No. 17-1390

CAPITAL CASE

IN THE
Supreme Court of the United States

TIMOTHY FILSON, WARDEN, *et al.*,

Petitioners,

v.

PAUL BROWNING,

Respondent.

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

RESPONDENT'S APPENDIX - VOLUME 1

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No. 15-99002

CAPITAL CASE

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL LEWIS BROWNING,

Appellant,

v.

RENEE BAKER, Warden,

Respondent.

APPELLANT'S OPENING BRIEF

Appeal from the United States District Court for the District of Nevada
Hon. Robert C. Jones

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JURISDICTION

The District Court had jurisdiction over this petition for habeas corpus under 28 U.S.C. § 2254. The District Court's Judgment was entered on August 1, 2014. 1ER 14. A timely FRCP 59 Motion was denied on January 13, 2015. 1ER 13. Notice of Appeal was filed on February 5, 2015. See 7ER 1711.

The District Court granted a Certificate of Appealability on five issues. 1ER 74. This Court has authority to decide these issues under 28 U.S.C. §§ 1291 and 2253. Pursuant to Circuit Rule 22-1(e), Appellant moves for a Certificate on three issues the District Court declined to certify. See Arguments IV-VI, below.

ISSUES PRESENTED

Certified Issues

1. Whether Browning's due process rights under *Brady v. Maryland* were violated by the prosecution's concealment of evidence that bloody shoeprints at the murder scene—concededly not Browning's—were made before police and medics arrived, likely by the true murderer.

2. Whether Browning's due process rights under *Napue v. Illinois* were violated by the prosecution's misleading evidence and argument to the jury that the bloody shoeprints were probably made by police or medics, not the murderer.

3. Whether Browning's due process rights under *Giglio v. United States* were violated by the prosecution's concealment of evidence impeaching informant Randall Wolfe.

4. Whether Browning's right to effective trial counsel was violated by his lawyer's failure to learn and inform his jury that (a) the bloody shoeprints at the scene were made before police and medics arrived, likely by the true killer; (b) the victim gave police a description of the killer that did not match Browning; (c) forensic analysis contradicts the prosecution's claim that Browning's knife was the murder weapon; and (d) the prosecution's key witnesses at trial were serial police informants who were rewarded for their testimony against Browning.

Uncertified Issues

5. Whether Browning's right to jury trial was violated by the omission of the element of deliberation from jury instructions defining first degree murder.

6. Whether Browning's right to due process was violated by the prosecutor's false argument to the jury that the victim's blood was on his jacket.

7. Whether Browning's right to due process was violated by the prosecutor's argument to the jury that the presumption of innocence is a "farce" and, "in this case," a "façade."

8. Whether Browning was denied effective assistance of counsel by his lawyer's wholesale failure to investigate and present a defense.

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the District of Nevada summarily dismissing a habeas corpus petition filed by Paul Lewis Browning, a state prisoner under sentence of death for a robbery-murder.

This is an actual innocence case. Browning has always maintained that he is innocent of the murder and was framed by two police informants. The record is full of evidence—mostly uncovered long after Browning's trial—supporting his claim.

- The victim was a jewelry store owner who was stabbed to death. Bloody shoeprints led from the body to toward the door where the killer fled. The shoeprints were not Browning's. The prosecution led the jury to believe the prints were made by police or medics, but withheld evidence that they were already present when police arrived, and so likely were made by the killer. See Argument I, below.

- The two key prosecution witnesses were indeed longtime, repeat police informants, who, unbeknownst to Browning's jury, were rewarded for their testimony against Browning. See Argument II, below.

- The only physical evidence allegedly tying Browning to the killing was a spot of blood on a jacket. The prosecutor told the jury it was the victim's blood and that alone conclusively proved Browning guilty. But in state habeas, Browning proved, and the State conceded, the blood on the jacket was not the victim's. See Argument V A, below.

- The dying victim gave police a description of the murderer that did not match Browning. At trial, the prosecution obscured and discounted this by misrepresenting the description and who gave it. This, too, was only exposed in state habeas proceedings. See Argument I B 4 b and Argument III, below.

The list goes on. See Argument I B 4, below. Many of the errors and misrepresentations were acknowledged by the Nevada Supreme Court. But that court held all the constitutional defects it recognized were nonprejudicial because of the supposedly "overwhelming" evidence of Browning's guilt. See 1ER 187-220, 269-275.

This "overwhelming" evidence originally included the alleged spot of the victim's blood on Browning's jacket. See 3ER 898-900; 4ER 1034. When Browning proved the blood was not the victim's, the Nevada Supreme Court fell back on a trio of the most common sources of wrongful criminal convictions: police informants, cross-racial identifications, and questionable forensic evidence.[1] See 1ER 153-154, 219.

[1] "[R]esearch has identified seven central categories of sources [of convictions of the innocent] … (1) mistaken eyewitness identification; (2) false confessions; (3) tunnel vision; (4) informant testimony; (5) imperfect forensic science; (6) prosecutorial misconduct; and (7) inadequate defense representation. … [T]he literature also discusses the potential role of race effects, media effects, and the failure of postconviction remedies." J. Gould and R. Leo, *100 Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. LAW & CRIM. 825, 841 (2010); *accord*, A. Kozinski, *Preface: Criminal Law 2.0*, 44 GEO. L.J. iii, iv, xxx, xxxiii (2015) (describing mistaken eyewitness identification, flawed forensic evidence, "serial informants," prosecutorial misconduct); B. Scheck et al., ACTUAL INNOCENCE 246 (2000); S.R. Gross, et al., *Exonerations in the United States*, 1989-2003, 95 J.CRIM.L.& CRIM. 523, 551 (2005); S. Guerra Thompson, et al., AMERICAN JUSTICE IN THE AGE OF INNOCENCE 9-42, 195-234 (2011).

The only common cause of wrongful convictions *not* present in this case is a false confession: Paul Browning has always said he is innocent of this crime.

The District Court below deferred to all the Nevada courts' rulings—including some not actually made, see pages 63-64, below—and dismissed Browning's federal habeas petition summarily, without allowing discovery, an evidentiary hearing, or oral argument. See 1ER 15, 121-132. *Sua sponte,* however, it granted Certificates of Appealability on five of Browning's constitutional claims, which are the main focus of this appeal. 1ER 74.

STATEMENT OF FACTS

The Amended Petition (2ER 301ff),[2] the state record, and the record below, show the following:

The crime and police investigation

The Nevada Supreme Court described the crime for which Paul Browning was convicted and sentenced to death, as follows:

> On November 8, 1985, Hugo Elsen was stabbed to death during a robbery of his jewelry store in Las Vegas. His wife, Josy Elsen, was in the back of the store when he was attacked. Hearing noises, she went into the showroom and saw a black man wearing a blue cap squatting over her husband holding a knife. She fled out the back door

[2] Because the petition below was summarily dismissed, the "facts alleged in the petition should be presumed as true unless they are patently false," *Fuentez v. Brown*, 256 F. App'x 966, 967 (9th Cir 2007) (citing *Blackledge v. Allison*, 431 U.S. 63, 75–76 (1977)), or unless they contradict reasonable factual determinations made in state court, *Murray v. Schriro*, 745 F.3d 984, 998 (9th Cir 2014).

Except where otherwise noted, the factual statements in this Brief are based on findings and statements of fact by the Nevada courts or the District Court below, found in the first volume of the Excerpt of Record ("1ER"); or on allegations in the Amended Petition (2ER 300ff) and supporting documents.

> to the neighboring store and asked the employees there to call the police. She and a neighboring employee, Debra Coe, then returned to the jewelry store where Coe placed a pillow under Elsen's head and covered him with a blanket. Two to four minutes later help arrived. Elsen soon died, after giving a very brief description of the perpetrator as a black man wearing a blue cap with loose curled wet hair.

1ER 188.

Las Vegas Police Officer Gregory Branon was the first officer to arrive and one of the first to enter the crime scene. 1ER 24-25, 193; 2ER 408; 6ER 1457. He found Mr. Elsen, who had been stabbed six times, lying in a pool of blood. 1ER 16; 2ER 408-409. He also saw bloody shoeprints with a man-sized tennis shoe tread that led from the northeast corner of the store (where Mr. Elsen was found) toward the entrance door, from which Mrs. Elsen later told police she saw the killer escape. 1ER 27; 2ER 373-375, n.39, 546; 4ER 981; 5ER 1241; 6ER 1654, 1659.

Officer Branon also took Mr. Elsen's "brief description" of the killer as a black man wearing a blue cap with hair that was "shoulder length," "loose curled" "wet" looking hair. 6ER 1461-1462; see 1ER 44.[3] Officer Branon said Mr. Elsen was "lucid" as he gave the description. 6ER 1459. But in his report (and his testimony at Browning's trial), Officer Branon used the shorthand term "geri

[3] Mr. Elsen said the killer's hair was "shoulder length," as well as "loose curled" and "wet." 6ER 1461-1462. The Nevada Supreme Court's opinion left out "shoulder length." See 1ER 44, 188.

curled type hair" to describe what Mr. Elsen had told him. 4ER 1000; see 3ER 832 ("Jeri-type curl"); 6ER 1461-1462.

While the police were investigating, a man named Randy Wolfe approached the crime scene and said he had information about the robbery. 1ER 16; 1ER 189. Wolfe was a heroin user and a repeat police informant. 1ER 35, 2ER 311. He said that a man, later identified as Paul Browning, was in his hotel room at the nearby Normandy Hotel with stolen jewelry and Wolfe's wife, Vanessa. 3ER 759. Vanessa Wolfe was a heroin addict and a prostitute who, like her husband, had long been an informant for the Las Vegas police. 3ER 789-790; 4ER 1019.

The police went to the Wolfes' hotel room, which was just a few blocks from the crime scene. 2ER 413. Wolfe called his wife to have her leave the room before the police got there. See 4ER 1026.

The police got to the Wolfes' hotel room just over a half hour after the robbery. 2ER 413; 4ER 1019. They kicked in the door and found Paul Browning. See 4ER 1027. Browning didn't have loose curled shoulder length wet hair. 1ER 193. Nor was he wearing a blue jacket or a blue cap, and no such cap or jacket was found in the Wolfes' room.[4] 1ER 274, n.3 ("Browning was not wearing the

[4]Vanessa Wolfe showed police a blue baseball-type cap in a dumpster outside the hotel (1ER 16), but there was conflicting testimony about whether it was the hat the witnesses saw. One of the identification witnesses, Debra Coe, said it looked like the hat she saw. 2ER 410; 3ER 696. So did Mrs. Elsen. 3ER 665. Another identification witness, Charles Woods, said the hat he saw was a beret, not

clothing described by the witnesses."); see Dkt. 83-17 at 41 (inventory). Browning's person was searched and had no blood on his body, clothing or shoes. 2ER 318-319; 4ER 1010. Nor were there any scratches, cuts or injuries as would be expected from a violent struggle, anywhere on his hands or body. 2ER 318-319; 7ER 1703. Browning surrendered to the police without incident and consented to a search of his own hotel room. 1ER 16; see 4ER 1025.

The search of Browning's hotel room produced no hat, weapon, clothing, jewelry, or anything relating to the robbery or murder. See 2ER 350; 4ER 1020-24. However, in the initial search of the Wolfes' hotel room, where Browning was arrested, the police found several items of jewelry stolen in the robbery, along with two long velveteen jewelry cases. 1ER 16; 4ER 1020-22. The jewelry cases and the stolen jewelry were not on or near Browning's person[5] and none of it bore his fingerprints. 1ER 210; see note 8, below. The search of the Wolfes' hotel room

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a baseball cap with writing on it. 3ER 714. Another witness, William Hoffman, said he saw a blue billed cap with writing, but not the one in evidence. 3ER 842-43. The cap from the dumpster had hairs and a "possible blood-like substance" on it, but when it was tested, nothing was found. 4ER 974-75, 1022.

[5]See 2ER 350; 4ER 1020-22. The opinions of the Nevada Supreme Court and the District Court below state at several points that Browning was found "in possession of" or "surrounded by" the stolen jewelry. See 1ER 16, 210, 216, 219. The record does not fairly support these statements. The only stolen items found in the room with Browning were a few watches on the floor, several feet away from where he was sitting (either in a chair, see 4ER 1027, or on the edge of the bed, 3ER 749), and single ring found on a table. See 2ER 350; 4ER 1020, 1031. Most of the jewelry taken in the robbery turned up later, in the possession of Vanessa and Randy Wolfe. 2 ER 322; see 3 ER 763-764; 4ER 1023.

also turned up a tan jacket and a used black Casio watch with a broken plastic band. 1ER 16; 1ER 70.[6]

Browning was taken from the Wolfes' hotel room to the crime scene, where he was shown to three possible witnesses in a "one man show-up procedure" which the Nevada Supreme Court understatedly acknowledged "may have been suggestive under the circumstances of this case." 1ER 273. The police pulled Browning, who is African-American, from the backseat of a patrol car with no shirt on and his hands cuffed behind his back, so the witnesses could identify him. 1ER 42; 2ER 364-366. Two of the witnesses—all of whom were white—did.

One of the witnesses who identified Browning was Deborah Coe, the adjoining business owner who came to Mrs. Elsen's aid. After the show-up, Mrs. Coe gave a statement in which she said that she had looked out a dark tinted window and saw a black man about 6 feet tall, 27-years old, medium color, moustache, with curly hair just past the ears, wearing blue jeans, a dark blue

[6] The Casio watch had Browning's thumbprint on it (2 ER 372, 400, 563) and the prosecution argued that proved Browning's connection to the stolen jewelry (3ER 871). But the watch was never connected to the jewelry store, was not part of the stolen jewelry returned to Mrs. Elsen, and was not admitted as evidence at Browning's trial. 2 ER 400; Dkt. 59-40, p. 23. Browning said the Casio watch was his, and described it. 2 ER 400-401. In state habeas the court noted the Casio watch was worn and was missing the number one on the watch's face. Dkt. 59-150, p.24.

windbreaker coat and a blue hat, running by the store. 1ER 16; 2ER 364-367.[7] Coe said it "[l]ooked like [the man] ran by [the victim's] door and it didn't look like he came out of it …. It looked like he must've ran past it." 2ER 365; 3ER 704. She didn't see anything in his hands. 2ER 367. After the show-up, Mrs. Coe said that Browning "resembled" the man she saw outside the store, but that she "won't point a finger at him because I can't be positive." 2ER 366; 4ER 991. Asked whether she could be "more sure in [her] mind," Coe responded "No, I wouldn't think so, no. … they all look the same and that's just what I think when I see a black person, that they all look the same." 2ER 367; 4ER 992.

The other witness who identified Browning at the show-up was Charles Woods. Mr. Woods told officers that he and another man, Raymond Wagner, were standing outside near the store when a black male came toward them at a slow jog. 1ER 16; 2ER 410. He said the man was wearing a beret-like hat (not a baseball cap) and, although he was "[w]ithin touching distance" of the man, he did not see blood on him and did not see he was carrying anything. 3ER 714, 718-719. A police officer told Mr. Woods "they have a suspect" and asked him to "stick

[7] Mrs. Coe originally told a police officer something about a man who was "blonde" who she "assumed … was white". 2ER 367, n.36; 4ER 989. This statement was not recorded and Browning's jury never heard about it. 2ER 367 and n.36; 3ER 677-709.

around and identify him" 3ER 716. When Browning was brought back for the show-up, Woods said he was the man outside the store. 1ER 16; 2ER 410.

The third witness at the show-up was Brad Hoffman, another adjacent business owner. Mr. Hoffman said he saw a person outside the store about 20 minutes before the robbery (3ER 839) whom he described as "Cuban," about 5'-7", with a slight build, wearing a Levi's shirt and a blue baseball cap. 3ER 835. He said Browning was not the person that he saw. 3ER 838-39.

Josy Elsen, the victim's widow, was unable to provide a detailed description of the man she saw, except that he was black and she recalled a blue cap. 1ER 38; see 3ER 663. When, a few weeks later, she was shown a photographic line-up, Mrs. Elsen said

> she did not think that she would be able to identify the subject, that she only saw him for a very slight moment from the side and that she could readily recognize the blue cap he was wearing, however never saw him full face and did not think she would be able to pick him out.

2ER 376; see 4ER 997. She was nonetheless shown an array of twelve photos, including one of Browning. 2ER 376; see 4ER 996-997, 1003-1008. She did not pick Browning but picked two other men who did not resemble him. 2ER 376-377; 4ER 996-998.

Hours after Browning's arrest, the Wolfes handed over to police additional jewelry—some sixty-five (65) pieces in all—that they said police had missed in two searches of their one-room apartment. 1ER 142; 2ER 322; 4ER 1023. That

still was not all of the jewelry that was taken, however. 1ER 142; 2ER 322. Martha Haygard, the manager of the Normandy Hotel, testified at trial, consistent with her pretrial statements, that she saw the Wolfes wearing large amounts of jewelry days after the crime. Dkt. 59-38, p. 23-24; see 6ER 1504-05. Randy Wolfe first denied, and then admitted, that he took some of the jewelry, and he apparently wore some of it to Browning's preliminary hearing. 2ER 322; 3ER 775; 5ER 1277-78. In state habeas, Browning proffered a witness who said he went with Wolfe to sell some of the stolen jewelry he had kept, as well. 2ER 320; 6ER1588.

Police investigators found 23 latent fingerprints at the scene, two of which their analyst said matched Browning. 1ER 189; 3ER 641-45; 5ER 1227. Neither of the two prints were in blood and there was no indication of their age. 3ER 645, 652; 5ER 1232-33. The police did not try to match these or any of the other fingerprints to anyone other than Browning. 3ER651-652; 5ER 1246-1250.[8]

The proceedings in state court

Because the Clark County Public Defender's office had represented the Wolfes, Randall Pike, a former Clark County deputy prosecutor, was appointed to represent Browning. 2ER 306; 5ER 1267. Pike spent less than twelve (12) hours

[8] The prosecutor argued at trial that the print was on a piece of shard from the working side of the counter. 3ER 872. In state habeas, Browning's lawyers called a latent print examiner and crime scene analyst who said it was possible for the print to be left on that surface by a person leaning over the case or standing in front it (5ER 1234-1239), as Browning said he had done while in the store with his girlfriend Marsha Gaylord, a day or so before the robbery. See 6ER 1636.

on all his factual and investigative preparation for trial. 2ER 306-307. Pike was authorized an investigator, Martin Schopp, but made little use of him. 2ER 307; see 6ER 1499 - 1502. Schopp told Pike months before trial that the investigation was inadequate, and he needed additional authorization to continue the investigation, but he never got it. 2ER 307-308; 6ER 1493-1504, 1509.

