IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES ROBINS, aka HA'IM AL MATIN SHARIF Petitioner/Appellant, vs. RENEE BAKER, Warden, Ely State Prison, Respondent/Appellee	CASE NO. 65063

APPELLANT'S OPENING BRIEF

Appeal from Order Dismissing Petition for Writ of Habeas Corpus (Post-Conviction)

Eighth Judicial District Court, Clark County

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I. Jurisdiction

This is an appeal from a district court order denying a postconviction petition for writ of habeas corpus in a capital case. A notice of entry of the decision was mailed January 21, 2014. (21AA5067.) A timely notice of appeal was filed on February 19, 2014. (21AA5068.) This Court has appellate jurisdiction of the instant appeal pursuant to Nev. Rev. Stat. §§ 34.575, 34.830.

II. Issues Presented for Review

A. Did the district court err when it dismissed Mr. Robins' state postconviction petition based on procedural bars without an evidentiary hearing?

B. Will dismissal of Mr. Robins' state postconviction habeas petition without an evidentiary hearing result in a fundamental miscarriage of justice with respect to Mr. Robins' conviction and sentence?

III. Statement of the Case

In December 1988, Charles Robins, aka Ha'im Al Matin Sharif,[1] was convicted of first degree premeditated murder of the eleven-month-old Brittany Smith, and a jury imposed a sentence of death.[2] This Court affirmed the conviction and sentence in 1990. (3AA498); *Robins v. State*, 106 Nev. 611

[1] In order to maintain consistency, we refer to Mr. Sharif as Mr. Robins, since that is the name identified in the initial case caption, and the name "Robins" has been the moniker for the Petitioner/Appellant in all of this Court's prior decisions.

[2] Mr. Robins was also convicted and sentenced to twenty years for felony child abuse with substantial bodily harm. (3AA506.) His sentence for that offense has been served and completed.

(1990). The district court's denial of Mr. Robins' first state petition for postconviction habeas relief was affirmed in 1999, when this Court concluded that although Mr. Robins had been denied his Sixth Amendment right to effective assistance of counsel at sentencing, he suffered no prejudice. (3AA632-38.) Mr. Robins then sought federal relief from his capital conviction and sentence by filing a habeas petition on May 5, 1999. (2AA339.) Later, on May 11, 2005, Mr. Robins obtained a stay of his federal habeas proceedings and returned to state district court to file a second state postconviction habeas petition. (3AA640-4AA771.) On January 20, 2009, this Court affirmed the district court's dismissal of the second petition, finding that the presented claims were barred on procedural grounds, as untimely and successive. (20AA4973.)

Mr. Robins then returned to federal court where he was to prosecute his federal habeas claims. However, on September 29, 2011, following recurring, egregious delays of those proceedings by Mr. Robins' counsel, Patricia Erickson, the United States District Court Judge Larry Hicks discharged Ms. Erickson, and he appointed the Federal Public Defender for the District of Nevada to represent Mr. Robins. (4AA790-91.)

Subsequently, the Federal Public Defender, Rene Valladares, filed a motion to withdraw from the representation of Mr. Robins, because an internal "investigation led to the discovery . . . [that]: (1) current and former employees

of this [Nevada Federal Public Defender's Office] bolstered Ms. Erickson's reputation as a qualified death penalty attorney before the courts and bar, despite their close and personal relationship with Ms. Erickson and knowledge of her inability to effectively represent her clients;" (2) Ms. Erickson had effectively abandoned Mr. Robins and provided ineffective representation to him during the entire time she represented him in state and federal proceedings; and (3) that former and current attorneys of the Federal Defender's office "ha[d] repeatedly vouched through testimony and affidavits regarding Ms. Erickson's effectiveness and fitness to practice law . . . [but those attorneys] knew of Ms. Erickson's problems and were given information from other professionals that Ms. Erickson was not performing effectively on her death penalty cases." (4AA791, 797-98.) Mr. Valladares concluded that his office was precluded by a conflict of interest from arguing that Ms. Erickson's professional misconduct excused procedural default of Mr. Robins' claims. (*Id.* at 799-800.) Judge Hicks agreed, and he granted the motion to withdraw.

On July 18, 2012, Judge Hicks appointed the Federal Public Defender for the District of Arizona to represent Mr. Robins, and undersigned counsel from the Arizona FPD entered his appearance. (4AA803-05.) Guided by *qualified* medical experts, new counsel then engaged in a first-in-time, thorough forensic investigation of the readily available medical evidence pertinent to

understanding the causes of Brittany Smith's injuries and ultimate death. The investigation revealed that Brittany suffered from infantile scurvy (Barlow's disease) and it could not be said to a reasonable medical certainty that her death resulted from a homicide. (18AA4288-422; 18AA4430-46; 20AA4874-75; 20AA4877-78; 21AA5019-20.)

Nearly simultaneous with the discovery of the new forensic evidence showing that Brittany's death could not be determined to be the result of a homicide, Brittany's mother, Lovell McDowell, and maternal uncle, Otha McDowell, divulged for the first time that on the eve of trial police and prosecutors had compelled Ms. McDowell to testify against Mr. Robins with threats that if she failed to do so she would be imprisoned and lose her other children. (17AA4149-52, ¶¶ 5, 9, 15; 17AA4220, ¶ 4.) When Ms. McDowell and her brother Otha implored that material portions of the testimony prosecutors sought to elicit from Ms. McDowell were untrue, these state officials told her she needed to testify to those facts because they wanted Mr. Robins to receive a death sentence. (17AA4149-52, ¶¶ 5, 6, 9, 15; 17AA4221-22, ¶¶ 9-14.) Ms. McDowell also recently divulged that Mr. Robins did not abuse Brittany, but she was coerced and threatened to testify otherwise by the State. (17AA4151-52, ¶ 15; 17AA4220, ¶ 4; 17AA4222, ¶ 11.)

Mr. Robins presented all this new evidence to Judge Hicks with a request that he be permitted to amend his federal habeas petition. The proposed amendment included allegations (1) that the failure to present exonerating forensic evidence that Brittany did not die as a result of a homicide was the result of ineffective assistance of counsel; and (2) that the State had violated constitutional duties owed to Mr. Robins under *Napue v. Illinois, infra,* and *Brady v. Maryland, infra*. Mr. Robins argued that any delay in presenting his amended claims should be excused because (1) such delay was attributable to attorney Erickson's egregious professional misconduct and (2) this was the rare case where the new evidence demonstrated that Mr. Robins was innocent of the crime of premeditated murder and his death sentence, and therefore, the refusal to consider the merits of his constitutional claims would result in a fundamental miscarriage of justice. (20AA4785-99.)

Judge Hicks agreed with Mr. Robins in all material respects. He granted the motion to amend, finding that Mr. Robins had alleged a "colorable claim of ineffective assistance of trial counsel" and that a colorable showing had been made that Mr. Robins was "actually innocent" of the offense and that "his death penalty was improperly imposed." (*Id.* at 4794, 4798.) In light of these findings, and the additional finding that Mr. Robins should not be made to suffer the consequences of delay caused by his prior counsel, Ms. Erickson, Judge Hicks

stayed the federal proceedings so that Mr. Robins could exhaust his new constitutional claims in state court proceedings. (*Id.* at 4798.)

Mr. Robins filed his new state postconviction habeas petition in the 8th judicial district court on August 30, 2013, within a very short time after learning that he had new grounds for relief. The State answered on November 13, 2013, claiming that Mr. Robins was procedurally barred from obtaining merits review of his claims. (20AA4800-22.) After receiving Mr. Robins' Reply in support of the petition on December 2, 2013, and hearing argument on December 11, 2013, the district court dismissed the petition exclusively on procedural grounds, refusing to consider the merits of any of the claims. (21AA5010.) Mr. Robins filed a request for reconsideration, but the court held to its decision and adopted verbatim written findings and conclusions of law that were prepared by the State's counsel. (21AA5057-65.) Robins timely filed this appeal.

IV. Statement of Facts

A. A primer on scurvy (Barlow's disease) in infancy and a general overview of the relation between this disease and Brittany's injuries.

During her short eleven-month life, Brittany Smith ("Brittany") was known to have suffered a single documented pre-mortem injury: on February 28, 1988, some six weeks before her April 19 death, Brittany presented at the University Medical Center in Las Vegas with a fractured right femur.

(7AA1602-03; 17AA4235; 18AA4242.) At the time of her admission, x-rays were taken of Brittany's fractured leg, as well as the remainder of her skeletal system. (18AA4245-46.) Nearly 25 years would pass before anyone on Mr. Robins' defense team would cause these x-rays to be examined by a qualified expert. (2AA371-78, 466-67.) As explained below, examination of these x-rays revealed that Brittany suffered from a severe hemorrhagic disorder caused by scurvy. Scurvy results in bone fractures, subdural bleeding and eventually death if left untreated.

Long before Mr. Robins' trial, it was commonly understood that conditions associated with Vitamin C deficiency and scurvy "must be considered in the differential diagnosis of skeletal injuries" in children. (20AA4945; 20AA4911-26); *see also* Spitz et al., Medicolegal Investigation of Death: Guidelines for the Application of Pathology to Crime Investigation 505 (2d ed. 1980). This point was stressed in the landmark medical paper published in 1962 in the Journal of the American Medical Association entitled "The Battered Child Syndrome," where the authors emphasize the critical role of radiological examination when making a battered child diagnosis, noting that the "bones tell the story." The authors explicitly address the differential (alternative, reasonably plausible) diagnoses that should be considered and ruled out before settling on a final diagnosis of battered child syndrome. The authors

unequivocally state "[s]*curvy* is commonly suggested as an alternative diagnosis [to a battered child diagnosis]" because the disease causes skeletal malformations that mimic child abuse. (20AA4912, 4915, 4917.) *See* Kempe et al., *The Battered Child Syndrome,* 181 JAMA 105, 109, 111 (1962) (italics in original).[3]

Scurvy in infancy results in unique, diagnostically determinative deformations in a child's bones that are visible on x-ray. (2AA359-60, ¶ 32.) And scurvy frequently results in fractures in a child's long bones, like Brittany's femur. (*Id.* at 361, ¶ 35.) Moreover, as more particularly described below, scurvy results in a breakdown in collagen, disrupting the skeletal system, and ultimately results in hemorrhaging throughout the body, not uncommonly resulting in fractured bones, bleeding under the skin that resembles bruising, bleeding under the scalp, bleeding throughout the abdominal area, and subdural bleeding of the brain. All of these conditions were ultimately seen in Brittany at the time of her death as revealed on autopsy, and all are symptomatic of scurvy. (*Id.* at 367-79.)

[3] As explained below, at Mr. Robins' trial the assistant medical examiner testified that Brittany was a battered child; however, she was not aware that Brittany had scurvy, nor did she account for this disease as a mechanism for Brittany's injuries.

The recent investigation and related discovery that Brittany had a fatal disease began with an examination of Brittany's 1988 x-rays by Dr. Patrick Barnes, M.D., a physician who was well qualified to conduct this study. After obtaining his doctor of medicine degree in 1973 and following his residency training and a fellowship at the Children's Hospital and Harvard Medical School in Pediatric Neuroradiology, Dr. Barnes obtained Board Certification in Diagnostic Radiology from the American Board of Radiology. He is currently Board Certified in both Diagnostic Radiology and Neuroradiology. (18AA4288, ¶ 1.) Since 2000, Dr. Barnes has held the positions of Chief of Pediatric Neuroradiology, Co-Director Pediatric MRI & CT Center, Lucile Packard Children's Hospital at the Stanford Medical Center, and Professor of Radiology at the Stanford University School of Medicine. (*Id.* ¶ 2.) A fuller account of Dr. Barnes' academic and professional qualifications is set forth in his Curriculum Vitae ("CV"), which consists of 58 pages, and is located at Exhibit A to his Declaration (18AA4303-4374.)

Dr. Barnes has significant experience and training as a pediatric neuroradiologist, particularly in the area of diagnosing child abuse. He began serving as a neuroradiology consultant to a child protection services agency in 1992, during his tenure as Chief of Neuroradiology and MRI at the Boston Children's Hospital. Since moving to Stanford in 2000, he has had occasion to

serve as a neuroradiology consultant to the child protective services agencies in that locale. In 2008, Dr. Barnes co-founded the Child Abuse Task Force, Suspected Child Abuse and Neglect ("SCAN Team"), at the Lucile Packard Children's Hospital at Stanford University Medical Center. This Task Force provides a screening program designed to recognize, respond to and manage cases of child abuse or neglect. In 2007, he served as Chair of the Child Abuse Task Force of the Society for Pediatric Radiology. (18AA4288-89, ¶¶ 3-5.) A more detailed summary of his academic and professional qualifications in the area of child abuse and child protection services is set forth in a condensed version of his CV, which is de-nominated Child Protection Services Resume, and it is attached as Exhibit B to Dr. Barnes' Declaration (18AA4376-82.)

Radiography is one of the tools in the child abuse detection toolbox. As explained by Dr. Barnes, "when a child presents with a fracture or break in a bone, then radiography or radiographic imaging (e.g., x-rays, CT scans) may serve an important role in assisting in the detection, or for that matter ultimately supporting a finding ruling out cases of suspected child abuse." (18AA4289, ¶ 6.) And see again, Spitz et al., Medicolegal Investigation of Death: Guidelines for the Application of Pathology to Crime Investigation 505 (2d ed. 1980) and Kempe et al., *The Battered Child Syndrome*, *supra*, at 109, 111, which both emphasize that scurvy should be ruled out in the forensic radiological analysis of

skeletal injuries when a child death has occurred or there is a suspicion of battered child syndrome.

Ultimately, as a result of his examination of Brittany's x-rays, Dr. Barnes identified a number of trademark degenerative skeletal symptoms unique to scurvy. These degenerative symptoms can be seen in Brittany's fractured right femur, and they are also plainly visible throughout her remaining upper and lower extremities. But before identifying Dr. Barnes' specific findings in Brittany's x-rays, it is essential to understand the role of Vitamin C in bone formation, as well as the catastrophic effects on the musculoskeletal system and potentially all organs of the body when Vitamin C depletion occurs in infants and small children.

Vitamin C is essential to the formation of normal, healthy bone. (18AA4291, ¶ 10.) Without Vitamin C, the collagen component of healthy bone is reduced, and bone structure turns to disarray, weakening the bone. (*Id.*) Left untreated, scurvy will cause hemorrhaging throughout the body with fatal results. Because Vitamin C plays this crucial role in bone formation, Vitamin C deficiency, or scurvy, typically manifests in a unique set of musculoskeletal abnormalities. These musculoskeletal abnormalities are especially common in infants and children with scurvy, as children experience rapid bone growth. (*Id.*) The destructive capacity of scurvy on an infant's bones will be revealed in

radiographic images by a number of classic markers or symptoms, which are described below:

- Growth Arrest Lines. Without sufficient Vitamin C, the body cannot make the building blocks of bone, and bone growth is arrested. This results in a phenomenon called growth arrest lines, which as depicted on x-ray, are areas of increased bone density that represent the position of the bone's growth plate at the time bone growth stopped. (*Id.* ¶ 11.)

- Osteopenia. Children with scurvy will commonly show signs of osteopenia, or low bone mineral density. Osteopenia can be seen on x-rays as areas of decreased opacity. (*Id.* ¶ 12.)

- Fraenkel's Lines. In contrast to the ground-glass appearance of osteopenic bone, on x-rays, children with scurvy often present dense white lines along the ends of long bones (such as the femur). These dense white lines, called Fraenkel's lines, appear as the zones of provisional calcification increase in thickness. (*Id*. ¶ 13.)

- Pelkan Spurs. Pelkan spurs may also be seen on x-ray examination of a child with scurvy. These spurs occur as fractures at the periphery of the zones of provisional calcification heal. (*Id.* ¶ 13.)

- Wimberger's Ring. X-rays of children with scurvy will also typically present with a ringed white margin at the epiphysis, or rounded end of

a long bone. This ringed appearance (known as Wimberger's ring) results from a shell of calcification around bony material that has low mineral density. (*Id.* ¶ 14.)

Of critical significance here, Dr. Barnes' examination of Brittany's x-rays reveal multiple inimitable signs of scurvy (Barlow's disease) throughout Brittany's upper and lower extremities, not just in the area of her broken right femur. Her x-rays reveal: osteopenia, Fraenkel's lines, Pelkan spurs and Wimberger's rings. As Dr. Barnes explained: "Brittany's x-rays revealed multiple classic images typical of those seen in children with scurvy (Barlow's Disease)." (18AA4292, ¶ 15.) These signs converge to make an irrefutable diagnosis of scurvy. For example according to Dr. Barnes:

- Osteopenia is noted in an x-ray taken of Brittany's pelvis and lower extremities (18AA4390-92) and in an x-ray of her upper extremities. (*Id.* at 4405-06.)
- Fraenkel's lines can be seen on several x-rays of Brittany's lower extremities (*Id.* at 4390-92, 4403-04, 4409-10, 4417-18) and in an x-ray of her upper extremities. (*Id.* at 4405-06.)
- White Wimberger's rings are seen around the epiphyses of Brittany's long bones in several x-rays of her lower extremities. (*Id.* at 4390-92, 4403-04, 4409-10, 4417-18.)

- Brittany showed evidence of characteristic scurvy-related Pelkan spurs; they can be seen in x-rays of her lower extremities. (*Id.* at 4409-10, 4417-18.)

Ultimately, Dr. Barnes was able to render an unequivocal diagnosis: Brittany suffered from scurvy, and it was scurvy that caused the fracture to her femur. (21AA5019-20, ¶ 4.) Dr. Barnes' conclusions are not based on new science. What is plainly visible on the x-rays today is identical to what would have been visible in 1988. At the time of Brittany's leg fracture in 1988, the classic signs of abnormal bone formation and skeletal corrosion associated with scurvy, as depicted in Brittany's x-rays, had been "well documented in the medical literature for many decades" and would have been readily discoverable in 1988 if defense counsel had investigated.[4] (18AA4292-93, ¶ 16; 20AA4874-75, ¶¶ 3-4.)

Ultimately relevant to an understanding of Brittany's injuries and death, as Dr. Barnes explains, the most destructive by-product of scurvy is excessive bleeding and hemorrhage. This is because as collagen formation throughout the body degrades, blood vessel walls weaken and then hemorrhage. (18AA4292, ¶ 18.) Hemorrhages related to the changes that occur with scurvy may manifest in

[4] Later, Mr. Robins lays out the case that his trial counsel were constitutionally ineffective for failing to conduct this investigation.

any part of the body, and in Britany's case they did. Relatedly, this hemorrhaging and defective collagen formation results in "[a] disorganized bone structure and decreased mineral density in a child with scurvy, [and it] increases the risk of fractures. The medical literature describes spontaneous fractures in infants and children with scurvy, including fractures to the femur, which occur as a result of the collagen structure of the bone being broken down and destroyed." (*Id.* ¶ 19.)

Relevant to an understanding of Brittany's leg fracture, a particular type of hemorrhage associated with scurvy is known as sub-periosteal hemorrhage, and this condition is associated with fractures in children with scurvy. (*Id.*) For the reasons explained below, Dr. Barnes concluded that Brittany experienced a sub-periosteal hemorrhage and resulting fracture in her femur. "In children with scurvy, weakened blood vessels under the membrane lining the outer surface of bones, the periosteum, can leak blood causing a sub-periosteal hemorrhage. This bleeding can lift membrane off the bone, and the body responds by attempting to heal the area by creating new bone at the site of the bleeding. This new bone formation also described as callus, is identical to the type of healing that occurs after a fracture. Brittany's x-rays show a large sub-periosteal hematoma on her right femur and a fracture line that transects the sub-periosteal new bone formation, or callus, at the site of the hematoma." (*Id.* at 4293-94, ¶

20; *see also* 18AA4417-18.) Dr. Barnes unequivocally concluded that the subperiosteal hemorrhage and large callus formation evident on Brittany's x-rays were caused by scurvy and this condition "caused the fracture to Brittany's right femur." (21AA5020, ¶ 4.)[5]

Dr. Barnes concluded his examination with several additional findings that are decidedly relevant to an understanding of Brittany's medical condition both before and after her death. Dr. Barnes was asked to explain the clinical significance of documented reports that in the weeks before her death, e.g., on February 2, 1988, child abuse detectives described Brittany as having discolorations or "various blotches covering portions of her face, *ears*, neck, chest, arms, buttocks, legs, *toes* and feet." (7AA1629-30) (emphasis added). Dr. Barnes found these descriptions to reveal additional evidence that Brittany was suffering from scurvy. As he explained, "Vitamin C depletion and scurvy and its corollary impediment to collagen formation can result in hemorrhage corresponding to discolorations of the skin as described by the detectives in their February 2, 1988 report . . . [b]ecause scurvy results in weakened blood vessels eventually leaking into tissues near the surface of the skin. Ecchymosis, or

[5] As explained further below, Dr. Barnes also unequivocally rejected the suggestion that Brittany suffered an earlier fracture to her femur.

bruising, sometimes accompanied by sores,[6] are a common symptom of scurvy." (18AA4295, ¶ 23.)

Dr. Barnes was also asked to describe the clinical significance of findings in Brittany's autopsy report that identified a very small transverse tear of the cartilage between the eleventh and twelfth thoracic vertebrae, and other evidence that revealed hemorrhage underneath her scalp, as well as subdural bleeding. Dr. Barnes' rejoinder was clear: "The spinal column would not be immune from collagen deficiencies or corresponding weaknesses in its composition. If left untreated, scurvy can lead to death. Several accounts of sudden deaths of children related to scurvy have been reported. Causes of death related to scurvy include subdural hemorrhage and cerebral edema secondary to the weakened, leaky blood vessels seen in scurvy patients. Scurvy (Barlow's disease) can result in hemorrhaging throughout the body." (18AA4295, ¶ 24.)

Given the striking nature of Dr. Barnes' findings, Mr. Robins presented those findings and all of the related medical documentation, including Dr. Hollander's autopsy, to Dr. John Plunkett, an experienced forensic pathologist. Dr. Plunkett is certified by the American Board of Pathology in Anatomical Pathology, Clinical Pathology, and Forensic Pathology, and was the Regina

[6] Coincident with the association of sores on the hemorrhaging skin, another witness, Brittany's uncle Otha McDowell observed these scabby sores over these areas of discoloration. (17AA4225, ¶ 23.)

Medical Center Laboratory/Pathology Director, was Medical Education Director, and the Minnesota Regional Coroner's Office (MRCO) Coroner or Assistant Coroner from 1978 through December 2004. (18AA4430, ¶ 1.) He retired as the Laboratory Director and Assistant Coroner on December 31, 2004, and as the Medical Education Director at the end of December 2005. (*Id*. ¶ 2.) During his final year as Director, the office performed over 2,000 death investigations and 300 autopsies. (*Id*. ¶ 3.) During his career, Dr. Plunkett personally performed over 3,000 autopsies, including over 200 on children under the age of two. (*Id*.) He has performed three autopsies on children whose death was due exclusively to inflicted head trauma. He has a special interest and expertise in infant head injury. (*Id*.) Dr. Plunkett's CV, which details his academic and professional qualifications, experience, and publications, is attached as Exhibit A to his Declaration. (18AA4439-46.)

Unlike Dr. Hollander, Dr. Plunkett had knowledge that Brittany suffered from scurvy (Barlow's disease), that had already resulted in serious injury to her right femur." (18AA4431, ¶ 5.) Dr. Plunkett concurred with Dr. Barnes "that scurvy can result in hemorrhaging throughout the body, that it could weaken or impede collagen formation throughout the child's body, including the spine, and that left untreated, scurvy can result in sudden death induced by subdural hemorrhaging and cerebral edema, secondary to the weakened blood vessels

associated with scurvy." (*Id*.) Indeed after reviewing Dr. Hollander's autopsy and Dr. Barnes' findings, Dr. Plunkett concluded that scurvy alone, or scurvy combined with an accidental head injury, could not be ruled out as the exclusive causes of Brittany's death, and what is more, it could not be determined to a reasonable medical certainty that Brittany's death was a homicide. (20AA4877-78, ¶ 3.)

We will return to Dr. Barnes' and Dr. Plunkett's findings later and show: (1) it cannot be held to a reasonable medical certainty that Brittany's death was the result of a homicide; (2) Mr. Robins did not commit premeditated murder; and (3) the forensic evidence available to the jury, presented by medical experts wholly unaware of Brittany's scurvy, is now exposed to have been palpably inaccurate, misleading, incomplete and unreliable.

B. Repeated child abuse investigations determined that Brittany was not an abused child.

Mr. Robins, when he was just 19 years old, lived with infant Brittany and her mother Lovell McDowell in Las Vegas, for just a few months preceding Brittany's April 19 death. (17AA4160; 17AA4177-78.) *Robins*, 106 Nev. at 619 ("Robins began living with the child and her mother in January 1988 . . . ."). During the capital proceedings, the prosecutor argued to the jury that the evidence supported the conclusion that Mr. Robins had physically abused and tortured the eleven-month-old Brittany Smith every day during this period.

(9AA2152.) This Court embraced the State's narrative noting that ". . . witnesses testified of the brutal physical abuse inflicted on . . . Brittany." *Robins*, 106 Nev. at 621.

But juxtaposed against the State's narrative, that Mr. Robins engaged in the tortuous abuse of Brittany on a daily basis during this few-months period until she died on April 19, 1988, is this undisputed fact: between February 2, 1988 and March 22, 1988, Brittany was carefully examined for any and all signs of physical abuse on no less than five occasions, at intervals of every week or two. These examiners repeatedly concluded that Brittany was <u>not</u> an abused child. (7AA1629-30; 7AA1615, 1618; 7AA1607; 7AA1619; 9AA2108.) However, of even greater significance, but never disclosed to the jury, is this: the principal ". . . witnesses [who] testified of the brutal physical abuse inflicted on . . . Brittany," *Robins*, 106 Nev. at 621, did <u>not</u> see Brittany—at all—<u>after</u> the child-abuse investigations were completed. The details of the investigations and the timing of the state's principal witnesses' observation of Brittany is outlined below.

