Breathalyzer test be administered to Mr. Milligan on July 4, 1980.[474] The Humboldt County Jail had a Breathalyzer machine on July 4, 1980. It was stored in the booking area. The test was quick, easy to administer, and cost effective.[475] Deputy Dorries, Deputy James, and Officer Peterson were all trained how to administer the Breathalyzer test. In fact, all three administered numerous tests prior to July 4, 1980.[476]

At Mr. Milligan's trial, Deputy Dorries testified that a "blood alcohol test" was not performed on Mr. Milligan because "he was not a driver of a vehicle and normally we do not run a B.A. on anyone unless he's been driving."[477] However, Deputy Dorries' superior, Steven Bishop, testified there was no such procedure in place at the Humboldt County Sheriff's Office in July 1980.[478] In addition, Deputy Dorries conceded that Mr. Milligan was intoxicated,[479] and that a Breathalyzer test

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[473]Ex. 201.

[474]NT, Prelim. Hrg., 7/25/80, at 158-159; NT 1/15/81, at 320, 327.

[475]Exs. 201, 207, 209.

[476]Exs. 201, 207, 209.

[477]NT 1/15/81, at 320, 327.

[478]NT, 8/3/81 at 52.

[479]NT, Prelim. Hrg., 7/25/80 at 178; NT 1/15/81 at 318.

would have provided an accurate measure of Mr. Milligan's intoxication.[480]

Officer Peterson offered a similar explanation as to why a blood alcohol test was not administered.[481] The State has failed to produce any documentation establishing that this so-called policy was officially promulgated by the Winnemucca Chief of Police or Winnemucca City officials prior to July 4, 1980.

When Mr. Milligan's current counsel interviewed Deputy Dorries, he offered another explanation why a Breathalyzer test was not administered. Deputy Dorries stated only the lead investigator, Deputy Len Otterstrom, could have requested a Breathalyzer.[482] Deputy Otterstrom never requested a Breathalyzer. Deputy Dorries added that had he been the lead investigator he "would've absolutely administered a breath test on Milligan because [he] knew alcohol could serve as a defense to crimes like attempted homicide."[483] Deputy Dorries conceded, however, that Deputy Otterstrom had no way of knowing whether Mr. Milligan was intoxicated because he (Otterstrom), Ramon Houston, and Ken Wolf immediately left the Watering Hole bar to search for Ms. Voinski. Deputy Dorries also conceded he never radioed his observations to Deputy Otterstrom to obtain authorization for a breath test. Deputy Dorries stated:

> Although I knew of the exculpatory value of intoxication, I never radioed Otterstrom my observations and concerns. I never heard or saw Peterson relay any similar information as well. Had this information been relayed, any reasonable lead investigator would have requested that Milligan be given a breath-test to determine Milligan's true level of intoxication.[484]

Deputy James offered a similar explanation, in that he did not administer a breath test unless the arresting officer(s) requested one. NT 1/15/81, at 337. Deputy James admitted, however, that he was not familiar with the Humboldt County Jail's policies and procedures because he had only

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[480]NT 1/15/81 at 327.

[481]NT, Prelim. Hrg., 7/25/80, at 157-158.

[482]According to Deputy Dorries, Deputy Len Otterstrom was the lead investigator because he was the first responding officer. Ex. 209. Moreover, the State has failed to produce any documentation establishing that this so-called policy was officially promulgated by the Humboldt County Sheriff or Humboldt County officials prior to July 4, 1980.

[483]Ex. 209.

[484]Id. (emphasis added).

worked at the jail for a short time. Id. The State has failed to produce any documentation establishing that this so-called policy was officially promulgated by the Humboldt County Sheriff or Humboldt County officials prior to July 4, 1980.

The State has failed to produce any documentation establishing that any policies and procedures were ever officially promulgated by the Humboldt County Sheriff's Office, the Winnemucca Police Department, Humboldt County officials, and Winnemucca City officials, regarding when (i.e., what type of offenses) and why (i.e., preserve evidence) Sheriff's Deputies and City Patrolmen could collect blood alcohol evidence.

Mr. Milligan would show that despite the fact that the aforementioned law enforcement agencies and city and county officials failed to officially promulgate any policies regarding the collection of blood alcohol evidence under any circumstances, it was general investigative practice in July 1980 to collect one of the following forms of physical evidence from a suspect who appeared intoxicated when he was arrested for any criminal offense: blood, breath, and urine.[485] It was general investigative practice to collect a blood, breath, or urine sample because observations by investigators were too unreliable to determine whether a suspect was intoxicated.[486] To avoid errors, it was general practice to perform a second, more definitive, scientific test. A preeminent crime investigation textbook of the 1970s and early 1980s stated:

> Two kinds of investigative procedure [sic] are applicable, one focused upon perceptible behavioral abnormalities of the suspect and another involving definitive analyses of his breath, urine, and blood for their alcohol content. The observation of an uncertain gait, slurred speech, and the odor of alcohol on the breath is preliminary evidence of Phase III impairment... [observation-of-performance methods]... are subject to considerable individual variability, and in some instances, they may be misinterpreted.... To guard against such errors, it is advisable to apply the second type of test, which involves the analysis for alcohol content of breath, urine, or blood by appropriate chemical or instrumental methods. The have the great virtue of proving information as to whether the person in question has been, or has not been, drinking, and if he has, the approximate quantity present in the body at the moment can be

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[485]See CRIME INVESTIGATION 346 (Thornton ed., 2d 1974) ("it must be emphasized that the determination of alcohol in blood through the analysis of blood, urine, or breath samples has been of the greatest value in the administration of justice, and must be considered an extremely important phase of criminalistics practice.").

[486]Id. at 351.

determined.[487]

More importantly, it was general investigative practice to adhere to the following four steps when a law enforcement officer arrested someone whom they suspected was intoxicated when he committed a criminal offense. The same preeminent textbook stated:

> Although operational details differ from one jurisdiction to another, the enforcement procedure encompasses several distinct steps, each of which includes certain fundamental elements. These steps may be outlined as follows:
>
> Step 1. *On-the-scene contact; first impressions of the investigating officer*.
> (1) What drew attention to the perpetrator?
> (2) Was the subject driving?
> (3) Observations and conversation with the subject that caused the officer to think that he subject was suffering an impairment of brain function that might be the effect of ingested alcohol.
>
> Step 2. *Further examination at a prepared central facility*.
> (1) Planned interrogation (Alcoholic Influence Report Form).
> (2) Planned performance tests, for the purpose of detecting only advanced gross impairments.
> (3) Withdrawal... of a physiological specimen to be analyzed for determination of alcohol content. In order decreasing convenience, the specimen may be blood, breath, or urine... .
>
> Step 3. *Follow-up by the investigating officer*.
> Statements recorded during the planned interrogation should be checked. These particulars should include such details as bars that were visited, times and location specified, the amount of liquor consumed, the taking of drugs, injuries, etc.
>
> Step 4. *Issuance of complaint, and disposition of the case*.[488]

The textbook also stated:

> It is an established fact... that alcoholic influence is perceptible at low blood alcohol levels and can be scientifically determined by [scientific] test[s] alone. However, it must be recognized that... courts and juries may require the police officer to have used all the methods enumerated in the four steps of investigation. For this reason the investigation steps presented here will... continue to constitute the official procedure in most jurisdictions.[489]

DA McDonald's memo also supports Mr. Milligan's claim that it was general investigative practice to ascertain the blood alcohol level of a defendant facing serious charges. DA McDonald's

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[487] Id.

[488] Id. at 352 (emphasis added).

[489] Id. at 352-353 (former emphasis in original; later emphasis added).

memorandum stated: "Too late for BAs on all in car but quickly as possible get everyone who saw any of them to write an alcohol influence report following NDH form where applicable."[490] DA McDonald's request clearly indicates he knew the State was obligated to obtain such evidence because of its exculpatory value.[491]

Officer Peterson, Deputy Dorries, and Deputy James failed to adhere to general investigative practice when they failed to administer the Breathalyzer test to Mr. Milligan on July 4, 1980. Officer Peterson conceded as much when Mr. Milligan's current counsel interviewed him:

> Once Willie and I transported Milligan up the elevator and into the booking area, we had the authority to give him a breath test. Although the breath test could've been easily administered, only taking a minute or two, we never had Milligan undergo a breath-test. Looking back on it now, if I could change anything in regards to my involvement in Milligan's case, I would've administered the breath test because I know the mitigating and exculpatory value of intoxication for certain offense.[492]

c. **The blood alcohol evidence was "material exculpatory" evidence as opposed to potentially useful evidence and it would have played a major role in Mr. Milligan's defense**

Material Exculpatory Evidence: The blood alcohol evidence was materially exculpatory as opposed to potentially useful evidence.

Mr. Milligan was charged with first-degree murder. The charges were pled in such a way to support two different first-degree murder theories: premeditation/deliberation and felony murder (robbery). At trial, the prosecutor argued both theories. To obtain a first-degree murder conviction under a premeditation theory, the prosecutor had to prove beyond a reasonable doubt that Mr. Milligan deliberately, willfully, and with premeditation killed Ms. Voinski. Under a felony-murder theory, the prosecutor had to prove beyond a reasonable doubt that Mr. Milligan specifically intended to commit the underlying felony–which in this case was robbery. Simply put, both theories required a showing of specific intent.

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[490]Ex. 104.

[491]See 2 SCIENTIFIC EVIDENCE §22-1, at 257 (Giannelli & Imwinkelried eds., 3d. 1999) ("in the overwhelming majority of cases" where alcohol is an issue "the prosecutor relies primarily on a chemical test to prove the defendant's BAC."). The exculpatory value of the blood alcohol evidence will be explained *infra*.

[492]Ex. 201.

Under Nevada law at the time, voluntary intoxication could negate specific intent. The trial judge repeatedly conveyed this principle to the jury.[493] The trial judge stated:

> If the evidence shows that the defendant was intoxicated at the time of the alleged offense, the jury should could his state of intoxication in determining if [the] defendant had such specific intent. If from all the evidence you have a reasonable doubt whether the defendant had or was capable of forming either such specific intents you must give the defendant the benefit of that doubt and find that he did not have such specific intent.[494]

If the jury determined Mr. Milligan was incapable of forming the specific intent to act willfully or deliberately, the jury was legally obligated to acquit Mr. Milligan of first-degree murder under the premeditation/deliberation theory. Likewise, if the jury determined Mr. Milligan was incapable of forming the requisite intent to purposely and knowingly rob Ms. Voinski, it was legally obligated to acquit Mr. Milligan of first-degree murder under the felony-murder theory. Under either situation, Mr. Milligan's intoxication exonerated him of first-degree murder.

DA McDonald's memo supports Mr. Milligan's claim that the blood alcohol evidence was material exculpatory evidence. If the blood alcohol evidence was so insignificant or only potentially useful to the prosecutor or the defendants, DA McDonald would not have made the "it's too late for BAs" comment and would not have directed investigators to immediately memorialize their recollections in an "alcohol influence report." DA McDonald was well aware of the exculpatory value of a high blood alcohol level.

The blood alcohol evidence was material exculpatory evidence.

Significant Role to the Defense: The blood alcohol evidence would have played a substantial role in Mr. Milligan's defense. Trial counsel's sole guilt phase defense was intoxication. Consequently, the blood alcohol evidence would have been the linchpin of Mr. Milligan's intoxication defense.

No Comparable Evidence: Trial counsel's intoxication defense was irreparably damaged because Mr. Milligan's blood alcohol level was never ascertained. There was no other comparable

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[493]NT 1/22/81, at 192-193 (Guilt Phase Instructions #31, #32, #34).

[494]Id. at 193 (Guilt Phase Instruction #34).

evidence which could have scientifically determined Mr. Milligan's level of intoxication.[495] The observations of law enforcement officers are simply too unreliable and lack the persuasive impact of scientific evidence. This is the very reason why prosecutors demand that blood alcohol tests be performed in the "overwhelming majority" of alcohol related cases:

> [I]n the overwhelming majority of cases the prosecutor relies primarily on the chemical test to prove the defendant's BAC. A prosecutor who relied exclusively on field tests would run the risk of the court concluding that the prosecutor had not sustained the initial burden of going forward and directing an acquittal. Even when the prosecutor has escaped a directed verdict, during summation the defense could point to the lack of a "truly scientific" chemical test to prove the defendant's guilt and invite the jury to treat that gap as a source of reasonable doubt. If the jury found that argument plausible, the result could be a not guilt verdict. Thus, despite the availability of nonscientific types of evidence, the prosecutor is under practical pressure to lay a convincing foundation for evidence of a scientific intoxication test.[496]

Deputy Dorries' declaration support Mr. Milligan's claim that there was no comparable evidence: "I was trained that the only way to determine whether someone was legally intoxicated was to administer a breath-test. Without the breath-test, there was no other way to tell if the person was legally drunk or their level of intoxication."[497]

Officer Peterson's declaration support Mr. Milligan's claim that there was no comparable evidence: "I was trained that the only way to determine whether someone was legally intoxicated was to perform a breath-test... There was no equivalent evidence which could be used to establish someone's actual blood alcohol level."[498]

Deputy James declaration support Mr. Milligan's claim that there was no comparable

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[495]The Breathalyzer had a minimal error rate. Moreover, if an error occurred, it typically underestimated the defendant's blood alcohol level. E.g., Gullberg, *An Application of Probability Theory to a Group of Breath-Alcohol and Blood-Alcohol Data*, 35 J. Forensic Sci. 1342, 1351 (1990) (the overestimation of blood alcohol from breath alcohol "is a very unlikely event"): Harding, Laessig & Field, *Field Performance of the Intoxilyzer 5000: A Comparison of Blood- and Breath-Alcohol Results in Wisconsin Drivers*, 35 J. Forensic Sci. 1022, 1027 (1990) ("the Intoxilyzer 5000 is likely to underestimate blood alcohol concentrations in the driving population."); Frankwoort, Mulder & Neuteboom, *The Laboratory Testing of Evidential Breath Testing Machines*, 35 Forensic Sci. Int'l 27 (1987) (although the results in general were good, the researchers observed that the results tended to underestimate actual concentration).

[496]Scientific Evidence, *supra*, at §22-1, at 257.

[497]Ex. 209.

[498]Ex. 201.

evidence: "I was trained that the only way to determine whether someone was legally intoxicated was either to perform a breath-test, blood-draw, or urine test. Without these tests, there was no other way to tell if a person was legally drunk or their level of intoxication."[499]

Mr. Milligan suffered substantial prejudice because he was forced to pursue his intoxication defense on the opinions and observations of law enforcement officers.

The Prosecutor Capitalized on the Lack of Definitive Proof of Intoxication: As mentioned supra, the prosecutor repeatedly capitalized on the fact that Mr. Milligan could not definitively prove, with scientific evidence, his blood alcohol level on July 4, 1980. In particular, trial counsel was forced to rely on Officer Peterson and Deputy Dorries' testimony to prove that Mr. Milligan was so intoxicated he was incapable of forming the requisite specific intent. This testimony, however, was anything but helpful, in that each officer made it quite clear that, while Mr. Milligan may have been a little inebriated, he was fully capable of thinking and acting willfully, purposely, and deliberately on July 4, 1980.

d. **The exculpatory nature of the blood alcohol evidence was apparent to Officer Peterson, Deputy Dorries, and Deputy James**

The exculpatory nature of the blood alcohol evidence was apparent to Officer Peterson on July 4, 1980. At Mr. Milligan's trial, Officer Peterson admitted that when he received police training he learned the difference between specific and general intent crimes, and that intoxication was extremely relevant to a determination of specific intent.[500]

The exculpatory nature of the blood alcohol evidence was apparent to Deputy Dorries on July 4, 1980. When Mr. Milligan's current counsel interviewed Deputy Dorries, he stated: "At POST-training... I... was trained to identify behavior associated with intoxicated and how alcohol affects people's motor functions and their criminal liability. I learned alcohol had exculpatory value because it could be used as a defense in certain offense."[501]

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[499]Ex. 207.

[500]NT 1/145/81, at 157-158; Ex. 201.

[501]Ex. 209.

The exculpatory nature of the blood alcohol evidence was apparent to Deputy James on July 4, 1980. When Mr. Milligan's current counsel interviewed Deputy James, he stated:

> As part of my training and education, I learned that different crimes require different mental states. I knew that certain crimes, like attempted robbery, burglary, or homicide, required evidence what prosecutors called 'specific intent.' I also learned that some crimes are classified as 'general intent' offenses. I knew if someone was intoxicated at the time of the offense, then this could be used by that person to argue that he or she didn't have the necessary intent to commit the offense charged. I was aware of the exculpatory value of intoxication on July 4, 1980.[502]

e. **The uncertainty as to what the blood evidence might have proved was not turned to Mr. Milligan's advantage**

A reasonably competent trial attorney would have requested a guilt phase jury instruction which read in part: "If you find that the State has allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer that the true fact is against the State's interest."

Trial counsel failed to litigate the destruction of evidence issue at all. As such, trial counsel failed to request such a jury instruction during the guilt phase.

Trial counsel did not have a strategic or tactical reason for not requesting such an instruction.

Trial counsel's actions fell below that what is expected of a person representing a criminal defendant facing the death penalty.

Mr. Milligan suffered substantial prejudice because the uncertainty as to what the blood alcohol evidence might have established was not turned to his advantage.

f. **The failure to collect Mr. Milligan's blood alcohol evidence was done in bad faith**

Clearly established state and federal constitutional law does not require Mr. Milligan to prove that Officer Peterson, Deputy Dorries, and Deputy James subjectively intended to foreclose a defense or deliberately deny Mr. Milligan his state and federal constitutional rights when they refused to collect and preserve Mr. Milligan's blood alcohol level. Instead, to prove bad faith, Mr. Milligan need only demonstrate that (a) the exculpatory value of the destroyed or uncollected evidence was apparent to them, and that (b) they failed to adhere to a generally accepted investigate practice which

[502] Ex. 207.

required them to collect and preserve apparently exculpatory blood alcohol evidence.[503]

Mr. Milligan proved these two factors. As a result, he has demonstrated that his clearly established state and federal constitutional rights to due process, equal protection, effective assistance of counsel, a fair trial, an impartial jury, and a reliable sentencing determination were violated.

Mr. Milligan is entitled to relief.

VII. Constitutional Violations–Penalty Phase

A. Ineffective Assistance of Counsel

Mitigation Evidence: Trial counsel had an obligation to fully and adequately investigate all mitigating evidence and theories available. Trial counsel failed to adequately investigate Mr. Milligan's social history. Mr. Milligan's previous counsel's performance fell below that which may be expected of counsel representing a defendant in a death penalty trial. An adequate and complete investigation would have developed evidence that Mr. Milligan suffered from a severe addiction to alcohol. Extensive evidence existed which explained Mr. Milligan's chronic abuse of alcohol from at least the age of eighteen. This illness impacted and inhibited Mr. Milligan's ability to accurately interpret events unfolding around him and to inhibit inappropriate responses. Moreover, under the influence of alcohol, Mr. Milligan's personality was much different than his normal self. Because counsel failed to conduct an adequate and complete investigation, Mr. Milligan's jury was denied an accurate and comprehensive understanding of his moral culpability for the offense. Had the jury been presented this evidence, it is reasonably probable that Mr. Milligan would have received a sentence less than death. Mr. Milligan is entitled to relief.

VIII. Summary

Mr. Milligan's trial was not an adversarial contest as envisioned by the Nevada and Federal Constitutions. Instead, it represented a foregone conclusion–i.e., Mr. Milligan was the assailant who willfully and knowingly killed Ms. Voinski when he repeatedly struck her with a twelve pound

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[503] See Arizona v. Youngblood, 488 U.S. 51, 56, n.* (1988) ("The presence of absence of bad faith by the police... must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.").

sledgehammer. Mr. Milligan's trial was a foregone conclusion because trial counsel performed abysmally; the prosecutor concealed exculpatory and impeachment evidence and presented knowingly false arguments to the jury; and the police failed to collect or destroy potentially exculpatory evidence in bad faith. Individually and collectively, each constitutional violation demands that Mr. Milligan be granted a new trial because they prevented the jury from considering a quantum of evidence which would have easily established reasonable doubt pertaining to Mr. Milligan's culpability.

Trial counsel's advocacy was abysmal. Had trial counsel conducted an adequate and complete guilt phase investigation he would have uncovered substantial evidence which not only discredited Ramon Houston, but also significantly incriminated him. Likewise, trial counsel would have developed evidence which called into question the forensic evidence which allegedly linked Mr. Milligan to Ms. Voinski's death. This evidence would have demonstrated reasonable doubt regarding Mr. Milligan's culpability. Finally, had trial counsel conducted an adequate and complete penalty phase investigation he would have unearthed a wealth of mitigating evidence relating to Mr. Milligan's battle with alcoholism, and how his alcoholism impacted his brain, decision-making, and personality skills. Had this evidence been developed and presented, the jury would have realized that Mr. Milligan's moral culpability warranted a sentence less than death.

The prosecutor's discovery violations and false testimony were disgraceful. His blatant disregard for the rule of law forced trial counsel to rely on a trial strategy which substantially prejudiced Mr. Milligan. Moreover, his shenanigans prevented the jury from hearing exculpatory statements made by Ramon Houston and Katherine Orfield, and from learning about potential blood evidence which incriminated Mr. Houston and exculpated Mr. Milligan. Furthermore, his actions prevented the jury from learning that the police coerced Mr. Houston's testimony, and that Mr. Houston received benefits in exchange for his testimony. Had the jury considered this evidence, it would have acquitted Mr. Milligan because this evidence established reasonable doubt. Finally, his false statements during closing arguments substantially interfered with the jury's assessment of Mr. Houston and Mr. Milligan's culpability, and in effect lowered his burden of proof by suggesting that the presumption of innocence no longer protected Mr. Milligan after he testified during the guilt

phase.

Lastly, the failure to collect and preserve potentially exculpatory evidence effectively prevented Mr. Milligan from presenting evidence which established reasonable doubt.

Either the state should have produced or trial counsel should have discovered and presented all that undersigned counsel has presented here. Trial counsel were ineffective for not doing so. Mr. Milligan's conviction and death sentence cannot be allowed to stand. Mr. Milligan is entitled to relief in the form of a new trial and a new sentencing proceeding.

State direct appeal counsel and state post-conviction counsel were likewise ineffective for failing to raise and litigate the above-referenced meritorious issues on direct appeal or in state post-conviction when Mr. Milligan had a right to effective assistance of counsel. There is no reasonable strategy, designed to effectuate Mr. Milligan's best interests, for the failures of trial direct appeal and post-conviction counsel. Mr. Milligan was prejudiced as a result of counsels' failures and he is entitled to relief. There is reasonable doubt regarding Mr. Milligan's culpability and he is entitled to relief.

CLAIM TWO

Mr. Milligan's death sentence violates his state and federal constitutional guarantees of due process, equal protection, the prohibition against double jeopardy, and a reliable sentencing determination due to the prosecutor's use of the same felony charges both to support his conviction on a felony-murder theory and to support one of the aggravating factors. U.S. Const. Amends. V, VI, VIII, and XIV.

SUPPORTING FACTS

Pre-Trial: Mr. Milligan was arraigned on October 20, 1980 and charged with first-degree murder with a deadly weapon and robbery with a deadly weapon.[504] Notably, under Nev. Rev. Stat. §200.100, the State could secure a first-degree murder conviction if the murder was "[c]ommitted in the perpetration or attempted perpetration of... robbery[.]"[505]

Guilt Phase: During the guilt phase of Mr. Milligan's trial, the State presented two alternative first-degree murder theories: premeditation/deliberation and felony-murder. For instance, during opening statements, the prosecutor stated: An element of murder is "that the act was willful, deliberate and premeditated or committed in the perpetration or attempted perpetration of a robbery... The State will be submitting this case to you on two theories, one is that murder is any willful, deliberate and premeditated act, the requisite intent as you'll be instructed upon, what those terms mean. That's murder just as much as murder committed in the course of a robbery or attempted robbery."[506] The prosecutor reinforced his felony-murder theory when he stated: "She was killed in the course of a robbery."[507]

In effect, the prosecutor argued that the substantive robbery charge was based on the same robbery which was invoked as the basis for the felony-murder theory of first-degree murder. The prosecutor did not suggest there was any basis for the substantive charge of robbery other than the

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[504]NT 10/20/80, at 6-10.