Prior to trial, Pike talked to Marsha Gaylord, Browning's girlfriend, who knew Vanessa Wolfe from prostitution. 5ER 1275; 3ER 791. Gaylord told Pike that she had been with Browning at the jewelry store, the day before the robbery; that she wasn't in jail as Randy Wolfe had claimed; and that she knew the Wolfes had a friend she thought was Cuban and had hair matching Mr. Elsen's description. See 5ER 1280; 6ER 1636-1638. However, Pike did not subpoena Gaylord and she disappeared after the prosecution secured an early trial continuance. See 2ER 361; 1266-67; 1ER 200, 2ER 319-320. See page 61, below.

Pretrial proceedings

The original trial date was set for March 3, 1986, with a calendar call on February 27, 1986. 2ER 323; see 4ER 908. At the calendar call, the prosecution said it was not ready to proceed and asked for a continuance. Defense counsel Pike objected and said he was ready to proceed. 2ER 323; 4ER 912. The judge ordered the lead trial prosecutor on the Browning's case, Daniel Seaton, to appear the next day to address the matter. Seaton did so, and claimed he needed a

continuance to "try to locate our witnesses." 1ER 297. The defense again objected and pointed out that there was no sworn testimony that the witnesses were unavailable, which Nevada law required. 1ER 297-98. It was later learned that the witnesses, Randy and Vanessa Wolfe, had been in the same judge's courtroom the same week, testifying for the same prosecutor's office in another case.[9] 5ER 1147-1154. The judge overruled Browning's objection and continued the trial. 1ER 299.

As a result, Browning's trial was delayed for over nine months (1ER 284-286; 2ER 323-24) while Pike sought relief in the Nevada Supreme Court and federal district court, through a habeas petition. See 1ER 294, 283-292. The motions and petition were denied on the ground that Browning had not shown the prosecution was continued by the State in bad faith and that he would be irreparably injured by waiting until after trial. 1ER 290-91.

The trial

Browning's trial began December 9, 1986. The prosecution challenged the only two African-American jurors called, so the jury was all white. 1ER 271.

[9] The case on which the Wolfes were testifying was *State v. Gerald Morell*, Clark Cty. No. C72592. See 2 ER 319; 6ER 1579-1586. On February 27, 1986—the day of the continuance request in Browning's case—Morell was acquitted by a jury. 2 ER 499, 588; 6ER1579-86. The acquittal came despite the Wolfes' testimony Morrell committed the charged crime in their presence —which Vanessa Wolfe tried to corroborate (much as she did in Browning's case) by giving police a knife she said she was given by Morrell. 3ER 803-806; 6ER 1580.

In opening statement, defense counsel Pike told the jury about the "footprints left at the scene in Mr. Elsen's blood [that] did not match the footprints of Paul Lewis Browning when he was arrested. Did not match." 3ER 622-623. The prosecutor did not mention the bloody prints in his opening, (3ER 602-619), but he countered the defense argument with the first prosecution witness, David Horn, an identification specialist with the Las Vegas Metropolitan Police Department. 3ER 626. Spec. Horn confirmed that the prints did not match Browning's shoes, but said he did not investigate them because (as the District Court summarized his testimony) the prints were "likely left by paramedics or off duty detectives." 1ER 26; 3ER 637-640.[10]

"Randy and Vanessa Wolfe [were] the State's key witnesses." 1ER 34. Both testified that Browning had confessed to them that he had killed someone. 3ER 750, 757, 804. Vanessa Wolfe said she found Browning on the bed with a quantity of jewelry. 1ER 16.[11] She said Browning had asked her to dispose of the blue hat and a knife, and she helped him cut the tags off some jewelry. 1ER 16; 3ER 805 - 810. She gave police a knife that the prosecution later suggested was

[10] In fact, the bloody prints were there before the police or paramedics entered the scene. 1 ER 25; see Argument I, below.

[11] Neither Browning nor the jewelry were on the bed when the police arrived, however. See note 5, above.

the murder weapon, although no forensic evidence—blood, trace evidence, or fingerprints—linked it to the crime or to Browning. 2ER 315-17.[12]

In cross-examination, defense counsel asked both Wolfes whether they received any benefit for their testimony. 3ER 773-74, 823. Randall Wolfe denied receiving any benefits other than a slight reduction of an unrelated charge. 1ER 36; 2ER 342; 3ER 773-774, 783. The prosecutor had him repeat this on re-direct. 3ER 787.[13] It was later learned that, between the time of Browning's arrest and trial, Randall Wolfe was charged with at least two felonies and several misdemeanors. 2ER 342; 6ER 1520-1549. After he testified in Browning's case, prosecutor Seaton got Wolfe probation, rather than a possible 5-year sentence on those charges. 2ER 343; 6ER 1526 - 1527, 1531-1533. He also helped Wolfe get a job, as a reward for his testimony against Browning. 1ER 36. See Argument II, below.

[12] In the District Court below, Browning's lawyers submitted a statement from a defense forensic examiner who, from a review of documentation, noted that the knife did not fit all Mr. Elsen's wounds, there was none of the residue on the knife that would be expected from a stabbing, and there was organic material at the base of blade, indicating that the knife had not been washed in a way that would remove such evidence from it. 6ER 1665-66.

[13] Pretrial, prosecutor Seaton responded to defense requests for disclosure of any incentives given Randy Wolfe by saying "I can tell the Court categorically at this time … there has never been any plea bargaining with Randy Wolfe regarding this case." 2ER 341-342; 4ER 933.

When the defense asked Vanessa Wolfe if she received anything for her testimony, the prosecutor objected on the ground the question was unfounded. 3ER 823. Mrs. Wolfe testified that she did not receive any benefits for her testimony. 3ER 823-824. On redirect, the prosecutor had her specify that the only consideration she received for her testimony was a $25.00 witness fee and $15.00 for food. 2ER 345; 3ER 827-828. After trial, it was learned Mrs. Wolfe had been arrested ten (10) different times between Browning's arrest and trial and the Clark County District Attorney's office declined to file all but one of those charges. 2ER 345-346; 6ER 1550 - 1569. In the one incident for which she was charged, Wolfe punched and bit the arresting officer. 2ER 345-346, n.22; 6ER 1563-1565. After Browning was sentenced, the charge against Mrs. Wolfe for that assault and battery was reduced to misdemeanor attempted escape and she received a fine of $1,000. 2ER 345-346, n.22; 6ER 1568-1569.

The most sympathetic trial witness was Josy Elsen. Prosecutor Seaton led her through an ambiguous identification of Browning as the man she saw kneeling over her husband with a knife. 3ER 663-65. Although Mrs. Elsen had seen Browning in some eighteen prior court appearances after she failed to pick him from the photo show-up (1ER 274; 2ER 378-79), she testified "I saw him only from the side, you know. Like I say, had a blue cap on. I saw this hair a little bit puffed in the back. . . That's all I saw." 3ER 663. The prosecutor then asked:

Prosecutor: Is he here?

Witness: He is here.

3ER 663. The trial court interjected and asked Mrs. Elsen what "he" was wearing and indicated for "the record" she had identified Browning. 3ER 664. Browning was the only African-American male in the court room. 1ER 38.

During closing argument Seaton told the jury Mrs. Elsen's identification was "as good as you can ask for":

> *Mrs. Elsen identified Browning*. . . She sat up here and told you this horrendous tale, and she pointed over at Mr. Browning and she said – points right at him – "That's the man who was kneeling over my husband." Is that a face which will be indelibly etched in her mind the rest of her life? Will she ever forget the face of the man who took her husband away from her? I think not. *That identification is as good as you can ask for*.

3ER 868 (emphasis added). Post-trial, however, the State conceded and affirmatively argued that Mrs. Elsen never actually made a positive identification of Browning, before or during trial. 1ER 199; 2ER 314, n.11.

The prosecution also called Mrs. Coe and Mr. Woods, both of whom identified Browning sitting in the courtroom, as they had at the one-man show-up. 3ER 699-701, 716-718. The defense countered with Mr. Hoffman, who repeated that Browning was not the man he saw outside the store before the robbery, who he again said was "Cuban." 3ER 837-838.

An identification specialist with the Las Vegas Metropolitan Police Department testified about the two fingerprints found in the shop that were alleged to match Browning's. 3ER 643. He testified that the prints were located on a countertop and from a glass shard. 3ER 643-44. A Las Vegas Police criminalist testified that the spot on the tan jacket found in the Wolfes' room with Browning was type B blood, the same as Mr. Elsen's, while Browning has type O blood. 1ER 213; 2ER 309.[14]

Although Officer Branon was the officer who first entered the scene[15] and took Hugo Elsen's description of his attacker (1ER 43-44), the prosecution did not call him as a witness. Defense counsel Pike did—but did so without first interviewing him or having him interviewed. 1ER 44; 2ER 317; 6ER 1473. As a result, Branon's direct testimony simply repeated his report about the description of the murderer he "received":

> Q. [defense counsel Pike] What was the description that you had?
>
> A. The description we received was black male, adult in his late twenties, wearing a blue baseball cap, blue windbreaker-type jacket, blue

[14] In state habeas, DNA testing on this spot showed, and the State stipulated, the spot of blood was not Mr. Elsen's. See pages 53-54, below.

[15] The Nevada Supreme Court referred to Branon as "the first officer on the crime scene" (1ER 193), but the District Court pointed out that one or two other officers were with him when he entered. 1 ER 29-30. Nothing indicated, and neither court found, that any officer or medic entered the scene *before* Branon, however.

> Levi's. He was medium complexioned, bore a mustache and what was described as a shoulder length Jeri-type curl.
>
> Q. Could you describe what Jeri curl hair looks like, if you know.
>
> * * *
>
> THE WITNESS: … you can tell it is chemically treated. It's got a wet, shiny look to it.

3ER 831- 33. Prosecutor Seaton—who made a practice of personally interviewing witnesses before trial, see 6ER 1408—asked Officer Branon no questions. 3ER 833. The jury therefore never heard the truth about the description—that it was given by Hugo Elsen himself, and that Mr. Elsen's actual description was that the killer, unlike Paul Browning, had hair that was "loose curled," "shoulder length" and looked "wet."[16]

In his rebuttal argument to the jury, Seaton relied upon Branon's editorial addition of the term "jeri-curl" to discount the significance of the discrepancy between the unattributed description and Browning's appearance: "Couldn't someone, *some white person*, not really knowing the true definition of Jeri curl, …

[16] The Nevada Supreme Court at one point said "Officer Branon testified *at trial* that he *received from the dying Elsen* a description of the killer …." 1ER 44, 193 (emphasis added). The District Court quotes this (1ER 44), but the italicized portion is clearly incorrect: remarkably, at Browning's trial, Officer Branon never said who the description came from (see 3ER 831-33) and neither did any other witness.

tell the officer that it looks to them like a Jeri-curl?. . . So I don't think there is anything to this Jeri curl business…" 3ER 894-95[17] (emphasis added).

Officer Branon's report did not mention the bloody shoeprints he saw at the scene (1ER 26-27; 4ER 999-1003), and defense counsel Pike asked him no questions about them. 3ER 830-34. As noted above, prosecutor Seaton asked Officer Branon no questions at all. *Id*. As a result, in closing argument, defense counsel Pike's answer to Horn's testimony about the likely source of the bloody prints was a vague, indirect criticism of the police investigation. See 3ER 880.

Prosecutor Seaton did not bother to answer this argument. 3ER 891-900. Instead, he told the jury that they could not assume that Paul Browning was like "you and me" because he was a heroin addict, and that was the motive for the robbery murder. 1ER 59; 2ER 349; 3ER 873.[18] The only witness who said that Browning was a heroin addict was Randy Wolfe. 1ER 197-98. Though the jury was never told of it, a drug screen done at Browning's arrest showed there was no heroin in his system. 2ER 349; 4ER 977.

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[17] The Nevada Supreme Court and District Court similarly misread the record when they said "the prosecutor argued that it was understandable if a white person, *such as the victim*, incorrectly used the term "jeri-curl" to describe Browning's hair." 1ER 44, 193 (emphasis added). The prosecutor never said or suggested the description came from "the victim." See 3ER 894-95.

[18] The prosecutor's arguments to the jury mentioned heroin six times, drugs six times, "addict" twice. 3ER 603, 604, 605, 610, 855, 865, 873, 874, 899.

Prosecutor Seaton also told the jury in closing that the presumption of innocence was a "farce" and "in this case" it was a "façade":

> Now we are talking about when that wonderful constitutional element called the presumption of innocence, we are now talking about *piercing that veil, dropping that façade* because, in fact, as a person sits in a courtroom he may not be innocent. He may be guilty.
>
> He has the presumption of innocence. And, of course, it is one when his guilt is shown that *the farce of that presumption is known* and it's been done in this case.

3ER 846 (emphasis added).[19]

Prosecutor Seaton's final rebuttal argument was brief and devastating. It began with more references to Browning's alleged heroin use and criticisms of defense counsel's failure to support his factual arguments—particularly the claim Marsha Gaylord had disappeared and was not available to testify for Browning.[20]

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[19] The Nevada Supreme Court's appeal decision said the reference to the presumption of innocence as a "farce" was "outrageous" misconduct but was not reversible because of the "overwhelming evidence" of guilt. 1ER 64. See Argument V A, below.

[20] > And I think this just points out a typical weakness of the defense's position in a very weak case, and this is, that is Marsha in jail, Mr. Pike wants to know, and why didn't I bring in jail records. I don't have to bring in jail records. I had testimony that she was in jail.
>
> Randy Wolfe said that Marsha Gaylord was in jail.

3ER 892. The prosecution stipulated in state habeas that Gaylord was not "in jail", but was arrested on the night before the murder, and released the next morning. 5ER 1109.

But he quickly and dramatically concluded by telling the jury that the blood on the jacket was the victim's and this singular fact provided Mr. Browning guilty:

> The jacket *that had Hugo Elsen's blood on it* that Paul Browning was wearing when he killed him. This proves his guilt as much as anything … [Y]ou don't have to spend five minutes in the deliberation room. Come back in here and tell me he's guilty. It's as simple as that.

3ER 899-900. The jury did as Seaton suggested, convicting Browning on all counts and then sentencing him to death. 1ER 189-190.[21]

Browning was assigned a new appointed lawyer on appeal. See 4ER 1032. The Nevada Supreme Court's appeal decision recognized several errors, including prosecutor Seaton's "outrageous" arguments denigrating the presumption of innocence. 1ER 269-275. However, it found any constitutional errors were harmless because of the "overwhelming" evidence of Browning's guilt. *Id*.

The Nevada court's opinion did not specify the evidence it found "overwhelming," but during oral argument the Justices emphasized the knife, the "bloodstained garments" and the testimony of Josy Elsen. See 4ER 1034, 1037-38. Years later, in postconviction and habeas proceedings, DNA testing showed that the blood on the only "bloodstained garment" in the case—the jacket found in the

[21] At the conclusion of the guilt phase of trial, the trial court instructed the jury that Nevada first degree murder is defined as "the willful, deliberate and premeditated killing of another human," but its instructions omitted the essential element of "deliberation." 2ER 382-383; 4ER 943; see Argument IV, below.

Wolfes' hotel room with Browning—was not Hugo Elsen's blood (1ER 33, 257-259); the prosecution conceded that Josy Elsen never actually identified Browning at trial (1ER 199; 2ER 314 n.11); and forensic evidence cast further doubt on whether the knife could have been connected to the murder (6ER 1665-66).

The state postconviction proceedings.

Browning's case lingered in state court for nearly twelve years (see 1ER 5), before he was afforded a state habeas evidentiary hearing before Judge Joseph Pavilikowski, the same judge who presided at his trial. 2ER 390. At this hearing, Officer Branon testified for the first time that the bloody shoeprints at the crime scene were there before the first officers entered. 1ER 24; 6ER1471-1472. Officer Branon said that he told this to the "general detail detectives" (6ER 1472) and "would have" told Spec. Horn as well. 2ER 309; 6ER 1472. Forensic testing indicated the prints were too big to have been left by either Mrs. Coe or Mrs. Elsen. 1ER 25; 6ER 1654-59. They were the only two people – besides the killer and the victim – who had been in the store before the police arrived. See 3ER 692-94.

Officer Branon's postconviction testimony also revealed the truth about the description of the murderer he "received" from Hugo Elsen. Officer Branon said that, given Mr. Elsen's "lucid" description of his assailant, he was "surprised" to learn Browning was arrested. 6ER 1468.

As noted above, also at the postconviction hearing, DNA testing showed that the spot on the jacket which the prosecutor told the jury was "Hugo Elsen's blood," was not Mr. Elsen's after all. 1ER 33, 257-259.

Despite this, Judge Pavlikowski dismissed the state habeas petition in a two page Order that simply said "The Court finds insufficient evidence to grant a new trial in this matter in light of the Nevada Supreme Court's prior rulings as to the overwhelming evidence to support the jury's verdict in this case." 1ER 255-56. Browning appealed—and over Browning's objection, briefing was suspended and the case was remanded for additional findings. 1ER 253-54. Seven days after the objection to the remand was overruled (1ER 254), Judge Pavlikowski signed 29 pages of Findings and Conclusions prepared by the Clark County District Attorney. 1ER 223-251.

In argument on the state habeas appeal, the Deputy Clark County District Attorney conceded his office was responsible for the nondisclosure of Officer Branon's testimony about the bloody shoeprints. 7ER 1691. But he argued that it didn't matter because, even if the prints were not made by the police or medics (as the prosecution had argued at trial), he said they were "probably" made by Mrs. Coe. 7ER 1691.

The Nevada Supreme Court affirmed the dismissal of the state habeas petition with respect to all Browning's guilt phase claims. 1ER 187-220.