The child-abuse investigation began on February 2, 1988, when acting on a report that Brittany "was covered" with bruises, Detectives Silbaugh and Metz of the Las Vegas Metropolitan Police Department carefully physically examined Brittany from head to toe and concluded she showed no visible signs of abuse.

(17AA4217-18.) In their written report, the officers went on to describe an unusual skin condition—a condition that Dr. Barnes has now unequivocally tied to scurvy in children. Brittany had unusual skin discolorations that Detective Silbaugh described as "various blotches covering portions of her face, ears, neck, chest, arms, buttocks, legs, toes and feet." (7AA1629-30; 17AA4217-18; 18AA4294-95, ¶¶ 22-23.)

Brittany's uncle, Otha McDowell, originally reported the skin discolorations because he thought he was seeing bruises. (*See* 17AA4225, ¶ 23.) He has since described that some of the discolorations had associated sores. Dr. Barnes has explained that sores accompanying such hemorrhaging skin discolorations is another unique marker for scurvy. (18AA4295, ¶ 23.)

Detective Silbaugh's description of Brittany raised an obvious red flag that Brittany was suffering from an unusual medical condition, but the record shows that trial counsel failed to conduct any investigation to determine the causes of these mysterious discolorations Detective Silbaugh observed over Brittany's "face, ears, neck, chest, arms, buttocks, legs, toes and feet." (7AA1629-30.)

One week after Detective Silbaugh's examination, on February 10, 1988, Brittany was examined again by two child-abuse investigators, who were simply following up on the original report concerning Brittany's alleged bruises. These

child-welfare professionals also carefully examined Brittany's body; they also noted unusual skin discoloration blotches but found no evidence of physical abuse. (17AA4229.)

On February 28, 1988, Brittany presented at the University Medical Center with a fractured right femur. The medical staff carefully examined Brittany's condition to determine if she exhibited any signs of abuse. The admitting physician found "[o]n physical examination, there [were] no other findings to indicate to me that there was any obvious child abuse." (7AA1607.) Brittany remained admitted as an inpatient at University Medical Center until she was discharged in a body cast on March 5, 1988. (17AA4235; 18AA4249, 4283.)

On March 10, 1988, as part of a continuing investigation of whether Brittany was being physically abused, Brittany was reexamined by the same child-abuse investigators who had examined her on February 10. Once again, they found that Brittany showed no signs of physical abuse. (7AA1618.) The apartment managers where Brittany lived were also interviewed, and they reported that they were familiar with Brittany and they did not see any signs of abuse. (7AA1594.)

On March 22, now for the fifth time in six weeks, Brittany was examined yet again, this time by her orthopedist at the University Medical Center.

Brittany's doctor did not find any signs of physical abuse on March 22. (18AA4286.)

Thus ironically, although it was the scurvy-related hemorrhaging causing skin discolorations on Brittany's body, and later the scurvy-related leg fracture that brought Brittany into contact with doctors and child-abuse investigators, these professionals failed to discover that Brittany was suffering from scurvy, a serious underlying illness that needed treatment.

Summarization of the undisputed historical evidence is called for. Because Brittany had been in the hospital from February, 28, 1988 to March 5, 1988, she had literally been physically examined for signs of physical abuse either every week or nearly every other week between February 2 and March 22, 1988. There was just over one week between the visit on February 2 and the visit on February 10. There was a 2 1/2 week interval between the visit on February 10 and the exam on February 28. There was less than one week between Brittany's discharge from the hospital on March 5 and the exam conducted by the welfare workers on March 10, and less than two weeks later on March 22, Brittany was seen at the University Medical Center.[7] Brittany died a

[7] In the argument section below, Mr. Robins argues that on these facts, there is no credible evidence to support the State's argument to the jury that Mr. Robins was torturing and physically abusing Brittany on a daily basis throughout this period.

few weeks later on April 19, but the principal witnesses had not seen Brittany again after March 22.

C. The principal child abuse eye-witnesses had no contact with Brittany, or any occasion to observe any alleged abuse, once the child abuse investigation and the medical evaluations were concluded on March 22.

All of the child-abuse witnesses had skin in the game and had motives to gain favor with the police and prosecuting agencies, due to their ongoing criminal activities and/or their arrests/convictions on criminal charges during the pendency of Mr. Robins' proceedings. (2AA378-79; 7AA1504-05; 7AA1529; 7AA1717-21; 18AA4463-65; 18AA4448; 18AA4451-57; 20AA4773-76.) Over time, their "stories" became more exaggerated and embellished until they fit with the prosecution theory, that Mr. Robins physically abused and tortured Brittany on a continuous basis over just a few months. (2AA353-54, 380-81.) But the jury never learned that the portraiture painted by these witnesses was false. Several of the key witnesses had no contact with Brittany following the six week child-abuse investigation that took place between the 2nd of February and March 22: an investigation that had roundly concluded that Brittany was not an abused child.

Brittany died on April 19, 1988, but abuse witness Robert Williams was arrested on drug charges in mid-March, and he did not see Brittany after removal of her cast on March 22. (7AA1504-05.) Abuse witness Sammy

Johnson did not see Brittany after her leg was casted on February 28. (4AA942-43.) Abuse witness Charmaine Young left Las Vegas in March, several weeks prior to Brittany's death, and did not return until after Brittany had died. (4AA895, 901.) None of these witnesses saw Brittany after the conclusion of the child-abuse investigation. And the jury never learned that the testimony of these "eyewitnesses" was in clear contradiction to the testimony and documentary evidence generated by medical, child welfare, and law enforcement professionals, each of whom concluded there was absolutely no physical evidence of the brutal daily assaults described by the eyewitnesses at trial. (2AA379-80.)

But what of Brittany's mother, Lovell McDowell? She also testified that Mr. Robins had physically abused Brittany. True enough. But as explained below, newly discovered evidence shows that her testimony was the by-product of coercion, it was materially false, and although the State knew this to be so, it presented her false testimony anyway.

D. The State applied threats, intimidation and coercion to procure materially false testimony from Brittany's mother, and despite knowing that material portions of her testimony were false, the State failed to correct her testimony.

Lovell McDowell was a critical witness. She was Brittany's mother. She was the person who spent the most time with Mr. Robins and Brittany. She was in the best position to know the truth about how Mr. Robins treated Brittany, and

other than Mr. Robins, she was the only eyewitness to Brittany's final moments before death. The truth about what Ms. McDowell knew about Mr. Robins' treatment of Brittany begins with this: after Brittany died, Ms. McDowell was extensively questioned by the police about Mr. Robins' treatment of Brittany, and she never once suggested that Mr. Robins had abused or killed her child. Mr. Robins' trial defense team also interviewed McDowell more than once in the months leading up to trial, and during these meetings Ms. McDowell tearfully insisted that Mr. Robins had not abused her child. (9AA2051-52.)

Ms. McDowell's eyewitness accounts of Mr. Robins' treatment of Brittany, including her consistent accounts that Mr. Robins did not abuse Brittany, date back to the above-described child-abuse investigation period that covered the time between February 2 and March 22, 1988. During that time, Ms. McDowell consistently reported to doctors, police detectives and child abuse investigators that Mr. Robins had not abused Brittany. (17AA4239; 18AA4242; 17AA4217-18; 17AA4203; 17AA4174; 17AA4177, 19AA4610-11; 18AA4243; 17AA4229-33.)

Ms. McDowell reiterated her account in a 54 page statement given to police detectives on April 19, 1988, after Brittany's death. In response to police questioning designed to determine if Mr. Robins had ever harmed, abused or killed Brittany, Ms. McDowell appeared bewildered at any such suggestion and

stated that Mr. Robins treated Brittany like his own daughter and "he was just treating us so good . . . and so nice. . . ." (17AA4204.) Rejecting the idea that Mr. Robins harbored ill-feelings toward Brittany or that he might be motivated to harm her, Ms. McDowell reported that Mr. Robins "thought Brittany was so pretty," that he "was crazy about [her]." (17AA4203.)

The worst Ms. McDowell could say during her April 19 police interview was that Mr. Robins had made benign mistakes by engaging in some "rough play" with her as if "she was a little boy," picking her up from the stroller once by her arms, and accidentally leaving bruises when he handled her while wearing heavy rings or nibbling or kissing on her. (17AA4174-77, 4193.) McDowell stated that when Mr. Robins did these things, she corrected him and he would "pout" and then "just started being gentle, you know, just pick up and kiss her." (17AA4176-77.) Mr. Robins was, after all, only 19 years old. (17AA4160.)

During this April 19 interview, Ms. McDowell also physically demonstrated that rough play was not abuse. When Detective Jackson asked Ms. McDowell to explain exactly what she meant by "rough play," McDowell physically demonstrated for him several of the things she was referring to, and the detective's response was that what she described was not abuse because it was how he played with his own children. (*Id*. at 4175.)

When it became clear to the State that Ms. McDowell was not going to accuse Mr. Robins of abuse, then, nearly two months after Brittany's death, the State indicted her for felony child abuse, an offense which carried a possible penalty of ten years in prison. Still Ms. McDowell remained unshaken in her convictions. Even after she was charged, Ms. McDowell wrote letters where she lamented Mr. Robins' predicament, noting that she was "sorry all this happen[ed] to [him]." (18AA4486.) Evidencing her continuing faith that Mr. Robins had not harmed her child, Ms. McDowell used her letter writing to profess her love and affection for him, stating at one point that their love would "last forever and ever." (18AA4483.)

On December 9, 1988, just a few days before Ms. McDowell's and Mr. Robins' joint trial was scheduled to begin, Ms. McDowell pleaded guilty to child abuse, with the only stated consideration for the plea being the State's promise to recommend probation. (5AA1026.) She would be permitted to withdraw her plea if she was not sentenced to probation. (*Id.*) Ms. McDowell's sentencing would not take place until after Mr. Robins' trial. (5AA1035.)

When Mr. Robins' trial commenced a few days later on December 13, his trial counsel requested a continuance because they had just learned of Ms. McDowell's plea and that she would not avail herself to testify on Mr. Robins' behalf, as the defense had anticipated. (5AA1047-52.) Defense counsel was still

unaware that Ms. McDowell would be testifying for the prosecution. (6AA1303.)

Ultimately, the State would call Ms. McDowell to testify during the guilt phase and the sentencing phase of the proceedings. (7AA1673.) Obviously, the State would need to credibly explain why Ms. McDowell had previously repeatedly insisted that Mr. Robins was innocent. So, prior to calling Ms. McDowell to the stand, the prosecutor moved in limine for admission of testimony from her that would help prove that Ms. McDowell had previously concealed Mr. Robins' abuse of Brittany because she was mortifyingly afraid of him; so much so the *story* would go, that she was unable to intervene to protect her daughter or assist in inculpating the child's killer after Brittany's death. (7AA1661-64.)

What does all this mean? It means that the State needed Ms. McDowell to say that she engaged in a cover-up of the abuse out of fear of Mr. Robins, because otherwise, according to the prosecutor, ". . . the State [could] not explain to the jury why Lovell McDowell decided to lie to the police on several occasions . . . [and] it would be difficult for a jury to comprehend why Miss McDowell would continue to live with a man [whom] she knew to be torturing her daughter." (*Id.* at 1664.)

The quoted prosecutor admission is essential to the understanding of the below-described prosecution misconduct claim and the *motivation* to engage in such misconduct: Because Ms. McDowell had previously urged Mr. Robins' innocence, if the State was to have any hope of convincing the jury to believe Ms. McDowell's about-face accusatory testimony, the jury would also need to believe Mr. Robins was so monstrous, vicious and violent that he was capable of instilling a fear in Ms. McDowell that was so great that she would fail to protect her child from Mr. Robins' abuse and then engage in a cover–up of the abuse that extended for months after her child's death.

And so it came to pass that the State elicited testimony from Ms. McDowell during the guilt phase that Mr. Robins had abused Brittany. (7AA1683-89.) She testified that she lied to the police and to child protection workers about the abuse because she was afraid of Mr. Robins. (*Id.* at 1686, 1688.) She reiterated these allegations during the sentencing proceedings, by bolstering her *alleged* motivation for the concealment of the abuse and her own failure to protect her daughter, with testimony that Mr. Robins was an extremely violent person. (9AA2039.) It mattered not that the 19 year old Mr. Robins had absolutely no record of inflicting physical violence on anyone, not ever. Ms. McDowell threw fuel on the fire during sentencing proceedings, offering

unreliable hearsay evidence, that everyone in the neighborhood lived in fear of Mr. Robins, just like she did. (9AA2043.)

But now we've learned the jury was deceived. Ms. McDowell was not afraid of Mr. Robins, not ever, and she outright lied to the jury when she testified to the contrary. It took nearly 25 years after bearing false witness and living with guilt for Ms. McDowell to come forward and provide a sworn declaration disclosing that she lied to the jury.[8] (*See* 17AA4148, ¶¶ 2, 4.) In her May 2013 sworn statement, Ms. McDowell reveals that she testified in the proceedings for a single reason: the prosecutors and police detectives had employed threats and intimidation; most pointedly they repeatedly threatened that if she "didn't testify in a certain way, [she] would go to prison and lose custody of [her] three children." (*Id.* ¶ 2.)

As explained below, the prosecution knew her testimony was false in at least two material respects.

First, the State knew Ms. McDowell was not afraid of Mr. Robins. As Ms. McDowell has finally revealed:

> When I told the police detectives and the prosecutor that I was not afraid of Robins, they told me "You need to say this." They told me, "Just say you were scared of him. It will be better for you."

[8] In her Declaration, Ms. McDowell recounts that she "felt guilt over the years for lying" and that she "felt bad every day that [she] had to lie." As she put it, "All of this just eats me up every day." (17AA4148, ¶ 4.)

> And I said it . . . They told me I had to make him look like a monster. He is not a monster. . . . In spite of my testimony, I didn't believe that Robins had posed any threat, and I still do not believe it to be true.

(*Id.* ¶¶ 9-10.)

That the State knowingly elicited false testimony from Ms. McDowell with respect to her alleged fear of Mr. Robins has been corroborated by Ms. McDowell's brother Otha McDowell. He, too, finally came forward on May 1, 2013, to disclose that he had been present during meetings between the police detectives, the prosecutors and Ms. McDowell, when Ms. McDowell's testimony was being prepared. (17AA4220, ¶ 13.) He witnessed first-hand that during these meetings, "the prosecution forced [Ms. McDowell] to change her description of her relationship with Robins." (*Id.* ¶ 3.) "They told my sister [Ms. McDowell], 'We don't want to do this to you, but you've got to change your story' to say that she was afraid of Robins." (*Id.* ¶ 11.) When brother Otha told the prosecutors that the story, that Ms. McDowell feared Mr. Robins, was untrue and that she was not afraid of him, the "prosecutors responded by saying that they were trying to get the death penalty for Robins and Lovell [McDowell] had to work with them." (*Id.* ¶¶ 9-10.) Otha recounts that the prosecutors told Ms. McDowell what to say and told her "what she should leave out . . . They told her to say she was afraid of him. They made her change her story to get him." (*Id.* ¶

13.) Otha swears that the "prosecutors knew the testimony they forced McDowell to give was false." (*Id.* ¶ 12.)

Second, the State knew that Ms. McDowell lied when she told the jury that no one "[held] anything over her head in exchange for testifying." (2AA393; 9AA2064-65.) McDowell has recently admitted that her denial was untrue, as she "had been told by police and prosecutors that if [she] did not testify in accordance with what the prosecution wanted [her] to say, [she] would go to prison and lose [her] children."[9] (17AA4149, ¶ 5.) The State was a party to the coercion, so it knew Ms. McDowell's denial, that anyone had held anything over her head, was untrue.

E. The State coerced Ms. McDowell into recanting testimony that would have been compellingly favorable to Mr. Robins' defense.

The end result of the State's misconduct is that it induced Ms. McDowell to testify that Mr. Robins had abused Brittany, but this was another lie. As Ms. McDowell explains in her recent Declaration, her allegations of child abuse were completely false, and she "never thought [Mr. Robins] endangere[d] [her] child [Brittany]." (17AA4151-52, ¶ 15.) As Ms. McDowell now recounts: "Robins loved my daughter and me. I always believed this and I believed it

[9] Whether Ms. McDowell would or could have suffered these legal consequences is immaterial. She believed the threats and potential consequences were real.

throughout the trial . . . I knew he loved Brittany and all our friends knew he loved her.[10] He was proud of her and treated her like she was his own child." (17AA4153, ¶ 18.)

Highlighting the reliability of the recent statements of Ms. McDowell, to the effect that Mr. Robins loved Brittany and had never abused her, these disclosures parallel those she gave to child-abuse investigators, doctors and police detectives both before and after Brittany died. (17AA4239; 18AA4242, 17AA4217-18; 17AA4203; 17AA4174; 17AA4177; 19AA4610-11; 18AA4243; 17AA4229-33.) These same exculpatory statements were given to Mr. Robins' defense counsel, and it was anticipated that she would provide this exonerating evidence to the jury at Mr. Robins' trial. (5AA1047; 9AA2051-53.) There is a consistent thread through all of Ms. McDowell's many pre-trial statements. But as both Ms. McDowell and her brother Otha have recently explained, Ms. McDowell was forced to change her story, and she was heavily coached and told what to say and what not to say. (17AA4149-50, ¶¶ 5-6, 8-9; 17AA4222, ¶ 13.)

[10] Robert Williams, one of Mr. Robins' former friends and accusers at his trial admitted to Ms. McDowell that he, too, lied about Mr. Robins' treatment of Brittany, in the hope that he would receive leniency on drug charges pending at the time of Mr. Robins' trial. Ms. McDowell also put the lie to the claims of the other witnesses who claimed that Mr. Robins abused Brittany. (17AA4154-55, ¶¶ 21-22.)

As a result, the jury was deprived of testimony from Ms. McDowell that Mr. Robins loved Brittany and had not abused her. (17AA4151, ¶¶ 13, 15; 4153, ¶ 18.) The jury was deprived of testimony from Ms. McDowell that she did not believe the prosecution theory, that Mr. Robins brutally beat Brittany in the minutes before she went into respiratory arrest and began to die, because she was in the next room in their small apartment, and if Mr. Robins had beaten her, she would have heard him doing it. (17AA4152, ¶ 16.) Instead she never heard Brittany cry or scream, "nor did she hear anything that led [her] to believe [he] was harming her." (*Id.*)

Perhaps of even greater relevance, Ms. McDowell would have testified that the so-called abuse eyewitnesses, who testified that Robins had tortured and abused Brittany were lying. As Ms. McDowell now explains:

> People testified at trial that I was present when Robins supposedly put Brittany on a shelf in a linen closet. They testified that I was there when he supposedly held her under the water in the bathtub. This testimony is false.

(17AA4155, ¶ 22.) Thus, Ms. McDowell corroborates: (1) the findings of police detectives, medical professionals and child-abuse investigators that Brittany was not an abused child, and (2) that the so-called abuse eyewitnesses lied to curry favor with police and prosecutors.

Finally, had she not been wrongfully coerced into recanting her pre-trial statements, Ms. McDowell could have provided trial testimony in another

respect, concerning Brittany's leg injury. When Ms. McDowell took Brittany to the University Medical Center on February 28, 1988, the x-rays showed a large sub-periosteal hemorrhage and callus, which the doctor thought was evidence of an earlier facture to the leg. (7AA1603.)

But Ms. McDowell reported to child-abuse investigators and medical professionals that Brittany had not had any symptoms of a fracture prior to just a few hours before the February 28 hospital admission; that Brittany only had symptoms of some swelling and a knot on her leg a few weeks prior, but the swelling and knot had dissipated. (17AA4156, 4239; 18AA4243.**)**

Ms. McDowell's pre-trial statements, that Brittany had not evidenced any symptoms of a leg fracture prior to February 28, is of critical importance, because it corroborates Dr. Barnes' current finding that Brittany did not suffer an earlier fracture, and that a single facture occurred on February 28 due to a scurvy-induced sub-periosteal hemorrhage. (18AA4294, ¶ 21; 21AA5019, ¶ 3.)[11] What is more, as explained in more detail below, the fact that Brittany did not suffer an earlier fracture is also important because Mr. Robins had been out

[11] As explained above, callus formation and sub-periosteal hemorrhage in scurvy mimics a similar callus formation that takes place after a fracture. As emphasized in the first medico-legal article on battered child syndrome in 1962: scurvy should be ruled out before making a child abuse or battered child diagnosis because scurvy "produces large calcifying subperiosteal hemorrhage." *See* Kempe et al., *The Battered Child Syndrome*, 181 JAMA at 111.

of town for the day preceding and day of Brittany's fracture on February 28; and so the prosecution theory was that Mr. Robins *must* have caused the earlier fracture. We now know there was no earlier fracture.

In her recent Declaration, Ms. McDowell recounts what she could have told the jury: Brittany did not suffer an earlier leg fracture. She had a knot in her leg at the end of January 1988, but "Brittany did not seem to be in pain [as] she was crawling around as she normally did," (17AA4156, ¶ 24), and it was not until the end of February while Mr. Robins was out of town for the weekend that Brittany was in "extreme pain" and "[s]uddenly stopped crawling." (17AA4156, ¶ 25.) Mr. "Robins did not cause the injury." (*Id.*)

Perhaps most striking, that Brittany had not suffered an earlier fracture to her leg, but had suffered a single break on February 28, 1988 due to scurvy, is consistent with the findings made by police detectives and child-abuse investigators who had examined Brittany during the first two weeks of February and determined she had no injuries.

Had she not been coerced to testify falsely, the exculpatory testimony that Ms. McDowell *could* have presented on Mr. Robins' behalf would have been compelling. Ms. McDowell's confirmation that Mr. Robins had not physically abused Brittany, and her charge that those witnesses who claimed otherwise were lying, would have been consistent with the non-abuse findings that were

repeatedly made during February-March, 1988, by police, child-abuse investigators and medical professionals.

So if Brittany was not a victim of child abuse, as her mother and numerous pre-mortem examiners had concluded, why did she die? The answer lies in the medical evidence. As explained further below, the *new* medical evidence demonstrates it cannot be reasonably determined that Brittany's death was a homicide and Mr. Robins is not guilty of murder.

F. The medical evidence utilized to obtain Mr. Robins' conviction and sentence is now proven to have been incomplete, inaccurate, scientifically unreliable and patently erroneous.

No witnesses observed Mr. Robins killing Brittany. Accordingly, at his trial, and then again during the sentencing phase, the prosecution relied on the testimony of medical experts to prove the elements of the crime and the statutory aggravator, to establish both (1) the *mens rea* and (2) the *actus reus* – which includes both the act itself and the causation of the resulting harm.

For example, throughout the State's guilt-phase closing argument, the prosecution argued that the jury could infer an intent to kill from the fact that the medical examiner, Dr. Hollander, had testified that Brittany's injuries were caused by "blunt force, serious force." (8AA1875.) The State also argued that the "physical evidence" of Brittany's multiple injuries, and the severity of those injuries proved the element of premeditation. (8AA1876-77, 1923.) "Nobody

inflicts these injuries unless they mean to kill." (*Id.* at 1932.) The State argued that Dr. Hollander had ruled out any possibility for accidental injury, but that she had ruled in the finding that Brittany was a battered child, because there was evidence she had suffered injuries in the weeks preceding her death, citing specifically, an earlier fracture to her femur and fibrosis enveloping her ureter. (*Id.* at 1932-33.)

The same medical evidence was foisted again at the close of the sentencing phase of the proceedings, when the State argued that it had proved the sole aggravating circumstance of depravity of mind and torture simply based on the nature of the injuries and the assumption that they must have been intentionally inflicted. (9AA2149-50.)

In sum, the State's medical evidence (never countered by the defense) supported a single inference: Brittany's injuries were the result of significant *intentionally* inflicted blunt-force trauma, exclusive of any other possible causes. However, as explained next below, the blunt-force trauma medical hypothesis rested on an incomplete, inaccurate and scientifically unreliable set of data and assumptions about Brittany's pre-mortem medical condition and its ultimate relation to her demise. Therefore, we itemize the errors and inaccuracies in the medical evidence presented during Mr. Robins' capital proceedings, next below.

1. The leg fracture.

The prosecution argued no less than 17 times to the jury that the fracture to Brittany's leg proved Mr. Robins' guilt of premeditated murder and/or that this injury supported imposition of a death sentence. (8AA1859, 1866-68, 1870, 1927-29; 9AA2150, 2191.) Dr. Hollander cited the femur fracture as evidence that Brittany was a battered child. (6AA1339.) Although the diagnosis of battered child syndrome anticipates that scurvy should be ruled out,[12] Dr. Hollander never performed a differential diagnosis, and it is undisputed that Dr. Hollander did not know that Brittany suffered from scurvy.[13] Based on the findings of Dr. Barnes it is now incontrovertible that Brittany had scurvy; it was scurvy that caused the fracture to her femur, and her leg injury was not the result of intentional trauma. (21AA5019, ¶ 3.) This leaves Dr. Hollander's diagnosis of battered child syndrome completely undermined and misleading, even if unintentionally so.

[12] *See* Kempe et al., *The Battered Child Syndrome*, *supra*, at 109, 111 (20AA4911, 4915, 4917).

[13] We also explain below, that neither Mr. Robins' trial counsel nor his prior postconviction counsel ever investigated the causes of the fracture to Brittany's leg.

2. Fibrosis encasing the left ureter.

At Mr. Robins' trial, Dr. Hollander also testified that Brittany showed evidence of scarring; i.e., fibrosis, around her ureter, with testing showing the formation of the affected tissues occurring about six weeks prior to her death. (6AA1332-33, 1349-50.) Dr. Hollander told the jury that the development of this fibrotic condition had a single explanation: blunt-force trauma. (6AA1334, 1339.) Dr. Hollander cited the multiple stages of healing in the affected tissues as further evidence of battered child syndrome. (6AA1350.)[14] Dr. Hollander's attribution of Brittany's fibrosis exclusively to blunt trauma and battered child syndrome was both inaccurate and misleading.