[505] Id. (quoting Nev. Rev. Stat §200.100).

[506]NT 1/13/81, at 55.

[507]Id. at 56.

robbery upon which the felony-murder theory was based.

The trial judge instructed the jurors that under Nev. Rev. Stat. § 200.030 they may find Mr. Milligan guilty of first-degree murder if they determined that the murder was "committed in the perpetration or attempted perpetration of robbery (felony-murder)."[508] The jurors were also instructed that one of the elements of first-degree murder was that the murder "was willful, deliberate and premeditated or committed in the perpetration or attempted perpetration of a robbery."[509] In order to find that the murder was committed during a robbery, the trial judge provided the following instruction: "The murder of a human being which occurs as a result of the commission of or attempt to commit the crime of robbery, and where there was in the mind of the defendant the specific intent to commit the crime of robbery, is murder of the first-degree. The specific intent to commit robbery and the commission or attempt to commit the crime of robbery must be proved beyond a reasonable doubt."[510]

Mr. Milligan was convicted of first-degree murder and robbery by use of a deadly weapon on January 22, 1981.[511] The jury's verdict form did not distinguish between felony-murder and willful, deliberate, and premeditated murder.

Penalty Phase: During closing arguments, the prosecutor argued that the robbery which supported the State's lone aggravator was the same robbery used to enhance the murder to first-degree murder under the felony-murder doctrine:

> The circumstance by which murder of the first degree may be aggravated, as may be applicable to the imposition of a death penalty in this case, and is the only aggravating factor for you to consider is that the murder was committed while the defendant was engaged, or was an accomplice, in the commission of or an attempt to commit, or flight after committing or attempting to commit a robbery.[512]
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[508]NT 1/22/81, at 188 (Instruction #22).

[509]Id. (Instruction #23).

[510]Id.

[511]NT 1/22/81, at 279-280.

[512]NT 1/27/81, at 101;

> the State of Nevada has proved to you by your verdict of guilty that this murder was indeed committed during the course of a robbery or flight after robbery... the State submits that is proof beyond a reasonable doubt by your verdict of guilty of robbery by the use of a deadly weapon last week.[513]

The trial judge instructed the jurors that the "circumstances by which murder of the first degree murder may be aggravated, as may be applicable to the imposition of a death penalty in this case, and is the only aggravating circumstance for you to consider is: That the murder was committed while the Defendant was engaged, or was an accomplice, in the commission of or an attempt to commit, or flight after committing or attempting to commit, any robbery."[514]

The jury sentenced Mr. Milligan to death on January 27, 1981. The jury found only one aggravating circumstance: "That the murder was committed while the Defendant was engaged, or was an accomplice, in the commission of or an attempt to commit, or flight after committing or attempting to commit, any robbery[.]"[515] The jury also found that this aggravating circumstance sufficiently outweighed Mr. Milligan's mitigating evidence.

Direct Appeal: On direct appeal, Mr. Milligan argued that his death sentence violated his state and federal constitutional rights because the underlying robbery felony was not only used to enhance the murder to first-degree murder, it was also used as the sole basis to aggravate Mr. Milligan's punishment from life in prison to death.[516] The Nevada Supreme Court considered the claim, but held it was meritless because it already addressed and dismissed a similar claim in Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).[517]

Overturning Petrocelli: The Nevada Supreme Court adhered to Petrocelli's rationale for nearly two decades.[518] In December 2004, the Nevada Supreme Court reversed course and held that

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[513] Id.

[514] NT 1/27/81, at 94 (Instruction #6).

[515] NT 1/27/81, at 137.

[516] Ex. 301, at 43-46.

[517] See Milligan v. State, 101 Nev. 627, 636, 708 P.2d 289, 295 (1985).

[518] E.g., Atkins v. State, 112 Nev. 1122, 1134, 923 P.2d 1119, 1127 (1996); Miranda v. State, 101 Nev. 562, 707 P.2d 1121 (1985); Farmer v. State, 101 Nev. 419, 705 P.2d 149 (1985).

the State may not use the same underlying felony it used to seek a first-degree murder conviction (under a felony-murder theory) as an aggravator in the penalty phase to seek a death sentence.[519] According to the Nevada Supreme Court, felony-murder aggravators do "not provide sufficient narrowing to satisfy constitutional requirements."[520] Consequently, the Nevada Supreme Court held that "where the State bases a first-degree murder conviction in whole or part on felony murder, to seek a death sentence the State will have to prove an aggravator other than the one based on the felony murder's predicate felony."[521] More importantly, the Court held that if the State failed to rely on a special verdict form, which allowed the jury to indicate whether their first-degree murder conviction was premised on premeditation or felony-murder, the State was prohibited from using "aggravators based on felonies which could support the felony murder."[522]

Mr. Milligan's jury was not provided with a special verdict form. As such, the jury failed to identify whether Mr. Milligan's first-degree murder conviction was premised on premeditation/deliberation or felony-murder.

McConnell Applies Retroactively: The Nevada Supreme Court decided McConnell nearly twenty years after Mr. Milligan's conviction became final in 1985. Despite the fact McConnell was decided so late after the fact, Mr. Milligan is still entitled to penalty phase relief under McConnell due to the Nevada Supreme Court's recent decision in Bejarano v. State, 146 P.3d 265, 2006 Nev. LEXIS 122 (Nov. 16, 2006). In Bejarano, the Nevada Supreme Court held that McConnell's "new rule" must be retroactively applied to cases such as Mr. Milligan's because "the McConnell rule is

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[519]See McConnell v. State, 120 Nev. 1043, 1069, 102 P.3d 606, 625 (2004) ("We... deem it impermissible under the United States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated."); see also Bennett v. Dist. Ct., 121 Nev. 802, 811, 121 P.3d 605, 611 (2005) (stating that McConnell announced "a fundamental departure from death-penalty precedent").

[520]McConnell v. State, 120 Nev. at 1067 ("We conclude that the narrowing capacity of the aggravators is largely theoretical.").

[521]Id. at 1069.

[522]Id.; see also Bejarano v. State, 146 P.3d 265; 2006 Nev. LEXIS 122, at * 27 (Nov. 16, 2006); Bennett v. Dist. Ct., 121 Nev. 802, 808-809, 121 P.3d 605, 611 (2005).

substantive in nature[.]"[523] The Nevada Supreme Court initially noted that McConnell "applies in cases where the defendant was charged with alternative theories of first-degree murder and a special verdict form failed to specify which theory or theories the jury relied upon to convict."[524] The Court went on to identify several facts which led it to conclude that the robbery and receiving-money aggravators used to support Bejarano's death sentence had to be invalidated under McConnell. These facts included:

- Bejarano was charged with first-degree murder with the use of a deadly weapon.
- The information alleged in part that Bejarano "willfully, unlawfully, and with malice aforethought, deliberation, and premeditation, and during the course and commission of a robbery, kill[ed]."
- Bejarano's jury found him guilty of first-degree murder with use of a deadly weapon, but returned only a general verdict form that did not indicate which first-degree murder theory or theories it relied upon to find his guilt.
- The jury subsequently found, as one aggravating circumstance, that Bejarno committed the murder during the commission of a robbery pursuant to Nev. Rev. Stat. §200.033(4).[525]

Despite invalidating two aggravators, the Nevada Supreme Court refused to vacate Bejarano's death sentence because four valid aggravators remained.[526]

On the same day Bejarano was decided, the Nevada Supreme Court also decided Rippo v. State, 146 P.3d 279, 2006 Nev. LEXIS 123 (Nov. 16, 2006). Rippo, like Bejarano, concerned whether McConnell applied retroactively, and if so, whether Rippo's death sentence had to be vacated. As in Bejarano, the Nevada Supreme Court identified several facts which supported its conclusion that three aggravating factors (i.e., robbery, kidnapping, and burglary) had to be

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[523]Id. at *19; see also Schriro v. Summerlin, 542 U.S. 348, 351-352 (2004) (substantive rules include "decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish.").

[524]Bejarano v. State, 2006 Nev. LEXIS 122, at *27.

[525]Id. at *27.

[526]Id. at *34 ("we conclude beyond a reasonable doubt that absent the invalid aggravators the jurors would have still found Bejarano death eligible... [and] would have returned a death sentence.").

invalidated under McConnell. These facts included:

- Prosecutors charge Rippo with two counts of murder for killing the victims "willfully, feloniously, without authority of law... and/or during the course of committing Robbery and/or Kidnapping and/or Burglary."
- Prosecutors presented two first-degree murder theories: the murder was premeditated and deliberate, and the murder was committed during the commission of a felony.
- The jury found Rippo guilty of two counts of first-degree murder and one count each of robbery and unauthorized use of a credit card; the jury's verdict form, however, failed to indicate whether the jury found first-degree murder based on premeditated murder, felony-murder, or both.
- In the penalty phase, the jury found three felony aggravators based on robbery, kidnapping, and burglary–the same felonies which supported the prosecutor's felony-murder theory.[527]

Again, as in Bejarano, the Nevada Supreme Court refused to vacate Rippo's death sentence because, even without the three aggravators, the "bulk of the [State's] case in aggravation... remain[ed] intact" and Rippo's mitigating evidence "was not particularly compelling."[528]

Bejarno and Rippo Dictate that Mr. Milligan's Death Sentence Must be Vacated: McConnell, Bejarano, and Rippo mandate that the lone robbery aggravator which Mr. Milligan's death sentence is premised on must be invalidated. Once invalidated, Mr. Milligan's death sentence must then be vacated and a new non-capital sentencing hearing scheduled to determine whether Mr. Milligan should be sentenced to life in prison with or without the possibility of parole.

The factual circumstances which resulted in the Nevada Supreme Court's decision to invalidate the aggravators in Bejarano and Rippo are present in Mr. Milligan's case. These facts include:

- Mr. Milligan was charged with two different theories of first degree murder: premeditation/deliberation and felony-murder.[529]
- During the guilt phase, the State made repeated references to the fact that the jury could convict Mr. Milligan under either the premeditation theory or

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[527]Rippo v. State, 146 P.3d 279, 2006 Nev. LEXIS 123, at *2-3, 8 (Nov. 16, 2006).

[528]Id. at *10, 11.

[529]NT 10/20/80, at 6-10.

felony-murder theory.[530]

- The jury was instructed it could find Mr. Milligan guilty of first-degree murder if the murder was premeditated or committed during the course of a robbery.[531]
- The jury convicted Mr. Milligan of first-degree murder and robbery with a deadly weapon, but failed to identify which theory Mr. Milligan's first-degree murder conviction was premised on: premeditation or felony-murder.[532]
- During the penalty phase, the State argued to the jury that it had already found Mr. Milligan death-eligible when it found him guilty of robbery (the same robbery the State used in support of its felony-murder theory).[533]
- The jury found only one aggravating factor: the murder was committed during the course of a robbery.[534]

Consequently, under these facts the robbery aggravator must be invalidated.

Moreover, unlike Rippo and Bejarano, Mr. Milligan's death sentence must be vacated once the robbery aggravator is invalidated because, absent the robbery aggravator, there are no other aggravators which could render Mr. Milligan death-eligible. This fact distinguishes Mr. Milligan's case from Rippo and Bejarano, in that in Rippo and Bejarano there were additional aggravators which the jurors could have relied on to find both defendants death-eligible.[535]

Either the state should have produced or trial counsel should have discovered and presented all that undersigned counsel has presented here. Trial counsel were ineffective for not doing so. Mr. Milligan's conviction and death sentence cannot be allowed to stand. Mr. Milligan is entitled to relief in the form of a new trial and a new sentencing proceeding.

State direct appeal counsel and state post-conviction counsel were likewise ineffective for failing to raise and litigate the above-referenced meritorious issues on direct appeal or in state post-

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[530]NT 1/13/81, at 55-56.

[531]NT 1/22/81, at 188 (Guilt Phase Instructions #22, #23).

[532]NT 1/22/81, at 279-280.

[533]NT 1/27/81, at 101.

[534]NT 1/27/81, at 137.

[535] See Bejarano v. State, 2006 Nev. LEXIS 122, at *34; Rippo v. State, 2006 Nev. LEXIS 123, at *9.

conviction when Mr. Milligan had a right to effective assistance of counsel. There is no reasonable strategy, designed to effectuate Mr. Milligan's best interests, for the failures of trial direct appeal and post-conviction counsel. Mr. Milligan was prejudiced as a result of counsels' failures and he is entitled to relief.

CLAIM THREE

Mr. Milligan's conviction and death sentence are invalid under the state and federal constitutional guarantees of due process, equal protection, the effective assistance of counsel, the right to confront adverse witnesses, and a reliable sentence due to the substantial and injurious effect of extensive prosecutorial misconduct and overreaching, which distorted the fact finding process and rendered the sentencing hearing fundamentally unfair. U.S. Const. Amends. V, VIII, & XIV.

SUPPORTING FACTS

I. Closing Arguments–Guilt Phase

During guilt phase closing arguments, the prosecutor made several comments which violated Mr. Milligan's clearly established state and federal constitutional rights.

Vouching for Ramon Houston's Credibility: As noted in Claim One, the prosecutor repeatedly vouched for Mr. Houston's credibility.[536]

Misrepresenting the Facts Regarding Ramon Houston's Immunity: As noted in Claim One, the prosecutor knowingly provided false testimony when he argued that Mr. Houston could be prosecuted for his preliminary hearing testimony.[537]

Misrepresenting the Forensic Evidence: As noted in Claim One, the prosecutor falsely argued that his blood expert positively identified human blood on Mr. Milligan's shoes and pants when in fact he did not.[538]

Misstating the Law Regarding the Presumption of Innocence: As noted in Claim One, the prosecutor improperly argued that Mr. Milligan's presumption of innocence was suspended or entirely removed after he testified on his behalf during the guilt phase.

Improperly Shifting the Burden & Introducing Off-the-Record Evidence: During his rebuttal, the prosecutor made the following argument:

> I think the next subject is the witnesses that have not been called. What the

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[536]NT 1/22/81, at 205, 206, 207, 273, 278.

[537]NT 1/22/81, at 246-247, 273.

[538]NT 1/16/81, at 465 ("I was not able to detect any substance that I could confirm as having been blood.").

> defense attorneys didn't tell you is that they had the same right to call Katherine Orfield as the State did... [Objection sustained]... However, in making a tactical decision they have the opportunity, the mechanism to call witnesses... The fact is that they had the wherewithal to do it. They have asked you the question: Why did not the State call Kathy Orfield? I will return the question. Why didn't they call her?[539]

The prosecutor's comments violated Mr. Milligan's clearly established state and federal constitutional rights and substantially prejudiced him. First, under clearly established state and federal law, the prosecution bears the sole burden of presenting evidence which establishes, beyond a reasonable doubt, each and every element of the offense charged. The burden of proof cannot be shifted to the defendant. The prosecutor's comments impermissibly shifted the burden of proof to Mr. Milligan. The jury was misled to believe that Mr. Milligan had the burden of proving his innocence. Additionally, the prosecutor's comments cannot be reconciled with the guilt phase instructions. The jury was instructed: "State must prove each and every necessary element of the crime which the defendant is charged, and proof of each such element must be to your satisfaction beyond a reasonable doubt."[540] Under these circumstances, it is reasonably likely the jury shifted the burden of proof to Mr. Milligan.

Mr. Milligan is entitled to relief.

Second, under clearly established state and federal law, jurors may not consider, and the prosecutor may not premise his arguments on, evidence not introduced at trial. The prosecutor's comments violated this clearly established constitutional principle, and substantially prejudiced Mr. Milligan because the comments plainly suggested there was additional, off-the-record evidence which incriminated Mr. Milligan. The jury was led to believe that Mr. Milligan purposely chose not to call Ms. Orfield to the stand because she would have implicated Mr. Milligan in Ms. Voinski's murder. Not only were the prosecutor's comments impermissible, because they introduced off-the-record evidence, they were false because Ms. Orfield never implicated Mr. Milligan, but instead fingered Mr. Houston as the person who struck Ms. Voinski with the sledgehammer.[541] Regardless

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[539]NT 1/22/81, at 268.

[540]NT 1/22/81, at 184 (Guilt Phase Instruction #12).

[541]See Claim One.

of whether the constitutional violation was introduction of off-the-record evidence or false testimony, both violations skewed the jury's assessment of Mr. Milligan and Mr. Houston's culpability.

Mr. Milligan is entitled to relief.

Introducing Off-the-Record Evidence, False Evidence, & Bruton Violation: During closing arguments, the prosecutor argued: "if [Ramon Houston] was lying, wouldn't the investigation and the other people giving the statements be consistent with each other and inconsistent with his?"[542]

The prosecutor's comment violated Mr. Milligan's clearly established state and federal constitutional rights and substantially prejudiced him.

First, under clearly established state and federal law, the jury may not consider, and the prosecutor may not premise his arguments on, evidence which was not introduced at trial. The prosecutor's comments violated this clearly established constitutional principle because it plainly suggested to the jury that Mr. Milligan's co-defendants made similar statements as Mr. Houston, which incriminated Mr. Milligan. This substantially prejudiced Mr. Milligan because it impermissibly bolstered Mr. Houston's credibility in one instance, while it aggravated Mr. Milligan's culpability in another. It is reasonable likely that the jury relied on this off-the-record evidence to convict and sentence Mr. Milligan to death.

Mr. Milligan is entitled to relief.

Second, under clearly established state and federal law, the prosecutor may not knowingly present false or misleading testimony. If false or misleading testimony is introduced, the prosecutor has a duty to rectify the damage caused by the false and misleading testimony. The prosecutor's comment was false because it created the misleading impression that all of Mr. Milligan's co-defendants made pre-trial statements which implicated Mr. Milligan and supported Mr. Houston's testimony. The only co-defendant who implicated Mr. Milligan was Terry Bonnette.[543] Neither Paris

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[542]NT 1/22/81, at 275.

[543]Ex. 141.

Hale nor Katherine Orfield implicated Mr. Milligan. More importantly, within two weeks of her arrest, Ms. Orfield gave a voluntary statement to the trial judge's courtroom deputy, Lyle Mattice, that Mr. Houston was the person who struck Ms. Voinski with the sledgehammer.[544] This information was corroborated by Ms. Orfield's statements made to a fellow Humboldt County Jail inmate, Terri Hood,[545] and in a letter she mailed home from the jail.[546] At both of her trials, Ms. Orfield implicated Mr. Houston as the person who struck Ms. Voinski with the sledgehammer.[547]

The prosecutor never rectified the damage caused by his false testimony. As a result, it is reasonably likely the jury relied on the prosecutor's false testimony during its deliberations.

Mr. Milligan is entitled to relief.

Third, under clearly established state and federal law, the prosecutor may not directly or indirectly introduce a non-testifying co-defendant's confession which implicates the co-defendant on trial. The prosecutor's comments did exactly this, at least with respect to Terry Bonnette's statements incriminating Mr. Milligan. The prosecutor's comments indirectly suggested to the jury that at least one of Mr. Milligan's co-defendants (i.e., Terry Bonnette) provided pre-trial statements which supported Mr. Houston's testimony. If the co-defendant's statements supported Mr. Houston's testimony, it too must have implicated Mr. Milligan in Ms. Voinski's death.

Mr. Milligan was substantially prejudiced by the prosecutor's comment because he was not afforded an opportunity to cross-examine Terry Bonnette because Mr. Bonnette exercised his Fifth Amendment right not to testify and to remain silent. Without the opportunity to cross-examine, Mr. Milligan was unable to undermine or rebut Mr. Bonnette's statement in front of the jury.

Mr. Milligan is entitled to relief.

II. Closing Arguments–Penalty Phase

Improperly Pressuring the Jury to Vote for Death: The prosecutor improperly pressured

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[544]Ex. 128.

[545]Ex. 129.

[546]Ex. 127.

[547]NT, Hale/Orfield, 8/25/82, at 553-554; NT, Orfield, 11/17/86, at 1260-1261.

the jury to vote for death when he argued:

> If you go back into the deliberation chambers and you find the aggravating circumstances and you find that it outweighs the mitigating circumstances all beyond a reasonable doubt and then you say I can't do it, you are not being fair then. You are not being fair to the State and the State deserves just as much fairness in your deliberation as the defendant does.[548]
> ...
>
> Ladies and gentlemen, if you find [the aggravators outweigh the mitigators], the State contends that you are duty bound to impose the sentence of death...
>
> Ladies and gentlemen, your duty, as the State sees it, is to determine that, and if you so find that the aggravating circumstances outweighs the mitigating circumstances, it is your duty to impose the death penalty... .[549]
> ...
>
> [Y]our duty would be violated if you did not return a death verdict if you found the aggravating circumstances outweighed the mitigating circumstances.[550]
> ...
>
> Now, as the instruction given, it's not mandatory that you return a death verdict. The State suggests if you find the aggravating circumstances outweigh the mitigating circumstances, then that's it. As the legislature enacted, it is your duty to impose the death verdict.[551]

The prosecutor's comments created a mandatory death penalty scheme because if the jurors determined that the aggravators outweighed the mitigators they must impose death; if they do not impose death they violate their oaths. Thus, in order to uphold their oaths, jurors must automatically vote for death whenever the aggravators outweigh the mitigating circumstances. The prosecutor's argument violated the clearly established state and federal constitutional principle which holds that mandatory death penalty schemes are per se unconstitutional.

The prosecutor's arguments violated the clearly established constitutional principle of individualized sentencing because there is a reasonable likelihood that the jurors interpreted the prosecutor's arguments to preclude the consideration of mercy whenever the aggravators outweigh the mitigators. Under clearly established state and federal constitutional law, mercy is a

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[548]NT 1/27/81, at 99.

[549]Id. at 108.

[550]Id. at 129.

[551]Id. at 130.

constitutionally relevant mitigating circumstance which jurors may premise a sentence less than death on.

Mr. Milligan is entitled to relief.

Misstating the Mitigation Case Law: Prior to its penalty phase deliberations, the jury was instructed that "[m]urder in the first degree may be mitigated" if the "murder was committed while the defendant was under the influence of extreme mental or emotional disturbances."[552] During his closing penalty phase argument, the prosecutor argued:

> The second [mitigating] issue, the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> Ladies and gentlemen, I'm sure Mr. Perkins will address that issue and I'll not try to tell you what he's going to say, but I submit to you on behalf of the State of Nevada that that goes to the issue of insanity. There is no insanity in this case. There is intoxication, yes, but not insanity.
>
> The State asks you to strike that portion from your mind because it is not a mitigating circumstance.
>
> The defendant at the time of the commission of this act was of sound mind. He was not insane. That's what the second mitigating circumstance goes to.[553]

The prosecutor's comments were improper because under clearly established state and federal constitutional law, a capital defendant's voluntary intoxication was considered mitigating evidence, and a capital jury could not be prohibited from considering this evidence for a sentence less than death.

The prosecutor's comments substantially prejudiced Mr. Milligan because a reasonable likelihood exists the jurors interpreted the prosecutor's comments to preclude the consideration of constitutionally relevant and permissible mitigation evidence.[554]

Mr. Milligan is entitled to relief.

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[552]NT 1/27/81, at 94 (Penalty Phase Instruction # 6).

[553]NT 1/27/88, at 102-103.