However, it remanded for resentencing, based on a finding that Browning's direct appeal counsel was ineffective for failing to the challenge the "depravity of mind" aggravator on which his death sentence was partly based. 1ER 203-208, 220.

Judge Pavlikowski presided over the resentencing. He ruled out any evidence challenging the trial testimony—even the testimony that had been proven false during state habeas. See 1ER 144-152; 2ER 391-402. Browning was again sentenced to death and the Nevada Supreme Court again affirmed on appeal. 1ER 139-172. Certiorari was denied on March 23, 2009. 1ER 137.

The federal proceedings below

Browning filed the initial habeas corpus petition below *pro se*, in 2005. Dkt. 1. Due to the extraordinary delays in the state proceedings to date, he requested and the District Court granted leave to proceed with his guilt phase claims despite the pendency of the resentencing. 1ER 175-79. Through new counsel, Browning amended the federal habeas petition and filed motions for discovery, expansion of the record, and an evidentiary hearing—or, in the alternative, summary judgment on his *Brady* claim regarding the bloody shoeprints. 1ER 121-32; 2ER 496, 498, 538, 542, 570.

Respondent opposed Browning's motions and District Court denied them all. 1ER 132.[22] Browning then asked for oral argument on the petition (2ER 570) but the District Court denied that as well, in an Order that found a number of the claims in the petition were unexhausted and required Browning to abandon them, go back to state court, or risk dismissal of his entire petition. 1ER 118-120. Browning objected and sought rehearing, but his objections were overruled. 1ER 84. Browning agreed to abandon the claims the court found unexhausted, preserving his right to challenge the exhaustion ruling on appeal. See 1ER 20-21.

The District Court then issued an order dismissing all Browning's remaining claims on the merits, but granting a Certificate of Appealability on five of them. 1ER 74. Browning again moved for rehearing, but that was denied (1ER 13) and this appeal followed. See 7ER 1711, 1737.

STANDARD OF REVIEW

This Court reviews the summary dismissal of a habeas corpus petition *de novo*. *Smith v. Mahoney*, 611 F.3d 978, 995 (9th Cir. 2010). District Court rulings on discovery and evidentiary hearings are reviewed for abuse of discretion. *Id.* at 997. District Court factual findings are reviewed for clear error, but

[22] The discovery motion denied by the District Court asked for, among other things, leave to submit requests for admission regarding the facts found by the Nevada state courts. See 2ER 498, 505-537.

decisions on mixed questions are reviewed *de novo*. *Lopez v. Thompson*, 202 F.3d 1110, 1116 (9th Cir 2000) (en banc).

A state court's finding of fact is presumed correct, whether it favors the petitioner or the State. 28 U.S.C. § 2254(e); *Burden v. Zant*, 498 U.S. 433, 436-37 (1991) (per curiam); *Sivak v. Hardison*, 658 F.3d 898, 911 (9th Cir 2011). State courts' rulings on legal issues they adjudicate on the merits are entitled to deference, unless the rulings are contrary to or involved an unreasonable application of clearly established Supreme Court law, or were based on an unreasonable determination of facts in light of the evidence presented in state proceedings. 28 U.S.C. § 2254(d)(1) & (2); *Cullen v. Pinholster*, 563 U.S. 170 (2011).

A decision is contrary to clearly established federal law if it fails to apply the correct controlling Supreme Court authority, *Williams v. Taylor*, 529 U.S. 362, 413-14 (2000) (opinion of Justice O'Connor), or it applies a rule in such a way that its "decision would be 'diametrically different,' 'opposite in character or nature,' and 'mutually opposed' to … clearly established precedent," *id.* at 406. A decision is an unreasonable application of established law if the state court applies a correct legal principle in a manner that is "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003).

Circuit precedent regarding an issue can be considered "for the limited purpose of assessing what constitutes 'clearly established' Supreme Court law and whether the state court applied that law unreasonably." *Woods v. Sinclair*, 764 F.3d 1109, 1121 (9th Cir 2014) *cert. denied* 135 S. Ct. 2311 (2015).

ARGUMENT

I. BROWNING WAS DENIED DUE PROCESS OF LAW WHEN THE PROSECUTION CONCEALED EXCULPATORY INFORMATION AND PRESENTED MISLEADING TESTIMONY REGARDING BLOODY SHOEPRINTS AT THE SCENE, WHICH WERE NOT BROWNING'S AND LIKELY WERE THE MURDERER'S.

Bloody shoeprints led from Hugo Elsen's body toward the front door of the shop—the door from which Mrs. Elsen told police she saw the murderer escape. 1ER 27; 2ER 374-375, n. 39; 4ER 981. The bloody prints did not match Paul Browning's shoes (1ER 25, 194; 4ER 1015), and there was no blood on Browning or his shoes or clothes when he was arrested minutes after the crime. 2ER 318-319; 4ER 1010.

In opening statement to the jury, Browning's defense pointed to this as evidence the murderer was someone else. 3ER 622-623. The prosecution countered with the testimony of Las Vegas Police Specialist David Horn, who testified "in essence, that the bloody shoeprints were likely left by paramedics or off duty detectives." 1ER 26; see 3ER 637-640. The tactic worked: in closing,

defense counsel was reduced to a general criticism of the police investigation (see 3ER 880-881)—which the prosecutor didn't bother to answer.

Years after Browning was convicted, in his state habeas proceedings, Officer Gregory Branon testified (as the District Court summarized) "that he was the first at the scene, [23] and when he arrived the bloody shoeprints were already there." 1ER 26; see 6ER 1456-57. Officer Branon acknowledged that he did not disclose that fact in his police report but said he "had mentioned it to the general detail detectives there" and "would have mentioned [this] … to Criminalistics Specialist Horn when he got there" as well. 1ER 27; 6ER 1472.[24]

[23] The District Court appears to have improperly failed to presume the correctness of a state court finding when it questioned Officer Branon's testimony that "he was first at the scene" (although the Nevada Supreme Court accepted that as fact, see 1 ER 193), citing evidence that one or two other officers entered the crime scene with him. 1 ER 29-30. However, Officer Branon never claimed he went in alone but always said he waited for backup before entering. See 1 ER 30; 6ER 1456-57. The other officers' testimony is consistent with this. See 1 ER 30. There is no evidence any officer or medic entered the crime scene before Officer Branon saw the bloody footprints there.

[24] The District Court focuses on Branon's testimony that he "would have" told Horn about the shoeprints, but overlooks his statement that he *did* tell the "general detail detectives," including the criminalistic specialist Horn, at the scene. 5ER 1472. The State acknowledged this in its State habeas Answer. Dkt. 59-177, pg. 27 of 31, lines 16-20 (Branon "indicated that he only informed the detectives involved in the case….")

No witness or other evidence in the state habeas hearing contradicted what Officer Branon said, and there was forensic testimony supporting it.[25] The Nevada Supreme Court therefore said in its habeas appeal decision that it is "evident that the prints were present before police and paramedics arrived." 1ER 195.[26]

In argument on the state habeas appeal, the State conceded it was the prosecutor's responsibility to disclose Officer Branon's observations to the defense. See 7ER 1691. The Nevada Supreme Court nonetheless rejected Browning's *Brady* claim. See Argument IB1, below. It did not separately address Browning's separate claim that the false and misleading prosecution testimony about the prints violated due process under the principles of *Napue v. Illinois*, 360 U.S. 264 (1959). See Argument I C, below.

In federal court below, after Respondent answered, Browning moved for summary judgment in his favor on the basis of both claims. Dkt. 132; see 2ER 542-46. In the alternative, he asked for discovery and an evidentiary hearing on whether Officer Branon's observations were conveyed to Spec. Horn or trial

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[25] Dr. Michael Sweedo, a crime scene analyst, testified at the postconviction hearing that based on the placement of the victim's body and the amount of blood on the floor, the prints must have been left before the body was found. 5ER 1254-55.

[26] See also 1ER 194 ("the prints did not match Browning's shoes and could not have been left by paramedics" …); 1ER 216 (accepting the "fact … that bloody shoeprints near the victim were already present when the first police officer arrived at the crime scene").

prosecutor Seaton. See 2ER 498,505,538,542. The District Court denied the discovery requests (1ER 121-32) and summarily dismissed both claims, finding the Nevada Supreme Courts' decisions rejecting them were "reasonable." 1ER 132. However, the District Court granted Certificates of Appealability on both issues. 1ER 6, 74.

A. The Nevada Supreme Court's finding that the bloody shoeprints were present before police and medics entered the crime scene cannot be disregarded in federal habeas.

"Under § 2254(d)(2), a federal court 'may not second-guess a state court's fact-finding process unless, after review of the state-court record, it determines that the state court was not merely wrong, but actually unreasonable.'" *Cunningham v. Wong*, 704 F.3d 1143, 1164 (9th Cir. 2013) (quoting *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004)). A state court's finding of fact is "entitled to a presumption of correctness" whether it is made by a trial or appellate court, and whether it favors the petitioner or the State. *Sivak*, 658 F.3d at 911; *see Burden*, 498 U.S. at 436-37; *Nora v. Frank*, 488 F.3d 187, 200-03 (3rd Cir. 2007); *Bland v. Department of Corrections*, 20 F.3d 1469, 1474 (9th Cir 1994).

No evidence counters the presumption that the Nevada Supreme Court was correct to credit Officer Branon's testimony that the bloody prints were present before police or medics entered the crime scene. Although the District Court

expressed skepticism about some aspects of Officer Branon's testimony,[27] it gave no reason to reject this finding, and it did not do so. Analysis of Browning's claims therefore must proceed from the factual premise that, contrary to what the jury was led to believe, it is evident that the bloody prints were made before the police or paramedics arrived.

B. The fact that the bloody shoeprints were present before police and medics entered the crime scene requires the writ to be granted on Browning's *Brady* claim.

By rejecting Browning's *Brady* claim despite its finding about the bloody shoeprints, the Nevada Supreme Court contradicted and unreasonably applied clearly established Supreme Court law.

> *Brady* requires the state to disclose "evidence that is both favorable to the accused and material either to guilt or to punishment." *U.S. v. Bagley*, 473 U.S. 667, 674, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (internal quotation marks omitted). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682. Thus, to establish a *Brady* violation, a defendant must prove: 1) "[t]he evidence at issue [is] favorable to the accused, either because it is exculpatory, or because it is impeaching," 2) the evidence was "suppressed ... either willfully or inadvertently," and 3) prejudice resulted, meaning there is a reasonable probability that disclosing the evidence to the defense would have changed the result. *See Strickler*

[27] See note 24, above. The District Court paradoxically discounted Officer Branon's testimony by noting that "despite the importance of such information to the investigation of Hugo Elsen's murder, that information [regarding the shoeprints] does not appear in Officer Branon's three page police report." 1ER 26-27. Almost by definition, much the same thing could be said with regard to any *Brady* violation.

> *v. Greene*, 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); *Bagley*, 473 U.S. at 682.

Andrews v. Davis, ___ F.3d ___, 2015 WL 4636957 at *25 (9th Cir Aug. 5, 2015).

The fact bloody shoeprints at this murder scene were made by someone who was there before the first responders—someone who wore man-sized tennis shoes and was not Paul Browning—was a matter of "obvious importance," as the District Court recognized. 1ER 26. It "substantially undermined the state's … theory," *Benn v. Lambert*, 283 F.3d 1040, 1062 (9th Cir 2002), that the shoeprints provided no reason to doubt Browning was the murderer.[28]

The State's concession to the Nevada Supreme Court that it was the prosecution's responsibility to disclose to the defense what Officer Branon saw, 7ER 1691, was clearly correct. The disclosure duty imposed by *Brady* and *Kyles v. Whitley*, 514 U.S. 419 (1995) is "broad" and a "prosecutor must presume in favor of disclosure, and resolve … doubts about the exculpatory nature of a document in favor of producing it." *Amado*, 758 F.3d at 1136 (citing *United States v. Agurs*, 427 U.S. 97, 108 (1976)).

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[28]In rejecting Browning's claim that his lawyer was ineffective for failing to investigate the bloody prints, the Nevada Supreme Court suggested they might have been made by Mrs. Elsen "and/or" Mrs. Coe, rather than the first responders. 1ER 25, 195. However, even if that was a possibility (and all the evidence indicates otherwise, see note 32, below), the fact that the prints were present before police arrived and thus could not be linked to the first responders was exculpatory and should have been disclosed, because it "tends to prove the innocence of the defendant," *Amado v. Gonzalez*, 758 F.3d 1119, 1134 (9th Cir 2014), even if it does not do so conclusively.

The Nevada Supreme Court did not question the exculpatory nature of this evidence, but rejected Browning's *Brady* claim regarding the bloody shoeprints by saying the following:

> Browning contends that the State withheld the fact, discussed earlier, that bloody shoeprints near the victim were already present when the first police officer arrived at the crime scene. *We have already concluded this information was not material in rejecting Browning's contention that his trial counsel was ineffective*. We further conclude that under *Brady the State did not withhold this information because it was reasonably available to the defense, as Browning acknowledges by claiming that his counsel should have interviewed the officer and discovered it.*

1ER 216 (italics added). The first of these italicized statements reflected a flawed and unreasonable view of *Brady's* materiality standard. The second is contrary to clearly established Supreme Court law. We address the second statement first.

1. The Nevada Supreme Court's statement that the truth about the shoeprints did not have to be disclosed because it could have been discovered by the defense was contrary to or an unreasonable application of clearly established Supreme Court law.

This Court recently held that a state court ruling indistinguishable from the second italicized statement quoted above—a ruling that a *Brady* claim requires a showing of "an inability [of the defense] to discover and produce the evidence at trial, with the exercise of due diligence"—was "contrary to ... clearly established Federal law, as determined by the Supreme Court…." *Amado*, 758 F.3d at 1136 (internal quotation marks omitted). "[D]efense counsel may rely on the

prosecutor's obligation to produce that which *Brady* and *Giglio* require him to produce." *Id.*

> The [state court's] … requirement of due diligence would flip that obligation, and enable a prosecutor to excuse his failure by arguing that defense counsel could have found the information himself. The proposition is contrary to federal law as clearly established by the Supreme Court, *see Early*, 537 U.S. at 8, 123 S.Ct. 362, and unsound public policy…. No *Brady* case discusses such a requirement, and none should be imposed.

Id. at 1136-37. This is not new law. The rule that prosecutors have an "affirmative duty to disclose evidence favorable to a defendant" can be traced "to early 20th-century strictures against misrepresentation and is of course most prominently associated with th[e Supreme] Court's decision in *Brady*." *Kyles*, 514 U.S. at 432. "A rule . . . declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 696 (2004).[29]

Petitioner agrees that an effective defense lawyer would have done more than Browning's did to find the truth about the shoeprints (and many other things). See Arguments III and VI, below. But the prosecutor's affirmative duty existed without a defense request. *Kyles*, 514 U.S. at 433.

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[29] *Accord, e.g., Gantt v. Roe*, 389 F.3d 908, 912-913 (9th Cir 2004) ("While the defense could have been more diligent—and, indeed, the defense lawyer's failure to investigate … is part of the petitioner's ineffective assistance of counsel claim—this does not absolve the prosecution of its *Brady* responsibilities," citing *Banks v. Dretke*, *supra*); *Benn v. Lambert*, 283 F.3d at 1061 (citing *Paradis v. Arave*, 130 F.3d 385 (9th Cir 1997)).

This is not a case where the exculpatory information was known to the defendant or available from public records, or where defense counsel was given "notice as to potential *Brady* material and given the opportunity to seek it out …." *Amado*, 758 F.3d at 1137. Nothing given to Browning or his defense counsel before trial suggested the bloody prints were there before the police and firefighters—and nothing suggested Officer Branon could attest to that fact. To the contrary, Officer Branon's police report said nothing about the shoeprints at all. See 1ER 26.

The Nevada Supreme Court held that, despite this, there was no withholding because defense counsel "should have interviewed the officer and discovered" when the prints were made. 1ER 216. That statement is contrary to or involves an unreasonable application of the clearly established *Brady* law cited above. It also forgets the Nevada court's own rejection of Browning's ineffectiveness claim on the ground that defense counsel reasonably "feared that investigation might establish that the prints had been left by police or paramedics, rather than some unidentified person." 1ER 194. If the prosecution had complied with its obligations under *Brady*, defense counsel would not have had that fear. That makes the nondisclosure more prejudicial to Browning, not less.

To the extent Nevada's rejection of this *Brady* claim was based on the premise that the truth about the bloody prints was "reasonably available" to the defense, it was contrary to clearly established Supreme Court law and deserves no deference under 28 U.S.C. §2254(d)(1) or (2).

2. The Nevada Supreme Court's statement it "already concluded" the truth about the bloody shoeprints was not "material" under *Brady* warrants no deference under 28 U.S.C. §2254(d).

The Nevada Supreme Court gave an alternate reason for rejecting this *Brady* claim: "We have already concluded this information" ["that bloody shoeprints near the victim were already present"] "was not material in rejecting Browning's contention that his trial counsel was ineffective." 1ER 216. The referenced passage "already" addressing the materiality issue in the ineffective counsel claim reads, in full, as follows:

> Because the prints did not match Browning's shoes and could not have been left by paramedics, who arrived after Officer Branon, Browning argues that this information indicated that another person committed the murder. We conclude that this information was not material and that trial counsel acted reasonably. Counsel explained at the evidentiary hearing that once he determined that the shoeprints did not match Browning's shoes, he chose not to investigate the prints further. He feared that investigation might establish that the prints had been left by police or paramedics, rather than some unidentified person. As long as the source of the prints was unknown, counsel could argue to the jury that the actual murderer had left them. Although it is now evident that the prints were present before police and paramedics arrived, counsel's basic reasoning remains sound because the bloody shoeprints were likely left by Mrs. Elsen and/or Coe, who were with Elsen before the first officer arrived.

> Counsel made a reasonable, tactical decision to leave the source of the prints uncertain.

1ER 194-95. This passage does not qualify as an "adjudication of the merits" of the issue of *Brady* materiality; and if it did, it would be an unreasonable one. Either way, it was not entitled to the deference the District Court gave it.

a. The Nevada Supreme Court's statement was not an adjudication of the merits of the *Brady*/materiality issue.