As explained by Dr. Barnes, scurvy results in the breakdown of collagen and hemorrhaging throughout the body. (18AA4293, ¶ 18.) Scurvy-related hemorrhage throughout the internal organs is commonplace, and the hemorrhaging results in formation of scar tissue and fibrosis. Hess, Scurvy Past and Present 85,101 (1920). Given Brittany's tendency to hemorrhage and form scar tissue, conditions that were unknown to Dr. Hollander, Mr. Robins asked Dr. Plunkett to review Dr. Hollander's findings regarding Brittany's fibrosis.

[14] Unbeknownst to Dr. Hollander, the dating of the formation of the fibrotic tissue to six weeks before Brittany's death neatly corresponded to the date that a severe case of scurvy ravaged Brittany's right femur.

Dr. Plunkett found the condition of the ureter to be consistent with idiopathic retroperitoneal fibrosis, a condition unrelated to blunt trauma. (18AA4435, ¶ 16.) The symptoms of idiopathic retroperitoneal fibrosis are identical to those Dr. Hollander identified during Brittany's autopsy. (21AA5024, 5051-52, 5055.) Dr. Plunkett reported that the absence of injury to any of the surrounding organs or other tissues in Brittany's retroperitoneal space suggested that the fibrosis condition was not related to inflicted blunt trauma. Dr. Plunkett did not find the evidence sufficient to conclude that blunt force caused the fibrosis and he ultimately concluded that the cause of the fibrosis could not be determined to a reasonable medical certainty. (18AA4435, ¶ 16.)

Dr. Plunkett's conclusions find support in the scientific literature. First, scientific research unequivocally reports that trauma-induced retroperitoneal fibrosis is extremely rare, and that in almost all cases, such fibrosis is the result of diseases of unknown causes or other pathologies, not inflicted injury. (21AA5047, 5048, 5052-53.) But trauma-induced retroperitoneal fibrosis is not only extremely rare, the research also demonstrates that where retroperitoneal fibrosis has been related to blunt trauma or inflicted injury, the condition has been nearly universally documented to coincide with injuries to surrounding structures and organs—**injuries which Brittany did not have**—including injuries to other gastrointestinal structures, such as the distal esophagus, the

posterior parts of the duodenum, the pancreas, the posterior parts of the ascending and descending colon, the kidneys, adrenal glands, the bladder, the abdominal aorta and inferior vena cava, among others. (21AA5032, 5047. *And see generally* 21AA5031-45 (discussing the extent of injury associated with blunt trauma to the trunk)).

Accordingly, Dr. Hollander's representation to the jury that Brittany's fibrosis could only be related to blunt trauma was materially inaccurate and misleading. The jury never learned that her condition was identical to idiopathic retroperitoneal fibrosis. The jury never learned that trauma-induced retroperitoneal fibrosis is extremely rare and that it coincides with damage to surrounding structures; a condition completely absent in Brittany. Her surrounding structures were undamaged. It follows from all of this, that Dr. Hollander's attribution of Brittany's fibrosis to trauma and battered child syndrome was inaccurate and misleading.

3. The subdural hemorrhage and cerebral edema.

Dr. Hollander did not find any exterior injury to Brittany's head, (*see* 4AA829-30; 6AA1326-27), but she did find that Brittany had a subdural hemorrhage, (4AA830; 6AA1328), and she concluded that the most likely cause of Brittany's death was from swelling of the brain, (6AA1337). Pivotally, Dr. Hollander diagnosed Brittany's head injury to a single possible source: blunt-

force trauma. This representation of the medical science turns out to have been materially false and misleading. Why? Because lacking an accurate and complete understanding of Brittany's medical condition at the time of death, Dr. Hollander took no account of the fact that scurvy produces identical symptoms of subdural bleeding and brain swelling.

As explained by both Dr. Barnes and Dr. Plunkett, Brittany's symptoms of subdural hemorrhaging and cerebral edema are well recognized outcomes secondary to the weakened blood vessels associated with scurvy; the same scurvy that had caused Brittany's femur to spontaneously break in two several weeks earlier. (18AA4295, ¶ 24; 18AA4431, ¶ 5; 18AA4434, ¶ 12; 20AA4877, ¶ 2.) Dr. Hollander's finding that Brittany's subdural bleeding could only have been caused by a significant blunt-force trauma was clearly erroneous. Drawing on all of the medical evidence, Dr. Plunkett has determined that scurvy cannot be ruled out as an exclusive cause of Brittany's subdural hemorrhage and resulting death.

4. Small tear in 11th thoracic vertebra.

During the autopsy, Dr. Hollander discovered a transverse tear in the cartilage of Brittany's 11th thoracic vertebra in her lower spine. (6AA1332, 1335.) Dr. Hollander gave the jury one, and only one, option to consider with respect to the origin of this small tear: "very hard" blunt trauma. (8AA1839-40.)

Dr. Hollander absolutely ruled out any possibility of accidental injury, and she ruled out any prospect that the cartilage tear could have resulted from the administration of cardiopulmonary resuscitation ("CPR"). (8AA1841-42.) Once again, however, Dr. Hollander's medical hypotheses left the jury with a misleading and inaccurate telling of the most probable source of such an injury.

For example, unaware that Brittany had scurvy, that had already led to skeletal corrosion and a transverse fracture of her femur, Dr. Hollander failed to consider an obvious diagnostic conclusion reached by both Dr. Barnes and Dr. Plunkett: that scurvy would produce a corresponding collagen erosion contributing to the resulting fracture in the cartilage in her spine. (18AA4295, ¶ 24; 18AA4431, ¶ 5; 20AA4877, ¶ 2.)

Equally significant, based on the flawed assumption that Brittany had a healthy skeletal system, Dr. Hollander completely ruled out CPR as a cause of the tear in Brittany's cartilage. However, as explained by Dr. Plunkett, Dr. Hollander's flawed assumption led to a similarly erroneous conclusion. Dr. Plunkett found that the breakdown of collagen associated with scurvy meant that the cartilage would have been susceptible to injury during CPR, especially the improper CPR administered by Mr. Robins. (18AA4431, ¶ 5; 18AA4435, ¶ 15.)

Dr. Plunkett's finding that Mr. Robins' CPR efforts were incorrectly performed were corroborated by Sergeant William McCormick, a passerby who

had training in infant CPR and who assisted with CPR efforts to revive Brittany. (6AA1363, 1364.) McCormick characterized Mr. Robins as panicked and unable to reasonably respond to directions about how to appropriately administer CPR to Brittany. (*Id.* at 1368-70.) McCormick described Mr. Robins as blowing into Brittany's mouth with "**extreme force**," and "**pumping vigorously**" on her midsection, chest, upper abdomen and torso. (*Id.* at 1368) Sgt. McCormick testified that Mr. Robins' CPR method was not appropriate, as CPR on an infant necessitated using much less force over a smaller area of the chest. (*Id.* at 1367-68.)

Given the fact that Brittany had a pre-existing disease that manifested in symptoms of corrosive weakening of collagen, and in light of the descriptions of Mr. Robins pounding on Brittany, Dr. Plunkett had no difficulty associating the cartilage tear to Mr. Robins' "incorrectly performed" efforts at CPR. (18AA4435, ¶ 15.) Indeed the scientific literature reports injuries to the spine related to improperly performed CPR in cases involving a pre-existing skeletal disease process. Steven S. Azuma et al., *Chest Compression-Induced Vertebral Fractures*, 89 Chest 154 (1986) (describing two cases of chest compression-

induced vertebral fractures in elderly patients, one of which resulted in rupture of the same cartilage that was torn in Brittany's spine).[15]

The tear in the *weakened* cartilage in between Brittany's eleventh and twelfth vertebrae is clearly referable to efforts to resuscitate her, and Dr. Hollander's prediction that the injury was exclusively attributable to intentionally inflicted blunt-force trauma was based on her misunderstanding of Brittany's pre-existing medical condition and was manifestly erroneous.

5. Subgaleal hemorrhages underneath scalp.

At autopsy, Dr. Hollander identified four discrete areas of subgaleal hemorrhage underneath Brittany's scalp, that ranged in size from 1 to 1 1/2 inches. (6AA1327-29.) Dr. Hollander represented that these small hemorrhages were the result of inflicted trauma. (8AA1840-41.) But once again this opinion

[15] It is relevant again, that Dr. Hollander only identified a very "faint" bruise on Brittany's skin over the situs of the cartilage tear. (6AA1330.) And she reported no damage to the soft tissues or bony structures surrounding this small tear in the cartilage. Surely, Brittany would have evidenced additional injury to the bony structures or other tissues surrounding the cartilage tear, if severe blunt force had been applied to her back. *See, e.g.*, Francis Denis & J. Kenneth Burkus, *Shear Fracture-Dislocations of the Thoracic and Lumbar Spine Associated with Forceful Hyperextension (Lumberjack Paraplegia)*, 17 Spine 156 (1992) (describing the catastrophic neurological damage and distinct ecchymotic bruising associated with hyperextension injuries to the thoracic spine); Dachling Pang & James E. Wilberger, Jr., *Spinal Cord Injury without Radiographic Abnormalities in Children*, 57 J. Neurosurgery 114 (1982) (discussing the increased likelihood and severity of spinal cord injury in children whose spines undergo distortion).

was both incomplete and misleading. As explained by Dr. Barnes, the hemorrhagic effects of scurvy are virtually limitless. (18AA4293, ¶ 18.) And in patients with scurvy, subgaleal hemorrhage can occur without any preceding trauma at all. *E.g.*, Harry Lowenburg, Sr. et al., *Scurvy with an Unusual Symptom*, 54 JAMA Pediatrics 73 (1937).[16]

What is more, Brittany was reported to pull out the hair on her head. (6AA1327-29; 17AA4145, ¶ 20.) Hair pulling is a common cause of subgaleal hemorrhage in children. Cathey E. Falvo et al., *Subgaleal Hematoma from Hair Combing*, 68 Pediatrics 583 (1981). Subgaleal hematomas have been documented in healthy children subsequent to normal, accidental or incidental trauma, such as hair combing and braiding. *See, e.g.*, Charles O. Onyeama et al., *Subgaleal Hematoma Secondary to Hair Braiding in a 31-Month-Old Child*, 25 Pediatric Emergency Care 40 (2009); Tien T. Vu et al., *Subgaleal Hematoma*

[16] Lowenburg referred to the subgaleal hematoma as a subaponeurotic hematoma throughout the report. The terms subgaleal and subaponeurotic are synonymous. Lowenburg's published case report described a 10-month-old girl who presented to the hospital with a soft lump on her head, which was later diagnosed as a subgaleal hemorrhage. There was no history of trauma, and physicians did not find any signs of trauma on examination. 54 JAMA Pediatrics at 73. The mother reported sudden swelling of the girl's head and resolved swelling and tenderness in the girl's right thigh. *Id.* Radiologic studies revealed the subgaleal hemorrhage, as well as several classic signs of scurvy. *Id.* at 75, 77. A subperiosteal hemorrhage in the right femur became visible in x-rays taken about two weeks after the first imaging study. *Id.*

from Hair Braiding: Case Report and Literature Review, 20 Pediatric Emergency Care 821 (2004); Cathey E. Falvo et al., *Subgaleal Hematoma from Hair Combing*, 68 Pediatrics 583 (1981).

Beyond the foregoing, given Brittany's tendency to suffer bleeding and hemorrhage, common techniques for positioning the head even during the proper administration of CPR could have caused the small areas of hemorrhage. M.P. Ryan et al., *Do Resuscitation Attempts in Children Who Die, Cause Injury?*, 20 Emergency Med. J. 10, 11 (2003); James A. Kaplan & Roger M. Fossum, *Patterns of Facial Resuscitation Injury in Infancy*, 15 Am. J. Forensic Med. & Pathology 187, 188 figs.3(a) & 3(b) (1994). Finally, there is evidence from Brittany's mother that Brittany's head collided with the faucet when Mr. Robins rushed to place her head under the sink in efforts to revive her, and Dr. Plunkett agreed this could have resulted in the small subgaleal hemorrhages(17AA4152-53, ¶ 17; 18AA4435-36, ¶ 17.)

The small subgaleal hemorrhages are referable to numerous innocent causes, rendering the account of Dr. Hollander incomplete and misleading.

6. Other areas of small hemorrhage related to CPR.

In her testimony, Dr. Hollander referred to some bruising in Brittany's jaw, tongue, neck and chest; hemorrhage in the mesentery; and bloody fluid in the chest and abdominal cavities as evidence of injury. None of these

observations were posited as playing a role in causing significant injury or death. (6AA1326, 1327, 1331-32.) Also, it is not clear that Dr. Hollander ever excluded the possibility that these non-fatal bruises/hemorrhages could have been caused by Mr. Robins' resuscitation efforts, or subsequently by medical professionals. For example, on direct examination, Dr. Hollander only seemed to *exclude* the head injury (subdural hemorrhage), the fractured leg, the fracture in the cartilage in the back and the fibrosis as not being caused by resuscitation activities.[17] (6AA1336-37.) Nevertheless, the record is clear that primarily due to her fundamental misunderstanding of Brittany's pre-existing medical condition (that Brittany had Barlow's disease) Dr. Hollander did not fully or genuinely consider the impact of CPR and other resuscitation activities and their role in causing some of the minor bruising and hemorrhage described above. Stated somewhat differently, once Dr. Hollander made the assumption that Brittany had been beaten to death and there had been a homicide, she gave little or no attention to the issues addressed here: whether some minor bruising and hemorrhaging could have been accidentally caused by life-saving measures.

It is apparent from the foregoing, that Dr. Hollander formed her limited and incomplete opinions about whether Brittany could have suffered minor bruising and hemorrhaging during the hour-long resuscitation without gathering,

[17] The causes of these medical conditions have already been addressed above.

much less considering, what had transpired during this period before Brittany reached the hospital. Dr. Hollander admitted in her testimony that the only information she received regarding the resuscitation efforts came from the report of the coroner medical examiner investigator. (6AA1343.) She was uncertain whether the investigator had interviewed the paramedics who tried to revive Brittany and admitted she had no record of the investigator speaking with either Mr. Robins or Sgt. McCormick, both of whom had also performed some manner of resuscitation. (6AA1343-44.) Not only did Dr. Hollander lack basic information about how the resuscitation proceeded, but she also lacked awareness of the fragility of Brittany's blood vessels, and her propensity to hemorrhage and bruise, associated with her advanced case of scurvy.

The point to be made here is that Dr. Hollander's carefully circumscribed testimony regarding the causes of Brittany's minor bruises and hemorrhage misled the jury. The bruises and abrasions and focal hemorrhages outlined below, all of which were confined to the areas involved in the resuscitation attempt, were exactly the types of injuries that children who die in spite of CPR suffer. M.P. Ryan et al., *Do Resuscitation Attempts in Children Who Die, Cause Injury?*, 20 Emergency Med. J. 10, 10-12 (2003).

To illustrate, Brittany had two bruises and a "small scratch" on her jaw and a "very small bruise" on her right eyelid. (6AA1326, 1327.) These very

same facial injuries are not uncommon in patients, like Brittany, who received mouth-to-mouth resuscitation and bag-mask ventilation. (6AA1394-95.) *See* James A. Kaplan & Roger M. Fossum, *Patterns of Facial Resuscitation Injury in Infancy*, 15 Am. J. Forensic Med. & Pathology 187, 188-90 (1994) (describing injuries to nose, lips, cheeks, head, and neck); Carin Hagberg et al., *Complications of Managing the Airway*, 19 Best Practice & Res. Clinical Anesthesiology 641, 642 (2005). *See also* Adrian A. Matioc, *The Adult Ergonomic Face Mask Concept: Historical and Theoretical Perspectives*, 21 J. Clinical Anesthesia 300, 301, 302 & figs.2, 4, 5 (2009) (illustrating finger placement during ventilation). The jury did not receive this crucial evidence.

Brittany also had a hemorrhage in her tongue and hemorrhage around her trachea. (6AA1331.) Dr. Hollander testified that the injury to Brittany's tongue could have been caused by "a hand pressing against the jaw and the base of the tongue," (*Id.*), but no one explained to the jury that this was exactly what Brittany's rescuers would have done during their attempts to save her life, as they positioned her head while breathing for her during both mouth-to-mouth resuscitation and bag-mask ventilation. The accepted technique for mouth-to-mouth resuscitation requires the rescuer to lift the lower jaw with his fingertips so that the patient's tongue does not fall backward and block the airway. Bengt Roth et al., *Jaw Lift—a Simple and Effective Method to Open the Airway in*

Children, 39 Resuscitation 171, 172, 173, figs.1 & 2 (1998). Similarly, during bag-mask ventilation, the rescuer creates an airtight seal between the mask and the patient's face by pressing firmly with three fingers on the lower jaw. Adrian A. Matioc, *The Adult Ergonomic Face Mask Concept: Historical and Theoretical Perspectives*, 21 J. Clinical Anesthesia 300, 301, 302 & figs.2, 4, 5 (2009). Further, no one explained to the jury that the paramedic's attempts to insert a breathing tube into Brittany's trachea could have caused injury to the tongue, as this required him to "stick the blade into the baby's mouth and . . . lift the tongue up." (6AA1396.)

Dr. Hollander testified that the hemorrhage around the trachea was evidence of injury. However, the jury did not hear that medical professionals had inserted large needles into Brittany's neck to give her fluids and medications during the resuscitation, (6AA1308), or that this could cause injury, M.P. Ryan et al., *Do Resuscitation Attempts in Children Who Die, Cause Injury?*, 20 Emergency Med. J. 10, 11 (2003).

Finally, Brittany had three bruises on her upper chest and hemorrhages in the mesentery. (6AA1326, 1331-32.) Although Dr. Hollander admitted she had seen a child suffer a lacerated liver from CPR attempts, (6AA1337), she failed to expressly acknowledge the possibility that Brittany could have suffered comparatively minor, non-life-threatening injuries in the same area as a result of

a lengthy resuscitation attempt. In fact, bruises and abrasions are common complications of CPR, and a significant portion of those bruises appear on the anterior chest. M.P. Ryan et al., *Do Resuscitation Attempts in Children Who Die, Cause Injury?*, 20 Emergency Med. J. 10, 11 (2003). Indeed Brittany exhibited these upper chest and mesentery hemorrhages in the location where Sgt. McCormick described the "panicked" Mr. Robins "pumping vigorously" on Brittany during his overly physical CPR effort. (6AA1368, 1378, 1379, 1383.) Moreover, the fact that Brittany suffered from scurvy and was more likely than unaffected children to suffer bruising and hemorrhage by CPR efforts, let alone efforts that involved what Sgt. McCormick described as Mr. Robins "pounding vigorously" on the entire midsection, exposes Dr. Hollander's analysis to be incomplete, misleading and clearly erroneous.

Dr. Plunkett agrees that the small amount of bloody fluid in Brittany's chest and abdominal cavities, as well as the hemorrhages in the mesentery and skin bruises can all be explained by the interplay between the resuscitation and the catastrophic impact of scurvy. (18AA4435, ¶ 15, 18AA4436, ¶ 18.) And the fact that the minor hemorrhages were unassociated with any visceral injuries to Brittany's delicate abdominal organs belies any suggestion that they were caused by severe blunt trauma. (*See* 21AA5031-45.)

In sum, all of the minor bruises and hemorrhage have their explanatory origin in the resuscitation efforts employed to save Brittany's life. Contrary suggestions presented to the jury were fundamentally erroneous and misleading.

7. Conclusions regarding forensic evidence.

The State's theory of guilt and eligibility for the death sentence hinged on a set of severely flawed, now discredited set of forensic assumptions about Brittany's medical condition at the time of her death and during the weeks preceding her passing. The State relied on Dr. Hollander's erroneous and materially incomplete understanding of Brittany's medical condition to prove (1) that Brittany's death resulted from a homicide and (2) to prove intent to kill, premeditation and eligibility for the death penalty. (8AA1876-77, 1923; 9AA2149-50.) The discovery that Brittany had scurvy (Barlow's disease) completely undermines each and every one of Dr. Hollander's conclusions. Medical science does not allow a reasonable certain conclusion that Brittany died as a result of a homicide, and her medical condition does not support an inference that Mr. Robins committed premeditated murder. (20AA4877-78, ¶ 3.)

But the new medical evidence, as compelling as it is, constitutes only one leg of a three-legged stool. There is a consistent thread between (1) the new medical evidence undermining any conclusion that there was a homicide (2) the insistence of Brittany's mother that Mr. Robins did not abuse Brittany and those

who claimed otherwise were liars and (3) the repeated pre-mortem findings of investigators, law enforcement and medical professionals that Brittany was not an abused child. All three of these categories of evidence consistently point toward Mr. Robins' innocence, a factor which, as explained below, must be applied to excuse any procedural default of the constitutional claims in Mr. Robins' habeas petition.

G. Statement of Facts Conclusion.

There remains an unanswered question. Why did Brittany develop scurvy? The unadorned answer is that she suffered from Vitamin C deficiency and all that implies if left untreated. But this answer leaves another question about Brittany's socio-nutritional environment. This question is more difficult to answer, but in any event the evidence shows that Brittany must have developed scurvy before Mr. Robins entered Brittany's life.

As this Court explained, Mr. "Robins [did not] beg[in] living with the child [Brittany] and her mother [until] January 1988 . ." *Robins*, 106 Nev. at 619. However by mid-January 1988, scurvy was already entrenched in Brittany, as evidenced by the fact that it was then that her uncle Otha called child welfare services to report the scabby bruises over her body; one of the telltale signs of infantile scurvy. (18AA4294-95, ¶¶ 22-23; 17AA4225, ¶ 23.) Then, it was later in January that Brittany's mother first noticed the swelling on Brittany's leg, a

sign that scurvy had advanced to the stage to produce a subperiosteal hemorrhage; a condition that ultimately caused her femur to fracture. (18AA4294, ¶ 21; 21AA5019, ¶ 3; 17AA4156, ¶ 24.)

All of this allows us to say that Mr. Robins was not responsible for the nutritional deficits that allowed Brittany to initially develop scurvy. The best that can be said on the basis of the present record is that before Mr. Robins entered the picture, Brittany's uncle Otha expressed significant concerns that Ms. McDowell had "engaged in a pattern of neglect of her children." (17AA4226, ¶ 30.) As a result, Otha was instrumental in having two of Ms. McDowell's children removed from Las Vegas and sent to Illinois to live with other family members. (*Id.* ¶ 29.) Before the children were sent to Illinois, Otha found them living in an unheated apartment during the winter. He saw an electric hair dryer being used to keep one of the children warm and that Ms. McDowell's boyfriend was hoarding food that should have gone to the children. (*Id.* ¶ 27.)

None of this is said to cast blame on Brittany's mother. She suffered an immeasurable loss, which affects her to this day. However, even Ms. McDowell now recognizes that she "was remiss when it came to Brittany's diet and healthcare [and] that [h]er diet could have been much better." (17AA4157, ¶

26.) It is anticipated that following this appeal, during the discovery and fact development process more can be learned about Brittany's early environment.

V. Summary of Argument

The district court erred when it dismissed Mr. Robins' postconviction petition, without affording a hearing, after concluding all of the claims were procedurally defaulted. We address the guilt-phase claims and sentencing claims in turn.

Guilt Phase Claims

Mr. Robins presented two guilt-phase claims in his petition, an ineffective assistance claim and a *Brady/Napue/Giglio* claim.

With respect to the ineffective assistance claim, the record shows counsel knew there were serious questions about the "timing and causes" of Brittany's only known pre-mortem injury, the femur fracture which occurred several weeks before she died. Defense counsel even conceded to the jury that the issues around how and when the fracture occurred were among the most "crucial issues" in the entire case. Despite counsel's alertness to the issue, they never investigated the timing and cause of the fracture and the record indicates that neglect of this investigation must be attributed to inattention and constitutional deficiencies in counsel's performance as understood under *Strickland v.*

Washington. We defer the discussion of prejudice caused by counsel's defalcation momentarily.

The *Brady/Napue/Giglio* claims are grounded in allegations that the State knowingly allowed perjured evidence to go to the jury. The claim is verified by both Brittany's mother Lovell McDowell and McDowell's brother Otha. Ms. McDowell was pressured and threatened to falsely testify that she had concealed Mr. Robins' abuse of Brittany because she was afraid of him. This was a lie, and both Ms. McDowell and Otha assure that the State knew so. Ms. McDowell told the jury that her testimony was not the result of threats or pressure, but as the State knew, this was also a lie. The ultimate result is that Ms. McDowell was forced to recant earlier statements that Mr. Robins loved Brittany, he had not abused Brittany; and from Ms. McDowell's account of the night of Brittany's death, he had not killed her. Further, the jury was deprived of Ms. McDowell's account of the witnesses who accused Mr. Robins of abuse: she says they were liars.

The prejudice from the failure to hear the merits of these guilt-phase constitutional claims will result in a fundamental miscarriage of justice. The discovery that Brittany had scurvy upends the entire prosecution theory concerning the cause and manner of Brittany's death, as well the cause of her only documented pre-mortem injury, the fractured femur. The record now shows

that the medical examiner's trial testimony was inaccurate and misleading in every material respect. The new medical discoveries are in harmony with Ms. McDowell's pre-trial statements and her current refrain that Mr. Robins did not abuse Brittany and that witnesses testifying otherwise were liars. What's more, both Ms. McDowell's protestations on Mr. Robins' behalf and the new medical evidence are in harmony with the repeated child-abuse investigations occurring in the weeks before Brittany's death that confirmed she was not an abused child.

It has been over 25 years since Mr. Robins was convicted and condemned for a crime he did not commit. Yes, judicial concerns with respect to finality have a role to play, but not in an ultimate sense. Achieving constitutional justice trumps finality. This Court is the guardian of that quest for justice, and justice in the context of this case equates with finding the truth. Mr. Robins' jury was deprived of a legitimate mechanism for finding the truth and so was this Court in prior proceedings.