[554]Moreover, the prosecutor's comments were not only improper but also illogical, in that if Mr. Milligan was declared insane, there would have been no need to conduct a penalty hearing because Mr. Milligan could not have possessed the requisite level culpability to be convicted of first-degree murder.

Misstating the Mitigation Evidence Law: Mr. Milligan testified that he had no recollection of the events which resulted in Ms. Voinski's death because he suffered an alcoholic blackout. NT 1/16/81, at 533-564; NT 1/20/81, at 1-17. When he testified, Mr. Milligan professed remorse for Ms. Voinski's attack, even though he had no recollection of the attack. Id.

During closing arguments, the prosecutor argued:

> ... I submit that the only way the defendant could feel remorseful is if he truly remembers doing the act.
>
> If he doesn't, he's only being told what he did. In order to really feel an acute reaction to remorse, you have to remember what you did.
>
> You have to remember how horrible it was, almost so horrible you don't want to remember.
>
> Ladies and gentlemen that's true remorse. That's not what we have here.
>
> Assuming the defendant is telling the truth about his not remembering, then he cannot have true remorse. If he does have true remorse, then he lied to you on the stand when he said he doesn't remember.[555]

The prosecutor's comments violated Mr. Milligan's clearly established state and federal constitutional rights. At the time of Mr. Milligan's trial, it was clearly established that a capital defendant's remorse was a relevant and permissible mitigating circumstance. Moreover, there was no requirement which mandated that, in order to give mitigating value to a capital defendant's remorse, the capital defendant must prove to the jury he remembers performing the lethal act.

The prosecutor's comments substantially prejudiced Mr. Milligan because a reasonable likelihood exists that the jurors interpreted the prosecutor's comments to preclude the consideration of Mr. Milligan's remorse because he could not remember the events which resulted in Ms. Voinski's death.

Mr. Milligan is entitled to relief.

Misstating the Mitigation Evidence Law: The prosecutor argued that voluntary intoxication was not a mitigation circumstance because it did not excuse his behavior:

> The other [mitigating circumstance... is intoxication.
> The State feels that you've already addressed that, you deliberated on it. You've decided that the defendant either was not intoxicated

[555]NT 1/27/81, at 105.

> period or was not intoxicated to such a degree that he could not form the intent to do the act of which he did and that which he was convicted of.
>
> Ladies and gentlemen, if that's the case, you've convicted him of that. Neither of those propositions in the State's mind is a mitigating circumstance. Even if he was intoxicated, that's no excuse for the crime...
>
> The defendant knew what he was doing at the time of the commission of the act and the defendant should suffer full well the consequences.
>
> We submit that's not a mitigating circumstance.[556]

The prosecutor's comments were improper because the jury was misled to believe that in order for evidence to have mitigating value it must excuse the defendant's behavior. The prosecutor's comments violated clearly established state and federal constitutional law, which, at the time, held that a jury could give mitigating value to any factor which "tend[ed] to lessen or otherwise explain the defendant's conduct."[557] Likewise, a circumstance could be mitigating if the jury believed that the circumstance called for a sentence less than death.[558]

It was clearly established by the time Mr. Milligan was tried, that intoxication was a circumstance which "tended to lessen or otherwise explain" a capital defendant's conduct or a circumstance which called for a sentence less than death.

The prosecutor's comments substantially prejudiced Mr. Milligan because a reasonable likelihood exists that the jurors interpreted the prosecutor's comments to preclude the consideration of constitutionally relevant and permissible mitigating evidence, despite being otherwise instructed.[559]

Mr. Milligan is entitled to relief.

Arguing that Jurors Should Show Mr. Milligan the Same Mercy He Showed Ms. Voinski: The prosecutor argued that the jury should show Mr. Milligan the same mercy Mr. Milligan

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[556]NT 1/27/81, at 106.

[557]NT 1/27/81, at 95 (Penalty Phase Instruction #8).

[558]Id. ("a mitigating circumstance may be a fact or circumstance about the defendant which would cause you to believe that a less severe punishment might be appropriate") (Penalty Phase Instruction #8).

[559]NT 1/27/81, at 106.

showed Ms. Voinski: "The only thing I can offer as the representative of the State is: Did the defendant give any mercy to Zalihon Voinski when he struck her on the head with a twelve pound sledge hammer? He did not, and because he didn't, you should show no mercy to the defendant as well."[560]

The prosecutor's comment violated clearly established state and federal constitutional law which prohibited prosecutors from suggesting that jurors should show the defendant the same mercy he showed the victim. In particular, the prosecutor's comments violated the clearly established principle of individualized sentencing which is premised on a morally reasoned decision. Exhorting the jurors to act in the same way as the perpetrator of a murder is the antithesis of a "moral reasoned response" to the defendant and his crime.

The prosecutor's comments substantially prejudiced Mr. Milligan.

Mr. Milligan is entitled to relief.

Basing Argument on Speculation Rather than Evidence: During Mr. Milligan's penalty hearing, Mr. Milligan's mother, Naomi Friedman, testified.[561] Ms. Friedman never testified that she wanted Mr. Milligan to die for his crime.

The prosecutor argued:

> Ladies and gentlemen, I also feel that in response to my last question, any mother would not want to have her son die, any father... would not, but at the same time if a mother lost her son to a violent crime, the State believes that that mother would want that person who killed her son to die. That's human nature. The defendant's mother was certainly candid with us when she told us about how she felt, but I submit to you... that her emotions at this point in time have clouded her judgment.[562]

The prosecutor's comments were improper. At the time of Mr. Milligan's trial, clearly established state and federal constitutional law prohibited prosecutors from premising their closing arguments on speculation. Instead, a prosecutor's closing arguments could only be premised on the evidence introduced at trial. The prosecutor's comments violated this clearly established principle

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[560]NT 1/27/81, at 106.

[561]NT 1/27/81, at 55-61.

[562]NT 1/27/81, at 107.

because they were based entirely on conjecture and speculation. There was no evidence whatsoever introduced during the penalty phase which suggested that Ms. Friedman wanted her son to die because he was convicted of killing Ms. Voinski. To the contrary, Ms. Friedman wanted the exact opposite.[563]

The prosecutor's comments substantially prejudiced Mr. Milligan because the jury was misled to believe that Mr. Milligan's own mother wanted him to die for his crimes.

Mr. Milligan is entitled to relief.

Jury May Not Consider Sympathy: The prosecutor argued that a sentence less than death may not be premised on sympathy.[564] The prosecutor's comments were improper and substantially prejudiced Mr. Milligan.

At the time of Mr. Milligan's trial, it was clearly established, under state and federal constitutional law, that a jury may not be precluded from considering evidence relating to Mr. Milligan's character and background. Forbidding the jury to take sympathy into account, precluded the jury from considering Mr. Milligan's character and background, and effectively negated the constitutional mandate that all mitigating evidence be considered during deliberation, and denied Mr. Milligan the individualized sentencing determination which was required under clearly established state and federal constitutional law. Prosecutorial arguments which attempt to remove emotion from capital sentencing, such as the prosecutor's anti-sympathy comments in this case, mislead juries into believing that mitigating evidence about a defendant's background or character must be ignored. Mitigating evidence regarding background or character is not limited to evidence of guilt or innocence, nor does it necessarily go to the circumstances of the offense. Rather, it can include an individualized appeal for compassion, understanding, and mercy as the defendant's personality is developed, and the jury is given an opportunity to understand and to relate to him as a human being.

A capital defendant's constitutional right to present and have the jury consider mitigating evidence during the penalty phase is very broad. The jury must be permitted to consider as a

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[563]NT 1/27/81, at 55-61.

[564]NT 1/27/81, at 129.

mitigating factor any aspect of a defendant's character and any of the circumstances of the offense which the defendant proffers as a basis for a sentence less than death. Moreover, the sentencer must give individualized consideration to the mitigating circumstances surrounding a defendant and the crime, and may not be precluded from considering any relevant mitigating evidence.

The all-inclusive anti-sympathy argument made by the prosecutor in Mr. Milligan's case, carries with it the danger of leading the jury to ignore sympathy based on the mitigating evidence. The prosecutor's argument did not preclude the jury's consideration of "mere sympathy" (that is, sympathy totally divorced from the evidence adduced during sentencing), but precluded consideration of all sympathy, including any sympathy warranted by the evidence. Because the jury was mistakenly told not to consider any sympathy, rather than "mere sympathy," it is reasonably likely that the jury construed the prosecutor's argument to forbid consideration of any evidence which evoked a sympathetic response when making a moral judgment about Mr. Milligan's moral culpability. As a result, the prosecutor's comments precluded the jury's consideration of the entirety of Mr. Milligan's penalty phase evidence.

Mr. Milligan is entitled to relief.

Summary

The prosecutor repeatedly made impermissible and inflammatory comments during the guilt and penalty phase closing arguments.

The prosecutor's comments violated several of Mr. Milligan's clearly established federal constitutional rights. Specifically, these comments:

a. Impermissibly vouched for Ramon Houston's credibility;

b. Misstated critical facts as to misleadingly aggravate Mr. Milligan's culpability;

c. Misstated critical facts to misleadingly inflate Ramon Houston's credibility;

d. Improperly shifted the burden of proof to Mr. Milligan;

e. Improperly minimized or removed Mr. Milligan's constitutional right to be presumed innocent;

f. Unfairly minimized the State's burden of proof;

g. Introduced highly prejudicial, off-the-record evidence;

h. Introduced highly prejudicial false evidence which affected the jury's assessment of Mr. Houston's credibility and Mr. Milligan's culpability;

i. Improperly pressured the jury to vote for death;

j. Prevented the jury from considering constitutionally relevant and permissible mitigating evidence.

Either the state should have produced or trial counsel should have discovered and presented all that undersigned counsel has presented here. Trial counsel were ineffective for not doing so. Mr. Milligan's conviction and death sentence cannot be allowed to stand. Mr. Milligan is entitled to relief in the form of a new trial and a new sentencing proceeding.

State direct appeal counsel and state post-conviction counsel were likewise ineffective for failing to raise and litigate the above-referenced meritorious issues on direct appeal or in state post-conviction when Mr. Milligan had a right to effective assistance of counsel. There is no reasonable strategy, designed to effectuate Mr. Milligan's best interests, for the failures of trial direct appeal and post-conviction counsel. Mr. Milligan was prejudiced as a result of counsels' failures and he is entitled to relief.

CLAIM FOUR

Mr. Milligan's conviction and death sentence violate the state and federal constitutional guarantees of due process, equal protection, trial by jury, trial before an impartial jury, and a reliable sentence because the trial judge failed to properly instruct the jury. U.S. Const. Amends. V, VI, VIII, & XIV.

SUPPORTING FACTS

I. Guilt Phase Jury Instructions

Mr. Milligan's conviction is unconstitutional because it is premised on infirm jury instructions.

Reasonable Doubt Instruction: The trial judge instructed the jury on reasonable doubt:

> 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 jury, 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 about must be actual and substantial, not mere possibility or speculation.[565]

There are two defects in this instruction which inflated the constitutional standard of doubt necessary for acquittal. The second sentence provided that reasonable doubt "is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life." This language was an inappropriate characterization of the degree of certainty required to find proof beyond a reasonable doubt, rather than an explanation of reasonable doubt itself. This language was also an historical anomaly; as far as can be discerned, no other state currently uses this language in its reasonable doubt instruction, and the few states which previously used it have since disapproved it.

The final sentence of the trial judge's instruction was also constitutionally infirm. The trial judge instructed that for "[d]oubt to be reasonable" it "must be actual and substantial, not mere possibility or speculation."[566] This language, particularly the word "substantial," was similar to

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[565]NT 1/22/81, at 184-185. [Inst. 13].

[566]Id. at 25 (emphasis added).

language condemned by the United States Supreme Court,[567] and when read in conjunction with the "govern or control" language, created a reasonable likelihood that the jury would convict based on a lesser degree of proof than the Constitution required. This sentence elevated the threshold of reasonable doubt, making reasonable doubt unconstitutionally difficult to recognize while making lack of reasonable doubt more attainable.

The characterization of the proof standard as an "abiding conviction of the truth of the charge" did not cure the defects in this instruction. That statement was not linked to any proper definition of the reasonable doubt standard. Moreover, the language which immediately preceded this statement suggested a standard of proof that was impermissibly low.

The prosecutor's comments regarding reasonable doubt aggravated the error.[568]

Mr. Milligan was substantially prejudiced by this improper instruction because it effectively lowered the prosecution's burden of proof.

Mr. Milligan is entitled to relief.

Premeditation and Deliberation Instruction: Nevada law provides that first-degree murder can be established by a "premeditation and deliberation" theory. Nev. Rev. Stat. §200.030(1). The jury was instructed:

> The unlawful killing must be accompanied with a deliberate and clear intent to take life in order to constitute murder of the first degree. The intent to kill must be the result of deliberation and premeditation. It must be formed upon a pre-existing reflection, and not upon a sudden heat of passion sufficient to preclude the idea of deliberation. There need be no appreciable space of time between the intention to kill and the act of killing; they may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation on the part of the slayer and, if such is the case, the killing is murder in the first degree, no matter how rapidly these acts of the mind may succeed each other, or how quickly they may be followed by the act of killing.[569]

The concept of "instantaneous premeditation" rendered the instruction unconstitutional.

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[567] E.g., Francis v. Franklin, 471 U.S. 307 (1985); Sandstrom v. Montana, 442 U.S. 510 (1979); Yates v. Aiken, 484 U.S. 211 (1988), Cage v. Louisiana, 498 U.S. 39 (1990); Sullivan v. Louisiana, 508 U.S. 275 (1993)

[568] NT 1/27/81, at 201-224, 268-279.

[569] NT 1/22/81, at 190 [Instr. 24].

Such an instruction created a reasonable likelihood that the jury would convict and sentence on a first-degree murder charge without any rational basis for distinguishing between first and second degree murder because the "instantaneous" definition is indistinguishable from the express malice aforethought doctrine in second-degree murder cases. See infra. The absence of a rational distinction gives rise to an equal protection claim because it prevents evenhanded and consistent application of either the first or second degree murder statutes. The inability to adequately distinguish between first and second degree murder also rendered the instruction unconstitutional under clearly established state and federal law because the instruction failed to narrow the class of defendant's eligible for the death penalty.

The "premeditation and deliberation" instruction is unconstitutionally vague. Not only does it not require any sort of premeditation, its vagueness allowed prosecutors unlimited discretion to charge a defendant with first-degree murder. Furthermore, the instruction failed to adequately instruct the jury on how to accurately assess the culpability issue and it made defense against the first-degree charges virtually impossible because trial counsel had no way of discerning what the State was required to prove to establish"premeditation and deliberation."

Mr Milligan was substantially prejudiced by this jury instruction because it relieved the State of its burden of proving each essential element of first-degree murder beyond a reasonable doubt.

Mr. Milligan is entitled to relief.

Malice Aforethought Instruction: "Malice aforethought" is an essential element of second-degree murder under Nevada law. Nev. Rev. Stat. §200.020 (2). Pursuant to Nev. Rev. Stat. §200.020 (2),the jury was provided the following "malice aforethought" instruction:

> Malice aforethought, as used in the definition of murder, means the intentional doing of a wrongful act without legal cause or excuse or what the law considers adequate provocation.
>
> ....
>
> Express malice is that deliberate intention unlawfully to take away the life of a creature, which is manifested by external circumstances capable of proof.
>
> Implied malice is when no considerable provocation appears, or when all

the circumstances of the killing show an abandoned or malignant heart.[570]

This instruction violated clearly established state and federal law and substantially prejudiced Mr. Milligan.

The instruction's "implied malice" component relieved the State of its burden to prove each and every element of second-degree murder beyond a reasonable doubt, subverted the presumption of innocence, and invaded the jury's fact-finding province. The "implied malice" component created a mandatory presumption that malice shall be implied both in the absence of provocation and when the circumstances of the killing demonstrate an "abandoned or malignant heart." This explicit and unqualified command foreclosed an independent jury consideration of whether the facts established "malice aforethought"– which is an essential element of second-degree murder.

This instruction is also unconstitutional because it created a reasonable likelihood that the jury would convict and sentence on a first-degree murder charge without any rational basis for distinguishing between first-degree and second-degree murder because the "instantaneous" definition is indistinguishable from the express malice aforethought doctrine in second-degree murder cases. The absence of a rational distinction gives rise to an equal protection claim because it prevents evenhanded and consistent application of either the first-degree or second-degree murder statutes. The inability to adequately distinguish between first-degree or second-degree murder also rendered the instruction unconstitutional because it failed to narrow the class of death-eligible defendants.

The instruction is unconstitutionally vague because it failed to identify the "basic facts" from which malice shall be implied. This in turn prevented Mr. Milligan from adequately identifying and arguing to the jury those facts which would support a second-degree rather than first-degree murder conviction.

Mr. Milligan is entitled to relief.

II. <u>Penalty Phase Jury Instructions</u>

Mr. Milligan's death sentence is unconstitutional because it is premised on several faulty jury instructions which rendered his death sentence inherently unreliable.

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[570]NT 1/27/81, at 191-192 [Instr. 27].

Failure to Instruct on Elements of the Felony Offense Used as an Aggravating Factor: During Mr. Milligan's sentencing hearing, the trial judge instructed the jury on the one aggravating factor alleged by the prosecutor: "That the murder was committed while the Defendant was engaged, or was an accomplice, in the commission of or an attempt to commit, or flight after committing or attempting to commit, any robbery."[571].

The trial judge's failure to instruct on the elements of robbery resulted in no adequate finding by the jury of those elements and amounted to a directed verdict of guilt on the elements of this aggravating factor. Such a finding could only be based on the guilt phase conviction as to the underlying robbery felony, without proof of any nexus between the commission of the robbery and the commission of the homicide, and without any proof of the personal commission of the homicide or other mental state required by Nev. Rev. Stat. § 200.033(4)(a) & (b).

The prosecutor exacerbated the trial judge's failure to instruct on the elements of robbery by arguing that, by their guilt phase verdict, the jury had already found the robbery aggravating.[572]

The trial judge's failure to instruct the jury on the elements of the felony aggravating circumstance is per se prejudicial. Nevada is a weighing state, in which each aggravating factor adds a separate weight in the jury's calculus leading to a determination of death-eligibility and to the ultimate sentence. The State cannot show beyond a reasonable doubt that the consideration of the unconstitutional findings of the aggravating factors did not affect the sentencing verdict.

Mr. Milligan is entitled to relief.

Anti-Sympathy Instruction: The trial judge instructed the jury not to consider sympathy: "In deciding this case, you must not be swayed by any sentiment, sympathy, passion, or prejudice for or against the defendant, or by any guesswork as to the facts."[573]

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[571]NT 1/27/81, at 94 [Instr. 6]

[572]NT 1/27/81, at 101 ("the State of Nevada has proved to you by your verdict of guilty that this murder was indeed committed during the course of a robbery or flight after robbery... the State submits that is proof beyond a reasonable doubt by your verdict of guilty of robbery by use of a deadly weapon last week.").

[573]NT 1/27/81, at 91.

The trial judge's instruction violated clearly established state and federal constitutional law and substantially prejudiced Mr. Milligan.

Forbidding the jury to take sympathy into account precluded the jury from considering evidence relating to Mr. Milligan's character and background, and effectively negated the constitutional mandate that all mitigating evidence be considered during deliberations, and denied Mr. Milligan the individualized sentencing determination that the Constitution required. Instructions which attempt to remove emotion from capital sentencing, such as the anti-sympathy instruction in this case, mislead juries into believing that mitigating evidence about a defendant's background or character must be ignored. Mitigating evidence regarding background or character is not limited to evidence of guilt or innocence, nor does it necessarily go to the circumstances of the offense. Rather, it can include an individualized appeal for compassion, understanding, and mercy as the personality of the defendant is developed and the jury is given an opportunity to understand and to relate to him as a human being.

A capital defendant's constitutional right to present and have the jury consider mitigating evidence during the penalty phase is very broad. The jury must be permitted to consider as a mitigating factor any aspect of a defendant's character and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Moreover, the sentencer must give individualized consideration to the mitigating circumstances surrounding a defendant and the crime, and may not be precluded from considering any relevant mitigating evidence.

The all-inclusive anti-sympathy instruction used in Mr. Milligan's case carries with it the danger of leading the jury to ignore sympathy based on the mitigating evidence. The instruction did not properly preclude the jury's consideration of "mere sympathy" (that is, sympathy totally divorced from the evidence adduced during sentencing), but precluded consideration of <u>all sympathy</u>, including any sympathy warranted by the evidence. Because the jury in this case was told not to consider any sympathy, rather than "mere" sympathy, it is reasonably likely the jury understood that it was forbidden to consider any evidence which evoked a sympathetic response when making a moral judgment about Mr. Milligan's culpability. Thus, the erroneous instruction precluded the jury's consideration of the entirety of Mr. Milligan's penalty phase evidence.

The anti-sympathy instruction substantially and injuriously affected the process to such an extent as to render Mr. Milligan's death sentence inherently unreliable and unconstitutional. The State cannot show, beyond a reasonable doubt, that this instruction did not affect the jury's sentencing determination.

Mr. Milligan is entitled to relief.

Failure to Instruct that Mitigating Factors Must be Considered and Not Unanimously Found: The trial judge instructed the jury:

> Murder of the first degree may be mitigated by any of the following circumstances, even where the circumstance may not be sufficient to constitute a defense or reduce the degree of the crime:
>
> (a) The defendant has no significant history or prior criminal activity;
>
> (b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;
>
> (c) The defendant acted under duress or under the domination of another person;
>
> (d) The youth of the defendant at the time of the crime;
>
> (e) any other mitigating factors.[574]

The trial judge also instructed the jury that mitigating circumstances are those facts or circumstances "which tends to lessen or otherwise explain the defendant's conduct, or a mitigating circumstance may be a fact or circumstance about the defendant which would cause you to believe that a less severe punishment might be appropriate." NT 1/27/81, at 95 [Instr. 8].

The trial judge also informed the jury:

> The mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that <u>you may take into account</u> as reasons for deciding not to impose the death sentence upon the defendant. You <u>should</u> pay careful attention to each of these factors. Any one of them may be sufficient, standing alone, to support a decision that death is not the appropriate punishment in this case. But, you should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstances as reasons for not imposing the death

[574]NT 1/27/81, at 94-95 [Instr. 6].

sentence.[575]

The trial judge's instructions violated clearly established state and federal constitutional law and substantially prejudiced Mr. Milligan because they failed to inform the jury it must consider Mr. Milligan's mitigating evidence. At the time of Mr. Milligan's trial, it was clearly established, under state and federal law, that the jury must consider a capital defendant's mitigating evidence and that they be given a proper vehicle to consider this evidence. The use of the phrases "you may take into account" or "you should pay careful attention to each of these factors," left the juror with the mistaken impression they were not absolutely required to consider Mr. Milligan's mitigating evidence. Consequently, it is reasonably likely the jurors did not fully consider Mr. Milligan's mitigating evidence during their penalty phase deliberation. The jury's failure to fully consider Mr. Milligan's evidence violated his clearly established state and federal constitutional rights.

Mr. Milligan is entitled to relief.

The trial judge's instruction also failed to inform the jury that any mitigating circumstance could be considered by an individual juror in making his or her own determination as to the appropriate penalty, regardless of what the other jurors thought about the existence of that circumstance. The instructions failed to convey that each juror is individually permitted to consider and give effect to mitigating evidence when deciding whether to impose a sentence of life or death.

The prosecutor aggravated this defect when he repeatedly referred to the jury, as a whole, as having to determine whether a mitigator actually existed:

> If you go back into the deliberation chambers and you find the aggravating circumstances and you find that it outweighs the mitigating circumstances all beyond a reasonable doubt and then you say I can't do it, you are not being fair then.[576]
>
> ...
>
> You can't take into consideration whether or not that would be changed. That's not for you to take into consideration at this point.[577]

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[575]NT 1/27/81, at 94-95 [Instr. 9] (emphasis added).