The presumption that a state court adjudicated the merits of a federal constitutional claim presented to it is "strong" but not irrebuttable. *Johnson v. Williams*, 133 S. Ct. 1088, 1096 (2013). "[T]he presumption … may be rebutted" by the content or context of the reference to the claim in the relevant state decision. *Id.* For example, an issue is not "adjudicated" where it is "simply mentioned in passing in a footnote or buried in a string cite[.]" *Id.* Nor are the merits of an issue adjudicated by a state court's factually erroneous statement that it adjudicated the same issue previously. *Cone v. Bell*, 556 U.S. 449, 466 (2009). And a state court's decision based on one element of a two-part constitutional claim is not an "adjudication of the merits" of the other.[30]

[30] *See, e.g., Shelton v. Marshall*, ___ F.3d ___, 2015 WL 4664530 at *7 (reviewing materiality element of *Brady* claim *de novo* because state court did not clearly address it); *cf. Rompilla v. Beard*, 545 U.S. 374, 390 (2005) ("Because the state courts found the representation adequate, they never reached the issue of prejudice, and so we examine this element of the *Strickland* claim *de novo*."); *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (same); *see also Harris v. Thompson*, 698 F.3d 609, 624 (7th Cir. 2012) (collecting cases).

The content and context of the Nevada Supreme Court's reference to *Brady* materiality rebut the presumption of adjudication here. The Nevada court's statement it had "already concluded this information was not material" (1ER 216), like the ruling of the Tennessee court at issue in *Cone v. Bell, supra*, "rested on a false premise" that the court had already passed on the merits of the claim, when in fact it hadn't. See 556 U.S. at 466.

As the passage quoted just above makes clear, the state court's rejection of this aspect of Browning's ineffective assistance claim focused on the defense counsel's alleged tactical decision not to investigate the bloody prints. 1ER 194-95. Obviously, that has nothing to do with materiality under *Brady*. Though a defense lawyer may make "a reasonable, tactical decision" to forego an investigation that might or might not turn up exculpatory evidence, police and prosecutors cannot make a "reasonable, tactical decision" not to disclose such evidence to the defense.

Although the paragraph in which the Nevada court rejected this aspect of the ineffective assistance contains the passing phrase "this information was not material" (1ER 194), that cannot be an adjudication of *Brady* materiality. The test for materiality under *Brady* is whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. The Nevada Supreme

Court applied that test to other aspects of Browning's *Brady* and ineffective assistance claims (1ER 194, 215, 216), but said nothing of the kind with regard to the bloody shoeprints. Compare 1ER 194-95, 216.

Moreover, the *Brady*/materiality question turns in part on the likely impact of "disclosure of the suppressed evidence to competent counsel …." *Kyles*, 514 U.S. at 441. The Nevada Supreme Court never came close to considering that. The oblique cross-reference to its conclusory use of the word "material" in a different context therefore should not be treated as an adjudication of the merits of the *Brady* materiality issue under §2254(d).

b. If the Nevada Supreme Court's statement was an adjudication of the merits of *Brady*/materiality, it was an unreasonable application of clearly established Supreme Court law on that subject.

If the Nevada Supreme Court's postconviction opinion was an adjudication of the merits of the *Brady*/materiality issue, it was contrary to clearly established law. As noted above, it did not include any consideration of the likelihood that disclosure of the truth about the shoeprints would have led to a different result—alone or developed by competent counsel. Nor did it consider the impact it would have had on the jury together with the other undisclosed and undiscovered exculpatory evidence. See 1ER 194-95, 216. That is what *Kyles* requires; and it is what the Nevada Supreme Court did in

addressing some of Browning's other *Brady* and ineffectiveness claims.[31] "[W]hile the state court initially identified this as the correct legal principle for determining whether suppressed evidence was material, its statements … dismissing the materiality [of this evidence] … miss the point." *Goudy v. Basinger*, 604 F.3d 394, 400 (7th Cir. 2010).

The materiality of this nondisclosure under *Brady* is not reasonably diminished by the statement that *defense* counsel's "reasoning" for not investigating the prints "remains sound because the bloody shoeprints were likely left by Mrs. Elsen and/or Coe." 1ER 195. That was not a finding about what would have resulted from disclosure and investigation of the prints—and if it had been, it would be an unreasonable one. The suggestion that the prints were left by Mrs. Elsen "and/or" Mrs. Coe (1ER 195) is baseless and therefore

[31] See 1 ER 219: "Several of Browning's claims establish some prejudicial effect: the failure of trial counsel to discover and present the evidence that the *victim's description of the perpetrator's hair* did not match Browning's hair, counsel's failure to object to the *prosecutor's improper statement linking Browning to prostitution*, the prosecutor's *failure to divulge that Wolfe received benefits* for his testimony, and the unfounded inference that the *blood on Browning's coat could have been the victim's*. The question is: if we consider these factors cumulatively, is there a reasonable probability that Browning would not have been convicted of first-degree murder?" (Italics added.) The state court did not similarly consider the cumulative impact of a list of facts including the bloody prints.

unreasonable under § 2254(d)(2).[32] *See Wiggins v. Smith*, 539 U.S. 510, 528 (2003) (factual assumption without record support unreasonable). Moreover, as the Supreme Court has explained, speculation about a possible interpretation of evidence that was not presented to the jury is an unreasonable basis for determining that the evidence was not material. *Smith v. Cain*, __ U.S. ___, 132 S. Ct. 627, 630 (2012) ("A reason that the jury *could* have disbelieved … undisclosed [evidence] … gives us no confidence that it *would* have done so." [Original emphasis]); *see also Kyles*, 514 U.S. at 434-35 ("A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict.").

> [S]tatements repeatedly dismissing the materiality of evidence on the basis that it "does not mean that [the defendant] … was not the other shooter," miss the point.… [These] statements … would require that [the defendant] … prove the new evidence necessarily "would have" established his innocence. Placing this burden on [the defendant]

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[32] As the District Court noted, the available evidence on the subject suggests "that the bloody shoeprints likely were *not* left by Mrs. Elsen or Mrs. Coe." 1ER 25 (emphasis added). No witness testified the prints were made by Mrs. Elsen or Mrs. Coe and the prosecutor never so argued at trial. "Had there been evidence obtainable to contradict and disprove the testimony offered by petitioner, it cannot be assumed that the State would have refrained from introducing it." *Miller-El v. Cockrell*, 537 U.S. 322, 345 (2003) (quoting *Norris v. Alabama*, 294 U.S. 587, 594-595 (1935)). The bloody prints were of man-sized tennis shoes (1ER 27), and they "led away from the bloodstained areas towards the east, front door" (1ER 27; 3ER 637), while Mrs. Elsen and Mrs. Coe both left out the back. 3ER 661, 666, 692,695. Moreover, forensic examination submitted in federal habeas without objection confirmed the prints were not made by either of the women. 6ER 1654-1659.

> …was "diametrically different," *Taylor*, 529 U.S. at 406, than the clearly established principle laid out in *Kyles*, 514 U.S. at 434, *Bagley*, 473 U.S. at 682, and *Agurs*, 427 U.S. at 112-14.

Goudy, 604 F.3d at 400; *accord*, *Paradis v. Arave*, 240 F.3d 1169, 1177 (9th Cir 2001). If what Officer Branon saw had been disclosed, the prosecutor no doubt would have tried to come up with an argument to discount its significance. Even if the jury *could* have accepted some such argument, it cannot be said that the jury necessarily *would* have done so, considering the bloody shoeprints "in the context of the entire record," *Agurs*, 427 U.S. at 112. The Nevada courts never purported to say otherwise.

As we show in Part I B 4 below, if the Nevada court had applied the proper constitutional analysis, it could not reasonably have failed to conclude that this nondisclosure, combined with all the other defects in this trial, undermines confidence in Paul Browning's conviction. But the Nevada Supreme Court didn't conduct that analysis, so its decision rejecting this claim is not entitled to deference.

3. The District Court erroneously deferred to the Nevada Supreme Court's disposition of this claim and added error of its own.

Without regard to the above, the District Court summarily dismissed Browning's *Brady* claim on the ground that the Nevada Supreme Court's rejection of it was "reasonable." 1ER 26. As we have just shown, that deference was misplaced. And the District Court compounded that error by

adding rationales of its own for rejecting this *Brady* claim: that Branon's testimony about the prints "was not given until the evidentiary hearing in 1999, fourteen years after trial"; that the "information does not appear in Officer Branon's three-page police report"; and that "there is no credible evidence that Officer Branon told anyone this information before the 1999 evidentiary hearing." 1ER 26-27.

The first two of these points support Browning's *Brady* claim rather than undermines it. Many, if not most, *Brady* claims involve important facts left out of police reports and only revealed long after trial. See note 27, above. The third point reflects an equally fundamental misunderstanding of the law this Court recently summarized in another habeas case from Nevada:

> To satisfy its duty [under *Brady*], the State must disclose evidence known to the prosecutor as well as evidence " 'known only to police investigators and not to the prosecutor.' " [*Strickler v. Greene*, 527 U.S. 263 (1999)] at 280–81 (citing *Kyles v. Whitley*, 514 U.S. 419, 438 (1995)). Thus, the prosecutor has an obligation "to learn of any favorable evidence known to the others acting on the government's behalf in [the] case, including the police." *Id.* at 281 (citing *Kyles*, 514 U.S. at 437).

Comstock v. Humphries, 786 F.3d 701, 709 (9th Cir 2015); *see also Carrillo v. Los Angeles*, __ F.3d __, 2015 WL 5024010 (9th Cir Aug. 26, 2015) (holding that clearly established law in 1984 "compelled prosecutors to disclose evidence favorable to the accused, even when that evidence was known only to the police

and not to the prosecutor." [quoting *Jackson v. Brown*, 513 F.3d 1057, 1074 (9th Cir 2008)]).

It is undisputed that the exculpatory evidence here—the fact the bloody shoeprints were there before the first responders—was known to Officer Branon, at least. Officer Branon's testimony that he told the "detail detectives" at the scene and "would have" told Spec. Horn, was undisputed; and there is circumstantial evidence that prosecutor Seaton knew about it, as well. See Argument I C, below. But as the passage quoted just above makes clear—and as the State conceded in argument to the Nevada Supreme Court—none of that was necessary to establish a *Brady* violation. The undisputed fact that one officer knew was enough. The District Court was wrong to rule otherwise.

4. On the entire record of this case, there is at least a reasonable probability that disclosure of the truth about the bloody shoeprints would have led to Browning's acquittal.

The only remaining question is materiality. The answer to that question is the same whether reviewed *de novo* or through the lens of AEDPA deference. When the truth about the bloody shoeprints is considered with all the other exculpatory evidence kept from the jury at trial, and balanced against the evidence of guilt, no fair-minded jurist could have confidence in the accuracy of the verdict in this case. That is the ultimate test of materiality. *See Kyles*, 514 U.S. at 436; *Jackson*, 513 F.3d at 1076.

By itself, bloody shoeprints that are not the defendant's left at a murder scene at a time when no one was there but the murderer could give rise to reasonable doubt in almost any case. But it is only one of many reasons to doubt Paul Browning's guilt that his jury never heard. Weighed together, against the scant and questionable evidence implicating Browning, there is much more than a reasonable probability the result of this trial would have been different if this evidence had been disclosed.

a. The evidence of Browning's guilt presented at trial was far from overwhelming.

In upholding Browning's conviction on appeal, the Nevada Supreme Court found several constitutional errors insufficiently prejudicial on the ground the evidence of guilt was "overwhelming." 1ER 210-13, 270, 272. Its appellate opinion did not say what evidence led it to that conclusion, but during oral argument the questions from the Justices pointed to Josy Elsen's alleged identification, the fingerprint in the store, the knife, and the "bloodstained garments." 4ER 1034, 1037-38. In its habeas appeal opinion—after it was proved that the victim's blood was not on the only "bloodstained garment" allegedly linking Browning to the murder, the tan jacket—the Nevada court repeated its statement from direct appeal that the evidence was "overwhelming" and specified four things: Browning's "fingerprints at the crime scene, identification by three witnesses placing him at or near the crimes, his

admissions of guilt to the Wolfes, and his presence in a hotel room surrounded by the stolen jewelry." 1ER 219; see also 1ER 153.

On its face, this evidence pales in comparison to that which courts have properly found strong enough to render a *Brady* violation harmless.[33] To the contrary, most of it is the very type of evidence that has been shown to be most commonly associated with erroneous convictions. See note 1, above.

The identification testimony

"[R]esearch shows that eyewitness identifications are highly unreliable, especially where the witness and the perpetrator are of different races." Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. at iii (footnotes omitted);

[33] *Compare, e.g., Runningeagle v. Ryan*, 686 F.3d 758, 770-71 (9th Cir 2012) ("police found [defendant's] palm print on the clothes dryer next to the victims' bodies and matched [his] shoes with the bloody shoeprints found at the house;" "[defendant] discussed the crimes several times before his arrest and told his girlfriend … whom he showed … the property stolen from the [victims] … that 'he had been in a fight with two people and had hit them "full-force;"'" [w]hen the police arrested [him] … they found the … stolen property;" a codefendant testified and described his crime in detail; and the undisclosed evidence would "not [have] materially detracted from the overwhelming evidence of …guilt"); *Hamilton v. Ayers*, 583 F.3d 1100, 1110-1112 (9th Cir 2009) (defendant bought murder weapon, had insurance motive, two coconspirators testified he hired them to commit murder, and "[t]he suppressed evidence and possible falsehoods pertained to the details of collateral matters with which the jury was well acquainted."); *Hendricks v. Zenon*, 993 F.2d 664, 667-68 (9th Cir 1993) (victim told police defendant assaulted her; police found defendant with car matching description, "blood spatters and a tire iron with blood on it in the car," and matched tire prints to the scene).

"[E]yewitness recollections are highly susceptible to distortion by post event information or social cues." *Perry v. New Hampshire*, 132 S. Ct. 716, 739 (2012) (dissenting opinion). Erroneous eyewitness identifications are one of the most common causes of wrongful convictions. See note 1, above.

There were three identification witnesses in this case—other than the victim's widow, Josy Elsen, whom the State later conceded never really identified Paul Browning. See page 54, below. All three witnesses (like Mrs. Elsen) were white, and Browning is African American. All three first saw Browning in a one man show-up the Nevada court acknowledged may have been "suggestive." 1ER 273. Two of the three witnesses—one of whom said she thinks black people "all look the same," see 3ER 684—said Browning was the man they saw outside the store after the murder. The third witness said he saw someone else—whom he said was a "Cuban"—in front of the store, a few minutes before the crime. 3ER 835.

This was hardly a component of "overwhelming evidence." Any juror or judge aware of the facts regarding eyewitness identification—which Browning's lawyers put on in state habeas (5ER 1156ff), but the Nevada Supreme Court ignored—would give this little weight.

Browning's alleged admissions

The Wolfes' uncorroborated testimony that Browning admitted the crime was only as good as their word. Even the Nevada Supreme Court acknowledged that there were many reasons to doubt the Wolfes' credibility. 1ER 215-16. In addition, as discussed below, the Wolfes were later revealed to be long time police informers who profited by their testimony. See Argument II, below. "Serial informants" are another of the most common causes of wrongful convictions. Kozinski, 44 GEO. L.REV. at xxx; note 1, above. The record is replete with evidence suggesting the Wolfes—much like the informant-witness "Beanie" in *Kyles*, *see* 514 U.S. at 429-30—were themselves involved in the crime, along with their nameless "Cuban" associate. An alleged admission testified to by such a witness hardly adds anything to an "overwhelming" case for guilt.

Browning and the jewelry

The Wolfes testified that they had left Browning in their hotel room, alone with some of the stolen jewelry, before they brought the police there. See 3ER 756-61, 814. When the police kicked in the door, Browning and the jewelry were there, but none of the jewelry was on or near his person, none bore his fingerprints, and none was in *his* room when the police later searched it. See page 7-8, above. The fact he was in the Wolfes' room with the jewelry was as

consistent with the possibility he was framed by the Wolfes as with the prosecution's contention he was the murderer. Circumstantial evidence consistent with both innocence and guilt hardly makes an "overwhelming" prosecution case.

The fingerprints in the store

The only objective evidence linking Browning to the crime scene was testimony that two of his fingerprints—along with some 23 others—were found in the store. But fingerprints, too, can be much less probative than they seem. See Kozinski, 44 GEO. L.REV. at iv. The prints here were in a place a customer in the store could reach; and there was no way to tell when they were made. 5ER 1234-37. Forensic testimony submitted below without objection debunked the prosecution's claim that the prints were in a place where customers (which Browning admitted he had been) could not reach. 6ER 1235-1237.

Inconsistent cross racial identifications, the testimony of two apparently involved police informants, and inconclusive forensic evidence hardly add up to "overwhelming" proof of guilt. That is probably why prosecutor Seaton focused his final argument to the jury on the later-discredited claim that the victim's blood was on Browning's jacket. 3ER 899-900. The rest of the prosecution's evidence provides little reason for confidence in the jury's verdict, in light of the truth about the bloody shoeprints. That would be so, even if that had been the

only later-exposed flaw in the prosecution's case. But it wasn't; there were many more.

b. The facts now known provide numerous new reasons to doubt the reliability of Browning's conviction.

The list of additional reasons to have grave doubts about the jury's verdict, found and developed since Browning's trial, is long.

- **Contrary to what the jury was told, there was no blood or trace evidence on Browning's person or clothes.**

"The materiality of evidence 'is best understood by taking the word of the prosecutor.'" *Shelton*, 2015 WL at *9 (quoting *Kyles*, 514 U.S. at 444 *and* citing *Banks*, 540 U.S. at 700, *and Horton v. Mayle*, 408 F.3d 570, 579 (9th Cir 2005)). Prosecutor Seaton's dramatic rebuttal argument to the jury made clear the central importance of the false claim that "Hugo Elsen's blood" was on a jacket Paul Browning wore: He said the jury should convict in "five minutes" based on that alone. See 3ER 899-900. The argument was crucial because common sense and forensic experience indicate a person who stabs another six times is likely to have the victim's blood on him—and except for the alleged spot of Mr. Elsen's blood on the jacket, which the State has now conceded was not Mr. Elsen's (1ER 257-67), Paul Browning had none.