This Court wisely protected the justice-seeking, truth-finding function, when it adopted the *Schlup* test to prevent a miscarriage of justice, in recognition that "a petition supported by a convincing *Schlup* gateway showing 'raise[s] sufficient doubt about [the petitioner's] guilt to undermine confidence in the result of the trial without the assurance that that trial was untainted by constitutional error.'" *House v. Bell*, 547 U.S. at 537 (alteration in original)

(quoting *Schlup*, 513 U.S. at 317). *See Pellegrini v. State*, *infra*. Mr. Robins has demonstrated "sufficient doubt about [his] guilt to undermine confidence in the result of the trial." *See House*, 547 U.S. at 537. His is the truly "extraordinary case," *id.* at 536, where steps must be taken to thwart a manifest injustice, and the merits of his constitutional claims must be heard.

Sentencing Phase Claims

Mr. Robins' guilt-phase claims also apply to his sentencing, which is to say that in combination counsel's deficient performance and the *Brady/Napue/Giglio* claims prejudiced the outcome of his sentencing, and failure to consider the claims in the sentencing context will also result in a fundamental miscarriage of justice. In the sentencing context that means Mr. Robins must make a colorable showing that, but for constitutional error, no juror would have found him death eligible. *Pellegrini*, *infra*. For the reasons explained below, Mr. Robins satisfies this test. Although it is unnecessary to the fundamental miscarriage of justice showing, Mr. Robins also presents the claim that his trial counsel failed to investigate and present significant mitigating evidence. The new mitigating evidence supplants the miscarriage of justice showing.

Mr. Robins has an additional sentencing claim that arises out of bailiff-jury misconduct that should be considered once the fundamental miscarriage of

justice showing is made. The claim rests on recently discovered evidence that the bailiff had an *ex parte* communication with the jury during deliberations concerning the prison conditions that Mr. Robins would live under should he receive a life sentence. The information provided by the bailiff would be understood as signifying that conditions of life confinement would be lenient, and the result is that the communication caused significant prejudice.

Mr. Robins also has a cumulative error claim that should pass through the fundamental miscarriage of justice gateway.

Other Exceptions to Procedural Default

There are other exceptions to procedural default that have application. For example, Mr. Robins *Brady/Napue/Giglio* claims are independently excusable from default because the State suppressed the evidence of its misconduct and the evidence is material. *Bennett v. State*, *infra*. For similar reasons, the jury misconduct claim is excused from default, as the bailiff's concealed misconduct served as an impediment external to the defense.

Finally, Mr. Robins makes the showing that egregious professional misconduct committed by his prior postconviction counsel, Patricia Erickson, also equates with an impediment external to the defense and procedural default rules will not apply.

VI. Argument

A. Mr. Robins has presented colorable constitutional claims for relief, and he must be afforded an evidentiary hearing before such claims are subject to dismissal.

It is clearly established that a habeas petitioner is entitled to an evidentiary hearing, where the allegations, if true, would entitle a petitioner to relief and the allegations are not belied by the record. *Mann v. State*, 118 Nev. 351, 353, 46 P.3d 1228, 1229 (2002). Below, Mr. Robins demonstrates that this standard is met with respect to each claim presented in his habeas petition. Later, in Argument B, Mr. Robins separately shows that the district court erred in dismissing his colorable claims on grounds of procedural default, without an evidentiary hearing.

1. Mr. Robins was deprived of effective assistance of counsel at trial in violation of the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Sections 6 and 8 of the Nevada Constitution.[18]

A central premise of Mr. Robins' claim is that the performance of his trial counsel was constitutionally deficient because counsel failed to conduct any forensic investigation into the timing and causes of Brittany's leg fracture—her only documented pre-mortem injury. It is a secondary premise that had counsel conducted a minimally effective forensic investigation of the leg fracture, the

[18] Mr. Robins presented this argument in Claim One of his habeas petition. (2AA352-88.)

full-body x-rays of Brittany that were taken on the date of her hospitalization would have been examined by a qualified radiologist retained to assist the defense, and Brittany's scurvy would have been discovered. This, in turn, would have led to the discovery that Brittany's death could not be determined to be homicide and Mr. Robins is not guilty of first degree murder.

The evidence that Brittany had scurvy would have been readily discoverable at the time of Mr. Robins' trial in 1988. Dr. Barnes explained this in his submissions to the district court. "For some decades preceding [Dr. Barnes'] introduction to medical education in the 1970s, standard radiology medical education included instruction on how to distinguish skeletal factures that may have a causal relation to scurvy or some other disease producing, pathogenic cause on the one hand, and trauma induced fractures, lacking apparent pathogenic causes, on the other hand. Similarly, for many decades, and currently, standard radiological textbooks have contained instruction on the detection of the unique skeletal changes caused by scurvy and other disease related disorders." (20AA4877, ¶ 3.)

Emphasizing the clear path to early discovery of Brittany's scurvy, Dr. Barnes emphasized that "if defense counsel had requested that [he], or any competent practicing radiologist consider the differential diagnosis [i.e., non-trauma related causes] . . . for Brittany's subperiosteal hemorrhage and femur

fracture then . . . [he or] any reasonably competent radiologist would have looked at Brittany's x-rays for the well-recognized pathogenic signs and symptoms . . . of scurvy and other recognized causes of fractures in children . . . [which] can be seen throughout Brittany's extremities [and] would have been readily discoverable in 1988." (20AA4874-75, ¶ 4.)

It is undisputed that Brittany's scurvy could have been easily discovered prior to Mr. Robins' 1988 trial. Next we demonstrate that the subject investigative failure is relatable to prejudicial constitutional deficiencies in trial counsel's performance.

Mr. Robins' ineffective assistance claim turns on application of the Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* guarantees fulfillment of Mr. Robins' Sixth Amendment right to counsel. *See Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012). "The right to the effective assistance of counsel at trial is a bedrock principle in our justice system." *Id.* Under the well-known two prong test, Mr. Robins must establish deficient performance by his trial counsel and prejudice. *Strickland*, 466 U.S. at 688, 694; *accord Warden, Nev. State Prison v. Lyons*, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984).

General Standard for Assessment of Deficient Performance. To establish deficient performance, Mr. Robins must show that "counsel's representation fell

below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.*; *Means v. State*, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004).

Several general propositions are attached to the assessment of deficient performance. First, the reasonableness of counsel's challenged conduct on the facts of the particular case must be viewed as of the time of counsel's conduct, "from counsel's perspective at the time." *Strickland*, 466 U.S. at 689-90. Second, although Mr. Robins "must overcome the strong presumption that his counsel's conduct fell within the wide range of reasonable professional assistance," *id.* at 689, strategic choices resulting from lack of diligence in preparation and investigation are not protected by the presumption in favor of counsel. *See Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003); *see also Strickland*, 466 U.S. at 690 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."). Third, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Wiggins*, 539 U.S. at 521 (quoting *Strickland v.*

Washington, 466 U.S. 668, 690-91 (1984)). Therefore, "the strength of the general presumption that counsel engaged in sound trial strategy turns on the adequacy of counsel's investigation." *Francis v. Miller*, 557 F.3d 894, 901 (8th Cir. 2009) (quoting *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984))).

Finally, courts have found the various editions of the ABA Criminal Justice Standards and Death Penalty Guidelines useful in assessing the reasonableness of counsel performance. As Justice Stevens noted in writing for the Court's majority in *Padilla v. Kentucky*, 559 U.S. 356, 366-67 (2010): "We long have recognized that 'prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . . .'" (citing *Strickland*, 466 U.S. at 688; *Bobby v. Van Hook*, 558 U.S. 4 (2009) (per curiam); *Florida v. Nixon*, 543 U.S. 175, 191 (2004), and n.6 (2004); *Wiggins*, 539 U.S. at 524; *Williams v. Taylor*, 529 U.S. 362, 396 (2000)). Justice Stevens concluded: "Although they are 'only guides,' *Strickland*, 466 U.S. at 688, and not 'inexorable commands,' *Bobby*, 558 U.S. at 8, these standards may be valuable measures of the prevailing norms of effective representation . . . ." *Id.* at 367.

General Standard for Assessment of Prejudice. In order to establish prejudice, Mr. Robins must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different." *Strickland*, 466 U.S. at 694. Further when considering prejudice, *Strickland* recognizes that "[s]ome errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. . . . Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Strickland*, 466 U.S. at 695-66.

With the foregoing parameters defining deficient performance and prejudice in mind, next Mr. Robins will address the deficiencies in the performance of his trial counsel.

Deficient Performance

We begin with *Strickland's* admonition that the reasonableness of counsel's conduct must be viewed at the time of counsel's conduct "from counsel's perspective at the time." *Id.* at 689-90. There are several key facts that counsel learned and therefore knew in the lead-up to the trial, which would have propelled a reasonable lawyer to conduct an investigation of the cause and timing of Brittany's leg fracture.

- It was undisputed that on February 28, 1988, the day that Brittany first experienced symptoms of her fractured leg, Mr. Robins was out of town; thus he was not in proximity to Brittany, and therefore he could not have been the precipitating cause of the injury to her leg on February 28. (8AA1772-73; 17AA4156-57, ¶ 25.)
- The State theorized that the callus formation on Brittany's leg at the time of her hospital admission meant that her leg had initially been fractured a few weeks earlier. (8AA1868.) The State insisted Mr. Robins must have fractured Brittany's leg sometime a few weeks earlier and then the State had Dr. Hollander cite the leg fracture as evidence that Brittany was a battered child. (8AA1933.)
- But countering the prosecution theory that Brittany had suffered an earlier leg fracture, trial counsel knew that Brittany's mother reported that although Britany had displayed some swelling on the leg in late January 1988, the swelling resolved without medical treatment, and Brittany did not express symptoms of a fracture until February 28, 1988, when it is conceded Mr. Robins was absent from Las Vegas. (17AA4239; 17AA4181-84; 7AA1689-91.)
- Also countering the prosecution theory that Brittany had suffered an earlier leg fracture, trial counsel knew that Brittany had been

examined twice during the first two weeks of February by police and child-abuse investigators, and the documentation from those investigations is notable for its report that Brittany was well (except for the bizarre skin discolorations covering Brittany's body, which are now correlated with her scurvy). (7AA1619-20; 17AA4217-18; 17AA4299.)

- Apart from the fact that the evidence proved there had not been an earlier fracture, the description of how Brittany's leg eventually fractured on February 28, 1988, also powerfully suggested a need for defense investigation. Brittany's mother described Brittany as fine all day, and then after napping, Brittany spontaneously erupted in distress and severe pain, without experiencing any direct physical trauma to her leg. (17AA4239.)
- Added to all of this evidence, defense counsel knew in the lead up to the trial, that the child's mother was insisting on Mr. Robins' innocence and it was anticipated that she would testify for Mr. Robins at trial. (5AA1047-54.) The mother's defense of Mr. Robins only heightened the clear likelihood that Mr. Robins had not been the cause of the fractured leg or her death and that the

State's forensic theories needed to be subject to investigation and adversarial testing.

The State needed to tie Mr. Robins to Brittany's broken femur, her only known pre-mortem injury. Relying on the February 28 x-rays, the State successfully argued (even without presenting evidence from a radiologist expert witness)[19] that Mr. Robins must have caused an earlier fracture to the femur and they leveraged the argument further when Dr. Hollander tied the alleged earlier leg fracture to proof of battered child syndrome. However, given the clear and convincing discrepancies associated with the theory that there had been an earlier leg fracture, which were known to defense counsel, an objectively reasonable counsel would have sought expert assistance to have the timing and cause of Brittany's only known pre-mortem injury assessed. In this case, that simply meant a competent radiologist needed to review the subject x-rays for the defense. But inexplicably, no investigation was done.

However, to be sure, the failure to investigate did not result from defense counsel's lack of appreciation of the crucial need for such an investigation.

[19] The State relied on Dr. Rajnovich, a pediatrician who cared for Brittany during her post February 28 hospital stay, to testify at trial regarding the *implications* of the callus formation on Brittany's February 28, 1988 x-rays. However, even Dr. Rajnovich questioned whether the callus formation seen on the x-ray signaled an earlier fracture, because, as he testified, no symptoms of a fracture were present prior to February 28, the day Brittany entered the hospital first exhibiting distress from a fracture! (7AA1605.)

Indeed, defense counsel told the jury during closing argument that the leg fracture was among the *most* crucial issues in the entire case. We quote from defense counsel's closing guilt-phase statement to the jury:

> "The issue of the leg. That is a very, very crucial issue in the case. The leg injury was what the doctors said when I tried to decide whether this was an abuse case or not. The leg is what bothers me. . . . The leg injury how did it occur?"

(8AA1896-97.)

Mr. Robins' claim of ineffective assistance of counsel practically frames itself around these just-quoted admissions of trial counsel. He describes the leg as not just a crucial issue, but as a "very, very crucial issue." And channeling what he knew the jury was thinking, defense counsel admits that the leg fracture is what makes the difference in his own mind about whether this is a child abuse case, or not. As he noted, this "is a very, very crucial issue . . . when I try to decide whether this is an abuse case or not." Again focusing on what he surely knew the jury was thinking, defense counsel admits he is also bothered by the leg injury. Nevertheless, defense counsel conducted no investigation of the fracture or its causes, and he was left to stand in front of the jury and simply *wonder* how it occurred. (2AA377, ¶ 88.)

As explained above, "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional

judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Wiggins*, 539 U.S. at 521-22 (citing *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984)); *accord State v. Powell*, 122 Nev. 751, 759, 138 P.3d 453, 458 (2006). Given the discrepancies in the prosecution's evidence regarding the *alleged* earlier leg fracture and defense counsel's own admission with respect to the "crucial" nature of the issue, the decision to completely forgo any investigation of the timing and cause of the leg fracture cannot be characterized as being supported by "reasonable professional judgment." *Elmore v. Ozmint*, 661 F.3d 783, 851 (4th Cir. 2011) ("the gross failure of Elmore's 1984 trial lawyers to investigate the state's forensic evidence—including the medical examiner's time-of-death opinion . . . had a palpably adverse effect on the defense"); *Duncan v. Ornoski*, 528 F.3d 1222, 1236 (9th Cir. 2008) (finding deficient performance where "the central role that the potentially exculpatory blood evidence could have played in Duncan's defense increased [counsel's] duty to seek the assistance of an expert"); *Driscoll v. Delo*, 71 F.3d 701, 709 (8th Cir. 1995) ("[A] reasonable defense lawyer would take some measures to understand the laboratory tests performed and the inferences that one could logically draw from the results."); *Anderson v. Johnson*, 338 F.3d 382, 392 (5th Cir. 2003) (counsel was ineffective

when "he relied exclusively on the investigative work of the state and based his own pretrial 'investigation' on assumptions divined from a review of the state's files"); *Miller v. Anderson*, 255 F.3d 455, 459 (7th Cir. 2001) (finding deficient performance when counsel failed to hire an expert to rebut the prosecution's expert testimony about physical evidence linking defendant to the crime scene when the defense theory was that defendant was not at the crime scene), *remand order modified by stipulation*, 268 F.3d 485 (7th Cir. 2001) (vacated at request of parties when settlement was reached).

Forensic evidence was vital to proving the prosecution's case against Mr. Robins during the guilt/innocence phase, as well as during sentencing. It was equally vital for defense counsel to understand that scientific evidence and be prepared to challenge it. Inherently, a defense-related expert investigation of the State's forensic evidence regarding the timing and causes of the leg fracture would be required.[20] As far back as 1982, the American Bar Association Standards for Criminal Justice—which the Supreme Court has said are appropriately considered as guides to whether counsel's conduct was objectively unreasonable—provided that "[i]t is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading

[20] This conclusion is also supported by the Declaration of attorney Dan Cooper, the *Strickland* standard of care expert, who presented a detailed Declaration to the State District Court. (20AA4880-891.**)**

to facts relevant to the merits of the case and the penalty in the event of conviction . . . ." 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.); quoted in *Rompilla v. Beard*, 545 U.S. 374, 387 (2005).

Forensic investigations will require experts, and in accordance with this obvious professional norm, ABA Guideline 11.4.1(7)(A-C) provides that defense counsel "should secure the assistance of experts where it is necessary or appropriate for preparation of the defense, for an adequate understanding of the prosecution's case or for rebuttal of any portion of the prosecution's case at the guilt/innocence phase or the sentencing phase of the trial."

The above cited ABA Guidelines and Standards further support the conclusion that the performance of Mr. Robins' trial counsel was constitutionally deficient. But here, there is more because the State relied on its version of the fractured leg evidence to argue that Brittany was a "battered" child. (8AA1933.) Battered Child Syndrome is a medico-legal diagnosis, and objectively reasonable counsel would have conducted basic research into its meaning, application and diagnostic parameters. If counsel had conducted such basic research on the diagnostic criteria for battered child syndrome they would have readily discovered that **"[s]*curvy* is commonly suggested as an alternative diagnosis [to battered child syndrome] since it also produces large calcifying subperiosteal hemorrhages . . . ."** Kempe, et al., *The*

Battered Child Syndrome, *supra*, at 106, 109, 111 (italics in original, bold emphasis added) (20AA4912, 4915, 4917).[21] But basic research with respect to the diagnostic criteria for battered child syndrome was also inexcusably neglected, and counsel doubled this error by failing to consult with an expert to determine if the battered child diagnosis could be countered.[22] *See Duncan*, 528 F.3d at 1235 ("Although it may not be necessary in every instance to consult with or present the testimony of an expert, when the prosecutor's expert witness testifies about pivotal evidence or directly contradicts the defense theory, defense counsel's failure to present expert testimony on that matter may constitute deficient performance.")

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[21] Battered child syndrome is a long recognized medico-legal diagnosis. It is first reported in Nevada case law in 1982 in *Bludsworth v. State*, 98 Nev. 289, 290, 646 P.2d 558, 559 (1982). In *Bludsworth*, the Court signaled its recognition of battered child syndrome "as an accepted diagnosis signifying serious and persistent physical abuse." *Id.* The Court cited as authority for the application of the battered child medical diagnosis, the 1973 case of *People v. Henson*, 304 N.E.2d 358 (N.Y. 1973). *Id.* In turn, the *Henson* case traced the acceptance of the battered child medical diagnosis to the landmark research study published by Kempe et al., in 1962 in the Journal of the American Medical Association.

[22] Counsel also neglected basic pathology research. *See* Spitz et al., Medicolegal Investigation of Death: Guidelines for the Application of Pathology to Crime Investigation 505 (2d ed. 1980). Spitz cautions that scurvy "must be considered in the differential diagnosis of skeletal injuries" in children. *Id.*

"A petitioner asserting a claim that his counsel did not conduct a sufficient investigation bears the burden of showing that he would have benefited from a more thorough investigation." *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Mr. Robins has made this showing, as demonstrated by the discussion of *Strickland* prejudice below. Mr. Robins' petition for habeas corpus stated a colorable claim of deficient performance of counsel.[23]

Prejudice

Strickland is designed to protect the Sixth Amendment right to a "reliable adversarial testing process." *Strickland*, 466 U.S. at 688. No reliable adversarial testing process inured to Mr. Robins' trial or sentencing proceedings. As the Court said in *Strickland*, some errors of counsel "will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture," 466 U.S. at 695-96, and clearly this is such a case.

The investigation into the timing and causes of the fracture to Brittany's femur opened a virtual Pandora's box of compelling defense evidence, starting with evidence that demonstrated Brittany was suffering from scurvy (Barlow's

[23] The allegations include those showing that trial counsel failed to present evidence that the key prosecution witnesses had no occasion to observe Brittany after the investigations by other professionals concluded that she was not an abused child and allegations showing ineffective impeachment of the State's witnesses. (2AA382.)

Disease). X-rays revealed the signature markings of scurvy throughout Brittany's upper and lower extremities several weeks before her death in the form of osteopenia, Fraenkel's lines, Wimberger's rings, and Pelkan spurs. The investigation also led to the discovery that the hemorrhagic symptoms of the disease had left the blotchy discolorations seen from time to time on Brittany's body and that were aptly described by Detective Silbaugh in early February 1988. But most relevant of all, the investigation revealed that Brittany had suffered a sub-periosteal hemorrhage leading to the callus formation and a spontaneous, atraumatic fracture of her femur on February 28, 1988, that Brittany had not suffered an earlier fracture as thought by Dr. Hollander, and therefore Brittany was not a battered child. *See* record citations, *ante*, at 6-25.

These findings change everything. The discovery that Brittany had scurvy advanced to the stage where she had experienced spontaneous fracture of one of her large bones, led to an additional discovery about the advanced stages of scurvy itself, that Brittany's "spinal column would not be immune from collagen deficiencies or corresponding weaknesses in its composition, and if left untreated, scurvy can lead to subdural hemorrhage, swelling of the brain and death." (18AA4295, ¶ 24.) Causes of death related to scurvy include subdural hemorrhage and cerebral edema secondary to the weakened, leaky blood vessels seen in scurvy patients. (*Id.)*

Because the medical examiner, Dr. Hollander, did not know that Brittany had scurvy (Barlow's disease), the entire evidentiary picture given to the jury was false and misleading. Dr. Hollander told the jury that Brittany's leg fracture and the fact that she had some fibrosis in her retroperitoneal space proved she was a battered child, (6AA1338-39), but these conclusions lacked any reliable scientific bases. Brittany's leg fractured due to a devastating disease process—scurvy—not traumatic injury. (21AA5019, ¶ 3.) And the evidence of her fibrosis is linked to idiopathic retroperitoneal fibrosis, not inflicted trauma. (*See* record citations, *ante*, at 40-43). Dr. Hollander also misled the jury to believe that an enormous force would have been required to cause the subdural hemorrhage, (8AA1840-41), but this was not true, for Brittany was extremely susceptible to an identical non-trauma induced subdural hemorrhage from scurvy. (20AA4877, ¶¶ 2-3.) Similarly, Dr. Hollander also told the jury that a very powerful, significant blunt force trauma would have been essential to cause the tear in the cartilage in Brittany's spine, (6AA1335-36.), but this also was a fallacy, because her spinal cartilage would have been susceptible to degradation and disintegration even in the absence of any trauma, or from Mr. Robins' improper efforts at CPR. (*See* record citations, a*nte* at 44-47.) Lastly, Dr. Hollander testified that Brittany's death should be ruled a homicide. This, too, is now an

unsustainable conclusion. The evidence does not lead to the conclusion that there was a homicide. (20AA4877-78, ¶¶ 3-4.)

The scientific truth about the causes of Brittany's injuries now closely align with the findings made by the doctors, social workers and police who investigated for signs of abuse throughout the months of February and March 1988 and determined Brittany was not an abused child. What is more, all of this new evidence collectively puts the lie to the principal group of alleged eyewitnesses (Williams, Young and Johnson), none of whom saw Brittany after the doctors, police and social workers had completed their investigations, and each of whom were looking to curry favor with the police and did so through their ever-changing and exaggerated stories. The medical evidence also corroborates Brittany's mother's insistence—both before Mr. Robins' trial and again more recently—that Mr. Robins did not abuse or kill her child.

The irresistible conclusion here is that the identified deficiencies in trial counsel's performance must be held to undermine confidence in the outcome of the conviction, and in such circumstance *Strickland* prejudice is established. *Duncan*, 528 F.3d at 1240 ("If the difference between the evidence that could have been presented and that which actually was presented is sufficient to 'undermine confidence in the outcome' of the proceeding, the prejudice prong is satisfied."); *Elmore*, 661 F.3d at 871 (finding prejudice when the new forensic

evidence "altered the entire evidentiary picture"). It is clearly established on this record that the negative consequences of defense counsel's failure to conduct a minimally adequate investigation results in more than a reasonable probability that the jury would have "had a reasonable doubt respecting guilt" and acquitted Mr. Robins of First Degree Murder. *Strickland*, 466 U.S. at 693.

2. Mr. Robins was deprived of effective assistance of counsel at sentencing in violation of the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Sections 6 and 8 of the Nevada Constitution.[24]

In Argument 1 above, Mr. Robins demonstrated that constitutional deficiencies in the performance of his trial counsel prejudiced the outcome of the guilt-phase portion of his capital proceedings. A near identical deficiency in the performance of counsel prejudiced the outcome of the sentencing proceedings. At sentencing, the State relied on the single aggravating circumstance in Nev. Rev. Stat. § 200.033(8) (1988), that the "murder involved torture, depravity of mind, or mutilation of the victim."[25] In Mr. Robins' direct-appeal decision, this Court affirmed the application of the aggravator on the basis that the evidence sustained proof beyond a reasonable doubt of the element

[24] Mr. Robins also presented this argument in Claim One of his habeas petition. (2AA352-88.)

[25] Challenge to the constitutionality of this statutory aggravator remains pending in Mr. Robins' currently stayed federal habeas proceedings, and that claim is not waived by its omission here.

of "torture" and "serious and depraved physical abuse beyond the act of killing itself." *Robins*, 106 Nev. at 629-30. In Mr. Robins' case, the jury was instructed that torture required proof that "act or acts which caused the death must involve a high degree of probability of death, and the defendant must commit such act or acts with the intent to cause pain and suffering for the purpose of revenge, persuasion or for any sadistic purpose." *Id.* at 628, 798 P.2d at 569.

During the sentencing proceedings, the prosecution argued there was proof of the statutory aggravator based on the nature of the physical injuries themselves and the testimony of Dr. Hollander with respect to the causes of those injuries. (9AA2149-50, 2153.) It is self-evident that proof of the single statutory aggravating circumstance was closely intertwined with the uncontested prosecution version of the medical evidence that was presented during the guilt-phase portion of the trial. However, it is equally obvious that the new medical evidence presented by Mr. Robins completely undermines any suggestion of torture or serious and depraved physical abuse and the proof of the statutory aggravator is absent.