[576]NT 1/27/81, at 99 (emphasis added).

[577]Id. at 100 (emphasis added).

_____...

> Ladies and gentlemen, if you find [the aggravators outweigh the mitigators], the State contends that you are duty bound to impose the sentence of death.[578]

The trial judge's instructions violated clearly established state and federal constitutional law,[579] as a reasonable juror would have understood the instructions required the jury as a whole to unanimously find mitigating factors. Reasonable jurors would have believed they were precluded from considering mitigating evidence unless all 12 jurors agreed on the existence of the circumstance. The jury would have reasonably thought itself required to reject one or more mitigating circumstances, even if 11 jurors found a particular circumstance existed. Thus, one holdout juror could prohibit a finding of any mitigating circumstances, and guarantee a death sentence, if the jurors agreed to even one aggravating factor.

The record supports Mr. Milligan's claim. The jury failed to find a single mitigating circumstance.[580] Moreover, the jury refused to find Mr. Milligan's insignificant criminal history as a mitigating factor, even though the prosecutor described Mr. Milligan's two misdemeanor convictions as insignificant.[581] Likewise, the jury failed to give mitigating value to Mr. Milligan's intoxicated state of mind, despite Mr. Milligan and Mr. Houston's testimony which clearly proved Mr. Milligan was intoxicated when Ms. Voinski was attacked.

By failing to convey the lack of unanimity requirement as to mitigating circumstances, and the absence of a state law requirement of meeting a burden of proof as to their existence, the instructions, taken as a whole, impermissibly limited the jurors' consideration of Mr. Milligan's mitigating circumstances in violation of clearly established state and federal constitutional law.

Permitting the possibility that a single juror could block consideration of a mitigating factor

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[578] Id. at 108 (emphasis added).

[579] E.g., Mills v. Maryland, 486 U.S. 367 (1988); McKoy v. North Carolina, 494 U.S. 433 (1990),

[580] NT 1/27/81, at 137.

[581] NT 1/27/81, at 102.

and consequently require the jury to impose a death sentence, established a capital sentencing scheme which permitted the death sentence to be wantonly and freakishly imposed. Such a "freakish" scheme violated Mr. Milligan's clearly established state and federal rights to a reliable sentencing determination and fundamental fairness.

The trial judge's failure to guide the jury's sentencing determination through instructions as to the lack of unanimity requirement for mitigating circumstances substantially and injuriously affected the process to such an extent as to render Mr. Milligan's death sentence inherently unreliable.

Mr. Milligan is entitled to relief.

Reasonable Doubt Instruction: The jury was instructed:

> 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 jury, 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 about must be actual and substantial, not mere possibility or speculation.[582]

The trial judge's instruction is unconstitutional and substantially prejudiced Mr. Milligan.

Trial judge's definition inflated the constitutional standard of doubt necessary for acquittal, and the use of this definition improperly infected Mr. Milligan's sentencing hearing. There are two defects in this instruction. The first principal defect is the second sentence: reasonable doubt "is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life." This language is an inappropriate characterization of the degree of certainty required to find proof beyond a reasonable doubt, rather than an explanation of reasonable doubt itself. This language is also an historical anomaly; as far as can be discerned, no other state currently uses this language in its reasonable doubt instruction, and the few states that previously used it have since disapproved it.

The final sentence of the instruction is constitutionally infirm. That sentence stated that for "[d]oubt to be reasonable" it " must be actual and substantial, not mere possibility or speculation."

[582]NT 1/27/81, at 96.

This language, particularly the word "substantial," is similar to language condemned by the United States Supreme Court,[583] and when read in conjunction with the "govern or control" language, created a reasonable likelihood that the jury imposed its death sentence based on a lesser standard of proof than state and federal law required. This sentence elevated the threshold of reasonable doubt, making reasonable doubt unconstitutionally difficult to recognize while making lack of reasonable doubt more attainable.

The characterization of the proof standard as an "abiding conviction of the truth of the charge" did not cure the defects. That term was not linked to any language suggesting a proper definition of the proof standard, and the immediately preceding language ("govern or control") linked the "abiding conviction" language to a standard of proof that was impermissibly low. In short, the instruction did nothing to dispel the false notion that the jurors could have an "abiding conviction" as to an aggravator if the reasonable doubts they harbored were not sufficient to "govern or control" their actions.

Mr. Milligan is entitled to relief.

Failure to Instruct that Aggravating Factors Had to Be Unanimously Found: The jury was instructed:

> First degree murder is punishable by death only if the jury finds one or more aggravating circumstances have been proved beyond a reasonable and the jury further finds that any mitigating circumstances do no outweigh the aggravating circumstances.[584]
>
> ...
>
> The jury may impose a sentence of death only if it finds beyond a reasonable doubt that there is at least one aggravating circumstance and further finds that there are no mitigating circumstances which outweigh the aggravating circumstances.[585]
>
> ...

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[583]E.g., Francis v. Franklin, 471 U.S. 307 (1985); Sandstrom v. Montana, 442 U.S. 510 (1979); Yates v. Aiken, 484 U.S. 211 (1988), Cage v. Louisiana, 498 U.S. 39 (1990); Sullivan v. Louisiana, 508 U.S. 275 (1993),

[584]NT 1/27/81, at 93-94 [Instr. 5].

[585]NT 1/27/81, at 94 [Instr. 6].

> Before you can consider imposition of a death sentence, you must be convinced beyond a reasonable doubt that the totality of the aggravating circumstances outweighs the totality of the mitigating circumstances. If you are not convinced beyond a reasonable doubt that the aggravating circumstance outweighs the mitigating circumstances, you must return a verdict of life imprisonment, with or without the possibility of parole.[586]
>
> ...
>
> you may not consider imposition of the death sentence unless you find first, that an aggravating circumstance exists beyond a reasonable doubt, and, second, you are convinced that the totality of the aggravating circumstance outweighs the totality of the mitigating circumstances.[587]

The trial judge's instructions violated Mr. Milligan's clearly established state and federal constitutional rights and substantially prejudiced him.

Nevada's death penalty statute requires unanimity for the finding of an aggravating factor. Nev. Rev. Stat. § 175.554 (2). The trial judge's instruction failed to inform the jury it was obligated to unanimously agree as to the existence of aggravating circumstances. Consequently, the jury's discretion was not properly channeled or limited because it lacked the requisite information as to how to properly find the existence of an aggravating factor. Affording the jury unlimited discretion to determine whether an aggravating factor existed, violated clearly established state and federal constitutional law because the lack of information prevented the jury from rationally narrowing the class of persons eligible for the death penalty. The failure to rationally determine Mr. Milligan's death eligibility rendered his death sentence arbitrary and capricious.

Mr. Milligan is entitled to relief.

Failure to Give to the Presumption of Life Instruction: At the close of Mr. Milligan guilt phase hearing, the trial judge provided the following instruction:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal; but the effect of this presumption is to place upon the State the burden of proving him

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[586]NT 1/27/81, at 95 [Instr. 7].

[587]NT 1/27/81, at 96 [Instr. 10].

guilty beyond a reasonable doubt.[588]

The trial judge failed to give a similar presumption of innocence instruction prior to the jury's penalty phase deliberations. In particular, the trial judge failed to instruct the jury that Mr. Milligan was presumed innocent of the death penalty until the prosecutor proved his single aggravator beyond a reasonable doubt, and the jury determined beyond a reasonable doubt that the single aggravator outweighed Mr. Milligan's mitigating evidence.

The trial judge's failure to offer a presumption of innocence instruction prior to the penalty phase deliberation violated clearly established state and federal law and substantially prejudiced Mr. Milligan.

Under Nevada law, Mr. Milligan could only receive a death sentence if the jury found at least one aggravator beyond a reasonable doubt. Under clearly established state and federal law, "murder plus one or more aggravating circumstances" is a separate form of "murder" simpliciter (i.e., the offense for which Mr. Milligan was convicted during the guilt phase of his proceedings, first-degree murder, is properly understood to be a lesser included offense of "first-degree murder plus aggravating circumstance(s))". In effect, the aggravators constitute new "elements" which must be found beyond a reasonable doubt.

Because "first-degree murder plus (at least) one aggravating circumstance" constitutes an entirely new and separate offense for which Mr. Milligan had to be "convicted" of during the penalty phase, he had a clearly established state and federal right to be presumed innocent of the new offense (i.e., capital murder). A presumption of innocence during a capital penalty hearing in effect constitutes a presumption of life because jurors must presume Mr. Milligan is innocent of the death penalty until the prosecutor proves every material element of capital murder beyond a reasonable doubt.

The trial judge failed to inform the jury Mr. Milligan was presumed innocent of the death penalty. The trial judge also failed to instruct the jury that this presumption placed the burden with the prosecutor of proving beyond a reasonable doubt every material element of the offense charged

[588]NT 1/22/81, at 184 [Inst. 12].

(i.e., capital murder).

The presumption of innocence also entitled Mr. Milligan to an instruction mandating that jurors must vote for life imprisonment when the penalty phase evidence was susceptible of two reasonable interpretations–one which favored death and the other which favored life imprisonment. The trial judge offered a similar instruction during the guilt phase: "if the defendant is susceptible to two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to his innocence and reject the other which points to his guilt."[589] The trial judge was constitutionally obligated to offer a similar instruction during Mr. Milligan's penalty hearing.

The trial judge's failure to properly instruct the jury alleviated the prosecutor's burden of proving each and every element beyond a reasonable doubt and, at the same time, forced Mr. Milligan to present evidence of his "innocence" or "life-worthiness." Both results rendered Mr. Milligan's death sentence inherently unreliable.

Mr. Milligan is entitled to relief.

The penalty phase jury instructions also violated clearly federal constitutional law, because they–collectively–could reasonably be interpreted as creating a presumption of death because it suggests that the mitigator(s) must outweigh the aggravator(s) before a life sentence can be considered. Thus, if mitigators and aggravators are of equal weight, the presumption tilts in favor of death. This issue is critical to Mr. Milligan's case because his death sentence is premised on only one aggravator (robbery). Such an instruction was provided during the guilt phase: "if the defendant is susceptible to two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to his innocence and reject the other which points to his guilt."[590] This constitutional infirmity renders Mr. Milligan's death sentence inherently unreliable.

The penalty hearing jury instructions are also constitutionally infirm because there is a

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[589]NT 1/22/81, at 183 [Instr. 9].

[590]NT 1/22/81, at 183 [Instr. 9].

reasonable likelihood that at least one juror interpreted the instructions to create a mandatory death penalty scheme when the aggravators outweigh or equal the mitigating circumstances. Clearly established state and federal constitutional law have rendered mandatory death penalty statutes per se unconstitutional. Moreover, by creating the likelihood that death had to be automatically imposed when the aggravators outweighed or equaled the mitigators, the jury instructions violated the clearly established principle that capital jurors must be allowed to consider, and must consider, any and all relevant mitigating evidence. As read to the jury, it is reasonably likely that at least one juror would have interpreted the jury instructions to prohibit the consideration of mercy, which is a constitutionally relevant mitigating circumstance.

Either the state should have produced or trial counsel should have discovered and presented all that undersigned counsel has presented here. Trial counsel were ineffective for not doing so. Mr. Milligan's conviction and death sentence cannot be allowed to stand. Mr. Milligan is entitled to relief in the form of a new trial and a new sentencing proceeding.

State direct appeal counsel and state post-conviction counsel were likewise ineffective for failing to raise and litigate the above-referenced meritorious issues on direct appeal or in state post-conviction when Mr. Milligan had a right to effective assistance of counsel. There is no reasonable strategy, designed to effectuate Mr. Milligan's best interests, for the failures of trial direct appeal and post-conviction counsel. Mr. Milligan was prejudiced as a result of counsels' failures and he is entitled to relief.

CLAIM FIVE

Mr. Milligan's conviction and death sentence are invalid under the state and federal constitutional guarantees of due process, equal protection, the effective assistance of counsel, a fair and impartial jury, and a reliable sentencing determination when a juror, who served on Mr. Milligan's jury, provided misleading and incomplete testimony during jury selection. U.S. Cont. Amends. V, VI, VIII, & XIV

SUPPORTING FACTS

Thomas F. Ormachea

Thomas F. Ormachea served on the jury which convicted Mr. Milligan of first-degree murder and sentenced him to death.

Voir Dire: During voir dire, Mr. Ormachea testified he believed in the presumption of innocence and would afford Mr. Milligan this presumption throughout his entire trial.[591] Mr. Ormachea testified:

- he knew little about Mr. Milligan's case and that he did not read about the case in the local newspaper;[592]
- he did not participate in, nor was he present for, any conversations regarding Mr. Milligan's case during the six months leading up to his trial.[593]
- he never expressed the opinion, prior to Mr. Milligan's trial, that Mr. Milligan should be "taken out and hanged."[594]
- he would automatically vote for death if Mr. Milligan were convicted of first-degree murder.[595]

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[591]NT 1/9/81, at 386, 389 ("Because I presume a person is innocent until proven guilty.").

[592]Id. at 387 ("Q: What have you heard about [Mr. Milligan's case] in discussions? A: Not anything of any–not much of anything, really.").

[593]Id. at 388 ("Q: Have you been present during the last six months when people were talking about this particular incident? A: Not to my recollection.").

[594]Id. at 388-389.

[595]Id. at 389. Mr. Ormachea subsequently changed his testimony after he learned he could not sit on Mr. Milligan's jury if he would automatically vote for death. Id. at 391 ("Q: Mr. Ormachea, would you automatically vote for a death sentence if someone is convicted of first degree

- he did not participate in, nor was he present for, any discussions regarding the death penalty prior to Mr. Milligan's trial.[596]
- he was willing and able to consider all three possible punishments: death, life without the possibility of parole, and life with the possibility of parole.[597]
- he rarely interacted with his customers at his restaurant, Ormachea's Dinner House, because he was too busy.[598]
- he rarely if ever discussed Mr. Milligan's case at his restaurant.[599]
- he was willing and able to consider Mr. Milligan's mitigating evidence.[600]
- he could be fair and impartial to Mr. Milligan.[601]

False/Misleading Testimony: Mr. Ormachea's testimony was false. The falsity of Mr. Ormachea's testimony only came to light when Mr. Milligan's current attorneys interviewed Father Frank Hoffman. After the interview, Father Hoffman executed a written declaration which is fully incorporated hereto as Ex. 210.

Father Frank Hoffman: Father Hoffman is currently a Roman Catholic priest and

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murder? A: Not in every case, no, I'm not sure."); id. at 406, 407.

[596] Id. at 391.

[597] Id. at 392.

[598] Id. at 403 ("Q: Do you normally converse with the customers at the bar? A: I usually don't have the time.").

[599] Id. at 403.

[600] Id. at 407.

[601] Q: Mr. Ormachea... the State is asking for a death sentence in this case and I want to ask you now, knowing what little you do about the case and the things we've been talking about, whether you can look at Mr. Milligan and tell him that you can be fair to him in this trial?

A: Yes, I can.

Q: And is there anything else that you think that we should know about your ability to serve as a juror in this case?

A: No, I can't think of anything.

Id. at 400-401.

Supervisor of the Spiritual Care Department at Scripps Mercy Hospital in San Diego, California. Father Hoffman was stationed at St. Paul's Catholic Church in Winnemucca, Nevada between March 1979 and September 1981.[602]

Father Hoffman was acquainted and friendly with Mr. Ormachea, and regularly patronized his restaurant, Ormachea's Dinner House, located at 180 Melarkey Street, in Winnemucca, Nevada.

Father Hoffman had approximately six conversations with Thomas Ormachea regarding Mr. Milligan's guilt and punishment before Mr. Ormachea was called for jury duty, during the time Mr. Ormachea was a member of the prospective jury panel and subject to voir dire, and while Mr. Ormachea sat as a juror in Mr. Milligan's trial. During these conversations, Mr. Ormachea repeatedly told Father Hoffman he adamantly believed Mr. Milligan was guilty of first-degree murder, and Mr. Milligan should be "hung" for Ms. Voinski's death.

According to Father Hoffman, Mr. Ormachea's restaurant was one of the central places in town where locals gathered and discussed Ms. Voinski's murder. Mr. Ormachea did not cook or serve meals at the restaurant; he tended the bar and regularly socialized with the other patrons. Mr. Ormachea openly expressed his disdain for Mr. Milligan and his belief Mr. Milligan was guilty and should receive the death penalty. Mr. Ormachea's hatred for Mr. Milligan was so intense, and his desire to see Mr. Milligan put to death was so great, that even Father Hoffman was convinced of Mr. Milligan's guilt and wanted him to receive the death penalty, due in large part to the discussions he had with Mr. Ormachea.[603]

Father Hoffman reviewed Mr. Ormachea's voir dire testimony. After he reviewed Mr. Ormachea's testimony, Father Hoffman stated that Mr. Ormachea failed to tell the truth about not having discussed the case with others; not having formed an opinion about guilt; his belief in the presumption of innocence; not having formed an opinion about punishment; his ability not to consider punishment until after the guilt phase; his intention not to automatically vote for the death penalty; and his ability to consider all three penalty options before deciding upon the appropriate

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[602]Mr. Milligan was arrested on July 4, 1980 and his trial occurred in January 1981.

[603]Ex. 210.

penalty.[604]

Mr. Ormachea never expressed any concern to Father Hoffman about testifying falsely during voir dire; and, after he was seated on the jury, Mr. Ormachea never expressed any concern to Father Hoffman about having violated the court's admonitions not to discuss or form any opinions about the case.

Prejudice: Mr. Ormachea's false testimony violated Mr. Milligan's clearly established state and federal constitutional rights. Mr. Milligan was substantially prejudiced by Mr. Ormachea's false testimony. Had Mr. Ormachea testified truthfully, he would have been disqualified to serve on Mr. Milligan's jury. Alternatively, had the trial judge not disqualified Mr. Ormachea, either sua sponte or pursuant to a Witherspoon objection, trial counsel could have peremptorily struck Mr. Ormachea because he failed to use their last four peremptory challenges. NT 1/9/81, at 539-540, 543.

Mr. Ormachea's presence on Mr. Milligan's jury rendered his trial fundamentally unfair.

Either the state should have produced or trial counsel should have discovered and presented all that undersigned counsel has presented here. Trial counsel were ineffective for not doing so. Mr. Milligan's conviction and death sentence cannot be allowed to stand. Mr. Milligan is entitled to relief in the form of a new trial and a new sentencing proceeding.

State direct appeal counsel and state post-conviction counsel were likewise ineffective for failing to raise and litigate the above-referenced meritorious issues on direct appeal or in state post-conviction when Mr. Milligan had a right to effective assistance of counsel. There is no reasonable strategy, designed to effectuate Mr. Milligan's best interests, for the failures of trial direct appeal and post-conviction counsel. Mr. Milligan was prejudiced as a result of counsels' failures and he is entitled to relief.

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[604] Id.

CLAIM SIX

Mr. Milligan's conviction and death sentence are invalid under the state and federal constitutional guarantees of due process, equal protection, the effective assistance of counsel, a fair and impartial jury, and a reliable sentencing determination because the trial judge failed to remove prospective juror who could not be fair and impartial to Mr. Milligan. U.S. Const. Amends. V, VI, VIII, & XIV.

SUPPORTING FACT

Mr. Milligan was entitled to a fair and impartial jury. Trial judges are obligated to ensure that a criminal defendant–particularly one facing death–is afforded this critical state and federal constitutional right.

To ensure that this right is afforded to criminal defendants, trial judges have a duty to remove jurors who reveal obvious biases against the defendant or are incapable of adhering to the trial judge's guilt and penalty phase juror instructions. Trial judges must remove such prospective jurors even in the absence of an objection from trial counsel because it is axiomatic that jurors who are biased against the defendant or are incapable of following the trial judge's jury instructions cannot possibly act as fair and impartial fact finders.

The trial judge in Mr. Milligan's case violated Mr. Milligan's clearly established state and federal constitutional rights when he failed to remove prospective jurors who were not qualified to serve on Mr. Milligan's jury because they either could not follow the trial judge's instructions or could not be fair and impartial to Mr. Milligan. The trial judge's failure to remove these jurors rendered Mr. Milligan's trial fundamentally unfair. Mr. Milligan is entitled to guilt and penalty phase relief.

a. **Failure to remove jurors whose beliefs prevented or substantially impaired their ability to adhere to the trial judge's guilt phase jury instructions regarding intoxication**

Mr. Milligan's guilt phase defense was premised entirely on intoxication.[605] Trial counsel

[605]NT 9/19/88, at 63, 119 (trial counsel conceded that Mr. Milligan's guilt phase defense rested entirely on an intoxication defense).

planned to present evidence that Mr. Milligan was so intoxicated when he struck Ms. Voinski that he could not have possibly formed the requisite specific intent to be guilty of first-degree murder. Trial counsel noticed the trial judge and the prosecution that the defense intended to present expert testimony regarding how alcohol affected a person's ability to develop specific intent.[606]

Under Nevada law at the time, intoxication could negate the mens rea of a specific intent offense such as premeditated murder or felony-murder (robbery). The trial judge's jury instructions adhered to this principle.[607]

The trial judge was acutely aware that the intoxication issue was critical to Mr. Milligan's defense, and that prospective jurors would have to be able to consider the intoxication jury instructions if Mr. Milligan was to receive a fair and impartial jury. If prospective jurors were unable to adhere to the trial judge's jury instructions, particularly Instruction #34, then the trial judge was constitutionally obligated to remove these jurors.

The trial judge failed to strike jurors Arruti and Braun after they testified they were unwilling to believe that intoxication could negate the mens rea of first-degree murder and robbery.[608] Jurors Braun and Arruti's testimony clearly indicated that their views prevented or substantially impaired their ability to adhere to and consider the trial judge's guilt phase jury instructions regarding intoxication and specific intent. Consequently, the trial judge was required to disqualify them from jury service even in the absence of an objection from Mr. Milligan's trial counsel because they could not fairly consider Mr. Milligan's legitimate state law defense.

The trial judge's failure to remove jurors Arruti and Braun rendered Mr. Milligan's trial fundamentally unfair.

Mr. Milligan is entitled to relief.

b. **Failure to remove jurors who would automatically vote for death**

Clearly established state and federal law mandates that jurors must consider a capital

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[606]NT/1/20/81, at 22-102 (Dr. John Chappel's testimony).

[607]NT 1/22/81, at 193-194 (Guilt Phase Instructions #32, #33, #34).

[608]NT 1/7/81, at 79 (Beth Arruti); NT 1/7/81, at 51 (Richard Braun).

defendant's mitigation evidence. Thus, jurors who would automatically vote for death once a capital defendant is convicted of a death-eligible offense are incapable and unwilling to consider a capital defendant's mitigation evidence. Moreover, because their pro-death penalty views prevent or substantially impair their ability to adhere to clearly established state and federal constitutional law and the trial judge's jury instructions, trial judges must automatically disqualify them from jury service.

Mr. Milligan's trial judge failed to remove two prospective jurors who clearly indicated they would automatically vote for death if Mr. Milligan was found guilty of a death-eligible offense.[609] Jurors Ormachea and Looper served on Mr. Milligan's jury. The trial judge's failure to remove jurors Ormachea and Looper violated Mr. Milligan's clearly established state and federal constitutional rights and rendered his trial fundamentally unfair.

Either the state should have produced or trial counsel should have discovered and presented all that undersigned counsel has presented here. Trial counsel were ineffective for not doing so. Mr. Milligan's conviction and death sentence cannot be allowed to stand. Mr. Milligan is entitled to relief in the form of a new trial and a new sentencing proceeding.