When the post-trial revelations about the bloody shoeprints and the blood on the jacket are weighed against the scant evidence of guilt, there can be little

confidence in the jury's verdict in this case. But there are many more reasons to doubt it than those.

- **Contrary to what the jury was told, the victim said the killer's hair was "loosely curled," "shoulder length" and "wet looking," and none of those phrases fit Browning.**

"There is no more dramatic circumstance in a criminal case … than when the victim … manages to identify the murderer before dying." [34] It is hardly less dramatic when the victim gives a description of the killer that does *not* match the accused. Hugo Elsen's dying description of his murderer did not match Paul Browning, in a key and most vivid respect: he said the killer's hair was "loosely curled," "shoulder length," and "wet looking." 1ER 45; 6ER 1461-1462. That description pointed away from Browning (who had a full "Afro" haircut that was neither loose, nor wet looking, nor shoulder length, see page 7) and toward the Cuban associate of the Wolfes who the defense said committed the crime. But obfuscation by the prosecution and the ineffectiveness of defense counsel combined to keep both the source of the description and the words used from Browning's jury. See pages 77-78, below.

[34] T. Ryan, "The Case of the Dying Declaration," THE SENTINEL 5/29/14 (http://www.thesentinel.com/mont/index.php?option=com_k2&view=item&id=469:the-case-of-the-dying-declaration&Itemid=752, last visited 9/9/15).

- **Contrary to what the jury was told, the victim's widow never identified Browning as the murderer.**

Lay jurors give unjustified credence to eyewitness identification testimony.[35] The prosecution in Browning's case took full advantage of this with regard to the alleged identification testimony of Josy Elsen, the widow of the victim. As quoted above, Seaton told the jury in closing "she pointed over at Mr. Browning and she said—points right at him—'That's the man who was kneeling over my husband'…. That identification is as good as you can ask for." 3ER 868. That conclusion was not true and no reasonable lawyer could have believed it to be true. See pages 17-18, above. Indeed, when in state habeas Browning asked for appointment of an expert to confirm it was not true, the prosecution admitted "Ms. Elsen did not positively identify defendant." See 2ER 314, n.11; 2ER 563-64 and n.6 (quoting Dkt. 59-163 at 14-16). So the jury was misled about this as well—and so were the Nevada Supreme Court Justices who relied on Mrs. Elsen's testimony to uphold Browning's conviction on appeal. 4ER 1037-38.

[35] "[J]urors routinely overestimate the accuracy of eyewitness identifications …." *Perry*, 132 S. Ct. at 739 (dissenting opinion of Justice Sotomayor) (footnotes omitted); *accord*, Kozinski, 44 GEO. L.J. at iii; see note 1, above; 5ER 1156ff.

- **The state's two "star" witnesses, Randall and Vanessa Wolfe, were police informants who had the jewelry from the robbery and profited from their testimony against Browning.**

Vanessa and Randall Wolfe were the kind of "'make-or-break' witness[es]" whose "testimony was the centerpiece of the prosecution's case" because "nearly all of the other evidence against [the defendant] … was circumstantial." *Maxwell v. Roe*, 628 F.3d 486, 508 (9th Cir 2010). The Wolfes were the only witnesses who testified that Browning confessed to the crime, and a "'confession is probably the most probative and damaging evidence that can be admitted'" against a criminal defendant. *Doody v. Ryan*, 649 F.3d 986, 1023 (9th Cir 2011) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991)). All the stolen goods were in the Wolfes' hotel room, and the Wolfes claimed the jewelry they belatedly handed over to police was hidden by Browning (3ER 762-63), and Vanessa Wolfe gave police the knife that was supposedly the murder weapon and a cap which the prosecution said the murderer wore. 1ER 142, 189.

The prosecution therefore had the Wolfes tell the jury over and over they had nothing to gain and were not being rewarded for their testimony. See 3ER 785-787, 827-828. But it was not true—as the Wolfes, who both were experienced police informers, doubtless knew. In its opinion on Browning's postconviction appeal, the Nevada Supreme Court acknowledged:

> At trial, [Randy] Wolfe denied receiving or expecting any benefits for his testimony. However, at that time Wolfe was the defendant in a separate criminal prosecution, and the prosecutor admitted at the post-conviction evidentiary hearing that after Browning's trial he told the district judge assigned to Wolfe's case that Wolfe had helped in prosecuting Browning; he also admitted that he later helped Wolfe acquire a job.

1ER 215; see page 16, above; Argument II, below. Vanessa Wolfe, too, was "a defendant in a separate criminal prosecution" while she was acting as a witness against Browning. In fact, she was arrested some ten times for prostitution and once for assaulting a police officer—but all the prostitution charges were dropped and the assault was reduced to a misdemeanor and a fine, after she testified against Browning. See 2ER 345-46; 6ER 1550-1569; page 17, above.

Again, Browning's jury knew none of this—another reason there can be no confidence in their verdict in light of what has now been disclosed.

- **Contrary to what the jury was told, the knife the prosecution claimed was the murder weapon was not linked to the crime.**

Any murder prosecution is hampered without a murder weapon. The prosecution was able to compensate for that problem in its case with a knife given to police by Vanessa Wolfe, which she said Paul Browning gave her. 1ER 189; 3ER 807-09. Forensic examination of the knife found no blood or trace evidence tying it to the murder, or to Browning, but based on testimony that Mr. Elsen's wounds were consistent with that having been made by that knife

(among any number of others, see 2ER 315-16) prosecutor Seaton told the jury it was "a terribly incriminating piece of evidence." 3ER 873.

Browning's trial counsel Randall Pike did not consult or present the testimony of a forensic expert (or any other kind of expert) regarding this allegation (or any other). However, in the District Court, Browning's federal defenders submitted an expert declaration[36] that concluded, based on autopsy photographs, the pathologist's testimony and an examination of the knife, that the "wounds sustained by Mr. Elsen do not coherently coincide" with its shape and dimensions. 6ER 1665-66.[37] He also noted the absence of trace evidence, or evidence of cleaning, that would be expected if the knife was used in a stabbing. *Id.*; see note 12, above. That is yet another reason to doubt Browning's guilt which his jury never heard.

- **Contrary to what the jury was told, the Casio watch with Browning's thumbprint on it was not taken in the robbery.**

There was no forensic evidence tying Browning to the stolen jewelry, either. See pages 8-9, above. But the prosecutor had a solution for this problem, as well: Browning's thumbprint was on a Casio watch that was in the

[36] Because the materiality issue was not adjudicated by the state court, consideration of this additional evidence in federal habeas was not precluded by *Cullen v. Pinholster*. *Murray v. Schriro*, 745 F.3d 984, 1000 (9th Cir 2014).

[37] According to the autopsy, one of the wounds was 5 inches deep. 6ER 1636. The knife Vanessa Wolfe gave police was only 3 ½ inches long. *Id.*

room where he was arrested. See 3ER 617, 871. The watch was never admitted into evidence because there was no proof it was stolen—and in fact, it was obviously used and had only half a wristband. See 2ER 400-401, 563; Dkt. 59-150, p. 24. That did not prevent prosecutor Seaton from putting it near the top of his list of evidence he claimed proved Browning guilty, and saying "if there is anyone who doubts as to whether or not he at least handled those items of jewelry, we know that he did because his fingerprints was [sic] on the Casio watch." 3ER 871. But as the Nevada Supreme Court later acknowledged, the "watch … was never linked to the crimes." 1ER 210.

So while the prosecution claimed that Browning took the jewelry out of its case, carried it to the Normandy Hotel, and removed sales tags from it (along with Vanessa Wolfe), his fingerprints were not on a single piece of the stolen jewelry—just this one old, broken watch. That is another reason confidence in this verdict cannot be maintained.

- **Contrary to what the jury was told, Browning had no heroin in his system on his arrest, and Marsha Gaylord was not in jail.**

"When identity is in question, motive is key." *House v. Bell*, 547 U.S. 518, 540 (2006). The prosecution's motive theory was "Browning committed the robbery to bail his girlfriend, Marsha Gaylord, out of jail so she could prostitute herself and give him the proceeds to purchase drugs." 1ER 193; see 3ER 855. The source of this unsavory story—which was sure to prejudice

Browning in the all-white jury's eyes—was Randy Wolfe. 3ER 753-55. Wolfe testified he knew this was so because Browning told him that was why he committed the robbery, and Browning had been trying to bail Gaylord out "prior to that a couple of days." 3ER 755. This not only supplied motive but gave the prosecution an opening to tie Browning to drugs and prostitution—which it did, though the Nevada Supreme Court said the reference to prostitution was "improper" (1ER 198)[38] and Browning's lawyer failed to object. *Id.*

Again, the prosecution's argument was built on demonstrable falsehoods. Marsha Gaylord had only been arrested late the night before the murder—not a "couple of days" prior, as Randy Wolfe said—and she got out of jail the next morning. See 6ER 1593. And Browning—who Wolfe said was hopelessly addicted, and who Seaton told the jury "shot the life of Hugo Elsen right up his arm" (3ER 847)—had no heroin in his system at the time of his arrest. See page 21, above.

The Nevada Supreme Court shrugged all this off, saying "Browning's precise motive for the crimes was not crucial to the State's case." 1ER 193. But whether motive was "key," as the Court said in *House* said, or "not crucial," it was something to which a reasonable juror could, and likely would, give weight.

[38] The Nevada Supreme Court found there was "no evidence that Browning was involved in pimping or pandering prostitution." *Id.*

And the "precise motive" that Wolfe came up with enabled the prosecution to appeal to the racial fears and stereotypes of an all white jury.[39] These untruths, and the potential appeal to race prejudice they carried, are still more reasons confidence in this verdict cannot be maintained. [40]

- **Marsha Gaylord could have explained Browning's fingerprints in the jewelry store.**

Marsha Gaylord appears to be the only potential witness defense counsel Pike actually interviewed before trial. 5ER 1275. Pike testified that Gaylord was prepared to be a witness before the prosecution got its trial continuance, and she would have testified that she and Browning were in the jewelry store a day prior to the homicide, explaining the presence of his fingerprints there. 5ER 1276-77. Gaylord would have also testified the Wolfes were acquainted with a

[39] See 2 ER 385 and n.44; 3ER 604 ("[T]hey would send their wives or girlfriends out for prostitution and shoot heroin in their arms;"); 3 ER 855: ("This man whose girlfriend prostituted for him;" "[T]he way to get drugs was to have Marsha Gaylord out of jail so that he she [sic] could go out on the streets … and get the money that way.")

[40] The fact Seaton made this racially provocative, false argument to an all white jury is another aspect of "the context of the entire record," *Agurs*, 427 U.S. at 112, that should be considered, particularly in light of the growing evidence of "the potential role of race effects" in wrongful convictions. J. Gould and R. Leo, 100 J. CRIM. LAW & CRIM. at 841. *See e.g.*, M. Johnson, et al., "African Americans Wrongly Convicted of Sexual Assault Against Whites: Eyewitness Error and Other Case Features," J. OF ETHNICITY IN CRIM. JUST. Volume 11, Issue 4 277-294 (2013); Johnson, M.B. Sex, Race, & Wrongful Conviction, THE CRIME REPORT, 10/03/13 http://www.thecrimereport. org /news/ articles /2013-10-sex-race-and-wrongful-conviction (last visited 9/9/15).

black Cuban male who had shoulder length jeri-curl style hair. 5ER 1280; 6ER 1637-1638. And she could have confirmed that (as records later showed) she had not been in jail for any length of time before the day of the murder and was released that morning. 2ER 328; 6ER 1593; 6ER 1638.

Defense counsel Pike—a former prosecutor—testified in the state habeas hearing Gaylord's testimony would have been "potentially exonerating" (5ER 1282), but she left town after the prosecution's continuance and was unavailable. Whether that was attributable to counsel's ineffective failure to secure her presence or the prosecutor's subterfuge to obtain a continuance (2ER 325, 361), should be considerated in the prejudice calculus.

- **The prosecutor argued that the presumption of innocence is a "farce" and a "facade."**

Because the ultimate question is one of confidence in the verdict, "[t]he context of the entire record" in which materiality is evaluated, *Agurs*, 427 U.S. at 112, should include the way the jury was told to reach that verdict. Browning's jury was told by prosecutor Seaton that the presumption of innocence is a "façade," and he had shown "the farce of that presumption" in this case. 1ER 63. We submit below that these statements, which the Nevada Supreme Court correctly called "outrageous" (1ER 272n1), were sufficiently so to warrant habeas relief by themselves. See Argument V B. But even if not,

they provide another reason there can be no confidence in the integrity and reliability of Browning's conviction.

c. In light of all known the evidence now of record, disclosure of the bloody shoeprints would have produced a different result.

It is a rare, lucky defense counsel who can tell a jury in a murder case: "These must be the killer's bloody footprints, and they are not my client's." Or: "The victim gave a lucid description of the killer that my client didn't match." Or: "This was a violent and bloody crime and there was no trace of blood or anything on my client." Or: "The victim's blood on the jacket which the prosecutor told you convicts my client by itself isn't the victim's at all." Or: "The witnesses who say my client did this are long time police informers who were the ones who actually had and kept the stolen jewelry, and they tried to frame another man by giving police a knife just last spring."

Paul Browning's defense counsel should have been able to say, and to prove, not just one of these things, but *all* of them, and more. But he couldn't and he didn't—because of the prosecution's concealment and his own ineffectiveness. All this must be considered in determining whether confidence in the jury's verdict in this case reasonably can be maintained. Considering it all, it cannot be.

C. The fact the bloody shoeprints were present before police and medics entered the crime scene requires the writ to be granted, or a hearing held, on Browning's *Napue* claim.

Although Browning also claimed in state habeas that the prosecution's testimony and argument about the bloody shoeprints violated the separate due process principles of *Napue* (see 1ER 101), the state courts did not address that claim. Accordingly, they made no findings regarding whether Officer Branon told Spec. Horn about when he saw the shoeprints, or whether prosecutor Seaton knew the truth about when the prints were made. Because of that, those issues are subject to *de novo* review in federal habeas, and the evidentiary restrictions of 28 U.S.C. §2254(d)(2) don't apply to Browning's *Napue* claim. *See Amado*, 758 F.3d at 1130; *Murray*, 745 F.3d at 1000 ("After *Pinholster*, a federal habeas court may consider new evidence only on *de novo* review…")

The petition below alleged that both Spec. Horn and prosecutor Seaton knew what Branon saw (see 2ER 338-39) and Browning moved for discovery and an evidentiary hearing to support that allegation. 2ER 304, 500, 581. But the District Court dismissed the claim summarily, holding that the Nevada Supreme Court's rejection of the claim was "reasonable." 1ER 27-31.

That was plainly error. The Nevada courts never adjudicated this claim—and if they had, on this record they could not have rejected it without contravening or unreasonably applying established Supreme Court law.

1. The *Napue* claim turned on different factual issues and a different prejudice standard from the *Brady* claim.

The due process principles of *Napue* are different from, and older than, those of *Brady v. Maryland*. *Napue* holds "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment" and "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." 360 U.S. at 269.

"False impressions" as well as outright lies violate *Napue's* due process principles. *See Hayes v. Brown*, 399 F.3d 972, 983 (9th Cir. 2005) (discussing *Alcorta v. Texas*, 355 U.S. 28 (1957)); *see also Miller v. Pate*, 386 U.S. 1 (1967) (due process violated by references to "bloody shorts" when prosecutor knew stains on shorts were paint). So does testimony that a prosecutor should have known was false through reasonable investigation.

> *Napue* applies whenever a prosecution "'knew or should have known that the testimony was false.' " *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir2005) (en banc) (quoting *United States v. Zuno–Arce*, 339 F.3d 886, 889 (9th Cir2003)). … [T]he prosecutor has a clear *Brady* obligation to investigate whether the police have evidence favorable to the defendant. *Kyles*, 514 U.S. at 438…. If the prosecutor has a duty to investigate and disclose favorable evidence known only to the police, he "should know" when a witness testifies falsely about such evidence….

Jackson, 513 F.3d at 1075. *Napue's* prejudice standard is significantly different from *Brady's*, as well.

> "In contrast [to a *Brady* claim], under *Napue*, … a conviction … is "set aside whenever there is '*any* reasonable likelihood that the false testimony *could* have affected the judgment of the jury.' " Although "*Napue* does not create a 'per se rule of reversal[,]' " "[w]e have gone so far as to say that 'if it is established that the government knowingly permitted the introduction of false testimony reversal is virtually automatic.' "

Sivak, 658 F.3d at 912 (quoting *Jackson* and *Hayes*, 399 F.3d at 985) (original emphasis).

The Nevada courts never applied *Napue* or its standards to this claim. The District Court wrongly deferred to a decision the state courts never made.

2. The District Court erred by summarily denying the *Napue* claim.

a. Substantial evidence indicates that both the prosecutor and his main police witness knew the truth about the bloody shoeprints.

There are good reasons to believe that Dan Seaton, the trial prosecutor, knew the bloody shoeprints were present before police and paramedics arrived.

Seaton testified he made a practice of personally interviewing "all potentially relevant witnesses prior to trial." 6ER 1408. [41] It is not plausible that in such interviews he would not have been told when the bloody prints were there by Officer Branon, or by any of the other officers who first entered the crime scene with him, or by Spec. Horn, or by the "detail detectives" Officer

[41] Seaton usually took notes during witness interviews. 6ER 1408. Browning's lawyers sought discovery of those notes in the state habeas hearing, but it was denied and the notes were filed under seal. 5ER 1145-46. They are not part of the federal court record.

Branon says he talked to about them.

In addition, despite Officer Branon's central role in the case, Seaton did not call him as a witness—and when the defense did, Seaton conspicuously asked him no questions, alone among all the percipient witnesses. See 3ER 833. That is circumstantial evidence Seaton knew Branon's testimony could hurt the State's case. *Cf. Miller-El v. Dretke*, 545 U.S. 231, 239-41 (2004) (prosecutor's racial motivation can be inferred from comparative juror questioning); *Boyd v. Newland*, 467 F.3d 1139, 1144 (9th Cir 2004) (same). That is hardly implausible: Seaton had an extensive history of prosecutorial misconduct. *See, e.g.*, *Santillanes v. State*, 104 Nev. 699, 703, 765 P.2d 1147 (1988) (directing the District Attorney of Clark County to take action to assure that "Mr. Seaton's prosecutorial misconduct, so frequently repeated heretofore, does not again recur."); Dkts. 71-72 (records of alleged *Brady* violations by Clark County District Attorney's office).