Mr. Robins contends here that the same reasons that should have propelled defense counsel to investigate the cause and timing of Brittany's leg fracture for the guilt-phase (which are already outlined in Argument 1 above) also apply to the sentencing phase; particularly given the applicable standard of

care in capital sentencing proceedings that signal the duty to investigate evidence "to rebut any aggravating evidence that may be introduced by the prosecutor." *Rompilla v. Beard*, 545 U.S. 374, 387 (2005). Accordingly, Mr. Robins submits there is clear evidence of deficient performance affecting the sentencing phase of his proceedings. The prejudice to the outcome of the sentencing proceeding is also plain to see; as there is more than a reasonable probability that the jury would have entertained a reasonable doubt with respect to the single aggravating factor.

3. The State deprived Mr. Robins of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to United States Constitution and Article I, Sections 6 and 8 of the Nevada Constitution by knowingly presenting false testimony and failing to provide Mr. Robins with exculpatory and impeaching evidence in its possession in violation of *Napue v. Illinois*, *Brady v. Maryland*, and *Giglio v. United States*.[26]

Within the statement of facts portion of this brief at pages 25-38`, Mr. Robins has presented detailed, record-supported evidence, which shows that the State applied threats, intimidation and coercion to procure materially false testimony from Brittany's mother, Lovell McDowell, and despite knowing that material portions of her testimony were false, the State failed to correct her testimony. This portion of the brief also demonstrated that as a by-product of the

[26] Mr. Robins presented this argument in Claim Two of his habeas petition. (2AA388-407.)

State's misconduct, Ms. McDowell was also coerced into recanting testimony that would have been extremely favorable to the defense. *See* 33-38, *ante.* The facts, substantiate Mr. Robins' claim that the State violated *Napue v. Illinois*, 360 U.S. 264 (1959) and *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972).

In *Napue*, 360 U.S. at 269, the Supreme Court held "that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." Nevada courts have long adhered to this clearly established Supreme Court precedent. *Hanley v. Sheriff of Clark Cnty.*, 85 Nev. 615, 460 P.2d 162 (1969). "Due process forbids the state from deliberately misrepresenting the truth, and a conviction that rests in part upon such false evidence must be set aside." *Hanley*, 85 Nev. at 617, 460 P.2d at 163 (citing *Miller v. Pate*, 386 U.S. 1 (1967)). To establish such a due process violation a "petitioner must show that (1) testimony was actually false, (2) the prosecution knew or should have known that the testimony was actually false and (3) that the false testimony was material. *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003). Mr. Robins submits that the verified allegations presented with his habeas petition, (*see* 2AA388-407), as encapsulated in the

detailed statement of facts at pp 25-38 above, establish a violation of *Napue* and a resulting due process violation in spades. [27]

The record dispositively shows that the State knew that the testimony of Brittany's mother Lovell McDowell was materially false in several ways.

- The State knowingly elicited false testimony from Ms. McDowell to the effect that she had previously concealed Mr. Robins' abuse of Brittany because she was in fear of him. Ms. McDowell's brother Otha corroborates that the State intentionally elicited this false testimony in its zeal to obtain a death verdict. (*See* record citations at 25-33 above.
- The State also knew and failed to correct Ms. McDowell's denial that no one "held anything over her head in exchange for testifying," when in truth the entirety of her testimony (and omitted testimony) was the product of threats and coercion. (2AA393; 9AA2064-65 and 17AA4151-52, ¶ 15.)
- The State's use of threats and coercion in order to elicit false testimony from Ms. McDowell was designed to cause Ms.

[27] Mr. Robins submits that proof of the *Napue* violation in this case also satisfied the showing that *Brady* and *Giglio* were violated as well. *Hash v. Close*, 968 F. Supp. 2d 825, 832 (W.D. Va. 2003). Independently, Mr. Robins' habeas petition alleges colorable claims that *Brady* and *Giglio* were violated. (2AA338-406.)

McDowell to conceal the truth from the jury: (i) that Mr. Robins loved Brittany; (ii) he had not abused her; and (iii) those witnesses who testified that she had witnessed such abuse were liars. (*See* record citations at 33-38 above).

The evidence described above clearly demonstrates that the State elicited and or failed to correct false testimony from Ms. McDowell, and in combination caused her to suppress and recant testimony favorable to the defense—all in violation of Mr. Robins' right to due process. *Napue*, 360 U.S. 264; *Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (per curiam) (the State cannot knowingly allow a witness to give a material false impression of the evidence); *Pyle v. Kansas*, 317 U.S. 213, 215-16 (1942) (State's use of perjured testimony and "deliberate suppression . . . of evidence favorable to [defendant] charges a deprivation of rights guaranteed by the Federal Constitution"); *United States v. Juan*, 704 F.3d 1137, 1142 (9th Cir. 2013) (the State's application of coercion to force a witness to recant testimony beneficial to the defense violates due process).[28]

Mr. Robins establishes prejudice resulting from this due process violation by showing that the false evidence was material. False testimony is material "if there is any reasonable likelihood that the false testimony could have affected

[28] And the State's failure to disclose that it used of threats or coercion to pressure a witness to testify also violates *Brady*. *See Simmons v. Beard*, 590 F.3d 223, 235 (3d Cir. 2009).

the judgment of the jury." *Soto v. Ryan*, __ F.3d __, *No. 11-17051*, No. 11-17051, 2014 WL 3686096, at *9 (9th Cir. July 25, 2014) (internal quotations and citations omitted). The materiality question only requires a reviewing court to decide "whether the error *could* have affected the judgment of the jury, whereas ordinary harmless error review requires [the court] to determine whether the error would have done so." *Id.* (italics in original) *(*quoting *Dow v. Virga*, 729 F.3d 1041, 1048 (9th Cir. 2013).

Mr. Robins satisfies the materiality showing with respect to both his conviction and sentence. First, the descriptions of the misconduct are bound up with evidence from the State that it needed Brittany's mother, Ms. McDowell, to change her story—whether true or not—to get the desired conviction and sentence. That is to say, the State recognized that not having certain testimony from Brittany's mother "*could* affect the judgment of the jury." *Id.* For example, the prosecutor told the trial judge that it needed to have Ms. McDowell testify that she had concealed Mr. Robins' abuse of Brittany, because she was in fear of him, or else ". . . the State [could] not explain to the jury why Lovell McDowell decided to lie to the police on several occasions . . . [and] it would be difficult for a jury to comprehend why Miss McDowell would continue to live with a man who she knew to be torturing her daughter." (7AA1664.)

The prosecutor so strongly believed that the outcome of the proceedings hinged on the jury's finding that Ms. McDowell was a credible witness, that he was even willing to have her lie. For even after Brittany's mother told the "police detectives and the prosecutor [that she] was not afraid of Robins, they told [her], 'you **need** to say this . . .'[they] told [her] that [she] had to make him look like monster." (17AA4148, ¶¶ 9-10) (emphasis added). Ms. McDowell's brother added to this point, explaining that when he told the detectives and prosecutor that Ms. McDowell was not afraid of Mr. Robins, they said they needed her to say she was afraid because ". . . they were trying to get the death penalty for Robins. . . ." (17AA4220, ¶¶ 9-10.)

In short, the State misconduct was not committed on a whim; it was compelled by the belief that unless Ms. McDowell reversed course and *credibly* recanted her previous statements favoring Mr. Robins, the outcome *could* be affected. This surmise on the part of the State was correct for the reasons explained below.

For example, if the jury had learned that the State had used threats and coercion to present *false* evidence that Mr. Robins had abused Brittany, and that the State had suppressed the truth: that according to Brittany's mother, Mr. Robins loved Brittany; that she would have been able to hear, but did not hear, Mr. Robins hurting Brittany the night of Brittany's death; that Mr. Robins had

never abused Brittany in her presence and that the witnesses who testified otherwise were lying, then all this evidence "*could* [and indisputably would] have affected the judgment of the jury."[29] *Soto*, 2014 WL 3686096, at *9. Why? *Because*, even if the jury relied on Dr. Hollander to believe there had been a homicide, the jury *could* have believed Brittany's mother [that Mr. Robins was not a child-abuser] and the jury *could* have disbelieved the other witnesses, whom Brittany's mother cast as liars, with the end result being that the jury *could* have had a reasonable doubt about whether Mr. Robins was the perpetrator of any abuse, let alone an intentional, premeditated murder.

The same considerations affect the outcome of the sentencing proceeding, but here the consequences are even more pronounced. No serious argument can be made that Ms. McDowell's perjured testimony to the effect that Mr. Robins was a violent monster "*could* [not] have affected the [sentencing] judgment of the jury." *Id.* Similarly, if the State had not suppressed the truth, no plausible case can be made that the sentencing jury would not have been affected by testimony that Mr. Robins loved Brittany and would never have done anything to intentionally harm her. Testimony from Brittany's own mother, that Mr.

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[29] Record citations to support these facts are contained at 17AA4151-56, ¶¶ 15, 16, 18, 19, 22, 23.

Robins' life should be spared would have been compelling and "could have affected" the outcome of the sentencing.

Mr. Robins has made a colorable showing that he was deprived of due process in connection with the guilt and sentencing phases of his capital proceedings.

4. Mr. Robins' rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 6 and 8 of the Nevada Constitution were violated as a result of bailiff and juror-related misconduct in the penalty-phase deliberations of his capital trial. [30]

Petitioner was sentenced to death as a direct result of the bailiff's *ex parte* injection into deliberations of inaccurate, extrinsic evidence Petitioner was given no opportunity to deny or explain, in violation of the Federal and Nevada Constitutions. Juror Oliverius recently told investigators what happened:

> [D]uring the penalty-phase deliberations, the jury took several votes but did not reach unanimity . . . . [T]wo jurors were opposed to sentencing Robins to death . . . . [T]he two hold-out jurors explained that they wanted to sentence Robins to life in prison without parole so that he would have an opportunity to reflect on his crime for a very long time. . . . [I]n response to the concerns of these holdout jurors, one juror, on behalf of the rest, asked the bailiff: what kind of conditions would Robins be subjected to if he were sentenced to life without parole? Would he be in the general prison population or would he be in a situation like solitary for the rest of his life? . . . [T]he reason this question

[30] This claim was presented as Claim Four in Mr. Robins' habeas petition. (2AA433-37.)

> was asked was so that the holdout jurors could decide whether life without parole would in fact give Robins the opportunity to reflect on his crimes, a result that those jurors believed was a more fitting penalty than death. . . . [T]he jurors received the following answer from the bailiff: if Robins were sentenced to life without parole, he would be in the general prison population. [W]hen the jurors received this response from the bailiff, the holdout jurors changed their votes right away, and on the next ballot, the vote was unanimous for death, and the jurors announced that they had a verdict.

(21AA4988-89, ¶ 6-8.)

Two other jurors have corroborated Juror Oliverius' account. Arthur Wade informed investigators that during the penalty-phase deliberations, there were jurors who did not want to sentence Mr. Robins to death. Juror Wade recalled that to address these jurors' concerns, the foreperson submitted a question to the bailiff. The bailiff came back with an answer. The bailiff's answer resolved the issue for the holdout jurors. Juror Wade recalled that after the response came back, these jurors changed their votes to death. (21AA4992, ¶ 6.) In addition, Juror Gleniese Payton confirmed that that during penalty phase deliberations, she recalls that the jurors did pose a question to the court, and that an answer was provided. (21AA4995, ¶ 6.)

This issue is clear-cut. A death sentence requires juror unanimity in Nevada. The difference between a life and death sentence comes down to even a single juror's vote. After several hours, this jury was deadlocked. Two jurors

were holding out for life—so that Mr. Robins would spend his life in prison reflecting on the crimes—a perfectly valid reason. But then the jury asked the bailiff for specific information about prison conditions, an issue that played no role in the trial.

This question triggered the bailiff's statutory duty to cease communications and notify the court. Nev. Rev. Stat. § 175.391; 175.451. During deliberations, the bailiff is prohibited from communicating with the jury without court order "except to ask them if they have agreed upon their verdict." Nev. Rev. Stat. § 175.391. If jurors submit a question to the bailiff, "the court, in consultation with the parties, should supply a prompt, complete and responsive answer or should explain to the jurors why it cannot do so." Nev. Rev. Stat. § 175.451. In the event that the jury is to receive further instruction in response to a question, they must be conducted back into the courtroom, and "the information required shall be given in the presence of, or after notice to the district attorney and the defendant or the defendant's counsel." *Id.*

The prohibition on *ex parte* bailiff communications is no mere formality. The Supreme Court has instructed that "[i]t is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment." *Mattox v. United States*, 146 U.S. 140, 149 (1892). As that Court clearly established over a century ago,

"[p]rivate communications, possibly prejudicial, between jurors and . . . the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." *Id*. at 150. *Mattox* created a presumption of prejudice when there is possibly prejudicial contact with a juror and there is a heightened risk of influencing the jury's verdict. *See Caliendo v. Warden of Cal. Men's Colony*, 365 F.3d 691, 696-97 (9th Cir. 2004).

The Supreme Court reemphasized the significance of the constitutional stakes in *Parker v. Gladden*, 385 U.S. 363 (1966) (per curiam), a landmark case constitutionally prohibiting improper bailiff communications with jurors. There, the Court explained that "the statements of the bailiff to the jurors are controlled by the command of the Sixth Amendment, made applicable to the States through the Due Process Clause of the Fourteenth Amendment. It guarantees that 'the accused shall enjoy the right to a . . . trial, by an impartial jury . . . (and) be confronted with the witnesses against him . . . .' As we said in *Turner v. Louisiana*, 379 U.S. 466, 472-73, 85 S. Ct. 546, 550, 13 L. Ed. 2d 424 (1965), 'the "evidence developed" against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.'" *Parker*, 385 U.S. at 365 (ellipses in original) (alteration in original).

In *Parker*, the Supreme Court reversed the petitioner's conviction specifically because the bailiff expressed his personal opinion to the jury about the defendant, observing, the "official character of the bailiff – as an officer of the court as well as of the State – beyond question carries great weight with a jury." *Id*.

Nevada takes the issue especially seriously: "[We] give a bailiff's statements to a jury especially close scrutiny in terms of accuracy and potential for coercion when challenged as improper." *Lamb v. State*, 251 P.3d 700, 712 (Nev. 2011). "A bailiff's ex parte communication with deliberating jurors beyond what Nev. Rev. Stat. § 175.391 permits is a species of misconduct." *Id.* at 711.

As the record demonstrates, the bailiff during Mr. Robins' penalty-phase deliberation violated Nevada's laws restricting communications with jurors and Mr. Robins' constitutional right to an impartial jury. The bailiff's conduct here falls into the category of the "most egregious," and prejudice should be presumed. The facts demonstrate that the bailiff's conduct was deliberately designed to suggest that there would be leniency in a life sentence, which in turn would influence the jury to settle on a sentence of death. The bailiff's conduct was clearly improper and prejudicial.

As explained above, prejudice must be presumed, but even if prejudice is not presumed, Mr. Robins can show that there is a "reasonable probability that the [extrinsic information] affected the jury's verdict." *Meyer v. State*, 119 Nev. 554, 572, 80 P.3d 447, 460 (2003) (a standard which is akin to *Napue* materiality and less stringent than either Strickland prejudice or Brady materiality).

Here, the information given to the jurors about the alleged leniency of a life sentence was the pivotal concern to the jurors' life or death decision. The bailiff provided information that a life sentence would result in leniency and that Mr. Robins would be placed in general population with no further limits on his freedom. Mr. Robins was unconstitutionally sentenced to death based on unacceptably extraneous, irrelevant and highly inflammatory information not disclosed to him and which he had no opportunity to explain or deny. *See Mattox*, 146 U.S. at 140; *Parker*, 385 U.S. 363.

Mr. Robins has presented a colorable claim that his capital sentence must be reversed as a result of bailiff and juror related misconduct.

5. Mr. Robins was deprived of his rights to the effective assistance of counsel during the sentencing phase of his capital proceedings, in violation of the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Sections 6 and 8 of the Nevada Constitution, when his counsel failed to investigate, develop and present significant, reasonably available mitigation evidence to the jury, including mitigation evidence demonstrating his painful, traumatic childhood and the corresponding neurological impairments and brain damage caused by these early life experiences.[31]

This claim was presented in part during Mr. Robins' first state postconviction habeas proceeding. There, following evidentiary hearings, this Court held that trial counsel's failure to present mitigation evidence concerning Mr. Robins' background was objectively unreasonable and constitutionally deficient under *Strickland.* (3AA632-37.)

Nevertheless, after this Court found deficient performance, it denied the claim for lack of prejudice. Applying *Strickland*'s well known test, this Court found that Mr. Robins had failed to demonstrate that there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. (3AA635-37.) Mr. Robins reasserted this claim in the current district court habeas petition for two reasons.

[31] This claim was presented as Claim Three in the Habeas Petition (2AA407-433.)

First, Mr. Robins was denied a full and fair hearing on the claim during the earlier proceedings. That fact has particular relevance here because Nev. Rev. Stat. § 34.820(2)(b) would prohibit this Court from granting an evidentiary hearing with respect to aspects of the claim as originally submitted, *unless* he can show that the first habeas hearing "was not full and fair." This showing is categorically made below.

Second, the claim has been resubmitted to show that the deficiencies in trial counsel's performance go beyond the failure to investigate and present mitigation evidence bearing on Mr. Robins' background. The evidence shows that counsel also neglected to investigate and present evidence that Mr. Robins' painfully distressing childhood experiences left him with significant neurological impairments (brain damage) that should have been presented to the sentencing jury. Robins' counsel during the first postconviction proceeding represented to the district court that Mr. Robins needed to be evaluated for the presence of neurological deficits, but she inexplicably failed to do so (3AA611-12, ¶¶ 1,5.)

We first establish that Mr. Robins was previously denied a full and fair hearing on this claim. Second, we show that counsel's deficient performance extended to a failure to investigate and present significant mitigation bearing on Mr. Robins' mental health. And third, we demonstrate that all of the new

mitigation evidence is sufficient to prove *Strickland* prejudice—a reasonable probability for a different sentencing outcome.

a. Mr. Robins was denied a full and fair hearing

I

During evidentiary hearings in the first postconviction habeas proceeding, Mr. Robins presented mitigation evidence not considered by his sentencing jury, showing (1) that his mother suffered from a long-standing mental illness; (2) that she frequently abused dangerous drugs during his childhood; (3) that she and her children lived in extreme poverty without sufficient food and clothing; and (4) that likely driven by her own mental illness, she physically and emotionally abused Mr. Robins. In turn, these dreadful circumstances left Mr. Robins in the streets by age eight, where he was left as prey to Los Angeles street gangs, (10AA2277-81, 2298-2302; 11AA2598-99, 2602-03, 2607-09; 19AA4537-38), and where, by age 16, he had been stabbed twice, shot three times, and sexually molested by strange men his mother allowed into the home, (19AA4493-94; 3AA560-61; 10AA2296-98, 2313-14; 11AA2602).

The new mitigation evidence included a particularly striking example of trial counsel's ineffectiveness: unbeknownst to the sentencing jury, or for that matter, Mr. Robins' trial attorneys or this Court upon review of the sentence,

Mr. Robins was born on August 31, 1968. This meant he was just 19 years old on the date of Brittany's death in April 1988. (10AA2274; 17AA4160.)

As outlined below, however, the state district court discounted and excluded the evidence Mr. Robins offered, unconstitutionally restricting evidentiary development and making a full and fair hearing an impossibility.

During the first state habeas proceeding, Mr. Robins presented evidence that his mother, Lenzie Riggins, suffered from serious mental illness throughout her life, which manifested in a serious chronic psychosis. (10AA2298-302; 11AA2598-99, 2607-09; 19AA4537-38.) Lenzie first began receiving treatment for her mental health problems as a pre-adolescent, before Mr. Robins' birth. (10AA2292-302.) While Mr. Robins was still a toddler, his teenaged mother was already experiencing auditory and visual hallucinations, and she believed that she was controlled by demons. (*Id*.) Later Lenzie came to believe that one side of her body was a male and the other side a female. (11AA2607.)

Though Mr. Robins attempted to elicit testimony from his aunt, Darlene Heard, about his relationship with his mentally ill mother, the court cut off questioning on the matter, stating "[w]ell again this is not a penalty hearing, where we're going into full depth evidence that you would have presented had they known about it. The issue is whether trial counsel should have been aware

of and raised this issue. Not what evidence they would have presented." (10AA2282.)

Later, Mr. Robins sought to present a report prepared by Lenzie's psychiatrist, Dr. Franklin Masters, to corroborate his aunt's testimony about Lenzie's mental illness. (10AA2351.) Dr. Masters' report confirmed that Mr. Robins' mother had a history of psychiatric illness, that her disease manifested in psychosis, that she had a long history of substance abuse, and that she had been using methamphetamine "speed" in the 1970s, when Mr. Robins was a young child, (19AA4537); Dr. Masters was prepared to testify in support of his report, (10AA2353). However, the court ruled that the Masters report was hearsay, Dr. Masters' testimony was irrelevant, and the proffered evidence was excluded. (*Id.*) Then, mitigation investigator, Peggy Tucker, presented testimony with the results of her investigation that further confirmed the extent and seriousness of Lenzie's mental illness, but again, the court ruled the evidence irrelevant hearsay. (11AA2599.)

In addition to evidence of his mother's mental illness, Mr. Robins presented evidence of his personal history brimming with family members addled by substance abuse. Mr. Robins' father, Walter Hill, was a heroin addict who abandoned Mr. Robins before birth. Mr. Robins' step-father was a heroin addict as well. (10AA2275-78; 11AA2608.) Mr. Robins' mother, too, had a long

history of abusing substances including alcohol, marijuana, amphetamines and crack cocaine. (11AA2607; 19AA4537.) The district court warned that Mr. Robins' aunt Darlene's testimony regarding heroin-addicted father figures was beyond the scope of the hearing, (10AA2282), excluded the psychiatric report outlining Lenzie's history of substance abuse as irrelevant, (10AA2353), and accepted testimony corroborating Leznie's substance abuse "just for the purposes of the record," (11AA2605-07).

Somewhat unsurprisingly, Mr. Robins' childhood home, afflicted by serious mental illness and substance abuse, was also plagued by extreme poverty. Witnesses described that Lenzie inadequately fed and clothed Mr. Robins and kept her home in an unsanitary, filthy condition. (10AA2415-16.) Frequently there was no food in the home. (10AA2291-92; 11AA2601.) Often, this meant that Mr. Robins had to try to find odd jobs in the neighborhood to get money for food. (11AA2601.)

Mr. Robins also presented evidence of the emotional and physical abuse he suffered at the hands of his mother. A next-door neighbor to Mr. Robins' childhood home testified that over an extended period of several years, she frequently heard his screams as he ran out of the house trying to evade capture by his mother. No doubt this also explains Mr. Robins' transition to life on the streets at eight years old. (10AA2416-18.)

Taken together, the evidence presented during the initial state postconviction hearings also demonstrated that Lenzie—no doubt predisposed by her troubling mental illness—chronically neglected and physically and emotionally abused Mr. Robins throughout his childhood and well into his teens. (10AA2277-81; 11AA2602-03.) Lenzie was described as extremely violent. (*Id*.) She beat Mr. Robins with anything she could get her hands on, but her favorite implements were belts and electrical cords. (*Id*.) It was also observed that Lenzie struck Mr. Robins in the head with a cast iron skillet. (11AA2602.) This evidence, too, was among that considered by the district court to be outside the scope of the hearing, (10AA2282), and suitable only "for purposes of the record," (11AA2605-07).

In addition, Mr. Robins presented evidence that he had been sexually abused as a young child. (3AA560-61; 19AA4493.) Mr. Robins offered his own sworn declaration in evidence, where he recounted that he had been sexually and physically abused and lived in a home rife with domestic violence. This evidence was denied admission on the State's hearsay objection. (10AA2359.) Mr. Robins' aunt, Darlene Heard, and his cousin, Nokkuwa Ervin, corroborated that Mr. Robins had first disclosed his sexual abuse to them when he was around 12 years old, several years after the molestations had occurred. (3AA560-61; 10AA2296-98, 2313-14; 11AA2602.)

II

The Supreme Court has repeatedly stressed that when measuring *Strickland* prejudice in a capital penalty-phase proceeding, the court must re-weigh the evidence in aggravation against the "totality of the evidence – 'both adduced at trial, *and the evidence adduced in the habeas proceeding[s]*.'" *Wiggins*, 539 U.S. at 536 (alteration in original) (emphasis in original) (quoting *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000)). During the state court evidentiary hearings, this last admonition was repeatedly honored in the breach, when the state district court precluded admission of relevant mitigation evidence in the first instance, thereby restricting evidentiary development and obstructing consideration of evidence relevant to proving the prejudice prong of *Strickland*. Thus, as explained above, the prejudice prong of *Strickland* was decided on an incomplete record, in proceedings that were neither full nor fair.

During the state district court habeas hearings, the judge admonished Mr. Robins' counsel that the purpose of the hearing was limited to the presentation of evidence on the issue of "whether counsel should have been aware of and raised issues regarding child abuse." (10AA2281-82.) By focusing exclusively on the question of counsel's performance, the judge narrowed the adjudication of the *Strickland* prejudice prong beyond recognition.

According to United States Supreme Court precedent, however, that Mr. Robins was raised by a mother who was a seriously mentally ill drug abuser is a compelling, dreadfully sad part of his life circumstances and is inherently mitigating. *See Tennard v. Dretke*, 542 U.S. 274, 285 (2004) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982)) (affirming that a State cannot preclude the sentencer from considering "any relevant mitigating evidence [and that] virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances"); *Sears v. Upton*, 130 S. Ct. 3259, 3262-63 & n.6 (2010) (after taking account of numerous out-of-court statements such as written reports, third-party accounts, and written affidavits of mitigation witnesses, affirming that relevant hearsay may not be excluded from mitigation calculus by rote application of hearsay rule).

The state court's rulings throughout the course of the evidentiary hearings had the effect of excluding large swaths of proffered relevant mitigation from consideration. For example, the judge discounted evidence of Mr. Robins' academic struggles to the point of complete irrelevance. (11AA2569-70.) In addition, mitigation investigator Tucker presented highly relevant mitigating accounts of the physical, sexual and emotional abuse of Mr. Robins, as well as the overall circumstances of neglect and poverty and the magnitude of mother Lenzie's mental illness via reports given to her by his cousin Nokkuwa Ervin.