State direct appeal counsel and state post-conviction counsel were likewise ineffective for failing to raise and litigate the above-referenced meritorious issues on direct appeal or in state post-conviction when Mr. Milligan had a right to effective assistance of counsel. There is no reasonable strategy, designed to effectuate Mr. Milligan's best interests, for the failures of trial direct appeal and post-conviction counsel. Mr. Milligan was prejudiced as a result of counsels' failures and he is entitled to relief.

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[609]NT 1/9/81, at 389-390 (Thomas F. Ormachea); NT 1/9/81, at 527-528 (Orville C. Looper).

CLAIM SEVEN

Mr. Milligan's conviction and death sentence are invalid under the state and federal constitutional guarantees of due process, equal protection, a fair and impartial jury, ineffective assistance of counsel, and a reliable sentencing determination because the trial judge improperly restricted the scope of trial counsel's voir dire. U.S. Const. Amends. V, VI, VIII, & XIV.

SUPPORTING FACTS

Mr. Milligan was entitled to a fair and impartial jury.

In order to select a fair and impartial jury, voir dire questioning cannot be so restrictive it prevents criminal defendants from identifying potential biases which would substantially prejudice them. In 1981, it was clearly established, under state and federal constitutional law, that capital defendants were permitted to ask questions which were aimed at exposing a prospective juror's view regarding capital punishment, his or her propensity to vote for death, or any biases which may prejudice the capital defendant. If a juror's pro-death penalty stance is so strong (particularly because of religious beliefs or personal experiences), that it would force them to automatically vote for death under any circumstances, then the juror is not qualified to serve on a capital jury because they are incapable of considering a capital defendant's mitigating evidence and affording the capital defendant an individualized sentencing determination.

Mr. Milligan's trial judge violated these clearly established state and federal constitutional rights when he prohibited Mr. Milligan from asking questions which were aimed at identifying a potential juror's stance toward capital punishment and their willingness to impose capital punishment. These impermissible rulings substantially prejudiced Mr. Milligan.

a. **The trial judge erred when it prohibited Mr. Milligan from questioning Beth Arruti about the Church of Latter Day Saints' stance on capital punishment**

Beth Arruti served on Mr. Milligan's jury.

During voir dire, Ms. Arruti testified she was a Mormon and affiliated with the Church of

Latter Day Saints (LDS).[610] Trial counsel subsequently asked Ms. Arruti "whether the LDS Church has a stand on the death penalty or on capital punishment."[611] The prosecutor objected to trial counsel's question. The trial judge sustained the prosecutor's objection and commented: "I know the stand of the church is not important. It's her view."[612]

The trial court's refusal to permit this line of questioning substantially prejudiced Mr. Milligan because it prevented him from exposing the fact that the Church of LDS believes capital punishment (or blood atonement) is necessary because it allows the murderer to atone for his sins.

Blood Atonement and the Mormon Church: The Church of LDS believes that the only way murderers can atone for their sin is through blood atonement. Specifically, Mormon doctrine teaches that Christ's atonement unconditionally saves the entire human family from physical death, the separation of the body and spirit which results from Adam's transgression. Christ's atonement also saves man from spiritual death, alienation from God resulting from one's actual sins, on the condition that the individual repent of his sins and obey God's commandments. However, the doctrine of blood atonement posits that man can commit some sins so heinous that Christ's sacrifice is unavailing, but the offender himself may partially atone for his sin by sacrificing his life in a way which literally sheds his blood. The spilling of blood is required because blood is viewed as possessing symbolic religious significance. "The man who commits murder, who imbues his hands in the blood of innocence, cannot receive eternal life because he cannot get forgiveness of that sin. What can he do? The only way to atone is to shed his blood."

The reasons for blood atonement are outlined in the book of Leviticus, 17th chapter, 11th verse: "For the life of the flesh is in the blood; and I have given it to you upon the altar to make an atonement for your souls; for it is the blood that maketh an atonement for the soul.'... If Christ's blood had not been shed, each individual would have had to have his blood shed, according to Bible doctrine."

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[610]NT 1/7/81, at 73.

[611]Id.

[612]Id. Trial counsel did not object to the trial judge's ruling and agreed to move on. Id. ("Okay. I'll move on.").

The first seeds of blood atonement teachings were planted in Mormon thought before the Saints settled in Utah. In 1843, Joseph Smith said:

> In debate, George A. Smith said imprisonment was better than hanging. I replied, I was opposed to hanging, even if a man kills another, I will shoot him, or cut off his head, spill his blood on the ground, and let the smoke thereof ascend up to God; and if ever I have the privilege of making a law on that subject, I will have it so.

On another occasion Joseph Smith stated: "Hanging is the popular method of execution among the Gentiles in all countries professing Christianity, instead of blood for blood according to the law of heaven."

Although the doctrine was taught, or at least suggested before the Saints went to Utah, blood atonement was fully developed by Brigham Young:

> There are sins that men commit for which they cannot receive forgiveness in this world, or in that which is to come, and if they had their eyes open to see their true condition, they would be perfectly willing to have their blood spilled upon the ground, that the smoke thereof might ascend to heaven as an offering for their sins; and the smoking incense would atone for their sins whereas, if such were not the case, they would stick to them and remain upon them in the spirit world.... It is true that the blood of the Son of God was shed for sins through the fall and those committed by men, yet, men can commit sins which it can never remit... There are sins that can be atoned for... [only] by the blood of the man.

Other early Mormon leaders, including Jedediah M. Grant and Heber C. Kimball, both counselors in the First Presidency of the Church, taught the doctrine of blood atonement and all played major roles in implementing the first capital punishment law in Utah.

While the most fervent sermons on blood atonement were preached during the reformation movement in the 1850s, a period of intense Mormon revivalism bordering on fanaticism, the doctrine also seems to have been defended by nineteenth century church leaders after the excessive rhetoric of the reformation had subsided. Responding to anti-Mormon critics in 1884, George Q. Cannon said: "We do not believe in hanging. We think that if a man sheds blood, his blood should be shed by execution... [But] it is a process of law [not a Church function] and has no reference to any Church ordinance." In 1889, the First Presidency and Council of Twelve issued an official proclamation answering claims that the Mormon Church had practiced blood atonement extralegally: "We regard the killing of a human being, except in conformity with the civil law, as a capital crime,

which should be punished by shedding the blood of the criminal after a public trial before a legally constituted court of the land."

In 1891, President Wilford Woodruff answered scurrilous charges against the Mormons: "It is a fundamental doctrine of our creed that a murderer cannot be forgiven that he 'hath not eternal life abiding in him', that if a member of our Church having received the light of the Holy Spirit, commits this capital crime, he will not receive forgiveness in this world nor in the world to come.... It is part of our faith that the only atonement a murdered [sic] can make for his 'sin unto death' is the shedding of his own blood [through capital punishment as practiced by the State and not the Church] according to the fiat of the Almighty after the flood: 'Whoso sheddeth man's blood by man shall his blood be shed.' But the law must be executed by the lawfully appointed officer. This is 'blood atonement' so much perverted by maligners of our faith. We believe also in the atonement wrought by the shedding of Christ's blood on Calvary; that it is efficacious for all the race of Adam for the sin committed by Adam, and for the individual sins of all who believe, repent, are baptized by one having authority, and who receive the Holy Ghost by the laying on of authorized hands. Capital crime committed by such an enlightened person cannot be condoned by the Redeemer's blood. For him there is 'no more sacrifice for sin'; his life is forfeit, and he can only pay the penalty. There is no other blood atonement taught, practiced or made part of the creed of the Latter-day Saints."

Scriptural support for the doctrine of blood atonement, for the sin of murder at least, was derived primarily from Genesis 9:6: "Whoso sheddeth man's blood, by man shall his blood be shed." This verse, coupled with I John 3:15 ("No murderer hath eternal life abiding in him"), Hebrews 9:22 ("And almost all things are by the law purged with blood; and without shedding of blood is no remission"), and Leviticus 17:11 ("For the life of the flesh is in the blood: and I have given it to you upon the altar to make an atonement for your souls: for it is the blood that maketh an atonement for the soul") provided the foundation from which Mormon leaders developed their doctrine.[613]

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[613] See Martin R. Gardner, *Mormonism and Capital Punishment: A Doctrinal Perspective Past and Present, Dialogue: A Journal of Mormon Thought*, Spring 1979, at 21-22; R. McConkie, Mormon Doctrine, 92-93 (2d ed. 1966).

Prejudice: Mr. Milligan was substantially prejudiced by the trial judge's ruling. Under the blood atonement doctrine, the only way Mr. Milligan could atone for his sin was to be put to death in a manner which would shed his own blood. Thus, the only punishment Ms. Arruti could legitimately consider was death. This violated Mr. Milligan's clearly established state and federal constitutional rights because Ms. Arruti's religious beliefs prevented her from considering Mr. Milligan's mitigating evidence.

Had trial counsel been provided an adequate opportunity to expose these basic tenets of the Mormon church, trial counsel would have moved to disqualify Ms. Arruti because of the Church's stance on capital punishment and blood atonement. Alternatively, had the trial judge not disqualified Ms. Arruti, either sua sponte or pursuant to a Witherspoon objection, trial counsel could have peremptorily struck Ms. Arruti because he failed to use Mr. Milligan's last four peremptory challenges.[614]

Ms. Arruti's presence on Mr. Milligan's jury rendered his trial fundamentally unfair.

Mr. Milligan is entitled to relief.

b. **The trial judge erred when it prohibited Mr. Milligan from asking Richard Braun why he felt capital punishment was appropriate and what types of cases he felt capital punishment was most deserving**

Richard Braun served on Mr. Milligan's jury.

During voir dire, Mr. Braun testified he supported and believed in capital punishment.[615] Trial counsel subsequently asked Mr. Braun: "What I'm interested in is why you think that a death sentence is appropriate."[616] The prosecutor objected to trial counsel's question, which was sustained by the trial judge.[617] Trial counsel responded: "Your Honor, what I'm interested in finding out is what Mr. Braun's thinking is on this area. I know that he would be instructed to follow the law, but if I know what his thinking is, then I can find out." The trial judge responded: "Well, rephrase the

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[614]NT 1/9/81, at 539-540, 543.

[615]NT 1/7/81, at 45 ("I believe in the death sentence").

[616]Id. at 46.

[617]Id.

question because the way you had it is improper." Trial counsel rephrased his question and asked Mr. Braun: "Are there any particular types of cases you think it should be imposed[.]" The prosecutor objected once again, and the trial judge sustained the objection: "I will sustain the objection. I think if we follow what's done in Witherspoon, it will be more accurate and proper." Trial counsel abandoned this line of questioning and simply asked Mr. Braun whether he would automatically vote for death if Mr. Milligan was found guilty of first degree murder–to which Mr. Braun answered: "No."[618]

Prejudice: The trial court's rulings violated Mr. Milligan's clearly established state and federal constitutional rights. Mr. Milligan was substantially prejudiced by the trial court's ruling because he was not given a proper vehicle to expose potential biases possessed by Mr. Braun regarding his support of capital punishment. The inability to expose Mr. Braun's biases, rendered Mr. Milligan's trial fundamentally unfair.

Mr. Milligan is entitled to relief.

c. **The trial judge erred when it prohibited Mr. Milligan from asking Edith Hascall whether she believed in the "eye for and eye" concept**

Edith Hascall served on Mr. Milligan's jury.

During voir dire, trial counsel asked Ms. Hascall: "Do you believe in an eye for an eye theory?" The prosecutor objected: "I think I'll object to that question. I don't think it is relevant to this procedure." The trial judge sustained the objection. Trial counsel abandoned this line of questioning.[619]

Prejudice: The trial court's ruling violated Mr. Milligan's clearly established stated and federal constitutional rights and substantially prejudiced Mr. Milligan.

The phrase "an eye for an eye, a tooth for a tooth," a quotation from Exodus 21:23-27, expresses a principle of retributive justice also known as *lex talionis* (Latin for "law of retaliation"). The basis of this form of law is the principle of proportionate punishment, often expressed under the

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[618] Id.

[619] NT 1/8/81, at 229.

motto, "Let the punishment fit the crime." This form of retributive justice dates back to the Code of Hammurabi where the principle of "exact reciprocity" was used very clearly. For instance, if a person caused the death of another person's child, the person's child would be put to death.

Mr. Milligan was substantially prejudiced by the trial court's ruling because he was not provided an adequate opportunity to determine whether Ms. Hascall believed in this form of retributive justice. If she believed in the *lex talionis* principle, trial counsel could have moved to disqualify Ms. Hascall because the only punishment she would have considered was death (i.e., because Mr. Milligan caused Ms. Voinski's death, "exact reciprocity" required Mr. Milligan to be put to death). Under clearly established state and federal constitutional law at the time, Ms. Hascall would have been disqualified from jury service because of her inability or unwillingness to consider sentences less than death and Mr. Milligan's mitigating evidence.

Either the state should have produced or trial counsel should have discovered and presented all that undersigned counsel has presented here. Trial counsel were ineffective for not doing so. Mr. Milligan's conviction and death sentence cannot be allowed to stand. Mr. Milligan is entitled to relief in the form of a new trial and a new sentencing proceeding.

State direct appeal counsel and state post-conviction counsel were likewise ineffective for failing to raise and litigate the above-referenced meritorious issues on direct appeal or in state post-conviction when Mr. Milligan had a right to effective assistance of counsel. There is no reasonable strategy, designed to effectuate Mr. Milligan's best interests, for the failures of trial direct appeal and post-conviction counsel. Mr. Milligan was prejudiced as a result of counsels' failures and he is entitled to relief.

CLAIM EIGHT

Mr. Milligan's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, and a reliable sentence because execution by lethal injection violates the constitutional prohibition against cruel and unusual punishments. U.S. Const. Amends. V, VI, VIII, & XIV; International Covenant on Civil and Political Rights, Art. 7.

SUPPORTING FACTS

Nevada law requires that execution be inflicted by an injection of a lethal drug. Nev. Rev. Stat. § 176.355 (1). Although there is no statutory basis for concealing the Nevada Execution Protocol, see Nev. Rev. Stat. §239.010(1) providing for disclosure of public books and records "the contents of which are not otherwise declared bylaw to be confidential"), the Nevada Department of Corrections did not release a redacted copy of its "Confidential Execution Manual," last revised February 2004, until April, 2006.[620] The execution manual specified that execution by lethal injection will be carried out using 5 grams of Sodium Thiopental, a barbiturate typically used by anesthesiologists to induce temporary anesthesia; 20 milligrams of Pavulon, a paralytic agent; and 160 milliequivalents of potassium chloride, a salt solution that induces cardiac arrest.[621] Sodium thiopental is a brand name for the generic drug sodium pentothal. Pavulon is a brand name for the generic drug pancuronium bromide.

The serious risk of cruel, protracted death posed by "slight error" in the use of these drugs is heightened by the fact that Nevada law does not require a physician to participate in any of the lethal injection procedures. Competent physicians cannot administer the lethal injection because the ethical standards of the American Medical Association prohibit physicians from participating in an execution other than to certify that a death has occurred.[622] Thus, the lethal injection is not administered by competent medical personnel.

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[620]Ex. 501.

[621]Id.; Ex. 504 at ¶ 10. See also Ex. 505.

[622]American Medical Association, House of Delegates, Resolution 5 (1992); American Medical Association, Judicial Counsel, Current Opinion 2.06 (1980).

Lethal injection conducted by untrained personnel using the three drugs specified by Nevada's protocol creates an unnecessary risk of undue pain and suffering because Nevada's procedures for inducing and maintaining anesthesia fall below the medical standard of care for the use of anesthesia prior to conducting painful procedures.[623] The humaneness of execution by lethal injection is dependent upon the proper administration of the anesthetic agent, sodium thiopental. In the surgical arena, general anesthesia can be administered only by physicians trained in Anesthesiology or nurses who have completed the necessary training to be Certified Registered Nurse Anesthetists (CRNAs).[624] Nevada's execution manual does not specify what, if any, training in anesthesiology the person(s) administering the lethal injection may have. If the untrained executioner fails to successfully deliver a quantity of sodium thiopental sufficient to achieve adequate anesthetic depth, the inmate will feel the excruciating pain of the subsequent injections of pancuronium bromide and potassium chloride.[625]

Nevada's lethal injection procedure is vulnerable to many potential errors in administration that would result in a failure to administer a quantity of sodium thiopental sufficient to induce the necessary anesthetic depth. The risk of error is compounded by Nevada's use of inadequately trained personnel.[626] The potential errors include: errors in preparing the sodium thiopental solution, because sodium thiopental has a relatively short shelf-life in liquid form, it is distributed as a powder and must be mixed into a liquid solution prior to the execution,[627] errors in labeling the syringes, errors in selecting the syringes during the execution, errors in correctly injecting the drugs into the IV, leaks in the IV line, incorrect insertion of the catheter, migration of the catheter, perforation, rupture, or leakage of the vein, excessive pressure on the syringe plunger, errors in securing the

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[623]Ex. 504 at ¶14-15, 18.

[624]Id. at ¶ 23.

[625]Id. at ¶ 17; Leonidas G. Koniaris et al., *Inadequate anaesthesia in lethal injection for execution*, The Lancet, Vol. 365, April 16, 2005, at 1412-14, Ex. 503.

[626]Ex. 504 at ¶ 21-22.

[627]Id. at ¶ 19.

catheter, and failure to properly flush the IV line between drugs.[628]

Nevada's lethal injection protocol further falls below the standard of care for administering anesthesia because it prevents any type of effective monitoring of the inmate's condition or whether he is anesthetized or unconscious.[629] In Nevada, during the injection of the three drugs, the executioner is in a room separate from the inmate and has no visual surveillance of the inmate.

> Accepted medical practice dictates that trained personnel monitor the IV lines and the flow of anesthesia into the veins through visual and tactile observation and examination. The lack of any qualified personnel present in the chamber during the execution thwarts the execution personnel from taking the standard and necessary measures to reasonably ensure that the sodium thiopental is properly flowing in to the inmate and that he is properly anesthetized prior to the administration of the pancuronium and potassium.[630]

The American Society of Anesthesiologists requires that "[q]ualified anesthesia personnel . . . be present in the room throughout the conduct of all general anesthetics" due to the "rapid changes in patient status during anesthesia."[631]

Nevada's lethal injection protocol fails to account for the foreseeable circumstance that the executioner(s) will be unable to obtain intravenous access by a needle piercing the skin and entering a superficial vein suitable for the reliable delivery of drugs.[632] Inability to access a suitable vein is often associated with past intravenous drug use by the inmate. However, medical conditions such as diabetes or obesity, individual characteristics such as heavily pigmented skin or muscularity, and the nervousness caused by impending death can impede peripheral IV access.[633] Typically, when the executioner is unable to find a suitable vein, the executioner resorts to a "cut down," a surgical

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[628] Id. at ¶ 22.

[629] Id. at ¶ 26.

[630] Id. at ¶ 26.

[631] Id., Attachment D [American Society of Anesthesiologists, Standards for Basic Anesthetic Monitoring].

[632] Id. at ¶ 33.

[633] See Deborah W. Denno, *When Legislatures Delegate Death: the Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What it Says About Us*, 63 Ohio St. L.J. 63, 109-10 (2002).

procedure used to gain access to a functioning vein. When performed by a non-physician, the risks are great. When deep incisions are made there is a risk of rupturing large blood vessels causing a hemorrhage, and if the procedure is performed on the neck, there is a risk of cardiac dysrhythmia (irregular electrical activity in the heart) and pneumothorax (which induces the sensation of suffocation). In addition, a cut-down causes severe physical pain and obvious emotional stress. This procedure should only take place in a hospital or other appropriate medical setting and should only be performed by a qualified physician with specialized training in that area.[634] Nevada's execution manual recognizes that a "sterile cut-down tray" may be required equipment "if necessary,"[635] but does not specify who determines when a cut down is necessary, how that determination is made, or the training or qualifications of the personnel who would perform such a cut down.

If the inmate is not adequately anesthetized by the successful administration of sodium thiopental, he will suffer the pain of the remaining two injections. The choice of "potassium chloride to cause cardiac arrest needlessly increases the risk that a prisoner will experience excruciating pain prior to execution" because the "[i]ntravenous injection of concentrated potassium chloride solution causes excruciating pain."[636] The inmate would be consciously aware and feel the pain of the potassium-induced fatal heart attack.[637]

Pancuronium bromide, the second drug in the lethal injection process, is a paralytic agent that paralyzes all voluntary muscles. This includes paralysis of the diaphragm and other respiratory muscles, which causes the inmate to cease breathing. Pancuronium "does not affect sensation, consciousness, cognition, or the ability to feel pain or suffocation." If the inmate is not adequately anesthetized prior to the pancuronium injection, the pancuronium will cause the inmate to

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[634]See Ex. 502 (Amicus Brief of Drs. Dill, Gogan, Kalkut, Mitchell, Mobley, and Winternitz on Writ of Certiorari to the United States Supreme Court, Nelson v. Campbell, No. 03-6821, dated Feb. 4, 2004).

[635]Ex. 501 at 7.

[636]Ex. 504 at ¶ 12.

[637]Id.

consciously experience a "torturous suffocation" lasting "at least several minutes."[638]

Pancuronium is "unnecessary" and "serves no legitimate purpose" in the execution process because both sodium thiopental and potassium chloride, if properly administered in the doses specified in the execution manual, are adequate to cause death.[639] Pancuronium "compounds the risk that an inmate may suffer excruciating pain during his execution" because it masks any physical manifestations of pain that an inadequately anesthetized inmate would feel during pancuronium-induced suffocation and potassium-induced cardiac arrest.[640] "[U]sing barbiturates [such as sodium thiopental] and paralytics [such as pancuronium] to execute human beings poses a serious risk of cruel, protracted death" because "[e]ven a slight error in dosage or administration can leave a prisoner conscious but paralyzed while dying, a sentient witness of his or her own slow, lingering asphyxiation."[641] By paralyzing the inmate and preventing physical manifestations of pain, pancuronium places a "chemical veil" on the lethal injection process that precludes observers from knowing whether the prisoner is experiencing great pain.[642]

Nevada's lethal injection protocol falls below the standard of care for euthanizing animals. The American Veterinary Medical Association (AVMA) allows euthanasia by potassium chloride, but mandates that animals be under a surgical plane of anesthesia prior to the administration of potassium.[643] "It is of utmost importance that personnel performing this technique are trained and knowledgeable in anesthetic techniques, and are competent in assessing anesthetic depth appropriate

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[638]Id. at ¶ 39-40.

[639]Id. at ¶ 37, 44.

[640]Id. at ¶ 37, 42.

[641]Chaney v. Heckler, 718 F.2d 1174, 1191 (D.C. Cir. 1984), reversed on other grounds, 470 U.S. 84 (1985) (citing Royal Commission on Capital on Capital Punishment, 1949-1953 Report (1953)).

[642]Ex. 504 at ¶ 44; Adam Liptak, "Critics Say Execution Drug May Hide Suffering," N.Y. Times (October 7, 2003).

[643]Ex. 143 (American Veterinary Medical Association, 2000 Report of the American Veterinary Medical Association Panel on Euthanasia at 680-81).

for administration of potassium chloride intravenously."[644] "A combination of pentobarbital [a barbiturate similar to, but longer acting than, sodium thiopental] with a neuromuscular blocking agent is not an acceptable euthanasia agent."[645] Nevada is one of at least 30 states that prohibit the use of neuromuscular blocking agents in euthanizing animals, either expressly or by mandating the use of a specific euthanasia agent such as pentobarbital.[646] Nevada's lethal injection statute would violate state law if applied to a dog. The consistent trend in professional norms and statutory regulation of animal euthanasia, places the method currently practiced by Nevada is outside the bounds of evolving standards of decency.