Though we submit it is apparent here, Seaton's subjective knowledge and intent to mislead is not essential to this claim. "[T]he duty to correct false evidence under *Napue* extends to evidence not known to be false by a particular prosecutor but known to be false by the government." *Phillips v. Ornoski*, 673 F.3d 1168, 1187 (9th Cir 2012) (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972)).

> *Napue* and *Giglio* make perfectly clear that the constitutional prohibition on the "knowing" use of perjured testimony applies when any of the State's representatives would know the testimony was false.

Jackson, 513 F.3d at 1075 (original emphasis).

Seaton aside, the preponderance of evidence indicates Spec. Horn, the scene investigator, knew the prints were present before police arrived. Officer Branon testified he "would have" told Horn and in fact he did tell the "detail detectives" on the scene, one of whom was Horn. 6ER 1472; see note 24, above. Part of Horn's job was to gather information from other detectives and officers on the scene (3ER 627), some of whom would have seen the prints were there before anyone went in, as Branon did. Yet Horn speculated to the jury that the prints were left by medics or police, when he knew or should have known otherwise.

The clear preponderance of available evidence shows that Horn knew and Seaton "knew or should have known," *Hayes*, 399 F.3d at 984, that the impression created by Horn's testimony about the bloody footprints was false.

b. The District Court wrongly denied discovery and an evidentiary hearing on this claim.

To the extent there was any material question about who knew or should have known the truth about the bloody prints, Browning moved the District Court to resolve those issues through discovery and an evidentiary hearing. 2ER 304, 500, 581. The District Court denied the discovery motions, saying "the state courts ruled on th[e] claims" regarding the bloody shoeprints, and the discovery "should

have been done in state court." 1ER 129, 132. This was doubly incorrect. Browning's state habeas lawyers did seek discovery relevant to the *Napue* claim—of Seaton's interview notes—and it was denied. 5ER 1103, 1145-47. And as noted above, the state courts never "ruled on" the *Napue* claim, at all.

Moreover, the relevant inquiry regarding whether Browning should be able to further develop the factual basis for this claim in federal court was not what his state lawyers "should have" done, but whether

> the applicant "failed" to develop the factual basis for the claim in state court. In this context, "failed" "connotes some omission, fault, or negligence on the part of the person who has failed to do something." *Williams*, 529 U.S. at 431–32. If the petitioner is not at fault (as defined for purposes of § 2254(e)(1)), we evaluate the propriety of an evidentiary hearing under the factors prescribed by *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), overruled on other grounds, *Keeney v. Tamayo–Reyes*, 504 U.S. 1, 5, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992). *Earp v. Ornoski*, 431 F.3d 1158, 1166 (9th Cir2005).
>
> If the court determines that the applicant did fail to develop the factual basis for a claim in state court, the district court can hold an evidentiary hearing only if … the claim … [is] based on facts that "could not have been previously discovered through the exercise of due diligence," §2254(e)(2)(A)(ii) … [and] "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable fact finder would have found applicant guilty …."

Kemp v. Ryan, 638 F.3d 1245, 1258 (9th Cir 2011). Browning asked for leave to prove that he could meet these standards—that he did not "fail to develop" this evidence, and that the now-available proof of his innocence is strong enough to

excuse any such failure if there were one. See 2ER 540, 580. But the District Court never considered these standards.

c. There is a reasonable probability that the prosecution's misleading testimony and argument regarding the bloody shoeprints could have affected the verdict.

As noted above, where the prosecution has offered false or misleading testimony, reversal is the norm, "virtually automatic." *Sivak*, 658 F.3d at 912.

Even if that were not true, reversal would be required here. The prosecution's false testimony here gutted a powerful defense argument—that the bloody footprints at the scene must have been the murderer's, and were not Paul Browning's. Though he featured this fact in opening, defense counsel virtually abandoned it after Horn's testimony—not asking Branon or any witness about it, and retreating to a lame criticism of the police investigation on the subject in closing. Compare 3ER 622-23 with 3ER 880-81.

Particularly in light of the weakness of the prosecution's case (see pages 48-53, above), and in light of the many other now-available reasons to doubt Browning's guilt (pages 53-65, above), the probability that the false testimony "*could*" have affected this verdict cannot be dismissed.[42] It requires reversal of Paul Browning's conviction.

[42] The Nevada Supreme Court's speculation that the footprints could have been made by Mrs. Elsen or Ms. Coe is irrelevant to the *Napue* issue, not only because the available evidence refutes it (see note 32, above), but also because that

II. BROWNING WAS DENIED DUE PROCESS WHEN THE GOVERNMENT CONCEALED EXCULPATORY INFORMATION REGARDING THE CREDIBILITY OF RANDALL WOLFE.

The Nevada Supreme Court called Randall Wolfe "an important witness for the State" and said he and his wife Vanessa were "the State's key witnesses." 1ER 195, 215. That was certainly true.

Randy Wolfe was Browning's original accuser. He testified for the prosecution at Browning's preliminary hearing and trial. 3ER 775. He was also the sole source of for the prosecution's allegation that Browning was a heroin addict (1ER 192), which it said was the motive for the robbery murder and a reason Browning could not be expected to act like "[y]ou and me." See 3ER 873.

He claimed that Browning had confessed the robbery and the murder to him, 3ER 750—a claim the prosecution unsurprisingly emphasized in its arguments to the jury. 3ER 874. Wolfe's claim that Browning confessed was one of the four items that the Nevada Supreme Court pointed to in its tally of the "overwhelming" evidence of Browning's guilt. See 1ER 219.

Because of that, Wolfe's credibility, his relationship with the prosecution, and the incentives he was being given for testifying, were centrally relevant at trial. Just before trial began, defense counsel moved for a continuance because he had

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suggestion was never made at the trial and so cannot impact what "could have affected the judgment of the jury."

learned Wolfe had been permitted to enter a guilty plea to a charge of attempt to sell a stolen credit card, and suspected a deal. 4ER 931-33. In response, prosecutor Seaton said "I can tell the Court categorically . . . there has never been any plea bargaining with Randy Wolfe regarding this case." *Id*. pg. 4. So the continuance was denied. *Id.*

At trial, Wolfe testified that he had, in fact, been allowed to enter a plea of guilty to a reduced charge of "attempted" possession of a stolen credit card. 3ER 743. On re-direct, prosecutor Seaton asked Wolfe "Have you ever received anything for your testimony here today," "and have I or anyone else indicated to you that [the five year sentence on the stolen property charge] … might be diminished in some respect?" 3ER 787. Wolfe answered "no" to both questions. *Id.*

In state habeas, however, it came to light that prior to Browning's trial, Wolfe was charged with at least two other felonies and several misdemeanors, which disappeared after he testified. 2ER 342; 6ER 1520, 1545. Also in state habeas the prosecution acknowledged that "both the Wolfes were informants" (5ER 1109), and Browning's lawyers submitted a transcript showing Wolfe's sentencing judge said Seaton had told him in chambers that Wolfe had been "helpful" to him on "several occasions." 6 ER 1327. Seaton denied this was true (6ER 1441-42), but he admitted that he had engaged in "off the record plea

bargaining" with potential informants (6ER 1446-48), and that he did speak with the sentencing judge in Wolfe's case after he testified against Browning (6ER 1444).

In fact, it was the very day that Paul Browning was formally sentenced to death that Seaton met with Wolfe's sentencing judge, and convinced the judge Wolfe "deserves something positive" for being "a witness in a recent trial" and being "somewhat helpful to [Seaton] on several occasions." 6ER 1527. As a result, Wolfe got probation, while his codefendants received four and five year prison sentences, which is what the prosecution had recommended for Wolfe as well. 6ER 1524-1535, 1542. At Wolfe's request, Seaton also later facilitated getting him a job. 6ER 1413.

Based on these revelations, the Nevada Supreme Court held: "[T]he prosecutor withheld information regarding benefits given to an important witness for the State, Randall Wolfe. . . Though the prosecutor maintained that he acted unilaterally and never made any deal with Wolfe, this information still should have been disclosed to the defense." 1ER 215. The state court nonetheless found no reasonable probability of a different outcome.

> Wolfe's credibility was extensively challenged at trial. The jury was made aware that he had initially kept some of the stolen jewelry in this case for himself and lied under oath about doing so. On cross-examination, defense counsel also established that Wolfe had a history of heroin and other illegal drug use and had used heroin just four days before testifying, had stolen property and pimped his wife to support his drug use, had three prior felony

> convictions, and still faced sentencing for one of those convictions. Thus, though the jurors were not told that Wolfe would receive benefits for his testimony, he was stiffly impeached on other grounds.

1ER 215-16. The court also considered the prejudice issue in light of the cumulative effect of some—but not all—of the errors at Browning's trial:

> the failure of trial counsel to discover and present the evidence that the victim's description of the perpetrator's hair did not match Browning's hair, counsel's failure to object to the prosecutor's improper statement linking Browning to prostitution, the prosecutor's failure to divulge that Wolfe received benefits for his testimony, and the unfounded inference that the blood on Browning's coat could have been the victim's. The question is: if we consider these factors cumulatively, is there a reasonable probability that Browning would not have been convicted of first-degree murder? We conclude that there is no such reasonable probability. The evidence of Browning's guilt remains overwhelming.

1ER 219. The District Court found these decisions "not objectively unreasonable." 1ER 37. But they were, for two reasons.

A. The undisclosed impeachment was not cumulative of what the jury heard.

The fact that a witness is receiving benefits for his testimony is uniquely impeaching. *See, e.g.*, *Maxwell v. Roe*, 628 F.3d 486, 510 (9th Cir 2010), quoting *Benn v. Lambert*, 283 F.3d 1040, 1058 (9th Cir 2002) ("The undisclosed benefits that [the informant] received added significantly to the benefits that were disclosed and certainly would have 'cast a shadow' on [the informant's] credibility. Thus, their suppression was material.").

Undisclosed evidence about a witness' history as an informant has a separate impeachment value. *Banks*, 540 U.S. at 698; *United States v. Shaffer*, 789 F.2d

682, 688-89 (9th Cir 1986); *see also Maxwell*, 628 F.3d at 511 (quoting *Benn*, 283 F.3d at 1058). This is particularly so here, because the fact Wolfe was an informant gave credence to the defense theory that the police ignored the signs that they were involved in the murder, and let them get away with it.

The Nevada court was clearly correct that the reward given Wolfe should have been disclosed. The fact he had been an informant for Seaton and the police should have been as well.

B. The Nevada Supreme Court unreasonably held the failure to disclose evidence impeaching Randy Wolfe's credibility was not prejudicial.

Although it correctly recognized that the prosecutor's rewards to Randy Wolfe should have been disclosed, the Nevada Supreme Court unreasonably found no prejudice.

It is long since clearly established that impeachment evidence is material and not cumulative if it is "of a different character than evidence already known to the defense." *United States v. Wilkes*, 662 F.3d 524, 535 (9th Cir 2011) (citing *United States v. Kohring*, 637 F.3d 895, 904 (9th Cir 2010)), and "'would have provided the defense with a new and different ground of impeachment,'" *Silva v. Brown*, 416 F.3d 980, 989 (9th Cir 2005) (quoting *Benn*, 283 F.3d at 1056). *See also Banks*, 540 U.S. at 702–03; *Shelton v. Marshall*, 2015 WL 4664530 at *11 (AEDPA case); *Gonzalez v. Wong*, 667 F.3d 965, 984 (9th Cir 2011), *cert. denied* 133 S.Ct. 135 (2012) (same); *Sivak*, 658 F.3d at 915; *Jackson*, 513 F.3d at 1077.

Unsupported speculation by defense counsel, or even evidence that a witness is hoping for a reward from the prosecution, is no substitute for proof he is actually getting one. See *Jackson*, 513 F.3d at 1077; *Phillips*, 673 F.3d at 1196.

Although the jury was told that Randy Wolfe was a drug addict with a criminal record, and defense counsel insinuated he was an informant and was hoping for leniency in his upcoming sentencing, the jury was never told about Seaton's practice of "off the record" plea bargaining, or his intention to put in a word with Wolfe's sentencing judge, or what that word would be. In fact, Wolfe was facing five years or more in prison but got probation. This was much stronger impeachment than anything Browning's defense counsel managed to muster.

Given Randy Wolfe's uniquely central role in the prosecution's case—accuser, alleged confessor, possible suspect, possessor of the stolen goods—a thorough evaluation of his credibility could not have been more important. The prosecution's failure to disclose this impeachment of him, considered in light of all the things that undermine confidence in this verdict (including the truth about the bloody shoeprints, which the Nevada Supreme Court left out of its analysis) could, with reasonable probability, have led to a different verdict in this case. The District Court erred in holding otherwise.

III. BROWNING WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS TRIAL LAWYER'S FAILURE TO INVESTIGATE AND PREPARE FOR TRIAL, WHICH ALLOWED THE JURY TO BE MISLED REGARDING THE SOURCE OF THE BLOODY SHOEPRINTS, THE VICTIM'S DESCRIPTION OF HIS MURDERER, THE ALLEGED MURDER WEAPON, AND THE CREDIBILITY AND INVOLVEMENT OF BROWNING'S PRIMARY ACCUSERS.

Browning's Amended Petition made a single claim regarding his trial counsel's pretrial investigation and preparation: "Petitioner's court appointed trial counsel, Randall Pike, failed to do the investigation necessary to confront the prosecution's case or to prepare and present the defense case at trial." 2ER 306ff. That was the same claim made in state habeas: "Browning claims first that his trial counsel failed to properly investigate the facts of this case." 1ER 192. Over objection, the District Court treated this not as a single claim but as an assemblage of separate criticisms of the harm caused by trial counsel's failure. 1ER 93, 94-99. It denied relief on each of the separate parts of the claim it identified, but granted a Certificate of Appealability on three of them. 1ER 74.

In this Brief, Petitioner moves to expand the Certificate to include his entire trial level ineffectiveness claim, as it was made. See Argument VI, below. Even as it was viewed by the District Court, relief should be granted on the basis of those three aspects of the ineffectiveness claim.

A. Browning's court appointed trial counsel failed to do basic pretrial investigation.

Sixth Amendment ineffective assistance of counsel claims are governed by *Strickland v. Washington*, 466 U.S. 668 (1984). "Under *Strickland* … we first determine whether counsel's representation 'fell below an objective standard of reasonableness.' Then we ask whether 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Hinton v. Alabama*, 134 S. Ct. 1081, 1087-88 (2014) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) and *Strickland*, 466 U.S. at 688, 694).

The failure to interview Officer Branon

The Nevada Supreme Court found that defense counsel Pike made several "unprofessional errors," one of which involves an aspect of Browning's ineffective assistance claim on which the District Court granted a Certificate: The state court held because Pike "failed to interview … Officer Gregory Branon" and learn the truth about Hugo Elsen's description of the murderer, "trial counsel was deficient, but that this deficiency alone was not prejudicial." 1ER 193-94. The District Court deferred to this conclusion. 1ER 44. The finding of deficiency was clearly correct. Failure to interview a key percipient witness alone can be ineffective, and failure to interview a witness who counsel knows will testify at trial, because counsel intends to call him, is even more so.

See Jackson v. Calderon, 211 F.3d 1148, 1160 (9th Cir 2000) ("We assume that it ordinarily falls below the *Strickland* level of required competence to put a witness on the stand without interviewing him"); *cf. Rompilla*, 545 U.S. at 383 (failure to examine prior conviction file that defense counsel knew the prosecution would use at trial was ineffective).

Contradictorily, however, the Nevada court held Pike was *not* ineffective for failing to learn that Officer Branon saw the bloody shoeprints at the crime scene before the police or medics entered. 1ER 195. The District Court said that conclusion was "reasonable" as well (1ER 25), even though it involved the very same inaction—the failure to interview Officer Branon before calling him as a witness—which the state court had just found to be "deficient." 1ER 194. The Nevada Supreme Court held otherwise regarding the bloody shoeprints, saying Pike made a "tactical" decision "to leave the source of the prints uncertain" because he "feared that investigation might establish that the prints had been left by police or paramedics." 1ER 194-95.

Even strategic decisions made by defense counsel must be "sound," *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986), however, and this alleged tactic makes no sense. The prosecution had its explanation for the shoeprints and presented it to the jury (through Spec. Horn) two days before Officer Branon was called to testify. See 3ER 626, 830. The defense had no answer to this, and

was sure to lose the point without one. There was no reason to believe that if Officer Branon was simply asked what he saw when he entered Mr. Elsen's shop, his answer would further bolster the prosecution's theory.

Not even Pike, who had no shortage of excuses for his other failings, claimed that was why he didn't put that question (or any other) to Officer Branon, before calling him. What Pike said was that he feared it could backfire if, for example, he "interviewed the ambulance driver" and "they had shoes that matched the track." 5ER 1325. There was no similar danger in asking Officer Branon to describe the crime scene—and if there had been, it would have been foolhardy to call him to the stand without finding out about it. "'[C]ounsel's anticipation of what a potential witness would say does not excuse the failure to find out.'" *Pavel v. Hollins*, 261 F.3d 210, 221 (2d Cir. 2001) (quoting *United States v. Moore*, 554 F.2d 1086, 1093 (D.C.Cir.1976)).

For all these reasons, this aspect of the Nevada Supreme Court's decision was objectively unreasonable.[43] It cannot have been both "deficient" and

[43] The Nevada Supreme Court also said that "[a]lthough it is now evident that the prints were present before police and paramedics arrived, counsel's basic reasoning remains sound because the bloody shoeprints were likely left by Mrs. Elsen and/or Coe …." 1ER 195. But Pike never said this, all available evidence contradicted it, and the prosecution never argued it until oral argument in the state habeas appeal. See 7ER 1691. Moreover, as the District Court noted, all the now available evidence indicates "that the bloody shoeprints likely were not left by Mrs. Elsen or Mrs. Coe …." 1ER 25; see 6ER 1654-59; note 32, above.

effective to call Officer Branon to the stand without finding out what he might say. Pike himself never claimed to have made a strategic decision not to do so,[44] and such a strategy would have made no sense.