(11AA2600-05.) However, the State asked the trial court to strike all of Tucker's mitigation testimony on hearsay grounds, and the trial court essentially agreed that the evidence was unworthy of actual consideration and allowed the evidence "just for the purposes of the record." (11AA2605-07.)

The record clearly demonstrates that, at best, the state habeas district court took a jaundiced view of the proffered mitigation and that the court failed to grasp the proper application of the *Strickland* test, ruling: "this is not a penalty hearing, where we're going into full depth evidence that you would have presented had they known about it [the abuse]" and "evidence [trial counsel] would have presented" was considered to be outside the scope of the state court *Strickland* enquiry. (10AA2282.)

Thus, the district court established a framework for the hearing that was explicitly contrary to established Supreme Court jurisprudence, which demanded that Mr. Robins be afforded an opportunity to demonstrate *Strickland* prejudice, measured by consideration of the "totality of the evidence – 'both adduced at trial and the evidence adduced in the habeas proceeding[s].'" *Wiggins*, 539 U.S. at 536 (emphasis in original) (quoting *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000)). The state court's misapplication of *Strickland* meant that vast portions of the proffered new mitigation were excluded or discounted

to irrelevance, a process that cannot fairly be said to have resulted in a full and fair hearing.

The wholesale exclusion of this mitigation evidence by the district court was left undisturbed by this Court when it decided the appeal of the district court's decision; thus, it too failed to cure the absence of a full and fair hearing. (3AA632-37.) Consequently, this Court (like the district court) took no account of the substantial evidence that demonstrated that Mr. Robins suffered repeated severe physical abuse, emotional abuse and neglect at the hands of a mother, who was mentally ill and who abused dangerous drugs, including methamphetamine. Like the district court, this Court took no account of the mother's mental illness, despite the fact that this was the centerpiece of the dreadful childhood circumstances Mr. Robins had to endure. (*Id.*)

The above demonstrates that Mr. Robins was <u>not</u> afforded a full and fair hearing of his claim during the first habeas proceeding. Therefore any proscription on evidentiary hearings in connection with the presently submitted claim under Nev. Rev. Stat. § 34.820 does not apply.

b. Consideration of the prior facts supporting the claim, supplemented by the newly discovered evidence of Mr. Robins' neurological impairments, demonstrates that he was denied his constitutionally guaranteed right to effective assistance of counsel at sentencing.

As explained above, this Court previously recognized that counsel's capital sentencing performance was constitutionally deficient. However, as argued above, the Court erred when it implicitly adopted the district court's exclusion of much of the mitigation evidence from the prejudice weighing calculus, depriving Mr. Robins of a full and fair consideration of the claim, contrary to *Strickland*.

But the record also shows that in addition to neglecting the investigation of Mr. Robins' background and distressing childhood, trial counsel also ignored clues revealing that the early childhood trauma had effects on his mental health and cognition. Thus, although there were red flags favoring an expansive evaluation of Mr. Robins' mental and cognitive health, no investigation was ever done. This is an inexcusable outcome, given the fact that Mr. Robins had provided his counsel with a biography describing head trauma and recurring exposures to threatened and actual violence, accompanied by Mr. Robins' description of emotional scars, including flashbacks. (19AA4493-95.)

Mr. Robins' presentence report also describes him as suffering from anxiety, blackouts, and flashbacks, and these reported symptoms would have

further led any objectively reasonable counsel to recognize that there was a substantial need for a complete mental health evaluation. (19AA4509.) Blackouts and flashbacks have long been associated with Post Traumatic Stress Disorder. *See* Trauma and its Wake, Volume 1, Chapter 11, (Charles R. Figley, Ph.D. ed. 1985.)

Trial counsel left additional leads uninvestigated. Trial counsel retained psychiatrist Dr. Jack Jurasky to conduct a pre-trial competency exam on Mr. Robins. The Jurasky report indicated that Mr. Robins was not able to subtract serial sevens, (19AA4512), and just as they failed to recognize the significance of the flashbacks and blackouts, trial counsel missed this red flag too. The serial sevens test has been a well-known preliminary screen for identifying signs of cognitive impairment since at least 1944. *See* Jurgen Ruesch, *Intellectual Impairment in Head Injuries*, 100 Am. J. Psychiatry 480 (1944). By the early 1970s, the serial sevens test was adopted as part of the mini-mental state examination as a screen for cognitive impairment. *See* M.F. Folstein et al., *"Mini-Mental State." A Practical Method for Grading the Cognitive State of Patients for the Clinician*, 12 J. Psychiatric Res. 189, 197-98 (1975). The record fails to demonstrate that Mr. Robins' trial counsel understood the Jurasky report, or that they engaged in any follow-up with respect to this additional red flag suggesting the existence of cognitive impairment and possible brain damage.

It is well established and should have been known to trial counsel that early childhood trauma, like that suffered by Mr. Robins, may have "catastrophic and permanent effects on those who . . . survive it. It has a severe impact on the child's mental development and maturation. Sustained feelings of terror, panic, confusion, and abandonment as a child have long term consequences for adult behavior. Psychosis, dissociative states, depression, disturbed thinking and alcohol and drug dependency are directly linked to child victimization." *Hamilton v. Ayers*, 583 F.3d 1100, 1132-33 (9th Cir. 2009) (internal quotation marks and citation omitted).

Mr. Robins' trial counsel were on notice that he had suffered repeated emotional trauma as a young child and that he suffered from flashbacks and emotional difficulties associated with the same. The presentence report expanded on the breadth of his psychological frailty describing anxiety, blackouts and flashbacks, and Dr. Jurasky's competency report identified a clear sign of possible cognitive impairment. All of these red flags were ignored.

"[W]here counsel is on notice that his client may be mentally impaired, counsel's failure to investigate his client's mental condition as a mitigating factor in a penalty phase hearing, without a supporting strategic reason, constitutes deficient performance." *Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir. 1995); *Seidel v. Merkle*, 146 F.3d 750, 756 (9th Cir. 1998) (finding

ineffective assistance where defense counsel "failed to conduct even a minimal investigation in order to make an informed decision" regarding his client's mental health defenses).

Clearly trial counsel's investigation of Mr. Robins' mental health was deficient and not justified by any reasonable trial strategy, and for the reasons explained below, this failure resulted in prejudice under *Strickland*.

More recently, a battery of neuropsychological tests were administered to Mr. Robins by Dr. James Sullivan, who is Board Certified in neuropsychology and forensic psychology. (19AA4515-17; 19AA4519-30.)

Consequent to this testing, Dr. Sullivan found evidence that Mr. Robins suffers from "significant and permanent brain damage, most pronounced in right hemisphere and frontal [lobe] regions." (19AA4527-29.) Dr. Sullivan was also able to draw the link between Mr. Robins' "tragic childhood" and the development of his cognitive impairments. He noted that the recognized causes of acquired brain damage include child abuse and other trauma and found that "it is difficult to imagine a scenario encompassing the first sixteen years of [Mr. Robins' life] that would be more likely to result in significant and permanent disability for the survivor . . . ." (*Id.*)

c. The new mitigation evidence, combined with the mitigation evidence presented in the first postconviction proceedings, is sufficient to prove prejudice under *Strickland*.

Neuropsychological deficits like those seen in Mr. Robins are commonly considered to result in *Strickland* prejudice when they have been kept from the sentencer. *Sears*, 130 S. Ct. at 3262-63 (holding that counsel was ineffective for failing to investigate and present evidence of significant frontal lobe brain damage); *Porter, Sears*, 130 S. Ct. at 451, 454 (concluding that counsel was ineffective for failing to investigate and present neuropsychological evidence that "Porter suffered from brain damage"); *Jefferson v. Upton*, 130 S. Ct. 2217 (2010) (remanding for determination of whether state court fact-finding denying ineffectiveness claim was entitled to deference when counsel failed to present uncontroverted expert testimony indicating that Jefferson had permanent brain damage).

The Ninth Circuit has repeatedly found prejudicial ineffectiveness in cases where counsel neglected investigation of a capital defendant's background and mental health. *Stankewitz v. Wong*, 698 F.3d 1163 (9th Cir. 2012); *James v. Ryan*, 679 F.3d 780 (9th Cir. 2012), *aff'd after remand*, *James v. Ryan*, 733 F.3d 911 (9th Cir. 2013); *Robinson v. Schriro*, 595 F.3d 1086 (9th Cir. 2010); *Hamilton*, 583 F.3d 1100; *Libberton v. Ryan*, 583 F.3d 1147 (9th Cir. 2009); *Correll v. Ryan*, 539 F.3d 938 (9th Cir. 2008); *Lambright v. Schriro*, 490 F.3d

1103 (9th Cir. 2007); *Frierson v. Woodford*, 463 F.3d 982 (9th Cir. 2006); *Daniels v. Woodford*, 428 F.3d 1181 (9th Cir. 2005); *Summerlin v. Schriro*, 427 F.3d 623 (9th Cir. 2005); *Boyde v. Brown*, 404 F.3d 1159 (9th Cir. 2005); *Jennings v. Woodford*, 290 F.3d 1006 (9th Cir. 2002); *Karis v. Calderon*, 283 F.3d 1117 (9th Cir. 2002); *Caro v. Woodford*, 280 F.3d 1247 (9th Cir. 2002); *Ainsworth v. Woodford*, 268 F.3d 868 (9th Cir. 2001); *Smith v. Stewart*, 189 F.3d 1004 (9th Cir. 1999); *Seidel*, 146 F.3d 750.

Here, on top of the fact that the sentencing jury was deprived of evidence that Mr. Robins suffered significant neurocognitive deficits is the fact that his jury was also deprived of the evidence of his painful childhood. The sentencing jury learned nothing about Mr. Robins' life history, and it had no evidence through which it could conduct an appraisal of his moral culpability. *Eddings v. Oklahoma*, 455 U.S. 104, 111 (1982) (explaining that consideration of offender's life history is a "constitutionally indispensable part of the process of inflicting the penalty of death"). *See also Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) ("evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable"); *Porter*, *Bobby*, 558 U.S. at 441-42 ("jury at Porter's original sentencing heard almost nothing that would humanize Porter or allow them to

accurately gauge his moral culpability"); *Wilson v. State*, 105 Nev. 110, 115-16, 771 P.2d 586 (1989).

Mr. Robins' jury was given a wholly misleading picture from which to assess his moral culpability. The failure to present mitigating evidence of childhood maltreatment, similar to what Mr. Robins experienced in his own home and surrounding environment has been found prejudicial. *See, e.g., Sears*, 130 S. Ct. at 3262 (parents' physically abusive relationship and divorce when defendant was young; verbal abuse); *Porter*, 130 S. Ct. at 449 (witnessing domestic violence as child; father shooting at defendant but missing); *Rompilla*, 545 U.S. at 391-92 (alcoholic parents who fought violently; no expressions of parental love or affection; verbal abuse); *Wiggins*, 539 U.S. at 517 (severe sexual and physical abuse; placement in foster care); *Williams*, 529 U.S. at 395 (parents imprisoned for neglect; defendant committed to state custody and placed in foster care).

What is more, evidence produced during the state postconviction hearing revealed that Mr. Robins was only 19 years old; barely removed from the traumatic events of his childhood at the time of the charged offense, a mitigating factor itself that would have sharpened the image of his lessened moral culpability.

Mr. Robins submits that this claim should be rendered moot because he is entitled to ultimate relief on his guilt-phase innocence-based claims. Nevertheless, as a matter of insuring a complete record is made with respect to all meritable claims, this claim has been presented. Accordingly, we submit, that given Mr. Robins' tender age at the time of charged offense and the recently discovered neuropsychological impairments associated with left hemisphere and frontal lobe brain damage, which are inextricably tied to his traumatic childhood experiences, "there is a reasonable probability that if all this mitigation had been presented at sentencing at least one juror would have struck a different balance" and decided to impose a life sentence, which satisfies the showing of prejudice under *Strickland*. *See Wiggins*, 539 U.S. at 537.

6. Mr. Robins' conviction and death sentence are invalid under the state and federal constitutional guarantees of due process, the effective assistance of counsel, and a reliable sentence due to the cumulative errors, misconduct by state officials and witnesses, and the systematic deprivation of his right to the effective assistance of counsel. U.S. Const. Amends. V, VI, VIII & XIV; Nev. Const. art. 1 §§ 1, 6 & 8; art. 4 § 21. [32]

Mr. Robins alleges that each of the claims specified in his district court habeas petition requires vacation of his conviction or death sentence. The cumulative effect of the errors on each of his claims was to deprive the

[32] This claim was presented as Claim Five in Mr. Robins' habeas petition. (2AA437-38.**)** For all the reasons explained in Arguments B, the cumulative error claim is excused from procedural default.

proceedings of fundamental fairness and to result 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. Robins. Singularly and in combination, these constitutional violations had an effect on the jury's verdicts, and the State cannot prove that these errors were harmless beyond a reasonable doubt.

B. The district court erred in dismissing Mr. Robins' habeas corpus petition on grounds of procedural default, without granting an evidentiary hearing.

The district court did not consider the merits of any of Mr. Robins' constitutional claims. *See Doggett v. State*, 91 Nev. 768, 771, 542 P.2d 1066, 1068 (1975) (citing *Machibroda v. United States*, 368 U.S. 487 (1962)) ("Where factual allegations are made which, if true, could establish a right to relief, a convicted person must be allowed an evidentiary hearing on such issue, unless the available record repels such allegations.") (emphasis added); *Vaillancourt v. Warden*, 90 Nev. 431, 432, 529 P.2d 204, 205 (1974) ("Where . . . something more than a naked allegation has been asserted, it is error to resolve the apparent factual dispute without granting the accused an evidentiary hearing."). Instead, the district court determined that all of the claims were procedurally defaulted, and on that basis alone Mr. Robins' habeas petition was dismissed. (21AA5057-59.) Below, we demonstrate that the district court erred in its decision

dismissing the petition on procedural default grounds without granting an evidentiary hearing. The district erred in this respect because the factual allegations supporting the petition, "if true," prohibit application of any rule of procedural default to prevent consideration of the merits of any of Mr. Robins' constitutional claims. Therefore, Mr. Robins' habeas petition was not subject to dismissal, and he was entitled to a hearing. *Mann*, 118 Nev. at 353, 46 P.3d at 1229 (habeas petitioner entitled to evidentiary hearing where allegations not belied by the record, and if true, would entitle petitioner to relief). This Court reviews a district court decision to dismiss a petition *de novo*. *Id.* (remanding for a hearing after independently deciding fact allegations in habeas petition were colorable).

As explained next below, Mr. Robins has presented well supported factual allegations that establish several colorable grounds to excuse any alleged procedural default of his claims. First, Mr. Robins makes the all-encompassing demonstration that the failure to consider the merits of his constitutional claims would result in a fundamental miscarriage of justice because he has made a colorable showing that he is innocent of the offense and ineligible for the death penalty. *See State v. Bennett*, 119 Nev. 589, 597-98, 81 P.3d 1, 6-7 (2003) (state courts will consider procedurally defaulted claim if petitioner can demonstrate that applying procedural bars would result in fundamental miscarriage of

justice). Although satisfaction of the fundamental miscarriage of justice test will excuse procedural default of all Mr. Robins' claims, he makes a secondary and a tertiary showing as well.

For example, Mr. Robins will make an independent demonstration that his *Brady/Napue* claims are excused from the application of rules of procedural default because the recently discovered exculpatory and impeachment evidence was suppressed by the State and the suppressed evidence is material. *See Bennett*, 119 Nev. at 599, 81 P.3d at 8 (to establish excuse for procedural default of Brady claim, "proving that the State withheld the evidence generally establishes cause, and proving that the withheld evidence was material establishes prejudice").[33]

Finally, Mr. Robins will make the separate showing that any alleged procedural default was attributable to the egregious professional misconduct of his prior counsel, Patricia Erickson, whose representation commenced during the pendency of Mr. Robins' first state postconviction habeas petition and extended through all subsequent state and federal proceedings until September

[33] By the same logic, any default of the juror/bailiff misconduct claim would also be excused because the evidence of misconduct was "suppressed," and the suppressed evidence resulted in prejudice. *See, e.g., Harris v. Warden, S. Desert Corr. Ctr.*, 114 Nev. 956, 959-60 (1998) and n.4, 964 P.2d 785, 787 (1998) (good cause to excuse procedural default can be shown with evidence that the factual basis of the claim was not reasonably available or that interference by a state official made compliance with the procedural rule impracticable).

2011, when her appointment was finally revoked by U.S. District Court judge Larry Hicks. The record shows that Ms. Erickson's professional misconduct—which is not imputable to Mr. Robins under ordinary attorney-client agency principles—created "impediment[s] external to the defense" sufficient to establish cause excusing any procedural default. *Passanisi v. Director, Dep't Prisons*, 105 Nev. 63, 66, 769 P.2d, 72, 74 (1989) (to show cause, petitioner must show an impediment external to the defense which prevented him from complying with state procedural default rules).

1. Failure to consider Mr. Robins guilt-phase constitutional claims will result in a fundamental miscarriage of justice.

I

Above, Mr. Robins presented a summary of his two guilt-phase constitutional claims, consisting of his ineffective assistance of counsel claim presented in Argument A(1), and his *Napue/Brady/Giglio* claim presented in Argument A(3). Adjudication of the merits of these constitutional claims is required if a petitioner shows that failure to consider the claims would result in a fundamental miscarriage of justice. *Bennett*, 119 Nev. at 597-98, 81 P.3d at 6-7.

The fundamental miscarriage of justice showing is satisfied for guilt-phase constitutional claims when "the petitioner makes a colorable showing he is actually innocent of the crime." *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). In turn, a *colorable* showing of actual innocence of the

offense is satisfied when the petitioner demonstrates that it is more likely than not, in light of new evidence, that no reasonable juror would find him guilty beyond a reasonable doubt. *Id.* (citing *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). Stating the test without the double negative, a "petitioner's burden . . . is to demonstrate . . . that more likely than not any reasonable juror would have a reasonable doubt [respecting guilt]." *House v. Bell*, 547 U.S. 518, 538 (2006).

As explained above, when deciding if a colorable *Schlup/Pellegrini* showing has been sufficiently made so as to require an evidentiary hearing, this Court accepts as true the allegations of Mr. Robins' petition. *Mann*, 118 Nev. 351, 46 P.3d 1228; *and see Wolfe v. Johnson*, 565 F.3d 140, 169-70 (4th Cir. 2009) (when assessing a request for evidentiary hearing to prove gateway innocence claim under *Schlup*, the court must assume pleaded fact allegations to be true). Below, Mr. Robins makes the colorable showing that in light of the new evidence, more likely than not "any reasonable juror would have a reasonable doubt [respecting guilt]." *House*, 547 U.S. at 538.

II

At trial, Dr. Hollander's testimony was critical to the State's case. Her opinions were the sole bases of the State's case as to cause and manner of death, and the State could not have obtained a conviction for premeditated murder without them. Absent her trial testimony, there is no evidence of the cause of

death or that a crime occurred. It is therefore appropriate to ask: what has become of Dr. Hollander's critical testimony in light of the new evidence?

In light of new evidence, no juror, acting reasonably, could accept or rely on any of Dr. Hollander's opinions to find Mr. Robins guilty of premeditated murder. Why? Because Dr. Hollander lacked critical ***diagnostic*** evidence: Brittany had scurvy (Barlow's disease). Dr. Hollander's lack of awareness of this crucial pre-mortem medical fact has completely undermined and negated each and every one of her diagnostic opinions. Dr. Hollander's testimony has been exposed to be inaccurate, unreliable, mistaken and misleading, even if unintentionally so. For example:

- Dr. Hollander testified that Brittany suffered repeated leg fractures caused by blunt force trauma and this condition supported a finding that she was a battered child. This testimony has been proven erroneous and misleading. The new evidence uncovered by Dr. Barnes unqualifiedly demonstrates that Brittany suffered a single leg fracture due to scurvy and the leg fracture does not sustain a finding that Brittany was a battered child. The new evidence must be assumed true because it is not belied by the record.[34]

[34] Record citations regarding the leg are at pp. 13-16, 40-41.

- Dr. Hollander testified that there was fibrosis around Brittany's ureter and that the exclusive cause of this condition was repeated blunt trauma. She added that this condition proved Brittany was a battered child. This testimony has been proven erroneous and misleading. The new evidence unqualifiedly demonstrates (i) that internal fibrosis is commonly caused by internal scurvy related hemorrhage; (ii) that blunt-force trauma induced retroperitoneal fibrosis is extremely rare and is associated with major injuries to the surrounding organs—a condition not seen in Brittany; and (iii) that Brittany's condition is *identical* to and indistinguishable from idiopathic retroperitoneal fibrosis, a condition not caused by blunt trauma. Although he found the medical evidence insufficient to identify the causes of the fibrosis to a reasonable medical certainty, Dr. Plunkett found that the absence of any injury to Brittany's surrounding organs and structures in her retroperitoneal space was suggestive of idiopathic retroperitoneal fibrosis, a generalized pathology not referable to blunt-force trauma.[35] The new evidence must be assumed true because it is not belied by the record.

[35] Record citations regarding the fibrosis are at pp. 41-43.

- Dr. Hollander testified that Brittany had a subdural hemorrhage resulting in edema (swelling of the brain) and her death. She attributed this condition to an exclusive cause: significant blunt-force trauma. Dr. Hollander's testimony regarding the cause of the subdural hemorrhage has been proven to be false and misleading. Dr. Plunkett has further illuminated Brittany's condition, explaining that her subdural hemorrhage and edema was indistinguishable from symptoms of scurvy, or symptoms of scurvy and accidental injury. The new evidence must be assumed true because it is not belied by the record.[36]
- Dr. Hollander identified the small tear in the cartilage in between Brittany's 11th and 12th vertebrae as an injury that was exclusively related to "very hard" blunt-force trauma, and she completely ruled out the possibility that Brittany might have been injured accidentally during CPR. Dr. Hollander's testimony regarding the cause of the tear in Brittany's cartilage has been proven to be false and misleading. The cartilage where the tear occurred is comprised entirely of collagen. Weakening and decomposition of collagen are

[36] Record citations regarding the subdural hemorrhage are at pp. 17-19, 43-44 above.

among the principal symptoms of scurvy, rendering Brittany predisposed to accidental fractures and tears in her bony structures. This outcome has particular resonance here, because Brittany would have been susceptible to a tear in her cartilage from the improper administration of CPR by Mr. Robins.[37] The new evidence must be assumed true because it is not belied by the record.

- Dr. Hollander described several small subgaleal hemorrhages underneath Brittany's scalp, which she exclusively attributed to blunt trauma, but once again her opinion has been demonstrated to be false and misleading. These small hemorrhages are identical to and indistinguishable from those caused without any trauma, in children with scurvy. What is more, given Brittany's *severe* pre-existing hemorrhagic condition, she would have been prone to these small subgaleal injuries from hair pulling (which Brittany was described to do) or even the positioning of her head during CPR.

[37] Record citations regarding the cartilage tear are at pp. 44-47.

The new evidence must be assumed true because it is not belied by the record.[38]

- Dr. Hollander implied that the few minor bruises and internal hemorrhages that Brittany had also must have been related to intentionally inflicted trauma but this, too, provided an erroneous and misleading account. All of these minor bruises/hemorrhages were typical for children who died despite undergoing CPR, but they would have been especially likely for Brittany, who had an underlying hemorrhagic disorder. The new evidence must be assumed true because it is not belied by the record.[39]
- Underlying all of Dr. Hollander's opinions is her mistaken assumption that Brittany was an otherwise healthy infant whose death was by homicide. Dr. Barnes now refutes the finding that Brittany was healthy, and Dr. Plunkett found the medical evidence insufficient to conclude to a reasonable certainty that a homicide occurred. The new evidence must be assumed true because it is not belied by the record.

[38] Record citations regarding these small subgaleal hemorrhages are at pp. 47-49.
[39] Record citations regarding these minor bruises/hemorrhages are at pp. 49-55.

- Dr. Hollander falsely assumed that Brittany had healthy leg bones that would not spontaneously fracture; she falsely assumed that Brittany had healthy cartilage in her spine that was not prone to easily tear; she falsely assumed that Brittany did not have an underlying severe hemorrhagic disorder of the sort that can result in small bleeds in the subgaleal space, as well as subdural bleeding and death; and she falsely assumed that Brittany was not suffering from a disease that results in internal hemorrhaging that is commonly associated with scarring/fibrosis.

The central *forensic* proof of Mr. Robins' guilt has been systematically dismantled. The evidence is not sufficient to label Brittany Smith's death a homicide. She was not a battered child. Just on the medical evidence alone, any juror would have a reasonable doubt about Mr. Robins' guilt. But that is just the tip of the iceberg.

III

In addition to the new medical evidence, Mr. Robins' jury would be presented with compelling new evidence from Brittany's mother, Lovell McDowell. Ms. McDowell would testify that Mr. Robins was not a violent man and she was not fearful of him; she would testify that Mr. Robins was not abusive toward Brittany and that he loved her; and she would testify that Mr.

Robins did not beat Brittany to death because she was in the next room and she would have heard it. Ms. McDowell's testimony that Mr. Robins did not abuse or kill Brittany is corroborated by the police, child-abuse investigators and medical professionals who examined Brittany over and over again during February and March 1988 for signs of abuse and determined Brittany was not an abused child, but that is not all. Ms. McDowell's testimony is corroborated by the new medical evidence, which fails to demonstrate that Brittany's death was a homicide.