There have been numerous documented cases of botched lethal injection executions that have produced prolonged and unnecessary pain, including:

> **Charles Brooks, Jr.** (December 7, 1982, Texas): The executioner had a difficult time finding a suitable vein. The injection took seven minutes to kill. Witnesses stated that Brooks "had not died easily."[647]
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> **James Autry** (March 14, 1984, Texas): Autry took ten minutes to die, complaining of pain throughout. Officials suggested that faulty equipment or inexperienced personnel were to blame.[648]
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> **Thomas Barefoot** (October 30, 1984, Texas): A witness stated that after emitting a "terrible gasp," Barefoot's heart was still beating after the prison medical examiner had declared him

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[644] Id. at 681.

[645] Id. at 680.

[646] See Ala. Code § 34-29-131; Alaska Stat. § 08.02.050; Ariz. Rev. Stat. Ann. § 11-1021; Cal. Bus. & Prof. Code § 4827; Colo. Rev. Stat. § 18-9-201; Conn. Gen. Stat. § 22-344a; Del. Code Ann. tit. 3, § 8001; Fla. Stat. § 828.058; Ga. Code Ann. § 4-11-5.1; 510 Ill. Comp. Stat. 70/2.09; Kan. Stat. Ann. § 47-1718(a); La. Rev. Stat. Ann. § 3:2465; Me. Rev. Stat. Ann. tit. 17, § 1044; Md. Code Ann., Crim. Law, § 10-611; Mass. Gen. Laws ch. 140, § 151A; Mich. Comp. laws § 333.7333; Mo. Rev. Stat. § 578.005(7); Neb. Rev. Stat. § 54-2503; Nev. Rev. Stat. Ann. § 638.005; N.J. Stat. Ann. § 4:22-19.3; N.Y. Agric. & Mkts. Law § 374; Ohio Rev. Code Ann. § 4729.532; Okla. Stat. tit. 4, § 501; Ore. Rev. Stat. § 686.040(6); R.I. Gen. Laws § 4-1-34; S.C. Code Ann. § 47-3-420; Tenn. Code Ann. § 44-17-303; Tex. Health & Safety Code Ann. § 821.052(a); W. Va. Code § 30-10A-8; Wyo. Stat. Ann. § 33-30-216.

[647] See Deborah W. Denno, *Getting to Death: Are Executions Unconstitutional*?, 82 Iowa L. Rev. 319, 428-29 (1997) ("Denno-1"); Deborah W. Denno, *When Legislatures Delegate Death: the Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What it Says About Us*, 63 Ohio St. L.J. 63, 139 (2002) ("Denno-2").

[648] See Denno-1 at 429; Denno-2 at 139.

dead.[649]

Stephen Morin (March 13, 1985, Texas): It took almost 45 minutes for technicians to find a suitable vein, while they punctured him repeatedly, and another eleven minutes for him to die.[650]

Randy Woolls (August 20, 1986, Texas): Woolls had to assist execution technicians in finding an adequate vein for insertion. He died seventeen minutes after technicians inserted the needle.[651]

Elliot Johnson (June 24, 1987, Texas): Johnson's execution was plagued by repetitive needle punctures and took executioners thirty-five minutes to find a vein.[652]

Raymond Landry (December 13, 1988, Texas): Executioners "repeatedly probed" his veins with syringes for forty minutes. Then, two minutes after the injection process began, the syringe came out of Landry's vein, "spewing deadly chemicals toward startled witnesses." A plastic curtain was pulled so that witnesses could not see the execution team reinsert the catheter into Landry's vein. "After 14 minutes, and after witnesses heard the sound of doors opening and closing, murmurs and at least one groan, the curtain was opened and Landry appeared motionless and unconscious." Landry was pronounced dead twenty-four minutes after the drugs were initially injected.[653]

Stephen McCoy (May 24, 1989, Texas): In a violent reaction to the drugs, McCoy "choked and heaved" during his execution. A reporter witnessing the scene fainted.[654]

George Mercer (January 6, 1990, Missouri): A medical doctor was required to perform a surgical "cutdown" procedure on Mercer's groin.[655]

George Gilmore (August 31, 1990, Missouri): Force was used to stick the needle into Gilmore's arm.[656]

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[649]See Denno-1 at 430; Denno-2 at 139.

[650]See Denno-1 at 430; Denno-2 at 139; Michael L. Radelet, Post-Furman Botched Executions, Death Penalty Information Center, available at http://www.deathpenaltyinfo.org ("Radelet").

[651]See Denno-1 at 431; Denno-2 at 139; Radelet; "Killer Lends A Hand to Find A Vein for Execution," L.A. Times, Aug. 20, 1986, at 2.

[652]See Denno-1 at 431; Denno-2 at 139; Radelet; "Addict Is Executed in Texas For Slaying of 2 in Robbery," N.Y. Times, June 25, 1987, at A24.

[653]See Denno-1 at 431-32; Denno-2 at 139.

[654]See Denno-1 at 432; Denno-2 at 139; Radelet.

[655]See Denno-1 at 432; Denno-2 at 139.

[656]See Denno-1 at 433; Denno-2 at 139.

Charles Coleman (September 10, 1990, Oklahoma): Technicians had difficulty finding a vein, delaying the execution for ten minutes.[657]

Charles Walker (September 12, 1990, Illinois): There was a kink in the IV line, and the needle was inserted improperly so that the chemicals flowed toward his fingertips instead of his heart. As a result, Walker's execution took eleven minutes rather than the three or four contemplated by the state's protocols, and the sedative chemical may have worn off too quickly, causing excruciating pain. When these problems arose, prison officials closed the blinds so that witnesses could not observe the process.[658]

Maurice Byrd (August 23, 1991, Missouri): The machine used to inject the lethal dosage malfunctioned.[659]

Rickey Rector (January 24, 1992, Arkansas): It took almost an hour for a team of eight to find a suitable vein. Witnesses were separated from the injection team by a curtain, but could hear repeated, loud moans from Rector.[660]

Robyn Parks (March 10, 1992, Oklahoma): Parks violently gagged, jerked, spasmed and bucked in his chair after the drugs were administered. A news reporter witness said his death looked "painful and inhumane."[661]

Billy White (April 23, 1992, Texas): White's death required forty- seven minutes because executioners had difficulty finding a vein that was not severely damaged from years of heroin abuse.[662]

Justin May (May 7, 1992, Texas): May groaned, gasped and reared against his restraints during his nine-minute death.[663]

John Gacy (May 10, 1994, Illinois): The lethal injection chemicals solidified, blocking the IV tube. The blinds were closed for ten minutes, preventing witnesses from watching, while

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[657]See Denno- 1 at 433; Denno-2 at 139.

[658]See Denno-1 at 433- 34; Denno-2 at 139; Radelet; Niles Group Questions Execution Procedure, United Press International, Nov. 8,1992 (Lexis/Nexis file).

[659]See Denno-1 at 434; Denno-2 at 140.

[660]See Denno-1 at 434-35; Denno-2 at 140; Radelet; Joe Farmer, "Rector's Time Came, Painfully Late," Arkansas Democrat Gazette, Jan. 26, 1992, at 1B; Marshall Frady, "Death in Arkansas," The New Yorker, Feb. 22, 1993, at 105.

[661]See Denno-1 at 435; Denno-2 at 140; Radelet.

[662]See Denno-1 at 435-36; Denno-2 at 140; Radelet.

[663]See Denno-1 at 436; Denno-2 at 140; Radelet; Robert Wernsman, "Convicted Killer May Dies," Item (Huntsville, Tex.), May 7, 1992, at 1; Michael Graczyk, "Convicted Killer Gets Lethal Injection," Herald (Denison, Tex.), May 8, 1992.

the execution team replaced the tubing.[664]

Emmitt Foster (May 3, 1995, Missouri): Seven minutes after the lethal chemicals began to flow into Foster's arm, the execution was halted when the chemicals stopped circulating. With Foster gasping and convulsing, blinds were drawn so witnesses could not view the scene. Death was pronounced thirty minutes after the execution began, and three minutes later the blinds were reopened so the witnesses could view the corpse. According to the coroner, the problem was caused by the tightness of the leather straps that bound Foster to the execution gurney. Foster did not die until several minutes after a prison worker finally loosened the straps.[665]

Ronald Allridge (June 8, 1995, Texas): Allridge's execution was conducted with only one needle, rather than the two required by the protocol, because a suitable vein could not be found in his left arm.[666]

Richard Townes (January 23, 1996, Virginia): It took twenty-two minutes for medical personnel to find a vein. After repeated unsuccessful attempts to insert the needle through the arms, the needle was finally inserted through the top of Townes' right foot.[667]

Tommie Smith (July 18, 1996, Indiana): It took one hour and nine minutes for Smith to be pronounced dead after the execution team began sticking needles into his body. For sixteen minutes, the team failed to find adequate veins, and then a physician was called. Smith was given a local anesthetic and the physician twice attempted to insert the tube in Smith's neck. When that failed, an angio-catheter was inserted in Smith's foot. Only then were witnesses permitted to view the process. The lethal drugs were finally injected into Smith 49 minutes after the first attempts, and it took another 20 minutes before death was pronounced.[668]

Luis Mata (August 22, 1996, Arizona): Mata remained strapped to a gurney with the needle in his arm for one hour and ten minutes while his attorneys argued his case. When injected, his head jerked, his face contorted, and his chest and stomach sharply heaved.[669]

Scott Carpenter (May 8, 1997, Oklahoma): Carpenter gasped, made guttural sounds, and shook for three minutes following the injection. He was pronounced dead eight minutes

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[664]See Denno-1 at 435; Denno-2 at 140; Radelet; Scott Fornek & Alex Rodriguez, "Gacy Lawyers Blast Method: Lethal Injections Under Fire After Equipment Malfunction," Chicago Sun-times, May 11, 1994, at 5; Rich Chapman, "Witnesses Describe Killer's 'Macabre' Final Few Minutes," Chicago Sun-times, May 11,1994, at 5; Rob Karwath & Susan Kuczka, "Gacy Execution Delay Blamed on Clogged IV Tube," Chicago Trib., May 11, 1994, at 1 (Metro Lake Section).

[665]See Denno-1 at 437; Denno-2 at 140; Radelet; "Witnesses to a Botched Execution," St. Louis Post- Dispatch, May 8, 1995, at 6B; Tim O'Neil, "Too-Tight Strap Hampered Execution," St. Louis Post-dispatch, May 5,1995, at B1; Jim Slater, "Execution Procedure Questioned," Kansas City Star, May 4, 1995, at C8.

[666]See Denno-1 at 437; Denno- 2 at 140.

[667]See Denno-1 at 437; Denno-2 at 140; Radelet.

[668]See Denno-1 at 438; Denno-2 at 140; Radelet.

[669]See Denno-1 at 438; Denno-2 at 140.

later.[670]

Michael Elkins (June 13, 1997, South Carolina): Liver and spleen problems had caused Elkins's body to swell, requiring executioners to search almost an hour – and seek assistance from Elkins – to find a suitable vein. See Denno-2 at 140; Radelet; "Killer Helps Officials Find A Vein At His Execution," Chattanooga Free Press, June 13, 1997, at A7.

Joseph Cannon (April 23, 1998, Texas): It took two attempts to complete the execution. Cannon's vein collapsed and the needle popped out after the first injection. He then made a second final statement and was injected a second time behind a closed curtain.[671]

Genaro Camacho (August 26, 1998, Texas): Camacho's execution was delayed approximately two hours when executioners could not find a suitable veins in his arms. See Denno-2 at 141; Radelet.

Roderick Abeyta (October 5, 1998, Nevada): The execution team took twenty- five minutes to find a vein suitable for the lethal injection. See Denno-2 at 141; Radelet; Sean Whaley, "Nevada Executes Killer," Las Vegas Review-Journal, Oct. 5, 1998, at 1A.

Christina Riggs (May 3, 2000. Arkansas): The execution was delayed for 18 minutes when prison staff could not find a vein.[672]

Bennie Demps (June 8, 2000, Florida): It took the execution team thirty- three (33) minutes to find suitable veins for the execution. "They butchered me back there," said Demps in his final statement. "I was in a lot of pain. They cut me in the groin; they cut me in the leg. I was bleeding profusely. This is not an execution, it is murder." The executioners had no unusual problems finding one vein, but because the Florida protocol requires a second alternate intravenous drip, they continued to work to insert another needle, finally abandoning the effort after their prolonged failures.[673]

Bert Hunter (June 28, 2000, Missouri): In a violent reaction to the drugs, Hunter's body convulsed against his restraints during what one witness called "a violent and agonizing death."[674]

Claude Jones (December 7, 2000, Texas): His execution was delayed 30 minutes while the

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[670]See Denno-2 at 140; Radelet; Michael Overall & Michael Smith, "22-Year-Old Killer Gets Early Execution," Tulsa World, May 8, 1997, at A1.

[671]See Denno-2 at 141; Radelet; "1st Try Fails to Execute Texas Death Row Inmate," Orlando Sent., Apr. 23, 1998, at A16; Michael Graczyk, "Texas Executes Man Who Killed San Antonio Attorney at Age 17," Austin American-statesman, Apr. 23, 1998, at B5.

[672]Radelet.

[673]See Denno-2 at 141; Radelet; Rick Bragg, "Florida Inmate Claims Abuse in Execution," N.Y. Times, June 9, 2000, at A14; Phil Long & Steve Brousquet, "Execution of Slayer Goes Wrong; Delay, Bitter Tirade Precede His Death," Miami Herald, June 8, 2000.

[674]See Denno-2 at 141; Radelet; David Scott, "Convicted Killer Who Once Asked to Die is Executed," Associated Press, June 28, 2000.

execution team struggled to insert an IV. One member of the execution team commented, "They had to stick him about five times. They finally put it in his leg."[675]

Joseph High (November 7, 2001, Georgia): For twenty minutes, technicians tried unsuccessfully to locate a vein in High's arms. Eventually, they inserted a needle in his chest, after a doctor cut an incision there, while they inserted the other needle in one of his hands. High was pronounced dead one hour and nine minutes after the procedure began.[676]

Sebastian Bridges (April 21, 2001, Nevada): Mr. Bridges spent between twenty and twenty-five minutes on the execution bed, with the intravenous line inserted, continuously agitated, asserting his innocence, the injustice of executing him, and the injustice of requiring him to sign a habeas corpus petition, and to suffer prolonged delay, in order to have the unconstitutionality of his conviction recognized by the court system. He remained agitated after the execution process began, so the sedative drugs appeared not to take effect and he died while apparently still conscious and shouting about the injustice of his execution.

Joeseph L. Clark (May 2, 2006, Ohio): It initially took executioners 22 minutes to find a suitable vein in Mr. Clark's left arm for insertion of the catheter. As the injection began, the vein collapsed. After an additional 30 minutes, the execution team succeeded in placing a catheter in Mr. Clark's right arm. However, the team again tried to inject the drugs into the left arm, where the vein had already collapsed. These difficulties prompted Mr. Clark to sit up, tell the executioners that "It don't work," and to ask "Can you just give me something by mouth to end this?" Mr. Clark was finally pronounced dead 90 minutes after the execution began.[677]

Nevada's execution protocol is similar to the lethal injection protocol employed in California prior to the recent litigation in Morales v. Hickman, 415 F.Supp.2d 1037 (N.D. Cal. February 14, 2006), aff'd, 438 F.3d 926 (9th Cir. 2006), cert denied, ___ U.S. ___, 126 S.Ct. 1314 (2006).[678] A Department of Corrections official has publicly stated what the drugs used in the execution are,[679] which are the same as those used in the three-drug "cocktail used in California.[680] The use of sodium thiopental, pancuronium bromide, and potassium chloride without the protections imposed in Morales to ensure adequate administration of anesthesia poses an unreasonable risk of inflicting

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[675]Radelet.

[676]See Denno-2 at 141; Radelet.

[677]Radelet; Andrew Walsh-Huggins, "IV Fiasco Led Killer to Ask for Plan B," AP (May 12, 2006).

[678]See Ex. 501 at ¶ 7.

[679]See Ex. 505, Cy Ryan, "Killer Makes Final Requests," Las Vegas Sun (March 18, 2004).

[680]Ex. 504.

unnecessary suffering.

This Court must prevent the infliction of unnecessary suffering in Mr. Milligan's execution by vacating the sentence or by requiring the execution to be conducted under conditions that eliminate the unnecessary risk of infliction of pain.

Either the state should have produced or trial counsel should have discovered and presented all that undersigned counsel has presented here. Trial counsel were ineffective for not doing so. Mr. Milligan's conviction and death sentence cannot be allowed to stand. Mr. Milligan is entitled to relief in the form of a new trial and a new sentencing proceeding.

State direct appeal counsel and state post-conviction counsel were likewise ineffective for failing to raise and litigate the above-referenced meritorious issues on direct appeal or in state post-conviction when Mr. Milligan had a right to effective assistance of counsel. There is no reasonable strategy, designed to effectuate Mr. Milligan's best interests, for the failures of trial direct appeal and post-conviction counsel. Mr. Milligan was prejudiced as a result of counsels' failures and he is entitled to relief.

CLAIM NINE

Mr. Milligan's death sentence is invalid under the federal constitutional guarantees of due process, equal protection, and punishment which is not cruel or unusual due to the restrictive conditions on Nevada's death row. U.S. Const. Amends. VIII & XIV.

SUPPORTING FACTS

Mr. Milligan has been incarcerated in single-occupancy confinement on the Nevada Department of Corrections' death row since January 1981. During those 26 years, he has been allowed only two hours of recreation and social contact for every 36 hour period.

The principal social purposes of retribution and deterrence sought through the death penalty have lost their compelling purpose by the passage of time. The acceptable state interest of retribution has been satisfied by the severe punishment already inflicted by forcing Mr. Milligan to live in spartan circumstances, cut off from normal social interaction. The United States Supreme Court has recognized the "painful character" of holding a prisoner in solitary confinement for only four weeks while awaiting execution.[681] This is due, not only to the isolating nature of solitary confinement, but also to the "horrible feeling" the prisoner must feel due to the knowledge he is to be executed and the "uncertainty" as to when.[682]

The deterrent value of any punishment is directly related to the promptness with which it is inflicted. The deterrent value of carrying out an execution 16 years after conviction is minimal, at best.[683] Carrying out an execution at such a removed date may have no deterrent value over and above the deterrent value of simply incarcerating the defendant for the years between conviction and execution.

The delay from Mr. Milligan's conviction to present is attributable to the ineffective assistance of trial, appellate, and post-conviction counsel. Trial, appellate, and post-conviction

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[681] In re Medley, 134 U.S. 160, 171-72 (1890).

[682] Id.

[683] See Jeffrey Fagan, Columbia Law School, "*Deterrence and the Death Penalty: A Critical Review of New Evidence*," Ex. 278. Death Penalty Information Center, "National Murder Rates, 1995-2004."

counsel have failed to investigate and present many legitimate claims to the state court and to this Court. Mr. Milligan cannot be held responsible for delays caused by his prior counsels' ineffectiveness.

Inflicting the punishment of death upon Mr. Milligan, after the State has inflicted the torturous punishment of holding him in near-solitary confinement for 27 years, would push his total punishment beyond what evolving standards of decency can tolerate. Mr. Milligan's death sentence must be vacated.

State direct appeal counsel and state post-conviction counsel were likewise ineffective for failing to raise and litigate the above-referenced meritorious issues on direct appeal or in state post-conviction when Mr. Milligan had a right to effective assistance of counsel. There is no reasonable strategy, designed to effectuate Mr. Milligan's best interests, for the failures of trial direct appeal and post-conviction counsel. Mr. Milligan was prejudiced as a result of counsels' failures and he is entitled to relief.

CLAIM TEN

Mr. Milligan's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, and a reliable sentence because the Nevada capital punishment system operates in an arbitrary and capricious manner. U.S. Const. Amends. VIII, & XIV.

SUPPORTING FACTS

Mr. Milligan incorporates each and every allegation contained in this petition as if fully set forth herein.

The Nevada capital sentencing process permits the imposition of the death penalty for any first degree murder that is accompanied by an aggravating circumstance.[684] The statutory aggravating circumstances are so numerous and so vague that they arguably exist in every first degree murder case.[685] Nevada permits the imposition of the death penalty for all first degree murders that are "at random and without apparent motive."[686] Nevada statutes also appear to permit the death penalty for murders involving virtually every conceivable kind of motive: robbery, sexual assault, arson, burglary, kidnaping, torture, escape, to receive money, and to prevent lawful arrest and escape.[687] The scope of the Nevada death penalty statute makes the death penalty an option for all first degree murders that involve a motive, and death is also an option if the first degree murder involves no motive at all.[688]

The death penalty is accordingly permitted in Nevada for all first degree murders, and first degree murders, in turn, are not restricted in Nevada within traditional bounds of premeditated and deliberate murder. As the result of the Nevada courts' use of unconstitutional definitions of reasonable doubt, express malice, and premeditation and deliberation, first degree murder convictions occur in the absence of proof beyond a reasonable doubt, in the absence of any rational

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[684] See Nev. Rev. Stat. 200.030(4)(a).

[685] See Nev. Rev. Stat. 200.033.

[686] Nev. Rev. Stat. 200.033(9).

[687] See Nev. Rev. Stat. § 200.033.

[688] See id.

showing of premeditation and deliberation, and as a result of the presumption of malice aforethought. Consequently, a death sentence is permissible under Nevada law in every case where the prosecution can present evidence, not even beyond a reasonable doubt, that an accused committed an intentional killing. It is well-settled that, in order to pass constitutional muster, a capital sentencing scheme must narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

As a result of plea bargaining practices and imposition of sentences by juries and three-judge panels, sentences less than death have been imposed for offenses that are more aggravated than the one for which Mr. Milligan stands convicted and in situations where the amount of mitigating evidence was less than the mitigation evidence that existed here. The untrammeled power of the sentencer under Nevada law to decline to impose the death penalty, even when no mitigating evidence exists at all, or when the aggravating factors far outweigh the mitigating evidence, means that the imposition of the death penalty is necessarily arbitrary and capricious.

Nevada law fails to provide sentencing bodies with any rational method for separating those few cases that warrant the imposition of the ultimate punishment from the many that do not. The narrowing function required by the Eighth Amendment is accordingly non-existent under Nevada's sentencing scheme, and the process is contaminated even further by Nevada Supreme Court decisions permitting the prosecution to present unreliable and prejudicial evidence during sentencing, regarding uncharged criminal activities of the accused. Consideration of such evidence necessarily diverts the sentencer's attention from the statutory aggravating circumstances, whose appropriate application is already virtually impossible to discern.

Because the Nevada capital punishment system provides no rational method for distinguishing between who lives and dies, such determinations are made on the basis of illegitimate considerations. All the people on Nevada's death row are indigent and have had to defend with the meager resources afforded to indigent defendants and their counsel. As this case illustrates, the lack of resources provided to capital defendants virtually ensures that compelling mitigating evidence will not be presented to, or considered by, the sentencing body. Nevada sentencers are accordingly

unable to, and do not, provide the individualized, reliable sentencing determination that the constitution requires.

The defects in the Nevada system are aggravated by the inadequacy of the appellate review process.

The Nevada capital punishment system suffers from the problems of under-funding of defense counsel, the lack of a fair and adequate appellate review process, and the pervasive effects of race. The problems with Nevada's process, moreover, are exacerbated by open-ended definitions of both first degree murder and the accompanying aggravating circumstances, which permit the imposition of a death sentence for virtually every intentional killing. This arbitrary, capricious, and irrational scheme violates Mr. Milligan's clearly established state and federal constitutional rights and is prejudicial per se and violates Mr. Milligan's rights under international law, which prohibits the arbitrary deprivation of life.