And interviewing Officer Branon was only one of the ways Pike could have learned, and showed the jury, the true significance of the bloody prints. Since the prints were there, the other officers who made the first entry must have seen them too; but Pike never interviewed them, either. Nor did he or his investigator speak to Officer Horn, whom he knew the prosecution would call to testify about the scene, and who he knew had knowledge of the prints. See 4ER 1012, 1015; *cf. Rompilla*, 545 U.S. at 383-84 (counsel has duty to examine evidence he knows the State will offer at trial). Even if the other officers and Horn did not admit what they saw, Pike would have learned that Horn was going to speculate that the prints were made by officers or medics—exploding any hope he might have had that he could win by trying to avoid the subject, and eliminating any "tactical" reason not to inquire further of Officer Branon.

[44]Pike's state habeas testimony on this point is revealing of his approach to Browning's defense: "In a criminal defense case it is overcasting a shadow of a doubt, as opposed to proving." 5ER 1325. That may explain why he told the trial court he was "ready to go" on February 27, 1986 (4ER 912) when he had done no investigation at all and spent only 24 hours total on the case. 6ER 1571. It is also consistent with the fact he spent less than a dozen hours on all types of factual investigation in the year that ultimately elapsed before trial, didn't hire or consult any experts of any kind, and didn't even fully use the investigative services available to him. See 3ER 306-08; 6ER 1495, 1510, 1514-5.

"There are countless ways to provide effective assistance in any given case." *Strickland,* 466 U.S. at 689. No doubt there are a number of other investigative approaches Pike could have taken that would have uncovered this fact. The problem is he took *none* of them, so the truth on this critical point never came out.

The failure to interview Randall and Vanessa Wolfe

Pike had a different excuse for his failure to interview or investigate the prosecution's two key witnesses, Randall and Vanessa Wolfe, which the Nevada Supreme Court also uncritically accepted:

> Counsel testified that to avoid becoming a witness himself, he had a policy of not personally interviewing witnesses. Instead, he had his investigator conduct all interviews. This is a reasonable tactic. The investigator gathered enough information to permit trial counsel to adequately cross-examine the Wolfes on their version of events, their drug usage, their informer status, their lying, and their convictions and arrests. Therefore, Browning has failed to show that counsel was ineffective.

1ER 195. This, too, was objectively unreasonable. Counsel's tactical claim, even if believed, provides no rational explanation for this failure. As quoted, counsel's alleged tactic was "he had his investigator conduct all interviews." But Pike denied the request of his assigned investigator, Martin Schopp, to interview the Wolfes. 6ER 1509. A tactical decision to have an investigator conduct interviews cannot rationally justify not having an investigator conduct interviews.

Furthermore, the record doesn't support the statement that trial counsel cross-examined the Wolfes on "their informer status, their lying, their convictions and arrests." Pike never asked either of the Wolfes—or any other witness—a single question about their history as informants. See 3ER 740-829. Pike called the Wolfes "informers" in argument to the jury (3ER 623), but he presented no evidence to back up the accusation. The only "lying" Pike asked either of the Wolfes about—a lie Randy Wolfe told at Browning's preliminary hearing, about wearing stolen jewelry to court, 3ER 775—was brought out by the prosecutor, not the defense, see 3ER 766. And although Pike asked about *some* of the Wolfe's prior convictions and arrests, he only scratched the surface, and missed the most significant charges apparently dropped and reduced in consideration of the Wolfes' testimony in Browning's case. See Argument II, above; 3ER 772, 774. Indeed, Pike knew so little he was unable to overcome a foundation objection to questions about the consideration Vanessa Wolfe was quite obviously getting from the prosecution. See 3ER 823; page 17, above.

There was no sound strategic reason for the failure to interview or investigate the Wolfes. Pike's investigator urged him to do so, but was rebuffed. 6ER 1494, 1497, 1509, 1513-1514. This aspect of Pike's investigation (or lack thereof) was classic ineffective assistance. *See Cargle v. Mullin*, 317 F.3d 1196 1216 (10th Cir. 2003) (trial attorney was ineffective for failing to investigate

adequately whether a witness had a deal with prosecutors); *Reynoso v. Giurbino*, 462 F.3d 1099, 1115 (9th Cir 2006) (counsel's investigation and preparation for trial were objectively unreasonable in light of her knowledge about the reward and the absence of any explanation for her failure to interview the two crucial eyewitnesses on that subject).

Again, there were other ways Pike could have prepared to impeach the Wolfes' damning testimony—but he didn't utilize them either. He could have authorized completion of the investigation of other defendants the Wolfes had informed on, as the investigator recommended. See 6ER 1509, 1579. He could have had a forensic examination performed on the knife Vanessa Wolfe claimed was the murder weapon. 2ER 315-17; see 6ER 1665-1666. He could have found and called a witness who said he went with Randy Wolfe to sell some of the stolen jewelry. 2ER 320; 6ER 1509, 1587-89. He could have done more than just write the prosecutor a two sentence letter asking for the Wolfes' "scopes," or criminal records, and "pending actions." See 4ER 1030. But he did none of these things.

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B. Browning was prejudiced by his trial counsel's ineffectiveness.

The Nevada Supreme Court considered the prejudicial effect of only one of these aspects of Pike's deficient performance,[45] the failure to interview Officer Branon and thereby "discover and present the evidence that the victim's description of the perpetrator's hair did not match Browning's hair." 1ER 194, 219. It found this failure to be insufficiently prejudicial on its own, or considered in conjunction with the few other errors by trial counsel and the prosecution it recognized. *Id*. The District Court did not specifically address the reasonableness of this conclusion, but included the failure to learn the truth about Hugo Elsen's description of the murderer in its own list of "alleged errors, whether actual or assumed" which it concluded "taken cumulatively, did not cause the sort of prejudice to Browning necessary to warrant habeas corpus relief." 1ER 68-69.

Notably, neither court included in these lists of errors the failure to discover what Officer Branon belatedly revealed about the bloody shoeprints. The Nevada court's conclusion was based on an untenable premise that the evidence against Browning was "overwhelming," even after the prosecution's most powerful and

[45] The Nevada Supreme Court also said, in reference to the broader claim that "trial counsel failed to properly investigate the facts of this case," that "Browning largely fails to specify what evidence would have been revealed by additional investigation and how the lack of any evidence prejudiced him." 1ER 192. This statement did not reasonably reflect the record. Browning's state habeas corpus appeal brief contained some 21 pages of specifications of the prejudicial effect of Pike's ineffectiveness. See Dkt. 59, Exh. 232, pgs. 39–60; Dkt. 131 at 17-21.

objective piece of evidence—what the prosecutor said was "Hugo Elsen's blood" on Browning's jacket—was eliminated. 1ER 219. The District Court did not explain the basis for its conclusion that the cumulative prejudice was not sufficient to "warrant habeas corpus relief." 1ER 68-69.

As shown above, neither of those conclusions can fairly be sustained. Considering the full range of errors now admitted and facts now known—including the truth about the bloody footprints, which neither court considered—the prejudice to Browning's defense cannot reasonably be denied.[46] If the jury had known that there was no easy explanation for the bloody footprints, *and* that the victim's blood was not on Browning or any of his clothing, *and* that Browning's fingerprints were nowhere on the jewelry, *and* that the knife was not the murder weapon, *and* that the Wolfes were informants and Randy Wolfe was lying about Marsha Gaylord being in jail, *and* that Browning had been in the store with Gaylord just the day before, this would have been a completely different trial. The jury heard Pike say a few of those things, but he proved none of them, because his attitude toward criminal defense was "overcasting a shadow of a doubt, as opposed to proving." 5ER 1325. That was classic ineffective assistance warranting reversal of this conviction.

[46] Because the Nevada Supreme Court never considered the prejudicial effect of Pike's failure to learn the truth about the bloody footprints, that aspect of its prejudice determination is not entitled to §2254(d)(2) deference. See note 30, above.

MOTION TO EXPAND CERTIFICATE OF APPEALABILITY

The Court should additionally grant a Certificate of Appealability, and relief, on the following claims.

IV. BROWNING WAS DENIED HIS SIXTH AMENDMENT RIGHT TO TRIAL BY JURY BY THE TRIAL COURT'S FAILURE TO INSTRUCT ON THE ELEMENT OF DELIBERATION IN FIRST DEGREE MURDER.

The jury that convicted Browning of first degree murder was given an instruction defining the elements of that crime (see 4ER 943) which used the exact language this Court has twice held unconstitutional because it omits the separate element of deliberation. *See Riley v. McDaniel*, 786 F.3d 719, 724 (9th Cir 2015); *Polk v. Sandoval*, 503 F.3d 903, 910 (9th Cir 2007). Browning's Petition challenged his conviction on that basis (2ER 382-86), but the District Court found the issue unexhausted and denied a Certificate of Appealability. 1ER 4-6, 115-16, 119.

A Certificate should issue permitting review of an issue which has been dismissed on procedural grounds if "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and … whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

It obviously is more than "debatable"—it is the law of this Circuit—that "the use of [this] … instruction violated the Due Process Clause" because it

"'relieved the state of the burden of proof on whether the killing was deliberate as well as premeditated.'" *Riley*, 786 F.3d at 724 (quoting *Polk*, 503 F.3d at 910). Since the Nevada courts did not adjudicate the merits of this legal issue, it is before this Court *de novo*, and *Riley* and *Polk* control.

The remaining question is whether the District Court was inarguably correct in its exhaustion ruling. It was not, for several reasons.

First, Browning's state remedies were exhausted because they were "no longer available, regardless of the reason for their unavailability." *Woodford v. Ngo*, 548 U.S. 81, 92-93 (2006). In Nevada, jury instructions not objected to at trial or on appeal cannot be challenged in state habeas, *Stewart v. Warden*, 94 Nev. 516, 517, 579 P.2d 1244 (1978), and a statute of limitations requires state habeas petitions to be filed within one year after the remittitur on direct appeal. NRS 34.726(1); *see Loveland v. Hatcher*, 231 F.3d 640, 642–43 (9th Cir 2000). That deadline passed in August 1989. See 1ER 268 (8/16/88 denial of rehearing on appeal).

Because of this, the District Court should have analyzed the issue not as an issue of exhaustion but one of procedural default. "Exhaustion and procedural default are distinct concepts in the habeas context." *Franklin v. Johnson*, 290 F.3d 1223, 1230 (9th Cir 2002). The Respondent's Answer did not allege this claim was procedurally defaulted but rested on exhaustion. See

2ER 486-87. It thereby waived any default argument it might have had. "[P]rocedural default is a defense that state is obligated to raise, is waived by failure to assert, and is not jurisdictional requirement…." *Ward v. Chavez*, 678 F.3d 1042, 1052 n.6 (9th Cir 2012) (citing *Trest v. Cain*, 522 U.S. 87, 89 (1997)); see also *id*. (citing *Francis v. Rison*, 894 F.2d 353 (9th Cir 1990)) (holding "the Government waived procedural default defense that it failed to raise, despite the Government's asserting failure to exhaust argument").[47]

Even if the District Court was correct in treating this as an exhaustion issue, the procedural aspect of its ruling was debatable. Much like the petitioner in *Clemmons v. Delo*, 124 F.3d 944 (8th Cir. 1997), *cited with approval in Custer v. Hill*, 378 F.3d 968, 974-75 (9th Cir 2004), Paul Browning went to extraordinary lengths trying to make his appointed counsel preserve all his

[47] Moreover, even if the State established a default, Browning could have excused it by showing cause and prejudice or a fundamental miscarriage of justice. *Robinson v. Schriro*, 595 F.3d 1086, 1100 n.10 (9th Cir. 2010). Though the record on this is undeveloped, Browning asked the District Court for leave to develop it (see 2ER 539-541), and there is plainly a basis on which Browning could establish both cause, in his appellate lawyer's ineffectiveness, *see Murray v. Carrier*, 477 U.S. 478, 488 (1986), and a miscarriage of justice, because of the strength of the now-available evidence raising doubts about his guilt, *see Schlup v. Delo*, 513 U.S. 298 (1995). If the default defense is not waived, the case should be remanded so he can make these showings. *See, e.g., Matias v. Oshiro*, 683 F.2d 318, 321 (9th Cir. 1982) (reversing decision claim was "unexhausted" and remanding for determination of "cause" and "prejudice"); *cf. Woods*, 764 F.3d at 1139 (remanding so District Court can consider cause and prejudice in the first instance).

constitutional claims. Like Clemmons, he moved for leave to file a *pro se* brief in his habeas appeal, and informed the Nevada Supreme Court that "several substantive claims of error integral to a full and fair review have been omitted against my specific wishes and consent." 7ER 1677. Like the state court in *Clemmons*, the Nevada Supreme Court turned him down. 1ER 221-22. Browning later took the extra step of filing a Petition for Extraordinary Relief, which raised the premeditation instruction issue as its first ground for relief. 7ER 1704. The Nevada Supreme Court had discretion to rule on the merits of that Petition, *Chambers v. McDaniel*, 549 F.3d 1191, 1196 (9th Cir 2008), but for unexplained reasons chose not to do so. 1ER 185. Under *Clemmons*, that should have been enough to satisfy the exhaustion requirement.

In addition, exhaustion of state remedies is excused "if the [state] corrective process is so clearly deficient as to render futile any effort to obtain relief." *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (citing *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971)). Neither the District Court nor the Respondent have pointed to any case in which the Nevada Supreme Court has reversed a conviction based on an unconstitutional jury instruction, in a successive state habeas petition. To the contrary, the Nevada court has repeatedly refused to entertain such arguments, with regard to this very issue. *See, e.g, Lisle v. State*, ___ Nev. ___, 351 P.3d 725, 729 (2015), and cases there

cited. The exhaustion doctrine does not require resort to purely conjectural state remedies. *See Russell v. Rolfs*, 893 F.2d 1033, 1037-38 (9th Cir 1990). Nor does it require futile presentations to state courts of issues they have recently rejected, at least when there is no reason to believe "the [state] courts would have decided petitioner's case differently." *Lynce v. Mathis*, 519 U.S. 433, 436 n.4 (1997).

"The futility exception applies when … the highest state court has recently decided the same legal question adversely to the petitioner." *Fisher v. Texas*, 169 F.3d 295, 303 (5th Cir. 1999). The Nevada Supreme Court has recently and repeatedly refused to grant relief, on both substantive and procedural grounds, on this exact constitutional claim. *See Nika v. State*, 124 Nev. 1272, 1279-87, 198 P.3d 839 (2008); *Byford v. State*, 116 Nev. 215, 236–37, 994 P.2d 700, 714–15 (2000).

Finally, "[i]nordinate, unjustifiable delay in a state-court collateral proceeding excuses the requirement of petitioners to exhaust their state-court remedies before seeking federal habeas corpus relief." *Jackson v. Duckworth*, 112 F.3d 878, 881 (7th Cir. 1997); *accord, Phillips v. Vasquez*, 56 F.3d 1030, 1033-38 (9th Cir 1995); *Story v. Kindt*, 26 F.3d 402, 404-07 (3rd Cir. 1994). When the District Court ruled on exhaustion, Browning's case was 28 years old and had spent 23 years in state court. His original state habeas petition was filed

in 1989 and not finally resolved until 2004. The state petition languished in the state district court for a dozen years for reasons never explained. See 1ER 5; 1ER 191, n. 2.[48] To require Browning to run that decades-long gauntlet again, with no realistic hope of convincing the Nevada Supreme Court to change its mind on this issue, would be the epitome of futility.

A Certificate should issue and relief should be granted on this claim.

V. BROWNING WAS DENIED DUE PROCESS BY THE PROSECUTOR'S MISCONDUCT IN ARGUMENT TO THE JURY.

A Certificate should also be granted, and Browning's convictions reversed, because of prosecutorial misconduct so severe as to deny due process.

A. The prosecutor falsely told the jury that the victim's blood was on Browning's jacket.

At trial, prosecutor Seaton made a dramatic final argument to the jury. He said that "Hugo Elsen's blood" was on a tan jacket[49] found in the Wolfes' room, and then he showed the jury a picture of Browning wearing that jacket. 2ER 309-310, 341. He then told the jury that this was so damning "you don't need to spend five minutes in the deliberation room. Come back in here and tell me he's guilty.

[48] Eight and a half years ago, in 2007, the District Court found the lengthy delay in the state proceedings was exceptional enough to militate against federal absention while Browning's resentencing appeal was pending. 1ER 178.

[49] Although witnesses from the crime scene testified that the perpetrator was wearing a blue jacket, the jacket introduced at trial alleged to have belonged to Browning was tan. 2ER 309, n.6.

It's as simple as that." 2ER 309-310, 341; 3ER 899. In state habeas, this was proved to be untrue: the blood on the jacket did not belong to the victim. 1ER 33.

The Nevada Supreme Court concluded this was not prosecutorial misconduct because "although the prosecutor was wrong that the blood belonged to the victim, the evidence he relied on was not false: the blood on the coat was the same type as the victim's." 1ER 33; 1ER 214. The District Court found that ruling reasonable. 1ER 33.

It clearly was not. Although "the evidence he relied on was not false," Seaton's argument was. There is a difference between a person's blood type and a person's actual blood. A forensic expert who testified under oath that the blood on a jacket was "the victim's blood," based on a test showing only that it was the victim's blood type, would commit perjury. "The evidence relied on" would not be false, but the testimony would be. So was Seaton's argument. No fair-minded jurist could say otherwise.

The Nevada Supreme Court's rejection of this claim was an unreasonable application of clearly established Supreme Court law holding that false or misleading arguments by prosecutors violate due process, *Miller v. Pate*, 386 U.S. 1 (1967); *Alcorta v. Texas*, 355 U.S. 28 (1957), even where there is not frank perjury but only creation of a "false impression," *Alcorta*, 355 U.S. at 31. *See also*

Brown v. Borg, 951 F.2d 1011 (9th Cir 1991). That includes arguments misrepresenting or exaggerating facts in evidence.

> Misrepresenting facts in evidence can amount to substantial error because doing so "may profoundly impress a jury and may have a significant impact on the jury's deliberations." *Donnelly*, 416 U.S. at 646. This is particularly true in the case of prosecutorial misrepresentation because a jury generally has confidence that the prosecuting attorney is faithfully observing his obligation as a representative of a sovereignty, whose interest "in a criminal prosecution is not that it shall win a case, but that justice will be done." *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

Gall v. Parker, 231 F.3d 265, 313 (6th Cir. 2000).