Under the *Schlup* innocence test, "the newly presented evidence may indeed call into question the credibility of witnesses presented at trial." *Schlup v. Delo*, 513 U.S. 298, 330 (1995). This admonition applies with full force here with respect to several witnesses who testified that Mr. Robins had physically abused Brittany. The new evidence dramatically calls the credibility of these witnesses into question. *See Del Prete v. Thompson*, No. 10 C 5070, 2014 WL 296094, at *44 (N.D. Ill. Jan. 27, 2014) (in the application of *Schlup* the Court need not accept the credibility of the prosecution's witnesses at the underlying trial).

First, the testimony of the witnesses who alleged abuse is belied by the new medical evidence, which fails to sustain proof that Brittany was physically abused, or that there was a homicide, let alone a premeditated killing. But

beyond this, the testimony of the alleged abuse witnesses is belied by the repeated findings of doctors, police and child-abuse investigators that Brittany was not an abused child, especially considering the new evidence that these witnesses had no occasion to observe Brittany after the child-abuse investigations were completed in late March 1988, a few weeks before her death. *See* 24-25, *ante*. Finally, Brittany's mother now testifies that these witnesses, who testified she was physically present when Mr. Robins allegedly abused Brittany, were liars. *Ante* at 35. Given that all of the alleged child abuse witnesses were either in custody on criminal charges, or awaiting disposition of criminal charges, no juror acting reasonably could or would rely on these witnesses to find Mr. Robins guilty of anything.[40]

[40] For example, Robert Williams had been arrested for and/or charged with attempted possession of a stolen vehicle, (7AA1528), and 23 counts of possession with intent to sell cocaine, (7AA1529). Payton Clark had been arrested for, among other things, possession of a controlled substance, (7AA1717-18), conspiracy to distribute a controlled substance, (18AA4463-65), and possession of a controlled substance with intent to sell, (*id.*). Charmaine Young had been arrested for and/or charged with, among other things, possession with intent to sell cocaine. (18AA4448, 4451-57; 20AA4773-76.) It has been long recognized that witnesses in custody or facing pending criminal charges are likely to be influenced to shade testimony to help the prosecution out of their personal desire to seek favor and leniency. *See Alford v. United States*, 282 U.S. 687, 693 (1931) (citing *People v. Dillwood*, 39 P. 438, 439 (Cal. 1895)) (holding fact that charges are pending against witness is a "circumstance tending to show that his testimony is or may be influenced by a

IV

Mr. Robins has presented colorable factual allegations—which must be assumed to be true—that demonstrate that no juror, acting reasonably, would find beyond a reasonable doubt that he is guilty of premeditated murder. Therefore, Mr. Robins is entitled to a hearing. Unfortunately, based on *faulty analysis* provided to the district court by the State/Respondent, the district court reached the opposite erroneous conclusion, finding that Mr. Robins failed to make a threshold showing of innocence under *Pellegrini, Schlup.* Although this Court reviews the district court decision *de novo*, in anticipation that the State will resubmit the same faulty reasoning to this Court that it advanced below, we address each of the district court's most conspicuous errors with respect to whether Mr. Robins presented a colorable claim of innocence.

At the urging of the State, the district court swiftly disregarded this Court's repeated admonition to accept as true allegations of fact not belied by the record. *Mann v. Staten*, 118 Nev. 351, 46 P.3d 1228. For example, the district court failed to consider any of the new medical evidence summarized at pp *ante*; finding instead that its presentation after a "long passage of time" should be viewed with skepticism and that the reliability of such evidence had

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desire to seek the favor or leniency of the court and prosecuting officers by aiding in the conviction of the defendant").

been "undermined" by the passage of time. The district court's fact-finding is unsupported by the record, and such fact-finding was improper in the absence of supporting proof adduced at a hearing. Also, the record belies the district court findings.

The passage of time does not affect the validity or reliability of Brittany's 1988 x-rays, which indisputably show that she had hallmark symptoms of scurvy in all of her extremities. The medical and scientific attributes of scurvy—its hemorrhagic characteristics; its propensity to cause internal bleeding, subdural hemorrhage, weakened bones, and atraumatic fractures; and even its ability to cause infant deaths—are not subject to variability with the passage of time. Consequently, the findings of Dr. Plunkett and Dr. Barnes are based upon an interpretation of a verifiable medical record that will not change with the passage of time. *See Dixon v. Yates*, No. 2:10-cv-0631 JAM AC P, 2014 WL 66523, at *16-18 (E.D. Cal. Jan. 8, 2014), *aff'd*, 2014 WL 2612085 (E.D. Cal. June 11, 2014). The language from *Dixon* is apt:

> The passage of time does not affect the validity of the toxicology results, which were based on a preserved blood sample. The passage of time does not affect the validity of the expert ballistics opinion, which was based on physical evidence that—unlike memory—does not change over time. The contents of petitioner's medical records is fixed, and their reliability is unaffected by the passage of time. Dr. Yokoyama's declaration is based on those records and on his

> experience as petitioner's treating physician. Dr. Victor's expert psychiatric evaluation is also based primarily on review of the medical records. There is no reason to suspect that the relevant pharmacological principles or scientific literature on which Dr. Victor relied have changed. These items of evidence provide the primary basis for petitioner's showing of actual innocence, and their reliability is unaffected by the delay(s) in obtaining them or the delay(s) in presenting them.

Id. at *16.

After rejecting the new medical evidence based on the State's unsupported allegation that it was unreliable, the district court took no account of the implications of this new evidence: that the medical evidence presented to the jury was erroneous and misleading. See the summary at pp 38-55 *ante*. What is more, the district court also failed to consider the other building blocks of the case for innocence, including new evidence from Brittany's mother, Lovell McDowell, which demonstrates (consistent with the new medical evidence and Ms. McDowell's initial statements to the police) that Mr. Robins had neither abused nor murdered Brittany, and that witnesses who testified otherwise were liars. *Ante* at 33-38. Failure to consider <u>all</u> of the new medical and non-medical evidence cumulatively signals a misapplication of the *Schlup* test. *See, e.g.*, *House*, 547 U.S. 518 (the Court decided Mr. House should pass through the innocence gateway to have his ineffective assistance of counsel claim heard after considering all the new scientific evidence plus evidence that a

third party may have killed the victim); *Wolfe*, 565 F.3d at 169-70 (refusing to consider recanting witness's evidence on credibility grounds without affording an evidentiary hearing, rather than accepting allegations as true, is an error of law when initially assessing *Schlup* claim); *see also Dixon*, 2014 WL 66523, at *17 (although "[l]ay witness observations are the type of evidence most susceptible to the effects of time . . . [the witness] declarations bear internal indicia of reliability [because they] are consistent with the medical records and with [the witness's] statement to police in the immediate aftermath of the shooting");[41] *Fairman v. Anderson*, 188 F.3d 635, 646 (5th Cir. 1999) (recantation by witness coerced by police into testifying against accused was sufficient to allow petitioner to satisfy *Schlup* showing of probable innocence).

After failing to consider any of the new evidence, the district court adopted an inapt legal ground to justify dismissal of Mr. Robins' petition, when it held that Mr. Robins failed to prove that scurvy was a "superseding cause" of Brittany's death. This case does not implicate the doctrine of superseding cause. An intervening or superseding cause becomes an issue if and only if the

[41] Like the *Dixon* case, Ms. McDowell's recantation is consistent with the new medical evidence and her initial police statements, and the basis for her recantation (State misconduct) is corroborated by her brother, Otha.

defendant has committed an initial culpable act,[42] but here there is no longer proof beyond a reasonable doubt that Mr. Robins committed an initial culpable act. Instead, the new evidence colorably demonstrates that it is more probable than not that no juror acting reasonably would find him guilty beyond a reasonable doubt of committing any culpable act; in this case that culpable act is premeditated murder.

The State's argument below and the associated district court finding beg the ultimate question and presume Mr. Robins "caused" Brittany's death (i.e., that he committed an initial culpable act of premeditated murder) and then asks if an intervening act interrupted the chain of causation. This is *argumentum ad absurdum*. There is no presumption that Mr. Robins is guilty of anything or causing anything, and the burden of proof does not shift to him. *See Del Prete*, 2014 WL 296094, at *44 (*Schlup* did not require defendant to prove alternate theory for cause of death of three month old infant, and what's more, expert testimony on alternate causes of infant's death was sufficient to show that no reasonable juror would still find defendant guilty beyond a reasonable doubt). The sole question presented is whether, given the totality of the evidence, any

[42] *See Bostic v. State*, 104 Nev. 367, 370, 760 P.2d 1241, 1243 (1988) (explaining when and if an intervening act "will supersede the original culpable act"). *See also* Restatement (Second) of Torts § 440 (1965) (superseding cause relieves party from harm caused by antecedent tortious act).

reasonable juror would find Mr. Robins guilty of premeditated murder beyond a reasonable doubt. For the reasons already explained above, it is more probable than not that no reasonable juror would do so. Accordingly, the district court's superimposition of a superseding cause burden on Mr. Robins was improper.

V.

The new evidence presented by Mr. Robins upends the entire prosecution theory concerning the cause and manner of Brittany Smith's death. The new medical evidence fails to sustain Dr. Hollander's conclusion that her death was a homicide. (20AA4877-78, ¶ 3.) Brittany's own mother, the real victim of her death, has joined the chorus insisting that Mr. Robins did not abuse Brittany or cause her death, and that she was forced by State officials to bear false witness against Mr. Robins during his capital proceedings; a sin that has tormented her for decades. Her brother, Brittany's uncle, has come forward to say that he witnessed this official misconduct.

It has been over 25 years since Mr. Robins was convicted and condemned for a crime he did not commit. Yes, judicial concerns with respect to finality have a role to play, but not in an ultimate sense. Achieving constitutional justice trumps finality. This Court is the guardian of that quest for justice and justice in the context of this case equates with finding the truth. Mr. Robins' jury was

deprived of a legitimate mechanism for finding the truth and so was this Court in prior proceedings.

This Court wisely protected the justice seeking, truth-finding function, when it adopted the *Schlup* test to prevent a miscarriage of justice, in recognition that "a petition supported by a convincing *Schlup* gateway showing 'raise[s] sufficient doubt about [the petitioner's] guilt to undermine confidence in the result of the trial without the assurance that that trial was untainted by constitutional error.'" *House*, 547 U.S. at 537 (alteration in original) (quoting *Schlup v. Delo*, 513 U.S. 298, 317 (1995)). Mr. Robins has demonstrated "sufficient doubt about [his] guilt to undermine confidence in the result of the trial." *See id.* His is the truly "extraordinary case," *Id.* at 536, where steps must be taken to thwart a manifest injustice, and the merits of his constitutional claims must be heard.

2. Failure to consider Mr. Robins' sentencing-phase constitutional claims will result in a fundamental miscarriage of justice.

Mr. Robins has sentencing claims that overlap with his guilt-phase claims; e.g., his claim that counsel ineffectively curtailed their forensic investigation such that they failed to discover Brittany had scurvy, as well as his *Napue*, *Brady*, *Giglio* claims. These constitutional claims affected the outcome with respect to Mr. Robins' conviction and sentence. In addition to these claims, Mr.

Robins has a sentencing claim alleging that counsel performed deficiently in the investigation and presentation of mitigating evidence, as a well as a bailiff/jury misconduct claim.

These claims will become moot when guilt-phase relief is granted, presently; nevertheless, Mr. Robins argues that the failure to consider his sentencing claims will result in a fundamental miscarriage of justice. Procedural default of sentencing claims is excused when new evidence demonstrates the petitioner is ineligible for the death penalty. *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. A petitioner demonstrates that he is ineligible for the death penalty when he shows by clear and convincing evidence that "but for a constitutional error, no reasonable juror would have found him death eligible." *Id*

"Nevada statutory law requires two distinct findings to render a defendant death-eligible: (1) a finding of at least one aggravating circumstance and (2) a finding that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." *Nunnery v. State*, __ Nev. __, 263 P.3d 235, 251 (Nev. 2011) (internal quotations omitted) (citing *Johnson v. State*, 118 Nev. 787, 802, 59 P.3d 450, 460 (2002)). Adhering to this standard, Mr. Robins shows by clear and convincing evidence that no reasonable juror would have found him death eligible but for the constitutional errors. At this

stage, the Court presumes Mr. Robins' factual allegations are true. *Mann*, 118 Nev. 351, 46 P.3d 1228.

Stated simply, the evidence that demonstrated Mr. Robins' innocence of the offense also demonstrates his ineligibility for the death penalty. The new forensic evidence regarding Brittany's medical condition, revealing the serious errors in the State's medical evidence, coupled with evidence from Brittany's mother that Mr. Robins loved Brittany, that Mr. Robins was not a violent man and that he did not abuse or kill her, would have deprived the State of evidence to prove the sole aggravating factor beyond a reasonable doubt. (*See* discussion at 33-55 *ante*.) In addition, Mr. Robins has also presented substantial mitigating evidence (as summarized in Argument A(5)) that was unknown to the jury. Considering all of the new evidence, leads inexorably to an indisputable conclusion: no juror would have found Mr. Robins eligible for a death sentence.

3. There is cause and prejudice to excuse default of the *Brady/Napue/Giglio* claim with respect to Mr. Robins' conviction and sentence.

Above, Mr. Robins showed that failure to consider all of his constitutional claims attacking the validity of his conviction and sentence would result in a fundamental miscarriage of justice. There are, however, additional grounds supporting relief from procedural default with respect to Mr. Robins' *Brady/Napue/Giglio* claims, both as to his conviction and sentence. The district

court failed to make any record specific findings with respect to the viability of Mr. Robins' cause and prejudice showing regarding these claims. The court simply concluded, without citation to a supporting record, that a showing of cause and prejudice had not been made. This Court reviews the district court decision *de novo. Mann*, 118 Nev. at 353, 46 P.3d at 1229 (remanding for a hearing after independently deciding that fact allegations in habeas petition were colorable).

Mr. Robins alleged in the district court proceedings that he learned of the State's misconduct and the prejudice caused thereby in May 2013, just several months before he filed his state habeas petition in September of that year. (20AA4955-77.) Given the recent discovery of the factual basis of the claim, procedural default of the claim will be excused if there is a showing of cause and prejudice. Cause and prejudice is established when there is evidence that the State suppressed exculpatory or impeachment evidence and the suppressed evidence is material. *State v. Bennett*, 119 Nev. at 599, 81 P.3d at 8. Mr. Robins has already demonstrated these two prongs (state suppression of evidence and materiality) in the substantive arguments set forth above in Argument A 3 at pp. 83-90. The colorable grounds for relief need not be repeated here. The district court erred in dismissing these claims without a hearing.

4. There is cause and prejudice to excuse procedural default of the bailiff/jury misconduct claim.

Mr. Robins is excused from default of the bailiff/jury misconduct claim for the reasons explained in Argument B(2) above, which showed that refusal to consider the merits of his sentencing claims would result in a fundamental miscarriage of justice. However, there are independent "cause and prejudice" grounds to excuse default of this claim.

Mr. Robins did not learn of the factual basis of this claim until August 2013, on the eve of filing his state habeas petition, during interviews of his jurors on unrelated issues. (20AA4959-60.) There is cause to excuse the default when an impediment external to the defense prevented compliance with the state's procedural default rules. *Passanisi v. Director, Dep't Prisons*, 105 Nev. at 66, 769 P.2d at 74. Cause is also shown when interference by officials made compliance with the procedural rules impractical. *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537.

Here, the bailiff had a statutory and constitutional duty to disclose questions from the jury, but he failed to do so and worse, he engaged in unauthorized communication with the jury without disclosure to Mr. Robins or his counsel. Clearly the bailiff's non-disclosure, contrary to his explicit legal duties, qualifies as "interference by [an] official [which] made compliance with the procedural rules impractical." *Id.* Also concealment of the misconduct

erected an external impediment to its discovery thereby constituting cause excusing any default. *See Williams*, 529 U.S. at 420 (juror's concealment of relationship with key prosecution witness during voir dire gave rise to cause to excuse procedural default). Mr. Robins has demonstrated cause to excuse procedural default.

Prejudice results when "the errors complained of . . . worked to the petitioner's actual and substantial disadvantage, in affecting the state proceeding with error of constitutional dimensions." *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537 (internal quotations and citations omitted). Mr. Robins satisfies this test.

The record shows that during capital sentencing deliberations, the jury asked the bailiff about the conditions of prison confinement for a prisoner serving a life without parole sentence. The inquiry sought input from a court official regarding the nature and quality of the punishment that would result from the jury's choice of sentence, as between death and life in prison. Here the bailiff provided an answer to the question that implicitly counselled the jury that a life sentence would result in leniency, when he told the jury that a life sentence would place Mr. Robins among the general prison population without any other restrictions, constraints, or limitations on his freedom.

In a capital sentencing proceeding, where the jury is tasked with deciding between granting life or imposing death for a fellow citizen, a court official's

unauthorized communication of information to the jury that describes the nature and quality of the punishment associated with a life sentence is presumptively prejudicial and results in error of constitutional dimensions under both state and federal law. *See* discussion of prejudice in Argument A (4) at pp 94-98 *ante*.

Mr. Robins has made a colorable showing of cause and prejudice. The district erred in its dismissal of this claim without granting a hearing.

5. Professional misconduct of Mr. Robins' prior counsel gives rise to cause to excuse procedural default of the ineffective assistance of counsel claims.

Patricia Erickson represented Mr. Robins for seventeen years, from the time of his first state habeas petition on April 4, 1994, through September 29, 2011, when Judge Hicks finally terminated her appointment as Mr. Robins' federal habeas counsel, due to Ms. Erickson's professional misconduct; e.g. her lack of diligence and her inexcusable delay of the proceedings. (3AA602; 17AA4122-27.**)** During the time that Ms. Erickson represented Mr. Robins, she handled, on average, 17.4 murder and capital cases per annum. (19AA4540-42; 4543-48.) During 1996-97, at the height of preparations for Mr. Robins' first state habeas petition evidentiary hearings, Ms. Erickson actually averaged 23 murder and capital cases per year. (*Id.*) She also actively represented her husband, Richard Walker, also charged with capital murder, during this and other periods.

Ms. Erickson's capital caseload is exclusive of an estimated 400 or more (non-murder) felony cases (or on average an additional 22 felony cases per annum) identified just in Clark County's database, and is exclusive of other criminal cases outside of Clark County, or misdemeanors, as well as many other types of cases she handled. (*Id*.)

By any reasonable measure, under applicable professional standards, Ms. Erickson's caseload was extraordinarily excessive. Mr. Robins had no knowledge of the unreasonably excessive caseload Ms. Erickson maintained, nor was he aware of the repeated court-imposed sanctions or substantial additional evidence of professional misconduct discussed below, which clearly demonstrated her sheer incapacity to diligently represent her clients or to manage her professional practice within the bounds of reason.

One of Mr. Robins' central claims in this appeal is that his trial counsel failed to cause an adequate investigation that should have resulted in the examination of Brittany's February 28, 1988 x-rays, which would have led to the discovery of Brittany's scurvy and its implications. Significantly, Ms. Erickson was acutely aware of the need for a forensic investigation.

On January 10, 1996, one full year before the evidentiary hearings in the first state habeas proceeding actually took place, Ms. Erickson asked for a continuance of the proceedings so she could complete certain essential

investigative tasks. (3AA604-09.) Ms. Erickson submitted an affidavit from her court-funded investigator, Tom Casler, who explained that the cause of Brittany's death needed to be investigated. (3AA615-616.) Mr. Casler attached to his affidavit a memorandum he had issued to Ms. Erickson that explicitly stated the x-rays related to Brittany's admission to the University Medical Center for her fractured femur needed to be obtained and then examined by a qualified forensic radiologist. (3AA622-23.)[43]

However, despite the fact that in January 1996, Ms. Erickson represented to the district court that the x-rays related to Brittany's fractured femur needed to be obtained and examined by a qualified expert radiologist, she failed to have the x-rays examined during the state court proceedings, or at any time thereafter. Mr. Robins contends here that Ms. Erickson's failure to cause the x-rays to be examined, a task that she represented to the district court needed to be done, was objectively unreasonable and representative of ineffective counsel. But it was more than ineffective. Mr. Robins demonstrates that Ms. Erickson's default was the byproduct of professional misconduct—not imputable to Mr. Robins under ordinary attorney-client agency principles—which created "impediments external to the defense" sufficient to establish cause excusing procedural default.

[43] In the same filing Ms. Erickson represented that Mr. Robins should be evaluated for organic brain damage, but she ignored that investigative task as well.

Wilson, 105 Nev. at 66, 771 P.2d at 74 (to show cause, "petitioner must show an impediment external to the defense which prevented him from complying with state procedural default rules").

Nevada has adopted the federal procedural default principle stated in *Coleman v. Thompson*, 510 U.S. 722, 754 (1991), which holds that attorney error during postconviction proceedings is generally not considered an external factor impeding a petitioner's compliance with procedural rules or that will excuse a procedural default. *See Mazzan v. Warden, Nev. State Prison*, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). Significantly, however, the *Coleman* rule followed by Nevada courts is a rule grounded in agency law. In *Coleman*, the Supreme Court held that in state collateral proceedings "[a]ttorney ignorance or inadvertence is not 'cause' [for purposes of the procedural default doctrine] because the attorney is petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.'" *Id.* at 753. Expressly invoking agency law, the Court stated: "In a case such as this, where the alleged attorney error is inadvertence in failing to file a timely notice, such a rule [i.e., that a "'lawyer ceases to be an agent of the petitioner'" when he performs ineffectively] would be contrary to well-settled principles of agency law." *Id.* at 754 (citing Restatement (Second) of Agency § 242 (1958)).

A corresponding applicable principle of agency law is that when an agent acts outside the authorized scope of the agency, the principal is not held liable for the acts of the agent. *See Maples v. Thomas*, 132 S. Ct. 912, 924 (2012) (Coleman procedural default rule will not apply to lawyer who acts outside scope of agency); *Holland v. Florida*, 560 U.S. 631 (2010) (client not bound by lawyer's failure to timely file habeas petition when lawyer's lack of diligence amounted to egregious professional misconduct). In his *Holland* concurrence, Justice Alito agreed that the *Coleman* procedural default rule would not apply to bind a client when settled principles of agency law so dictate. *Id.* at 560 U.S. 556-60 (Alito, J., concurring) (attorney breaching agency duties qualifies as impediment external to defense for procedural default purposes).

As explained below, Ms. Erickson engaged in a pattern and practice of professional misconduct that took her far outside the scope of her authorized agency. Under well settled principles of agency law, her misconduct is <u>not</u> imputable to Mr. Robins, and her misconduct resulted in "external impediments" to the adequate investigation and presentation of Mr. Robins' claims in earlier state court proceedings. Mr. Robins is excused from procedural default under these circumstances.

a. The Record of Misconduct.

Imposed and Threatened Sanctions as Evidence of Excessive Caseload Conflict of Interest.

Mr. Robins is not able to represent that a complete record of all the sanctions imposed against Ms. Erickson has been compiled but the following sample is considered representative.

- On September 26, 1995, this Court directed Ms. Erickson to file her opening brief in the *Evans* case (which had not been filed on its due date without explanation) and to show cause why she should not be held in contempt. (12AA2830.)
- On June 24, 1997, the Court sanctioned Ms. Erickson and removed her as counsel in the *Brown* case. (12AA2903-05.) Ms. Erickson had delayed submission of the opening brief for over two years, dating back to at least February 15, 1995. (12AA2783-93.)
- On June 24, 1997, this Court sanctioned Ms. Erickson and removed her as counsel in the *Ellington* case. (12AA2906-08.) Ms. Erickson had repeatedly delayed the appeal dating back over three years to at least April 22, 1994. (12AA2776.) In its June 24, 1997 order, the Court held that "it [could] not condone

counsel's dereliction in the prosecution of the appeal." (12AA2907.)

- On June 24, 1997, the Court sanctioned Ms. Erickson and removed her as counsel for her delay of the appeal in the *Emil* case, after she was unable to transmit the record on appeal six months after it was due. (12AA2909-13.) The Court characterized Ms. Erickson's conduct as demonstrating lack of diligence, professionalism and competence, and said that it would be "unconscionable to penalize" Mr. Emil. (12AA2912.)
- One year later, on July 29, 1998, this Court entered orders in two additional cases (*Wescott* and *Emmons*). (13AA3002-06.) The Court once again found, based on Ms. Erickson's delay of the appeals, that Ms. Erickson's representation lacked competence, diligence and professionalism.
- On December 31, 1998, the Court issued an order refusing to lift the sanctions earlier imposed because of counsel's "dilatory prosecution" of those appeals. (13AA3052-58.)
- On June 30, 2000, the Court ordered sanctions against Ms. Erickson in the *Alvarez* case because, after five extensions of

time, she had failed to file the required appellate pleadings. (13AA3088-89.)

- On July 22, 2004, the Ninth Circuit Court of Appeals issued a default notice in the *Corniel-Reyes* case after Ms. Erickson failed to file the opening brief on the due date. (14AA3298.) After obtaining relief from the default, and after several additional delays, on September 15, 2004, the Court threatened to impose sanctions and remove her from the criminal justice panel because the opening brief still had not been filed (14AA3306); and on December 20, 2004, the Court terminated her representation and ordered that she not be paid. (14AA3340-41.)
- Ms. Erickson began efforts to delay the filing of the opening brief in the *Mariscal* case on December 27, 2004. (14AA3342-45.) After several additional extensions, this Court threatened to impose sanctions in an order dated April 25, 2005, and again on August 2, 2005, when granting a fifth extension of time. (14AA3355, 3383-84.) Ms. Erickson *untimely* filed on August 22, 2005. (14AA3385-88.)

- On June 30, 2006, the Court sanctioned Ms. Erickson in the *Alvarez* appeal after she ignored a filing deadline despite five prior extensions of time. (14AA3460-61.)
- On November 30, 2006, this Court threatened to impose sanctions in the *Hays* case. (14AA3478.)
- On December 11, 2006, the Ninth Circuit issued a default notice in the *Sciara* case when Ms. Erickson did not file the opening brief on the due date and she had not sought an extension of time. (14AA3484.)
- On January 5, 2007, the United States District Court issued an order to show cause in *Howard*'s federal habeas case over concern regarding Ms. Erickson's "lack of effort." (15AA3490-92.) Ms. Erickson was removed from the *Howard* case on February 12, 2007 after she failed to file a response to the State's motion to dismiss. (15AA3511-19.)
- On January 29, 2007, this Court again threatened sanctions in the *Hays* case, as it had done nearly one year prior on November 30, 2006. (14AA3478; 15AA3493.)
- On May 17, 2007, the Court issued an Order for Ms. Erickson to appear in connection with three cases: *Hodge*, *Hays* and *Robins*.