State direct appeal counsel and state post-conviction counsel were ineffective for failing to raise and litigate the above-referenced meritorious issues on direct appeal or in state post-conviction when Mr. Milligan had a right to effective assistance of counsel. There is no reasonable strategy, designed to effectuate Mr. Milligan's best interests, for the failures of trial direct appeal and post-conviction counsel. Mr. Milligan was prejudiced as a result of counsels' failures and he is entitled to relief.

CLAIM ELEVEN

Mr. Milligan's conviction and death sentence violate the state and federal constitutional guarantees of due process of law, equal protection of the laws, a reliable sentence, and international law because Mr. Milligan's capital trial and sentencing and review on direct appeal were conducted before state judicial officers whose tenure in office was not during good behavior but whose tenure was dependent on popular election. U.S. Const. Art. VI, Amends. V, VI, VIII, & XIV.

SUPPORTING FACTS

The tenure of judges of the Nevada state district courts and of the Justices of the Nevada Supreme Court is dependent upon popular contested elections. See Nev. Const. Art. 6 §§ 3, 5.

Mr. Milligan's capital trial and sentencing and review on direct appeal were conducted before elected judges.

The justices of the Nevada Supreme Court perform mandatory review of capital sentences, which includes the exercise of unfettered discretion to determine whether a death sentence is excessive or disproportionate, without any legislative prescription as to the standards to be applied in that evaluation. See Nev. Rev. Stat. § 177.055(2). Mr. Witter incorporates the allegations of Claim Thirty-One.

At the time of the adoption of the United States Constitution, the common law definition of due process of law included the requirement that judges who presided over trials in capital cases, which at that time potentially included all felony cases, have tenure during good behavior. All of the judges who performed the appellate function of deciding legal issues reserved for review at trial had tenure during good behavior. This mechanism was intended to, and did, preserve judicial independence by insulating judicial officers from the influence of the sovereign that would otherwise have improperly affected their impartiality.

Nevada law does not include any mechanism for insulating state judges and justices from majoritarian pressures which would affect the impartiality of an average person as a judge in a capital case. Making unpopular rulings favorable to a capital defendant or to a capitally-sentenced appellant poses the threat to a judge or justice of expending significant personal resources, of both time and

money, to defend against an election challenger who can exploit popular sentiment against the jurist's pro-capital defendant rulings, and poses the threat of ultimate removal from office. These threats "offer a possible temptation to the average [person] as a judge . . . not to hold the balance nice, clear and true between the state and the [capitally] accused." Tumey v. Ohio, 273 U.S. 510, 532 (1927). One justice of the Nevada Supreme Court has acknowledged publicly that the time and expense of an election challenge involving a charge that a sitting justice was "soft on crime" due to a ruling that favored the defense "was not lost on" the elected Nevada judiciary.

Judges and justices who are subject to popular election cannot be impartial in any capital case within due process and international law standards because of the threat of removal as a result of unpopular decisions in favor of a capital defendant.

Conducting a capital trial or direct appeal before a tribunal that does not meet constitutional standards of impartiality is prejudicial per se, and requires that Mr. Milligan's death sentence be vacated. Mr. Milligan is entitled to penalty phase relief.

The above stated claim is of obvious merit. Competent appellate counsel would have raised and litigated this meritorious issue on direct appeal and in state post-conviction. There is no reasonable appellate strategy, reasonably designed to effectuate petitioner's best interest, that would justify appellate counsel's failure in this regard.

State direct appeal counsel and state post-conviction counsel were ineffective for failing to raise and litigate the above-referenced meritorious issues on direct appeal or in state post-conviction when Mr. Milligan had a right to effective assistance of counsel. There is no reasonable strategy, designed to effectuate Mr. Milligan's best interests, for the failures of trial direct appeal and post-conviction counsel. Mr. Milligan was prejudiced as a result of counsels' failures and he is entitled to relief.

CLAIM TWELVE

Mr. Milligan's conviction and death sentence are invalid under the state and federal constitutional guarantees of due process, equal protection, effective assistance of counsel, a fair tribunal, an impartial jury, and a reliable sentence due to the cumulative errors in the admission of evidence and instructions, gross misconduct by state officials and witnesses, and the systematic deprivation of Mr. Milligan's right to the effective assistance of counsel. U.S. Const. Amends. V, VI, VIII, & XIV.

SUPPORTING FACTS

Each of the claims specified in this petition requires vacation of the conviction or sentence. Mr. Milligan incorporates each and every factual allegation contained in this petition as if fully set forth herein.

The cumulative effect of the errors demonstrated in this petition deprived Mr. Milligan of proceedings that were fundamentally fair and resulted in a constitutionally unreliable sentence. Whether or not any individual error requires the vacation of the judgment or sentence, the totality of these multiple errors and omissions resulted in substantial prejudice to Mr. Milligan.

The State cannot show, beyond a reasonable doubt, that the cumulative effect of these numerous constitutional errors was harmless beyond a reasonable doubt; in the alternative, the totality of these constitutional violations substantially and injuriously affected the fairness of the proceedings and prejudiced Mr. Milligan.

Either the state should have produced or trial counsel should have discovered and presented all that undersigned counsel has presented here. Trial counsel were ineffective for not doing so. Mr. Milligan's conviction and death sentence cannot be allowed to stand. Mr. Milligan is entitled to relief in the form of a new trial and a new sentencing proceeding.

State direct appeal counsel and state post-conviction counsel were ineffective for failing to raise and litigate the above-referenced meritorious issues on direct appeal or in state post-conviction when Mr. Milligan had a right to effective assistance of counsel. There is no reasonable strategy, designed to effectuate Mr. Milligan's best interests, for the failures of trial direct appeal and post-

conviction counsel. Mr. Milligan was prejudiced as a result of counsels' failures and he is entitled to relief.

CLAIM THIRTEEN

Mr. Milligan's conviction and death sentence are invalid under the state and federal constitutional guarantees of due process, equal protection, and a reliable sentence due to the Nevada Supreme Court's failure to conduct a fair and adequate appellate review. U.S. Const. Amends. V, VI, VIII, & XIV.

SUPPORTING FACTS

The Nevada Supreme Court's review of capital cases has been inadequately. The opinions rendered by the court, as in this case, have been consistently arbitrary, unprincipled and result-oriented.

Under Nevada law, the Nevada Supreme Court had a duty to review Mr. Milligan's death sentence to determine (a) whether the evidence supports the finding of an aggravating circumstance or circumstances; (b) whether the sentence of death was imposed under the influence of passion, prejudice or other arbitrary factor; (c) whether the sentence of death is excessive considering both the crime and the defendant.[689] Such appellate review was also required as a matter of constitutional law to ensure the fairness and reliability of Mr. Milligan's death sentence.

The Nevada Supreme Court's opinion affirming the judgment provides almost no indication that the mandatory review was ever conducted in this case, other than a single boilerplate reference to the issue in the opinion:

> We have reviewed our other cases in which the sentence of death has been imposed to determine whether Milligan's sentence is disproportionate or excessive. Our review leads us to conclude that the sentence of death is neither disproportionate nor excessive.
>
> We also conclude from the record that the sentences of death were not imposed under the influence of passion, prejudice or any arbitrary factor.[690]

Mr. Milligan is informed and believes, and therefore alleges, that the statutory reference is contained in a formatted "macro" (a word-processing feature that prompts the repetition of word

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[689]Nev. Rev. Stat. §177.055(2).

[690]Milligan v. State, 101 Nev. 627, 639, 708 P.2d 289 (1985).

groups) in the Nevada Supreme Court's computer system, which the court staff have been instructed to insert at the end of every death penalty affirmance. The Nevada Supreme Court in this case and in many other cases, has accordingly purported to fulfill its duty to provide so-called mandatory "review" of death sentences by instructing its staff members to push a button on a computer.

The Supreme Court has never articulated any basis for conducting the review required by Nev. Rev. Stat. §177.055(2). Specifically, the Nevada Supreme Court has never, in this case or any other, made clear what standards apply to such review, and it has not published any rule or decision giving notice of what cases it uses for comparison in its review, of what evidence it will consider, or of how counsel should litigate the issue.

Had the Nevada Supreme Court conducted the type of appellate review required by statutory law and by the Constitution, it could not have upheld Mr. Milligan's conviction and death sentence. The reasons why Mr. Milligan's conviction and sentence cannot withstand scrutiny are alleged throughout this petition, and Mr. Milligan incorporates each and every factual allegation as if fully set forth herein.

The lack of adequate appellate review in this case is symptomatic of an irrational appellate review process in Nevada as a whole. The Nevada Supreme Court is among the busiest appellate courts in the nation; its seven justices decide approximately 1,800 cases per year, and in 2005, the court had over 2000 filings. Consequently, the Nevada Supreme Court Justices have virtually no knowledge about the facts and law surrounding most of the cases they are reviewing. Two former Nevada Supreme Court Justices have publicly declared that justices normally do not read the briefs, but instead rely on the bench memorandum prepared by staff attorneys to represent counsel's arguments and the facts in the record.[691] One justice referred to the former requirement of filing six copies of the briefs as "perpetuat[ing] the myth that we read each brief. That simply isn't true."[692] A second justice characterized the bench memorandum as a "necessary evil," and later added "it would be far better if we read your briefs before oral argument and digested them... the time simply

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[691] See State Bar of Nevada, *Advocacy before the Supreme Court*, (Reno, February 1, 1996).

[692] Id.

isn't there to do that." The justices have also publicly acknowledged that they do not personally read appellate records, explaining that "reading the entire record [is] what the law clerks do."[693]

The consideration of mitigation evidence on direct review, the determination of whether aggravating circumstances were proven beyond a reasonable doubt, excessiveness review and a review for passion and prejudice can be performed only by the state appellate court. The failure to provide such review here violated Mr. Milligan's constitutional right to due process and a reliable sentencing determination. No prejudice inquiry is possible and the case must be remanded to the state system for adequate appellate review.

Had Mr. Milligan's trial, direct-appeal, and state post-conviction attorneys complied with their state and federal constitutional obligation to render effective assistance of counsel, Mr. Milligan would not have been convicted of first-degree murder and would not have received a sentence of death. Mr.Milligan was deprived his state and federal constitutional right to effective assistance of counsel, a fair trial and reliable sentencing proceeding, due process and equal protection. Mr. Milligan is entitled to relief.

Either the state should have produced or trial counsel should have discovered and presented all that undersigned counsel has presented here. Trial counsel were ineffective for not doing so. Mr. Milligan's conviction and death sentence cannot be allowed to stand. Mr. Milligan is entitled to relief in the form of a new trial and a new sentencing proceeding.

State direct appeal counsel and state post-conviction counsel were likewise ineffective for failing to raise and litigate the above-referenced meritorious issues on direct appeal or in state post-conviction when Mr. Milligan had a right to effective assistance of counsel. There is no reasonable strategy, designed to effectuate Mr. Milligan's best interests, for the failures of trial direct appeal and post-conviction counsel. Mr. Milligan was prejudiced as a result of counsels' failures and he is entitled to relief.

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[693] Id.

CLAIM FOURTEEN

Mr. Milligan's conviction and death sentence are invalid under the constitutional guarantees of due process, equal protection, effective assistance of counsel, and a reliable sentence because appellate and post-conviction counsel failed to provide effective assistance of counsel. U.S. Const. Amends. VI, VIII, XIV.

SUPPORTING FACTS

John O'Connor represented Mr. Milligan on direct appeal. Mr. O'Connor's appellate advocacy fell below that which is expected of an attorney representing a defendant under the sentence of death. In particular, Mr. O'Connor failed to raise several meritorious record-based claims which have been thoroughly and repeatedly pled in this petition. Mr. O'Connor did not have a strategic or tactical reason for not incorporating each and every record-based claim pled in this petition. Mr. O'Connor's deficient performance substantially prejudiced Mr. Milligan; as repeatedly pled in the instant petition, had Mr. O'Connor pursued and pled these meritorious record-based claims, Mr. Milligan's appeal would have resulted in a different outcome–i.e., his conviction and death sentence would have been overturned and vacated.

William Smith and Annette Quintanna represented Mr. Milligan during his first post-conviction proceedings (1988 evidentiary hearing). Mr. Smith and Ms. Quintanna's post-conviction advocacy fell below that which is expected for attorneys representing a defendant sentenced to death. In particular, Mr. Smith and Ms. Quintanna failed to raise several off-the-record and record based claims which have been comprehensively pled in this petition. Mr. Smith and Ms. Quintanna did not have a strategic or tactical decision for not incorporating each and every off-the-record or record-based claim pled in the instant petition. Mr. Smith and Ms. Quintanna's deficient performance substantially prejudiced Mr. Milligan; as frequently pled in the instant petition, had Mr. Smith and Ms. Quintanna pursued and pled these meritorious off-the record and record-based claims, Mr. Milligan's post-conviction proceedings would have resulted in a different outcome–i.e., his conviction and death sentence would have been overturned and vacated.

Terri Roeser represented Mr. Milligan during his second post-conviction proceedings (1998

evidentiary hearing). Ms. Roeser's post-conviction advocacy fell below that which is expected for attorneys representing a defendant sentenced to death. In particular, Ms. Roeser failed to raise several off-the-record and record based claims which have been thoroughly pled in this petition. Ms. Roeser did not have a strategic or tactical decision for not incorporating each and every off-the-record or record-based claim pled in the instant petition. Ms. Roeser's deficient performance substantially prejudiced Mr. Milligan; as frequently pled in the instant petition, had Ms. Roeser pursued and pled these meritorious off-the record and record-based claims, Mr. Milligan's post-conviction proceedings would have resulted in a different outcome–i.e., his conviction and death sentence would have been overturned and vacated.

State direct appeal counsel and state post-conviction counsel were ineffective for failing to raise and litigate the above-referenced meritorious issues on direct appeal or in state post-conviction when Mr. Milligan had a right to effective assistance of counsel. There is no reasonable strategy, designed to effectuate Mr. Milligan's best interests, for the failures of trial direct appeal and post-conviction counsel. Mr. Milligan was prejudiced as a result of counsels' failures and he is entitled to relief.

CLAIM FIFTEEN

Mr. Milligan's death sentence is invalid under the federal constitutional guarantees of due process, equal protection, and a reliable sentence, as well as his rights under international law, because the death penalty is cruel and unusual punishment. U.S. Const. Art. VI, Amends. VIII & XIV; International Covenant on Civil and Political Rights.

SUPPORTING FACTS

The Eighth Amendment prohibits punishment which is inconsistent with the evolving standards of decency that mark the progress of a maturing society.

The worldwide trend is toward the abolition of capital punishment and most civilized nations no longer conduct executions. Portugal outlawed capital punishment in 1867; Sweden and Spain abolished the death penalty during the 1970's; and France abolished capital punishment in 1981. In 1990, the United Nations called on all member nations to take steps toward the abolition of capital punishment. Since this call by the United Nations, Canada, Mexico, Germany, Haiti and South Africa, pursuant to international law provisions that outlaw "cruel, unusual and degrading punishment," have abolished capital punishment. The death penalty has recently been abolished in Azerbaijan and Lithuania. Many of the "third world" nations have rejected capital punishment on moral grounds. As demonstrated by the world-wide trend toward abolition of the death penalty, state-sanctioned killing is inconsistent with the evolving standards of decency that mark the progress of a maturing society.

The death penalty is unnecessary to the achievement of any legitimate societal or penalogical interests in Mr. Milligan's case. Mr. Milligan's alcoholic blackout state, and the absence of any basis upon which to anticipate that he would pose an unmanageable danger if incarcerated, make his death sentence cruel and unusual punishment. Mr. Milligan incorporates the allegations of Claims One and Nine.

The death penalty constitutes cruel and unusual punishment under any and all circumstances, and constitutes cruel and unusual punishment under the circumstances of this case. Mr. Milligan's death sentence also violates international law, which prohibits the arbitrary deprivation of life, and

cruel, inhuman or degrading treatment or punishment.

State direct appeal counsel and state post-conviction counsel were ineffective for failing to raise and litigate the above-referenced meritorious issues on direct appeal or in state post-conviction when Mr. Milligan had a right to effective assistance of counsel. There is no reasonable strategy, designed to effectuate Mr. Milligan's best interests, for the failures of trial direct appeal and post-conviction counsel. Mr. Milligan was prejudiced as a result of counsels' failures and he is entitled to relief.

PRAYER FOR RELIEF

For the reasons stated above, this Court should issue a Writ of Habeas Corpus and vacate petitioner's conviction and death sentence.

DATED this 13th day of April, 2007.

Respectfully submitted,

/s/ Michael Charlton
Michael Charlton
Assistant Federal Public Defender

/s/ Gerald Bierbaum
Gerald Bierbaum
Assistant Federal Public Defender

/s/ Craig M. Cooley
Craig M. Cooley
Assistant Federal Public Defender

Attorneys for Petitioner

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

Ronnie G. Milligan

Ronnie G. Milligan

APPENDIX A

_____1._____Statement with Respect to Previous Proceedings

A. The failure to raise any of the claims asserted in this petition, which were susceptible to decision on direct appeal, was the result of ineffective assistance of counsel on appeal.

B. The failure to raise any of the claims asserted in this petition, which were susceptible of being raised in the state post-conviction proceeding, and appeal, was the result of ineffective assistance of counsel, in a proceeding in which Mr. Milligan had a right to effective assistance of counsel under state and federal law; was the result of representation by counsel that violated federal constitutional due process standards; and/or was induced by the state trial court's refusal to permit appointed counsel adequate time or resources to identify and present all of the available constitutional claims in violation of the right to an adequate opportunity to be heard guaranteed by the due process clause of the Fourteenth Amendment. Mr. Milligan did not consent to the failure to raise any available constitutional claim and did not knowingly and intelligently waive any such claim. Mr. Milligan did not conceal from, or fail to disclose to appointed counsel, at any stage of the proceedings, any fact relevant to any available constitutional claim.

C. Mr. Milligan and previous counsel were prevented from discovering and alleging all of the claims raised in this petition by the state's action in failing to disclose all material evidence in possession of its agents.

D. The Nevada Supreme Court has deemed counsel's failure to raise claims in prior proceedings or in a timely manner as sufficient cause to allow new claims to be considered and has disregarded such failures and addressed constitutional claims in the cases of similarly-situated litigants. Barring consideration of the merits of Mr. Milligan's claims would violate the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

1) The Nevada Supreme Court has exercised complete discretion to address constitutional claims, when an adequate record is presented to resolve them, at any stage of the proceedings, despite the default rules contained in Nev. Rev. Stats. §§ 34.726, 34.800, and 34.810. A purely discretionary procedural bar is not adequate to preclude review of the merits of

constitutional claims. E.g., Valerio v. Crawford, 306 F.3d 742, 774 (9th Cir. 2002) (en banc); Morales v. Calderon, 85 F.3d 1387, 1391 (9th Cir. 1996). Although the Nevada Supreme Court asserted in Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001), that application of the statutory default rules, some of which were adopted in the 1980's, was mandatory, 34 P.3d at 536, the examples cited below establish that the Nevada Supreme Court has always exercised, and continues to exercise, complete discretion in applying them. See also, Ybarra v. Warden, No. 43981, Order Affirming in Part, Reversing in Part, and Remanding (November 28, 2005), Ex. 433, and Ybarra v. Warden, No. 43981, Order Denying Rehearing (February 2, 2006), Ex. 434 (both reiterating that application of the statutory default rules is mandatory despite alleged inconsistencies in application).

2) The Nevada Supreme Court has complete discretion to address constitutional claims, when an adequate record is presented to resolve them, at any stage of the proceedings, despite the default rules contained in Nev. Rev. Stat. §§ 34.726; 34.800; 34.810. The Nevada Supreme Court has disregarded default rules and addressed constitutional claims, at any stage of capital proceedings, in the exercise of its complete discretion to do so.

3) The Nevada Supreme Court has now provided a laboratory example of this disparate, and therefore unconstitutional, treatment in the Rippo case. There, the Supreme Court, on appeal from the denial of post-conviction habeas corpus relief, sua sponte directed the parties to be prepared to argue an issue arising from a penalty phase jury instruction, regarding whether the jury had to be unanimous in finding that the mitigating evidence outweighed the aggravating factors to preclude death-eligibility. Rippo v. State, No. 44094; Bejarano v. State, No. 44297, Order Directing Oral Argument (March 16, 2006), Ex. 435 at 2. The issue was addressed on the merits in its decision. Rippo v. State, 122 Nev. ___, 146 P.3d 279, 285 (2006). This instructional issue had not been raised in any previous proceeding, cf. Nev. Rev. Stat. § 34.810(1)(b),(2), or in the habeas proceedings in the trial court, or in the Nevada Supreme Court itself. The only issue raised with respect to this jury instruction was whether it adequately informed the jury that non-statutory aggravating evidence that was not relevant to the statutory aggravating factors could be considered in the weighing process for finding death-eligibility. Exs. 436 at 30-33; 437; 438 at 31-34; 439 at 30-32; 440 at 20-23, 441. The Supreme Court first raised the issue sua

sponte in its order directing oral argument in 2006, long after the one year rule, Nev. Rev. Stat. § 34.726(1), and the five year rule, Nev. Rev. Stat. § 34.800(2), had elapsed from the finality of the conviction and sentence in 1998. Rippo v. State, 113 Nev. 1239, 946 P.3d 1017 (1997), cert. denied 524 U.S. 841 (October 5, 1998).

4) Despite the Nevada Supreme Court's repeated claim that it applies its default rules consistently, State v. District Court (Riker), 112 P.3d at 1074-1082; Pellegrini v. State, 117 Nev. 860, 880-886, 34 P.3d 519 (2001), there can be no rational dispute that in Rippo the Court sua sponte raised and addressed on the merits a claim that was barred under the statutory default rules. If those same rules are applied to bar consideration of the merits of any of Mr. Milligan's claims, the constitutional violation based on arbitrarily disparate treatment of similarly-situated litigants will be complete. See, e.g., Bush v. Gore, 531 U.S. 98, 106-109 (2000) (per curiam); Village of Willowbrook v. Olech, 528 U.S. 564-565 (2000) (per curiam); Myers v. Ylst, 897 F.2d 917, 921 (9th Cir. 1990) (equal protection requires consistent application of state law to similarly-situated litigants).

5) In Rippo, the court's decision made no mention of the supposedly mandatory default rules. See also, Bejarano v. State, 106 Nev. 840, 843, 801 P.2d 1388 (1990) (on appeal from denial of collateral relief, "[w]e consider sua sponte whether failure to present such [mitigating] evidence constitutes ineffective assistance"); Bejarano v. Warden, 112 Nev. 1466, 1471 n. 2, 929 P.2d 922 (1996) (addressing claim on merits despite default rules); Bennett v. State, 111 Nev. 1099, 1103, 901 P.2d 676 (1995) (addressing claims asserted to be barred by default rules; "[w]ithout expressly addressing the remaining procedural bases for the dismissal of Bennett's petition, we therefore choose to reach the merits of Bennett's contentions" (emphasis supplied); Ford v. Warden, 111 Nev. 872, 886-887, 901 P.2d 123 (1995) (addressing claim of error in court's mandatory sentence review on direct appeal raised for first time on appeal in second collateral attack, without discussing or applying default rules); Hill v. Warden, 114 Nev. 169, 178-179, 953 P.2d 1077 (1998) (addressing merits claims raised for first time on appeal from denial of third post-conviction petition because claims "of constitutional dimension which, if true, might invalidate Hill's death sentence and the record is sufficiently developed to provide an adequate basis for review."); see also,

Lane v. State, 110 Nev. 1156, 1168, 881 P.2d 1358 (1994) (vacating aggravating factor finding based on instructional error on mandatory review without noting issue not raised at trial or on appeal); Lord v. State, 107 Nev. 28, 38, 806 P.2d 548 (1991) ("Normally a proper objection is a prerequisite to our considering the issue on appeal. However, since this issue is of constitutional proportions, we elect to address it now.") (citation omitted); Powell v. State, 108 Nev. 700, 705-06, 838 P.2d 921 (1992) (addressing issue of delay in probable cause determination without indicating that issue not raised at trial or on appeal); Farmer v. Director, Nevada Dept. Of Prisons, No. 18052, Order Dismissing Appeal (March 31, 1988) (addressing two substantive claims on merits (guilty plea involuntary, insufficiency of aggravating circumstances) despite failure to raise on direct appeal), Ex. 404; Farmer v. State, No. 22562, Order Dismissing Appeal (February 20, 1992) (denying claim of improper admission of victim impact evidence on merits despite default), Ex. 405; Feazell v. State, No. 37789, Order Affirming in Part and Vacating in Part, at 5-6 (November 14, 2002) (granting penalty phase relief sua sponte (on appeal of first state habeas corpus petition) on basis of ineffective assistance of post-conviction counsel without requiring petitioner to plead "cause" under Nev. Rev. Stat. § 34.726(1) or 34.810)), Ex. 407; Hardison v. State No. 24195, Order of Remand (May 24, 1994) (addressing claims and granting relief despite timeliness and successive petition procedural bars raised by state), Ex. 409; Hill v. State No. 18253, Order Dismissing Appeal (June 29, 1987) (dismissing untimely appeal from denial of second post-conviction relief petition but sua sponte directing trial court to entertain merits of new petition), Ex. 410; Milligan v. State, No. 21504, Order Dismissing Appeal (June 17, 1991) (rejecting two substantive claims on merits (error to admit uncorroborated testimony of accomplice, death penalty cruel and unusual) despite failure to raise on direct appeal), Ex. 413; Neuschafer v. Warden No. 18371, Order Dismissing Appeal (August 19, 1987) (addressing merits of claims without discussion of default rules, in case decided without briefing, and in which court expressed "serious doubts" about authority of counsel to pursue appeal, but decided to "elect" to entertain appeal due to "gravity of appellant's sentence"), Ex. 416; Nevius v. Sumner (Nevius I) Nos. 17059, 17060, Order Dismissing Appeal and Denying Petition (February 19, 1986) (reviewing first and second collateral petitions in consolidated opinion, without addressing default rules as to second petition), Ex. 417; Nevius v. Warden (Nevius II), Nos. 29027, 29028,

Order Dismissing Appeal and Denying Petition for Writ of Habeas Corpus (October 9, 1996) (entertaining claim in petition filed directly with Nevada Supreme Court despite failure to raise claim in district court; noting that district court had "discretion to dismiss appellant's petition . . . ."), Ex. 418; Nevius v. Warden (Nevius III), Nos. 29027, 29028, Order Denying Rehearing (July 17, 1998) (same), Ex.419; Rogers v. Warden, No. 22858, Order Dismissing Appeal (May 28, 1993) (addressing two claims on merits (objection to M'Naughten test for insanity, error to place the burden on defendant to prove insanity) despite successive petition bar and direct appeal bar; claims rejected under law of the case), Ex. 424; Stevens v. State, No. 24138, Order of Remand (July 8, 1994) (finding cause on basis of failure to appoint counsel in proceeding in which appointment of counsel not mandatory, cf. Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247 (1997)), Ex. 428; Williams v. State, No. 20732, Order Dismissing Appeal (July 18, 1990) (addressing claim in third collateral proceeding on merits without discussion of default rules), Ex. 430; Ybarra v. Director, No. 19705, Order Dismissing Appeal (June 29, 1989) (addressing previously-raised claim without reference to default rules), Ex. 432.

6) The Nevada Supreme Court disregards the procedural bar arising from failure to raise claims in earlier proceedings. See Valerio v. Crawford, 306 F.3d 742, 778 (9th Cir. 2002); See also, Rippo v. State, 146 P.3d at 285; Bejarano v. Warden, 112 Nev. 1466, 1471 n. 2, 929 P.2d 922 (1996) (addressing claim on merits despite default rules); Bennett v. State, 111 Nev. 1099, 1103, 901 P.2d 676 (1995) (addressing claims asserted to be barred by default rules; "[w]ithout expressly addressing the remaining procedural bases for the dismissal of Bennett's petition, we therefore choose to reach the merits of Bennett's contentions" (emphasis supplied)); Ford v. Warden, 111 Nev. 872, 886-887, 901 P.2d 123 (1995) (addressing claim of error in court's mandatory sentence review on direct appeal raised for first time on appeal in second collateral attack, without discussing or applying default rules); Hill v. Warden, 114 Nev. 169, 178-179, 953 P.2d 1077 (1998) (addressing merits of claims raised for first time on appeal from denial of third post-conviction petition because claims "of constitutional dimension which, if true, might invalidate Hill's death sentence and the record is sufficiently developed to provide an adequate basis for review."); Farmer v. State No. 22562, Order Dismissing Appeal (February 20, 1992) (denying claim of improper

admission of victim impact evidence on merits despite default), Ex. 405; Feazell v. State, No. 37789, Order Affirming in Part and Vacating in Part, at 5-6 (November 14, 2002) (granting penalty phase relief sua sponte (on appeal of first state habeas corpus petition) on basis of ineffective assistance of post-conviction counsel without requiring petitioner to plead or prove "cause" in a successive petition), Ex. 407; Hardison v. State No. 24195, Order of Remand (May 24, 1994) (addressing claims and granting relief despite timeliness and successive petition procedural bars raised by state), Ex.409; Neuschafer v. Warden No. 18371, Order Dismissing Appeal (August 19, 1987) (addressing merits of claims without discussion of default rules, in case decided without briefing, and in which court expressed "serious doubts" about authority of counsel to pursue appeal, but decided to "elect" to entertain appeal due to "gravity of appellant's sentence"), Ex. 416; Ybarra v. Director No. 19705, Order Dismissing Appeal (June 29, 1989) (addressing previously-raised claim without reference to default rules), Ex. 432.

7) The Nevada Supreme Court consistently fails to apply the time bar provisions of Nev. Rev. Stat §34.726, or the rebuttable presumption of Nev. Rev. Stat. § 34.800 (2) to capital habeas petitioners. Rippo v. State, 122 Nev. ___, 146 P.3d at 285 (issue raised by Nevada Supreme Court sua sponte in 2006, when conviction and sentence final in 1998); Bejarano v. Warden, 112 Nev. 1466, 1471 n. 2, 929 P.2d 922 (1996) (addressing claim on merits despite default rules; successive petition filed approximately five years after direct appeal remittitur issued on January 10, 1989); Ford v. Warden, 111 Nev. 872, 886-887, 901 P.2d 123 (1995) (addressing claim of error in court's mandatory sentence review on direct appeal raised for first time on appeal in second collateral attack, without discussing or applying default rules; successive petition filed November 12, 1991, approximately five years after direct appeal remittitur issued on April 29, 1986); Hill v. State, 114 Nev. 169, 953 P.2d 1077 (1998) (addressing claims on merits filed directly with the Nevada Supreme Court; successive petition claims filed September 19, 1996, approximately ten years after direct appeal remittitur issued on September 5, 1986); Farmer v. State, No. 29120, Order Dismissing Appeal (November 20, 1997) (successive petition filed August 28, 1995, approximately ten years after direct appeal remittitur issued on September 17,1 85), Ex. 406; Jones v. McDaniel, No. 39091, Order of Affirmance (December 19, 2002) (addressing all three-judge panel claims on

merits; successive petition filed May 1, 2000, approximately nine years after direct appeal remittitur issued on October 25, 1991), Ex. 412; Milligan v. Warden, No. 37845, Order of Affirmance (July 24, 2002) (successive petition filed December 1992, approximately seven years after direct appeal remittitur issued on October 15, 1986), Ex. 414; Nevius v. Warden (Nevius II), No. 29027, Order Dismissing Appeal (October 9, 1996) (successive petition filed August 23, 1996, approximately eleven years after direct appeal remittitur issued on December 31, 1985), Ex. 418; Nevius v. Warden (Nevius III), No. 29027, Order Denying Rehearing (July 17, 1998) (successive petition filed February 7, 1997, approximately twelve years after direct appeal remittitur issued on December 31, 1985), Ex. 419; O'Neill v. State, No. 39143, Order of Reversal and Remand, at 2 (December 18, 2002) (petition filed "more than six years after entry of judgment of conviction" and issuance of remittitur on direct appeal on March 13, 1996), Ex. 421; Riley v. State, No. 33750, Order Dismissing Appeal (November 19, 1999) (successive petition filed August 26, 1998, approximately seven years after direct appeal remittitur issued on July 18, 1991), Ex. 423; Sechrest v. State, No. 29170, Order Dismissing Appeal (November 20, 1997) (successive petition filed July 27, 1996, approximately eleven years after direct appeal remittitur issued on September 18, 1985), Ex. 426; Williams v. Warden, No. 29084, Order Dismissing Appeal (August 29, 1997) (addressing claim that trial counsel failed to rebut aggravating evidence; claim rejected under law of the case, successive petition filed December, 1992, approximately five years after direct appeal remittitur issued on July 17, 1987), Ex. 431.

8) The Nevada Supreme Court has also applied inconsistent rules when deciding whether a petitioner can demonstrate "cause" to excuse a procedural default. One particularly striking inconsistency is the court's treatment of cases in which trial and/or appellate counsel acted as habeas counsel in the first state post-conviction petition. Compare Moran v. State, No. 28188, Order Dismissing Appeal (March 21, 1996) (finding that trial and appellate counsel's representation in first habeas proceeding did not establish "cause" to review merits of claims in subsequent habeas proceeding), Ex.415, with Nevius v. Warden (Nevius II), Nos. 29027, 29028, Order Dismissing Appeal and Denying Petition (October 9, 1996) (Petitioner "arguabl[y] established "cause" under same circumstances), Ex. 418; Wade v. State, No. 37467, Order of Affirmance

(October 11, 2001) (holding sua sponte that petitioner had established "cause" to allow filing of successive petition in same circumstances), Ex. 429; Hankins v. State, No. 20780, Order of Remand (April 24, 1990) (remanding sua sponte for hearing and appointment of new counsel on first habeas petition due to representation by same office at sentencing and in post-conviction proceeding), Ex. 408.

9) The Nevada Supreme Court has reached inconsistent results on the issue of whether a procedural rule that does not exist at the time of a purported default may preclude the review of the merits of meritorious constitutional claims. Compare Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001) (applying Nev. Rev. Stat. § 34.726 to preclude review of merits of successive habeas petition when one-year default rule announced for the first time in that case); Jones v. McDaniel, No. 39091, Order of Affirmance (December 19, 2002) (same), Ex. 412, with State v. Haberstroh, 119 Nev. 173, 180-181, 69 P.3d 676, 681-82 (2003) (refusing to retroactively apply rule that parties may not stipulate not to apply procedural default rules); Smith v. State, No. 20959, Order of Remand (September 14, 1990) (refusing to apply default rule that was not in existence at the time of the purported default), Ex. 427; Rider v. State, No. 20925, Order of Remand (April 30, 1990) (same), Ex. 422.

10) The Nevada Supreme Court has taken opposite positions on whether application of procedural default rules is waivable by the State. State v. Haberstroh, 119 Nev. 173, 180-181, 69 P.3d 676, 681-682 (2003), holding that parties could not stipulate to overcome state's procedural defenses, but construing a stipulation as establishing cause to overcome default rules without identifying any theory of cause that such a stipulation would establish or how it existed before the stipulation was entered; contra Doleman v. State, No. 33424, Order Dismissing Appeal (March 17, 2000) (finding stipulation with state to allow adjudication of merits of claim ineffective because of petitioner's failure to seek rehearing on claim and failing to find "cause" on the basis of the stipulation), Ex. 403. See also, Jones v. State, No. 24497, Order Dismissing Appeal (August 28, 1996) (holding challenge to jurisdiction of court waived by guilty plea), Ex. 411. The definition of cause is completely amorphous, because it is whatever the Nevada Supreme Court says it is on any particular occasion. See also, Leslie v. State, 118 Nev. 773, 59 P.3d 440, 445 (2002) (sua sponte

expanding definition of miscarriage of justice exception to default rules to include "innocence" of aggravating factor); contra Colwell v. State, 118 Nev. 807, 59 P.3d 463 (2002)(case decided same day as Leslie with the same aggravating factor and similar factual circumstances (a robbery case) but failing to take notice of petitioner's "innocence" of aggravating factor) (verdict form showing conviction of random and motiveless aggravating factor) Ex. 402; Rogers v. Warden, No. 36137, Order of Affirmance, at 5-6 (May 13, 2003) (raising miscarriage of justice exception sua sponte but failing to analyze petitioner's challenge to aggravating circumstance under actual innocence standard), Ex. 425. See also Feazell v. State, No. 37789, Order Affirming in Part and Vacating in Part (November 14, 2002) (sua sponte reaching both theory of cause not litigated in District Court or Supreme Court, and substantive issue, post-Pellegrini), Ex. 407.

11) The State has admitted that the Nevada Supreme Court disregards procedural default rules on grounds that cannot be reconciled with a theory of consistent application of procedural default rules. Bennett v. State, No. 38934, Respondent's Answering Brief at 8 (November 26, 2002) ("upon appeal the Nevada Supreme Court graciously waived the procedural bars and reached the merits" (emphasis supplied)), Ex. 401; Nevius v. McDaniel, D. Nev., No. CV-N-96-785-HDM-(RAM), Response to Nevius' Supplemental Memorandum at 3 (October 18, 1999) (Nevada Supreme Court noted issue raised only on petition for rehearing in successive proceeding, "but it did not procedurally default the claim. Instead, 'in the interests of judicial economy' and, more than likely, out of its utter frustration with the litigious Mr. Nevius and to get the matter out of the Nevada Supreme Court once and for all, the court addressed the claim on its merits"), Ex. 420.

E. Default bars that can be "graciously waived," or disregarded out of "frustration," are not "rules" that bind the actions of courts at all, but are the result of mere exercises of unfettered discretion; and such impediments cannot constitutionally bar review of meritorious claims. Lonchar v. Thomas, 517 U.S. 314, 323 (1996) ("'There is no such thing in the Law, as Writs of Grace and Favour issuing from the Judges.' Opinion on the Writ of Habeas Corpus, Wilm. 77, 87, 97 Eng. Rep. 29, 36 (1758) (Wilmot, J.)."). The Nevada Supreme Court's practices make review of the merits of constitutional claims a matter of "grace and favor," and they cannot constitutionally be applied to bar consideration of Mr. Milligan's claims.

F. The Nevada Supreme Court could not apply any supposed default rules to bar consideration of Mr. Milligan's claims when it has failed to apply those rules to similarly-situated petitioners, and thus has failed to provide notice of what default rules will be enforced, without violating the equal protection and due process clauses of the Fourteenth Amendment. Bush v. Gore, 531 U.S. 98, 104-109 (2000) (per curiam); Village of Willowbrook v. Olech, 528 U.S. 562, 564-565 (2000) (per curiam); Ford v. Georgia, 498 U.S. 411, 425 (1991).

2. Petitioner is filing this petition more than one year following the filing of the decision on direct appeal.

A. Petitioner alleges that any delay in filing this petition is not his "fault" within the meaning of Nev. Rev. Stat. § 34.726(2). Petitioner has been continuously represented by counsel since the beginning of the proceedings in this case, and counsel have been responsible for conducting the litigation. Petitioner has not committed any "fault," within any rational meaning of that term as used in § 34.726(1), in connection with the failure to raise any issue in the litigation. Any failure to raise these claims has been the fault of counsel, which is not attributable to petitioner under Pellegrini v. State, 117 Nev. 860, 36 P.3d 519, 526 n. 10 (2001).

B. Petitioner alleges that Nev. Rev. Stat. §34.726 cannot properly or constitutionally be applied to bar consideration of the merits of his claims.

1) Nev. Rev. Stat. § 34.726 has not been applied consistently to bar consideration of the claims of similarly-situated litigants. Applying § 34.726 to bar consideration of petitioner's claims would violate the due process and equal protection provisions of the Fourteenth Amendment.

2) Nev. Rev. Stat. § 34.726 cannot properly or constitutionally be applied to this petition, because the legislature did not intend it to apply to successive petitions. In holding that the section does apply to successive petitions, the Nevada Supreme Court's decision in Pellegrini v. State, 117 Nev. 860, 36 P.3d 519 (2001), arbitrarily ignored its own statutory construction precedents in order to apply a new procedural bar in capital cases.

i) Nev. Rev. Stat. § 34.726 was enacted in 1993 as part of

legislation to consolidate the former statutory post-conviction procedure under Chapter 177 and the habeas procedure under Chapter 34. The legislature was assured that the legislation would have the limited effect of requiring the trial court to hear all the collateral proceedings, and of consolidating the procedures.

ii) The proposed amendments combining the two statutory collateral procedures were generated by a committee created by the Nevada Supreme Court to study the post-conviction process. Nevada Legislature, 66th Sess., Assembly Committee on Judiciary, Minutes at 3 (February 6, 1991).[694] The chair of the committee, who was staff counsel to the Chief Justice, explained to the Assembly that the bill was intended to eliminate the chapter 177 proceedings. Those proceedings would be "unnecessary" if a related constitutional amendment was approved to allow the district court in which the trial was conducted to exercise habeas jurisdiction, rather than restricting habeas jurisdiction to the district in which the petitioner was incarcerated. Id. District Judge Fondi emphasized the problems of increased workload in the district of confinement due to the rising prison population, and stressed the propriety of habeas cases being heard in the original trial district. Id. at 4. Judge Fondi represented that the proposed procedure "would lead to a simplification of the process, judicial economy and the betterment of not only the courts but also the individuals seeking relief and their attorneys." Id. David F. Sarnowski, the Chief Deputy Attorney General for the Criminal Justice Division, argued in favor of the amendment that "[t]he best forum for the consideration of any claim is in the original trial court. . . ." Id. at 5. In response to the question "who would be ahead and who would be behind?" under the proposed amendments, the staff counsel to the Chief Justice explicitly represented to the assembly committee, "the system would be ahead and no one would be behind. No access to the courts would be cut off, but rather the process was being simplified by eliminating a redundant procedure." Id. (Emphasis supplied). Following these representations, the Assembly committee recommended passage of the bill. Id. at 6-7. The representations made to the Senate were equally unequivocal. Staff counsel to the Chief

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[694] The legislative history of the provision is in the 1991 legislative materials, although the statutory amendments took effect on January 1, 1993, because of the necessity of amending the constitution to allow the statutory change. Nev. Const. Art. 6 § 6(1); Art. 16 § 1(1).

Justice again characterized the proposed amendments as simply making "a two-tier system for post-conviction relief into a one-tier system." 15 App. 3523, Nevada Legislature, 66th Sess., Senate Committee on Judiciary, Minutes at 3 (March 20, 1991). He explicitly "affirmed" to the Senate committee that "a defendant would lose no procedural safeguards currently afforded him under Chapter 177"and that the bill only "removes process for the sake of process." Id. Most important, Chief Deputy Attorney General Sarnowski, again testified on behalf of his office in support of the bill, which he represented "as doing nothing more than transferring jurisdiction where it should be: in the court where the case was originally heard." Id. (Emphasis supplied). Following these representations, the Senate committee recommended the bill for passage. Id. at 4.

iii) In Pellegrini, the Court recognized that its interpretation of § 34.726 would add a new procedural hurdle to successive petitions that had not existed under prior law, 34 P.3d at 528, but it did not apply its normal rule that a statute should be interpreted consistently with the legislative intent even if the plain language appeared to contradict that interpretation. In Moody v. Manny's Auto Repair, 110 Nev. 320, 325, 871 P.2d 935 (1994), the Nevada Supreme Court construed a statute as codifying a court-created limitation on a rule of civil liability, rather than as a codification of the rule itself, although it was not "explicitly stated" in the statute, relying specifically upon the legislative history. See also, Nevada Power Company v. Haggerty, 115 Nev. 353, 367 989 P.2d 870 (1999) (referring to legislative history in construing statutory term); Banegas v. S.I.I.S., 117 Nev. 222, 19 P.3d 245, 249 (2001) (reviewing entire statute and legislative history to construe apparently unambiguous phrase); Advanced Sports Information, Inc. v. Novotnak, 114 Nev. 336, 339-341, 956 P.2d 806 (1998) (reviewing legislative history to determine that term "product" ambiguous, relying on principle that legislative intent prevails over "literal sense" of terms, and concluding that "product" includes intangible services).

iv) In Guinn v. Legislature, 119 Nev. 460, 76 P.3d 22 (2003) (on denial of rehearing), decided after Pellegrini, the same Court was faced with two constitutional provisions (the requirements of funding education and of a legislative super-majority to impose taxes) that were "clear on [their] face" yet still subject to "conflicting interpretations." 76 P.3d at 29. In construing the provisions, the Court resorted to "extrinsic evidence" to determine legislative

intent based upon the fact that the voters were not informed of the conflicting interpretations before the passage of the constitutional provision. Id. at 29-30. Consequently, the Court in Guinn resorted to a review of legislative history - focusing specifically upon the assurances made by proponents of the constitutional provision, id. at 25-27, in order to discern the intent of the legislation. Id. at 30. In particular, the Court focused upon consequences of the legislation that its proponents failed to warn about to conclude that the super-majority requirement for tax legislation had to yield to the education funding requirement. Id. 29-30. Had the court applied the same neutral principles of statutory construction that it applied in Guinn to the Pellegrini case, it could not rationally have concluded that § 34.726 applied to successive petitions.

v) The Court's failure to apply neutral principles, in Pellegrini, and the resulting unanticipated creation and retroactive application of a new default rule, makes the application of § 34.726 to petitioner's case impermissible under the due process and equal protection guarantees of the state and federal constitutions. Bush v. Gore, 531 U.S. at 104-109; Village of Willowbrook v. Olech, 528 U.S. at 562-565; Myers v. Ylst, 897 F.2d 417, 421 (9th Cir. 1990); Hicks v. Oklahoma, 447 U.S. 343, 346 (1980); see Hoffman v. Arave, 236 F.3d 523, 531 (9th Cir. 2001) ("if a state procedural rule frustrates the exercise of a federal right, that rule is 'inadequate' to preclude federal courts from reviewing the merits of the federal claim . . . [and] federal courts may reach the merits of the underlying claim"); Williams v. Lockhart, 873 F.2d 1129, 1131-32 (8th Cir.), cert. denied, 493 U.S. 942 (1989) ("new [state] rule designed to thwart the assertion of federal rights" is not adequate, and its violation will not be allowed to defeat federal jurisdiction).

3. No prejudice will result to the state from any delay in the filing of this petition, as all the evidence used in the first trial remains available, and the accuracy and reliability of the proceedings will be increased by the additional information disclosed in this petition.

4. The attorneys who previously represented petitioner were all appointed by the court and they were:

A. Pretrial Proceedings

Thomas Perkins

B. Trial and Sentencing Proceedings:

Thomas Perkins

Tony Axam

Virginia Shane

C. Direct Appeal:

John O'Connor

D. State Post-Conviction and Post-Conviction Appeal:

1988 Evidentiary Hearing:

William Smith

Annette Quintanna

1998 Evidentiary Hearing:

Terri Roeser

CERTIFICATE OF ELECTRONIC SERVICE

In accordance with Rule 5(b)(2)(D) of the Federal Rules of Civil Procedure, the undersigned hereby certifies that on the 13th day of April, 2007 a true and correct copy of the foregoing AMENDED PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254 BY A PERSON IN STATE CUSTODY was served by the United States District Court, CM/ECF electronic filing system to:

David Neidert
c/o Catherine Cortez Masto
Attorney General of Nevada
100 North Carson Street
Carson City, Nevada 89701-4717

/s/ *Rhonda Turner-Lewis*
An employee of the Federal Public Defender