The Court noted concern over whether Erickson could provide competent representation and ordered her to show cause why she should not be removed as counsel in the pending appeals, removed from the appointments panel and "prohibited from practicing before this Court." (15AA3558-59.)

- On September 10, 2007, this Court noted Ms. Erickson's neglect of the appeal in Mr. Robins' case, and ordered her to file her opening brief or be removed from the case and the appointments panel. (15AA3585-86.) On October 16, 2007, the opening brief was stricken because it had included extra-record material in clear violation of the Court's rules. (15AA3591-93.)
- On May 7, 2008, the Court ordered conditional sanctions against Erickson in the *McKenna* appeal. (15AA3674-76.)
- On June 10, 2008, the Court granted another extension in Mr. Robins' case, but expressed concern about the serial nature of the requested time extensions. (15AA3721-22.)
- Although the *Hays* appeal had already been the subject of this Court's January 29 and May 17, 2007 orders, over one year later on July 7, 2008, the Court again threatened to remove Ms.

Erickson from that case and the appointments panel because "she has not effectively managed her caseload." (15AA3724-26.)

- On August 13, 2008, the Court threatened sanctions and removal from the appeal and panel in the *Hughes* appeal. (16AA3794-96.)
- On October 29, 2008, after Ms. Erickson received seven extensions of time and then allegedly failed to remember to file the brief, this Court imposed sanctions in the *Hughes* case. (16AA3808-11.)
- On November 5, 2008, the Court expressed "distress and dismay" over the delays Ms. Erickson had caused in the *Guy* appeal and the Court threatened to terminate her representation. (16AA3815-16.)
- On December 3, 2008, this Court removed Ms. Erickson from the *Guy* case due to her "dilatory actions and neglect" of the client. (16AA3820-22.)
- On March 6, 2009, the Court denied a requested extension of time in the *Hughes* case after noting two years of delay and it ordered the appeal submitted without Appellant Hughes' reply brief. (16AA3840.)

- On October 26, 2009, this Court issued a *sua sponte* order noting that the *Mathis* opening brief due on October 16 was never filed and ordering that the brief be filed on October 26 or sanctions would be imposed. (16AA3899.) On November 25, 2009, the *Mathis* brief still had not been filed, and this Court terminated Ms. Erickson's appointment in that matter. (16AA3922-23.)
- On November 25, 2009, the Court observed Ms. Erickson's repeated failures to meet deadlines and terminated her appointment in the *Henderson* appeal. (16AA3920-21.)
- On December 16, 2009, the Court issued another order to appear, over concern about Ms. Erickson's ability to manage her caseload. (16AA3928-30.)
- On May 4, 2010, Judge Hicks expressed frustration over the delays being caused by Ms. Erickson in Mr. Robins' federal habeas case and noted that her "approach to deadlines cannot be countenanced under any circumstances." (16AA3952-53.)
- On June 23, 2010, this Court debarred Ms. Erickson from accepting further appointments in capital cases. (16AA3966-67.)

- On January 11, 2011, the Court imposed sanctions in the *Domingues* appeal because no brief had been filed on its due date. (17AA3992-94.)
- On September 29, 2011, Judge Hicks removed Ms. Erickson as Mr. Robins' appointed federal habeas counsel following repeated delays and Ms. Erickson's ultimate failure to file a response in support of his habeas claims. (17AA4122-27.)
- On August 2, 2012, Judge Navarro issued her decision in *Prator v. Cox*, No. 2:12-cv-0081-GMN-VCF, 2012 WL 3155643 (D. Nev. Aug. 2, 2012) finding Ms. Erickson's strategy to delay the state postconviction proceedings excused exhaustion of Prator's claims: "petitioner may not be held responsible for counsel's failure to prosecute his claims effectively." (17AA4145-46.)

Other Illustrations of Counsel's Excessive Caseload Conflict of Interest.

A number of relevant features are apparent from an examination of a small sample of Ms. Erickson's cases, which evidences Ms. Erickson's inability to manage her caseload, leading to her lack of diligence and the resulting conflict of interest described above. Ms. Erickson presents as a classic example of a lawyer who had to abandon services to one client in favor of another client.

- In the small sample of cases reviewed, motions for extension are often filed *after* the deadline has passed. This would have been another signal to the courts monitoring Ms. Erickson's work that she was unable to manage her excessive caseload. Within the sample, there are 42 instances in which Ms. Erickson sought extension of deadlines after the deadline had already expired. (12AA296676, 2987; 13AA2996, 3107-12, 3113-16, 3188-92, 3204-06, 3223-27; 14AA3246, 3250-54, 3256-61, 3263-67, 3276-80, 3282-85, 3328-30, 3361-62, 3385-87, 3405-07, 3411-13, 346668, 3474-76, 3479-80; 15AA3531-32, 3560-61, 3571-73, 3606-08, 3618-23,3632-33, 3727-28; 16AA3782-85, 3802-06, 3954-62, 3981-82, 3984-85; 17AA3992-93, 3995-96, 3998-99, 4001-04, 4006-07,4009-10, 4012-13, 4068-69, 4084-4116.)

- Illnesses of every variety were used as excuses to extend deadlines; e.g., an excessive number of flu illnesses, headaches, eye conditions, stomach infections or ailments, sinus infections, food poisoning, car accidents, or the side effects of drugs (Demerol, Oxycontin, muscle relaxants), among many others. (12AA2880-84, 2966-75; 13AA3035-37, 3107-11, 3186-87, 3194-98, 3204-05,

3223-27, 3232-35; 14AA3328-30, 3342-44, 3400-01, 3405-06, 3454-55, 3474-76; 15AA3502-04, 3546-47, 3601-04, 3644-50, 3691-94; 16AA3812-13, 3823-24, 3841-42, 3844-46, 3848-49, 3857-58, 3900-02, 3915-18, 3981-82; 17AA3992-93, 3995-96, 4001-04, 4006-07, 4012-13, 4035-36, 4037-43, 4047-49, 4051-55.)

- Ms. Erickson frequently attributed requests for delay to computer-related problems; e.g., computer malfunctions, computer viruses, briefs and work-product being deleted and having to be re-written, internet problems, claims not to have received federal orders from the district court ECF system, multiple cases of software problems and printing malfunctions. In the small sample of cases reviewed, we found twenty-one different claims associated with computer-related problems. (12AA2836-36; 13AA3096-01, 3170, 3199-3203; 14AA3250-54, 3256-62, 3282-85, 3411-12, 3466-68, 3470-72; 15AA3506-09, 3538-39, 3618-23; 16AA3851-52, 3890-93, 3911, 3954- 62, 3977-79; 17AA3995-96, 4009-10, 4059-63.)
- Frequently, Ms. Erickson admitted to her own management inadequacies as justifying delay. Lack of adequate office assistance was a frequent claim, but the excuses also included briefs that were never filed because they must have been lost in the mail, failure to

put a completed brief in the mail, failure to receive orders mailed to her by the courts, trust account problems, inability to locate court orders, losing track of time, mis-calendaring deadlines, not calendaring deadlines, and a "personal situation" that took up her time for five months from January to May 2005.[44] These claimed mishaps came up twenty-four different times. (12AA2875-78; 13AA3047-50, 3113-16, 3186-87, 3188-92; 14AA3256-61, 3276-80, 3282-85, 3293-97, 3299-04, 3328-30, 3356-59, 3361-62, 3367-69, 3479-80; 15AA3588-89, 3661-63; 16AA3802-06, 3854-55, 3874-79, 3931-32, 3977-79; 17AA4032-33, 4072-83.)

Evidence of Substance Abuse, Lack of Candor, Abandonment of Clients.[45]

Statement of Jamee Lynch Moore. Ms. Moore worked as Ms. Erickson's assistant from August 20, 2005 through April 1, 2008. (19AA4550, ¶ 2.) Ms.

[44] This reference to a personal situation corresponds to the California murder trial of her husband, Richard Walker. (19AA4558-66.) Ms. Erickson also represented Walker in his Nevada trial and appeal proceedings from approximately August, 1992 to October, 1999. She was ultimately removed from the case after she alleged her own trial ineffectiveness during postconviction proceedings. (19AA4568-69.)

[45] Investigation is continuing, and the subjects discussed next herein will be the subject of discovery requests and fact development.

Moore is a well-educated woman who has several observations with relevance here. First, Ms. Moore substantiates that Ms. Erickson had a serious substance-abuse problem and that her inability to work was often related to consumption of alcohol and being "hung over." (*Id.* ¶¶ 3-8, 12.) Despite Ms. Erickson's reliance on claims of illness when seeking extensions of court deadlines, Ms. Moore clarifies that Ms. Erickson absented herself from the office (mostly in the morning) because she was hung-over, not because she was ill. (*Id.* ¶¶ 12, 13.) Frequently, Ms. Erickson would have Ms. Moore bring casework to her residence, and the scene was often the same—empty wine bottles and the unmistakable odor of alcohol. (*Id*. ¶ 8.) It was not atypical for Ms. Erickson to have Ms. Moore deliver bottles of wine to her home. (*Id*. ¶15.)

Ms. Moore also confirms that Ms. Erickson often lied or exaggerated when seeking extension of court-imposed deadlines. (*Id*. ¶11.) Despite Ms. Erickson's claims to the contrary, she was almost never ill, and at times, when Ms. Erickson claimed in court filings to be confined to bed, she was engaged in social outings, or on one occasion shopping for a new car. (*Id.* ¶¶ 13-14.) Also, according to Ms. Moore, Ms. Erickson either fabricated or greatly exaggerated claims of computer problems or calendaring mistakes. (*Id*. ¶¶ 16-20.) Ms. Moore also clarifies that Ms. Erickson made outright misrepresentations to the

court when she claimed she was lacking any office assistance during a time when Ms. Moore was working full time. (*Id.* ¶¶ 16-20.)

These disclosures by Ms. Moore add significantly to the showing of egregious professional misconduct. Not only do they establish Ms. Erickson's violation of Rule 3.3 of the Nevada Rules of Professional Conduct (requiring candor in communications with a tribunal), but there is also something more nefarious at work here. Ms. Erickson fraudulently employed lack of candor in an attempt to conceal her lack of diligence.

Statement of Michael Charlton. Mr. Charlton is a capital defense attorney with experience in capital cases dating back to 1979. (19AA4580, ¶ 1.) Mr. Charlton was employed by the Federal Public Defender, District of Nevada, from July 2006 through June 2012. (*Id.* ¶ 2.) For a period of time, he represented Mr. Robins in his federal habeas proceedings. Mr. Charlton adds to the understanding of Ms. Erickson's inability to manage her excessive capital caseload; noting that she was continually seeking assistance from the federal public defender's office in the drafting of pleadings and she "had an excessive number of court appointed capital cases, far too many for one lawyer to manage." (*Id.* ¶¶ 4-5.)

Eventually, Mr. Charlton conducted an investigation into Ms. Erickson's professional misconduct, which resulted in the Federal Public Defender for the

District of Nevada withdrawing from Mr. Robins' case and several others that Ms. Erickson had at one time worked on. (*Id.* ¶ 12.) During that investigation Mr. Charlton confirmed that Ms. Erickson engaged in a pattern of abandonment of her clients. "She not only abandoned some of her client duties by relying on the [federal defender] to do her work, she also abandoned clients by excessively delaying or simply not completing time sensitive work." (*Id.* ¶ 5.)

According to Charlton's investigation "[d]ating back to the 1990s, she had far too many cases. Throughout this time, she continually demonstrated a lack of diligence, and a shear inability or incapacity to perform or complete the work in accordance with the duties owed to the courts and her clients." (*Id.* ¶ 12.) However, "[t]here was evidence that she had expended substantial time and resources on the California and Nevada criminal litigation of another capital defendant, Richard Walker, who was Ms. Erickson's husband." (*Id.* ¶ 13.)

Mr. Charlton's investigation also uncovered evidence of Ms. Erickson's substance-abuse problem (corroborating the observations of Ms. Moore). The federal defender files contained memoranda and correspondence from the members of the office of John Murphy, who was one of Ms. Erickson's investigators. Murphy made it known that he believed Ms. Erickson to be abusing drugs and or alcohol, which was clearly interfering with her ability to function as competent, diligent counsel. (*Id.* ¶ 14.) Pamela Olsen, a Murphy

staff member, reported a mid-day phone call with Ms. Erickson where she "was either drunk or high." (*Id.*) Mr. Murphy related a conversation with Ms. Erickson's assistant Karen, who in turn (i) related a threatened bar complaint from a client whom Ms. Erickson called when she was drunk; and (ii) who described the problems Ms. Erickson's drinking was having in the office. (*Id.*) Mr. Murphy hoped Ms. Erickson would stop "killing herself" with alcohol. (*Id.*)

b. Ms. Erickson's excessive caseload and related professional misconduct resulted in a conflict of interest as well as a breach of her duty of loyalty. Under well settled principles of agency law, her actions created impediments external to the defense sufficient to establish cause to excuse procedural default.

The Nevada Supreme Court's Rules of Professional Conduct, including their conflict of interest provisions, among several others, play a central role in the assessment of Ms. Erickson's misconduct in this case. The relevant conflict rule, as properly understood, stands for the following proposition: a lawyer shall not accept representation of a client (or must take steps to withdraw from an existent representation) when "there is a significant risk that the representation of one or more clients would be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a

personal interest of the lawyer." *See* Nevada Rules of Professional Conduct, Rule 1.7 (effective 2006).[46]

The stated conflict of interest rule finds its application in an infinite variety of contexts, and here it is clearly established that an excessive court-appointed caseload (akin to the overwhelming caseload maintained by Ms. Erickson) can result in a conflict of interest. *See, e.g., In re Edward S.*, 92 Cal. Rptr. 3d 725, 746-47 (App. Ct. 2009); *People v. Roberts, No.*, 07 A. 1878, 2013 WL 1459739, at *7 (Colo. App. Apr. 11, 2013) (quoting *In re Edward S.* with approval); *State ex rel. Mo. Pub. Defender Comm'n v. Waters*, 370 S.W.3d 592, 608 (Mo. 2012) (quoting *In re Edward S.* with approval).

Recently, the Florida Supreme Court described the nature of the excessive caseload conflict in the precise words of Nevada's conflict of interest Rule 1.7, which as quoted above, declares a prohibited conflict whenever "there is a significant risk that the representation of one or more clients would be materially limited by the lawyer's responsibilities to another client." *Pub. Defender v. State*, 115 So. 3d 261, 278-79 (Fla. 2013)

Not surprisingly, apart from Rule 1.7, the professional norms of criminal practice have uniformly required counsel to monitor their caseloads and to

[46] A substantially comparable rule regulated Ms. Erickson's conduct prior to the 2006 effective date of Rule 1.7. *See* Nevada Supreme Court Rule 157.2 repealed, and model rule comparison in Rule 1.7.

decline work if the size of the caseload would "interfere with the rendering of quality representation or lead to a breach of professional obligations." *See* ABA Standards for Criminal Justice, Standards 4-1.2 and 5-4.3 (2d ed. 1980).

Mr. Robins submits that the record clearly demonstrates Ms. Erickson was burdened by an excessive caseload conflict of interest during the entirety of the time she represented him. Her workload did "interfere with the rendering of quality representation [and it did] lead to a breach of [myriad] professional obligations." *Id.* She labored under a significant conflict of interest.

Mr. Robins presented Ms. Erickson's record of misconduct, as documented in this case, to Dean Emeritus and Professor of Law, Norman Lefstein. Professor Lefstein was asked to more broadly assess the implications of Ms. Erickson's professional misconduct. Professor Lefstein has spent over 40 years concentrating on issues concerning the quality of legal representation of criminal defendants and the associated professional ethical standards that adhere to a criminal defense lawyer's conduct. His Declaration and attached Curriculum Vitae detail the full account of his experience, and are too large to list here. (20AA4827-4872.) Professor Lefstein has published on issues pertaining to the quality of representation in death penalty cases, and he has worked extensively in an area of paramount importance with respect to the

assessment of Ms. Erickson's professional misconduct: the ethical issues attendant to excessive caseloads. (20AA4828-29, ¶¶ 4-6.)

Professor Lefstein had a prominent role in the publication of the American Bar Association Formal Opinion 06-441 titled "Ethical Obligations of Lawyers Who Represent Indigent Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation." (20AA4832, ¶ 13.) Finally, Professor Lefstein wrote a book on excessive criminal defense caseloads published in 2011, titled Securing Reasonable Caseloads: Ethics and Law in Public Defense. A supplement was published in 2012, titled Executive Summary and Recommendation: Securing Reasonable Caseloads – Ethics and Law in Public Defense. (*Id.*¶ 12.) We summarize here some of his principal conclusions in this case.

Finding that Ms. Erickson maintained an excessive caseload which "she clearly demonstrated that she was incapable of managing" throughout the time she represented Mr. Robins, Professor Lefstein had this to say:

> My conclusion that Ms. Erickson had an excessive caseload which led to egregious professional misconduct is not based solely on my assessment of the number of cases she handled; it is a conclusion supported in repeated findings of courts in which she appeared throughout the time she represented Mr. Robins. In just the sample of Ms. Erickson's cases under examination, Ms. Erickson was sanctioned at least nine times; she was threatened with sanctions at least an additional eight times; her representation was terminated by courts on 11 separate occasions, and she was threatened with termination of

> her court appointed representation on numerous other occasions, including in the case of Mr. Robins. In addition, courts issued orders to show cause at least four times so that Ms. Erickson would be required to justify her improper conduct; and courts actively threatened to remove her from the indigent court appointments list on at least six occasions. Finally, based in part on her "history before [the] court," in 2010, the Nevada Supreme Court ordered that Ms. Erickson not appear as counsel of record in any capital appeal, and in no more than three non-capital appeals while briefing is in progress. The court findings associated with all these events make repeated, specifically articulated findings associated with Ms. Erickson's dereliction of her duties, her neglect, her lack of diligence, her lack of effort, her dilatory actions, her lack of competence, her inability to manage her caseload, her poor management skills and the simple fact that she had far too many cases. On at least 10 occasions the Nevada Supreme Court made implicit reference to its conclusion that she had too many cases. Her caseload was so excessive that she was frequently unable even to manage to request postponement of a deadline until after the filing deadline had expired and on repeated occasions no request for delay was ever filed requiring *sua sponte* court intervention. The record recited above, including the various court findings describing Ms. Erickson's pattern of dereliction, lack of diligence and neglect, support my conclusion that she had an excessive caseload and engaged in a pattern of egregious professional misconduct throughout the time she represented Mr. Robins.

(20AA4838-49.)

Professor Lefstein concluded that Ms. Erickson serially violated the Nevada Supreme Court's Rules of Professional Conduct, ignoring her duty to reduce her caseload or withdraw from representation when it became apparent that her excessive caseload was interfering with her duty to provide competent and diligent representation. What is more, Professor Lefstein concluded that

throughout her representation of Mr. Robins, Ms. Erickson's excessive caseload resulted in a conflict of interest under the Nevada Supreme Court's Rules of Professional Conduct. "[A] lawyer with an excessive caseload, particularly a lawyer like Ms. Erickson, who repeatedly fails to manage her caseload with diligence, has an active conflict of interest because of 'the significant risk that the representation of one or more clients [will] be materially limited by the lawyer's responsibilities to another client.' Common sense alone would have informed any objectively reasonable lawyer in Ms. Erickson's position that she had an excessive caseload and a resulting conflict of interest, that did interfere with the rendering of quality representation [and did] lead to the breach of professional obligations. This is an inescapable conclusion on this record, which shows that Ms. Erickson was sanctioned by courts on multiple occasions, threatened with sanctions, orders to show cause, involuntary terminations of her appointments, and recurring, robust court characterizations of her professional actions as neglectful, dilatory, unprofessional and lacking in diligence.

Professor Lefstein went on to recount Ms. Erickson's specific investigative failures, including her failure to have an expert examine Brittany Smith's 1988 x-rays, despite her express representation to the state district court that the cause of Brittany's death needed to be investigated and that these x-rays needed to be obtained and examined. Professor Lefstein was specifically asked

to comment on (i) whether Ms. Erickson's investigative failures in Mr. Robins' case can be separated from her egregious professional misconduct; and (ii) whether the failure to discover and present constitutional claims during Ms. Erickson's tenure as Mr. Robins' counsel can be accredited to Ms. Erickson's professional misconduct and, if so, whether her misconduct constituted an objective factor external to Mr. Robins, such that Ms. Erickson's failure to present claims cannot be attributed to him under ordinary agency principles.

To the above inquiry, Professor Lefstein had this to say: "Answering the first question, in this case Ms. Erickson's alleged failures to investigate and present readily discoverable claims on behalf of Mr. Robins cannot be attributed to an isolated instance or two of professional lapse or neglect. Her performance in Mr. Robins' case cannot be understood apart from her extremely excessive caseload, her resulting conflict of interest, and the evidence of recurring court findings that confirm Ms. Erickson's pattern and practice of egregious professional misconduct throughout the entire time she represented Mr. Robins. In my opinion, there is an uninterrupted causal link between Ms. Erickson's failures in representing Mr. Robins and her egregious professional misconduct." (20AA4846.) "The second question asks whether Mr. Robins can be held constructively liable for Ms. Erickson's failure to timely discover and present his constitutional claims in earlier proceedings. It is my conclusion that as an

unknowing, innocent principal, Mr. Robins cannot be considered constructively liable under ordinary agency principles for the omissions of Ms. Erickson since the omissions are inextricably intertwined with her egregious professional misconduct. Ms. Erickson's omissions are not the result of simple negligence; she had an excessive caseload resulting in a conflict of interest, which meant that her duties to one client were materially limited by duties to others. Of necessity, therefore, Ms. Erickson constantly needed to forego services for one client in favor of another. And, specifically, in Mr. Robins' case, Ms. Erickson failed to fulfill her duties to her client as a result of her excessive caseload and conflict of interest. Consequently, Mr. Robins faced formidable external impediments to the timely discovery and presentation of his claims during the time he was represented by Ms. Erickson." (20AA4846.)

"Implicit in the attorney client relationship is the duty of loyalty. The Nevada Supreme Court has recognized that conflict of interest Rule 1.7 in its Rules of Professional Conduct prohibits unconsented conflicts of interest precisely to insure that lawyers fulfill their duty of loyalty. *Stalk v. Mushkin*, 125 Nev. 21, 28, 199 P.3d 838, 843 (2009); *Coleman v. State*, 109 Nev. 1, 3, 846 P.2d 276, 277 (1993) ("Where an attorney's loyalty to a defendant in a criminal case is diluted by that attorney's obligation to others, the defendant's sixth amendment right to effective assistance of counsel is not satisfied"). In my

opinion, Ms. Erickson's pattern and practice of egregious professional misconduct and her corresponding conflict of interest under which she operated her law practice constituted a serious breach of her duty of loyalty to Mr. Robins. As for the question of whether Ms. Erickson's failure to investigate and timely present Mr. Robins' constitutional claims is binding on Mr. Robins, basic and longstanding principles of agency law are applicable. Restatement (Second) of Agency § 112 provides that 'the authority of an agent terminates if without the knowledge of the principal . . . he acquires adverse interests or he is otherwise guilty of a serious breach of loyalty to the principal.' It follows, therefore, that a seriously disloyal agent [like Ms. Erickson] loses authority to bind her principal. This conclusion was reached in a recent Supreme Court decision which cited a violation of § 112 of the Agency Restatement as an example of when an attorney's misconduct would not bind the client. *See Maples*, 132 S. Ct. at 924." (20AA4847.)

The summary above clearly demonstrates: (i) Ms. Erickson engaged in a pattern of egregious professional misconduct, and due to her inability to manage a clearly excessive caseload, she labored under a significant conflict of interest in violation of Nevada's Rules of Professional Responsibility; (ii) Ms. Erickson's investigative failures in Mr. Robins' case were inextricably intertwined with her professional misconduct, which is to say her investigative

failures were not the result of simple negligence or ineffective assistance; (iii) under ordinary principles of agency law, Ms. Erickson's misconduct, which resulted from a conflict-induced breach of the duty of loyalty, is not imputed to Mr. Robins; and (iv) therefore, Ms. Erickson's misconduct resulted in an external impediment to the defense. Mr. Robins must be held excused from procedural default under these circumstances.

VII. Conclusion

For the foregoing reasons, Mr. Robins respectfully requests that this Court reverse the order of the district court and vacate his conviction and death sentence. In the alternative, Mr. Robins requests that this Court remand his case to the district court for an evidentiary hearing.

Dated this 8th day of August, 2014.

Federal Public Defender
Cary Sandman
Assistant Federal Public Defender

By */s/Cary Sandman*
Counsel for Petitioner

Law Offices of Lance J. Hendron

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of N.R.A.P.(a)(4), the typeface requirements of N.R.A.P. 32(a)(5) and the type style requirements of N.R.A.P. 32(a)(6), because I certify that this brief has been prepared in a proportionally spaced typeface using Microsoft Word, 14 font Times New Roman type style. I further certify that this brief is 35,364 words in length.

I hereby certify that I have read this appellate brief, and to the best of my known, information, and belief, it is not frivolous or interposed for any improper purpose. I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, including N.R.A.P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 8th day of August, 2014.

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that pursuant to NRCP 5(b)(2)(D) this document was filed electronically with the Nevada Supreme Court on the 8th day of August, 2014. Electronic Service of the foregoing APPELLANT'S OPENING BRIEF shall be made in accordance with the Master Service List as follows:

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Employee of the Federal Public Defender's Office