Because the Nevada Supreme Court unreasonably failed to recognize this as constitutional error, it did not consider prejudice and is owed no deference on that issue. See note 30, above. The question the District Court should have asked is whether Seaton's argument had a "substantial and injurious effect" on Browning's due process rights. *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993); *see Karis v. Calderon*, 283 F.3d 1117, 1128-29 (9th Cir 2002). Clearly, it did.

This was not a situation where the prosecutor made an inadvertent error in the course of a long argument, and corrected himself. *Cf. Downs v. Hoyt*, 232 F.3d 1031, 1038 (9th Cir 2000). Seaton made sure that his false statement that "Mr. Elsen's blood" was on Browning's jacket had maximum impact by holding it back to the end of his rebuttal, when the defense had made its closing argument and had no opportunity to respond, and the jury was just about to begin deliberations.

Prejudice is magnified where "[t]he prosecutor's improper comments occurred during his rebuttal argument and therefore were the last words from an attorney that were heard by the jury before deliberations." *United States v. Sanchez*, 659 F.3d 1252, 1259 (9th Cir 2011) (quoting *United States v. Carter*, 236 F.3d 777, 788 (6th Cir. 2001)). And Seaton magnified it even further by telling the jury to convict Browning in "five minutes" based on this supposed fact alone. 3ER 899-900.

Prejudice, like materiality, can often be measured "by taking the word of the prosecutor." *Kyles*, 514 U.S. at 444. Seaton's representation to the jury that "Mr. Elsen's blood" on Browning's jacket solely and conclusively established guilt is the best evidence, if any is needed, of his misrepresentation's "substantial and injurious effect." It warrants issuance of a Certificate and relief.

B. The prosecutor told the jury the presumption of innocence is a "farce" and a "façade."

Also in closing argument, prosecutor Seaton told the jury the presumption of innocence is a "façade" (because a defendant "may be guilty") and had been shown to be a "farce" in Browning's case. 2ER 351; 3ER 846. On direct appeal, the Nevada Supreme Court held, without citation or explanation, that "in light of the overwhelming evidence presented at the guilt phase of trial," "[e]ven this outrageous but unpreserved act of misconduct … does not prejudice Browning to the extent justifying reversal." 1ER 272 n1. In Browning's state habeas appeal,

after significant portions of the allegedly "overwhelming evidence" had been debunked (see pages 53-61, above) the Nevada Supreme Court simply repeated this determination. 1ER 198, 213.

The District Court first said it "agrees with the Nevada Supreme Court" that "[t]he comments of the prosecutor were improper," but then said the "gist" was a "legitimate argument" about the burden to overcome the presumption of innocence. 1ER 64. It then said "[w]ith this in mind, and considering the weight of the evidence against Browning, this court finds that the Nevada Supreme Court's conclusion … was not objectively unreasonable." *Id.*

The disagreement between the District Court and the Nevada Supreme Court over the propriety of the prosecutor's argument—whether it was "outrageous" or a "legitimate argument"—shows that issue is debatable. *Slack*, 529 U.S. at 484. The state court had the better of that particular debate. Argument removing or minimizing the presumption in the eyes of the jury is improper and highly prejudicial, and can deny due process. *See, e.g., Coffin v. United States*, 156 U.S. 432 (1895); *Bartlett v. Battaglia*, 453 F.3d 796 (7th Cir. 2006); *Mahorney v. Wallman*, 917 F.2d 469 (10th Cir. 1990).

There is also ample reason to debate the reasonableness of the Nevada Supreme Court's conclusion that the disparagement of the presumption of innocence did not "prejudice Browning to the extent justifying reversal." For one

thing, that is not the correct constitutional standard, as the District Court recognized: The standard is, at least, whether that misconduct "rendered the petitioner's trial fundamentally unfair." 1ER 60 (citing *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)[50]). That in turn depends on several things (*id*., citing *Darden*, at 182), none of which other than the allegedly "overwhelming evidence of guilt" was considered by the Nevada Supreme Court. See 1ER 272. Nothing in the District Court's decision indicates it considered anything else, either. See 1ER 60-61.

Although Browning's jury was given one of the potentially curative instructions referenced in *Darden*—that "arguments … of counsel are not evidence" (4ER 959)—Seaton's argument had nothing to do with evidence. What Seaton's argument did was distort the burden of proof, on which the jury was given an instruction that was marginally constitutional, at best.[51] Although Browning's ineffective defense counsel did not object to the argument, neither did he in any

[50] Because Seaton's "farce" and "façade" argument was one that undermined "specific guarantees of the Bill of Rights," *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, (1974) indicates that a less demanding prejudice standard than *Darden*'s should apply, one that does not "require[e] proof that the entire trial was … rendered fundamentally unfair" by the misconduct. *Mahorney*, 917 F.2d at 472.

[51] The jury was instructed that a "reasonable doubt" had to be "actual and substantial," and was satisfied by an "abiding conviction of the truth of the charge…." Although such instructional language may be constitutional, "defining reasonable doubt as a substantial doubt, 'though perhaps not in itself reversible error, often has been criticized as confusing,' *Victor v. Nebraska*, 511 U.S. 1, 20 (1994) (quoting *Taylor v. Kentucky*, 436 U.S. 478, 488 (1978)).

way invite it. And even with regard to the strength of the evidence, the Nevada Supreme Court formed its appeal conclusion on a record full of falsehoods and distortions. See pages 23-24, above.

This Court should grant a Certificate and review that decision, and reverse on that basis, as well.

VI. BROWNING WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY HIS TRIAL LAWYER'S WHOLESALE FAILURE TO INVESTIGATE AND PREPARE FOR TRIAL.

As previously noted, Browning's petition in the District Court, like his arguments in the state court, challenged Pike's overall failure to investigate the case and prepare for trial. 2ER 306 ff. According to Pike's time records, from the time he was appointed through the trial and sentencing, almost exactly a year later, he spent somewhere between five (5) and twelve (12) hours on any kind of actual investigation. 2ER 306-307; 6ER 1570. Although he was authorized to use an investigator, he did not have the investigator perform basic tasks including interviewing witnesses, despite the investigator's protests that the investigation was inadequate. 2ER 307-8; 6ER 1494, 1497, 1509, 1513-14. Pike's stated approach to the case was "overcasting a shadow of a doubt, as opposed to proving." Note 43, above.

The investigatory Pike was assigned, Martin Schopp, testified at the post-conviction hearing that it was not until April 7, 1986—a month after Pike had

reported "ready" for trial—that Pike asked him to do anything. 2ER 307; 6ER 1499. But Schopp said his work did not actually begin until August 4, 1986, because Pike didn't provide him the discovery file. 2ER 307; 6ER 1499-1500. And when Pike finally provided it, the discovery consisted of only two officer reports (Leonard and Radcliffe) and one witness statement (Randall Wolfe). 2ER 307. [52]

Pike's approach of simply trying to "overcast" doubt was not limited to his decision regarding witness interviews. He did nothing to develop any evidence to challenge the prosecution's case. He did not consult or seek to hire any expert witnesses except—in keeping with Clark County defense practice at the time[53]—a polygrapher to examine his client, see 4ER 910. Among the many ways Browning was prejudiced by this, the most glaring is Pike's inability to challenge the prosecution's claim that the blood on the jacket found with Browning in the Wolfes' room was "Hugo Elsen's blood."

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[52] In state habeas, Pike testified he asked Schopp to interview the Wolfes, as well as other witnesses. 1 ER 34; 5ER 1322. Schopp swore the opposite: that he notified Pike of witnesses that needed to be interviewed, including the Wolfes, but Pike never authorized them. 2 ER 308, 6ER 1500. Whichever was true, it is undisputed the interviews were not done.

[53] *See Miranda v. Clark County*, 279 F.3d 1102, 1106 (9th Cir. 2002) (describing Clark County use of polygraphs on indigent defendants). Browning's polygraph was reportedly inconclusive and was never put in evidence. See 2ER 553-54.

The Nevada Supreme Court refused to consider this aspect of Pike's ineffective assistance, saying that Browning's postconviction appeal counsel had not "provided any cogent argument, legal analysis, or supporting factual allegations" in support of it. 1ER 203. But they clearly had: in support of their general argument that "trial counsel failed to properly investigate the facts of this case" (1ER 192), their Opening Brief specified that "Mr. Browning's defense counsel failed to perform more precise testing of the prosecution's blood evidence, and essentially let it go unchallenged." Dkt. 59, Exh. 232 pg. 23 n.11. In their Reply Brief, they responded to the State's newly-minted argument that, although it had now been proved that the blood was not Mr. Elsen's, there was no proof that tests were available in 1986 to show that, as follows:

> Subsequent DNA testing has conclusively proven that the blood on the jacket was not Mr. Elsen's. While this DNA testing was not available at the time, there was other tests in common use that were much more discriminating than the simple ABO typing used by the State and accepted without challenge by defense counsel.

Dkt. 59, Exh. 251, pg. 16.

> At the time of Browning's trial, tests more advanced than ABO typing were available. See *Santillanes v. State*, 102 Nev. 48, 49, 714 P .2d 184 (1986) (this Court notes that an enzyme and protein blood test was used to determine that, though the defendant and the victim both had type 0 blood, a stain on the defendant's clothing could have been the victim's blood but could not have been his own); *U.S. v. Alderdyce*, 787 F.2d 1365, 1368 (9th Cir 1986) (noting use of blood enzyme testing); (9th Cir 1986)*U.S. v. Gwaltney*. 790 F.2d 13 78 (9th Cir 1986) (approving use of enzyme testing in conjunction with blood type testing as applied to analysis of semen in a May, 1984 trial); *Herrera v. Collins*, 506 U.S. 390, 422 (1993)(enzyme

> testing used in 1982 trial); *State v. Mower*, 622 P.2d 745,747 (Ct.App.Ore. 1981) (discussing use of a six-factor enzyme test which was normally undertaken by the prosecuting authorities); *State v. Washington*, 622 P.2d 986, 992 (Kan. 1981) (discussing reliability of the Multi-System enzyme analysis method and finding the test to be reliable and generally accepted in the scientific field as illustrated by its present use in over 100 criminal laboratories in this country and the FBI laboratory); *People v. Reilly*, 196 Cal.App.3d 1127, 1136-53 (1987); Andre Moenssens & Fred Inbau, SCIENTIFIC EVIDENCE IN CRIMINAL CASES 301 (2nd ed., 1978); 3 WHARTON'S CRIMINAL EVIDENCE § 594 (1987).

Id. at n.3.

Nonetheless, the Nevada state court said it was giving this ineffective assistance claim "no consideration," for lack of "cogent argument, legal analysis, or supporting factual allegations." 1ER 203 1ER 203.

Because of this, this aspect of Browning's ineffective assistance claim was before the District Court *de novo*, but subject to a potential state procedural bar. It is at least debatable whether such a bar could be sustained. *Cf. Lee v. Kemna*, 534 U.S. 362, 376 (2002) (arbitrary application of state procedural bar is not adequate to preclude federal habeas relief). Browning's counsel had shown and argued that Pike did virtually nothing to develop the facts of the case, including the fact first revealed in the state habeas hearing that the blood on the jacket was not actually Mr. Elsen's. When the State responded with the clearly disingenuous argument that there was no showing Pike could have proved that critical fact if he had tried, because the technology with which to do so was not available, they responded with

a string cite of cases showing it was. What additional "analysis" or "supporting factual allegations" were required to have their argument considered is a mystery.

It is well established that a defense lawyer's unreasonable failure to obtain expert assistance necessary to support his client's case and meet the prosecution's is ineffective assistance, and it was so in 1986. *See Duncan v. Ornoski*, 528 F.3d 1222, 1235 (9th Cir 2008) (and cases there cited).

In this case that was just one of many manifestations of Pike's near-complete failure to investigate and prepare his client's defense. Yet the Nevada Supreme Court refused to consider the representation as a whole and the total impact of the many consequences of Pike's nonfeasance and ineffectiveness. See 2ER 306-322, 356-72.[54] It is at least debatable that the District Court's

[54] Among other things, in addition to the failures described above, Mr. Pike failed to adequately cross-examine Josy Elsen and Debra Coe regarding their alleged identifications of Browning (2ER 314-15, 362-68); did not get a forensic evaluation of the knife alleged to be the murder weapon (2ER 317); did not bring out at trial the fact that Browning had no blood, cuts, or scrapes on him when he was arrested (2ER 318-19); failed to secure the trial testimony of Marsha Gaylord to explain Browning's fingerprints in the jewelry store (2ER 319-20); failed to find a witness who could have testified to Randall Wolfe's efforts to sell stolen jewelry (2ER 320); did not challenge the prosecution's assertion that police found Browning "surrounded by" the stolen jewelry (2ER 320-21); did not object to the prosecutor's improper arguments denigrating the presumption of innocence and falsely asserting that Browning was involved in prostitution (6ER 356, 358); failed to bring out evidence that Browning had no heroin in his system (2ER 358-359); failed to object to the prosecutor's false representation to the jury that Browning's jacket had the victim's blood on it (2ER 360-361); and failed to present evidence refuting the prosecution's argument (and Randy Wolfe's testimony) about when Marsha Gaylord was in jail (2ER 361).

deference to its decision was error. A Certificate should issue so this Court can consider that, as well.

CONCLUSION

This Court has rarely, if ever, reviewed a capital conviction with a combination of prosecutorial misconduct and ineffective defense as egregious as this one. The Nevada Supreme Court's decision affirming it failed to recognize the seriousness of these errors in light of clearly established Supreme Court law. The District Court's denial of the writ should be reversed, and the writ should be granted.

DATED this 9th day of September, 2015.

Respectfully submitted,

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NO. 15-99002

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

* * *

PAUL LEWIS BROWNING,

Petitioner-Appellant,

V.

RENEE BAKER, et al.,

Respondents-Appellees.

DC No: 3:05-cv-00087-RCJ-WGC
Nevada (Las Vegas)

Appeal from the United States District Court
for the District of Nevada

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I.

STATEMENT OF JURISDICTION

This appeal is from a judgment of the United States District Court for the District of Nevada denying a petition for writ of habeas corpus, 28 U.S.C. § 2254. The district court denied the petition and entered judgment on August 1, 2014. EOR 14. Appellant Paul Browning ("Browning") filed a notice of appeal on February 5, 2015. SEOR 517. The district court granted a certificate of appealability on five issues. EOR 74. Consequently, this Court has jurisdiction pursuant to 28 U.S.C. §§ 1291, 2253.

II.

STATEMENT OF THE ISSUES

The United States District Court, pursuant to Rule 11 of the Rules Governing Section 2254 Cases, ordered that a certificate of appealability is granted on the following claims in Browning's fifth amended petition for writ of habeas corpus:

- the claim in Claim 1, at paragraphs 5.7 to 5.7.3, that trial counsel was ineffective for conducting an insufficient investigation regarding the bloody shoe prints;

- the claims in Claim 1, at paragraphs 5.9 through 5.97, 5.12 through 5.12.4 and 5.16 through 5.16.4, that trial counsel was ineffective for failing to better investigate the credibility of the Wolfes, and better impeach the Wolfes' testimony;
- the claim in Claim 1, at paragraphs 5.13 through 5.13.4, that trial counsel was ineffective for not interviewing Officer Branon to learn that Branon

received from Hugo Elsen the description of the murderer's hair, and that the description did not match Browning's hair;

- the claims in Claim 4, at paragraphs 5.43 to 5.43.3, under *Brady* and *Napue*, that the prosecution withheld exculpatory information, and presented testimony that was misleading or false, when it presented the trial testimony of David Horn, whose testimony suggested, in essence, that the bloody shoe prints were likely left by paramedics or off duty detectives; and

- the claim in Claim 4, at paragraphs 5.46 through 5.49, under *Brady*, that the prosecution withheld from the defense information related to the credibility of Randall Wolfe.

Order, EOR 74.

III.

STATEMENT OF THE CASE

A. Statement of Facts:

1. 1986 jury trial presentation of facts.

The trial transcript of the December 1986 jury trial establishes the following facts:

a. Hugo Elsen was murdered in his store:

From 1955 through November of 1985, Hugo Elsen and his wife Josy Elsen, immigrants from Switzerland, were the proprietors of the Elsen Jewelry Store located at 520 South Las Vegas Boulevard. Trial Transcript, ("TT"), EOR 656-658.

On November 8, 1985, at approximately 4:20 p.m., Mr. Elsen was fatally attacked by Paul Lewis Browning. TT, EOR 659-661 (Josy Elsen's testimony that event occurred between 4:00 and 4:30 pm); EOR 690 (Debra Coe testimony establishing that she was notified of the event at 4:30 pm) and EOR 723 (Las Vegas Metropolitan Police Department, ("LVMPD") Officer Radcliff testifying he responded to the scene at 4:20 p.m.).

Browning stabbed Mr. Elsen six times with a single-edged knife. TT, SEOR 402-408, 417. The specific cause of death was attributed to one wound which pierced his heart in three separate places. TT, SEOR 409-410, 412. This indicated that the knife had been partially withdrawn and reinserted twice after the initial thrust. TT, SEOR 410-411. The attack resulted in an inoperable injury to the septum dividing the right and left chambers of the heart. TT, SEOR 409-410.

b. Paul Browning was observed murdering Hugo Elsen and fleeing from the scene:

Josy Elsen was an eyewitness to the murder. TT, EOR 661. She had been resting in a back room of the jewelry store when she heard a sound "like somebody push against the [glass] showcase." TT, EOR 659-661. When Mrs. Elsen went out into the front of the jewelry store, she saw a "black guy" with a "blue cap" and a raised knife over Hugo. TT, EOR 661. Mrs. Elsen further described the "black man with a blue cap" as having hair that "was a little bit puffed out on the bottom"

under the blue cap. TT, EOR 663. The "guy" had pushed Hugo way back into a corner on the vendor's side of the jewelry display counters in a sitting position on the floor. TT, EOR 662. At trial, Mrs. Elsen identified Paul Lewis Browning as the black man she saw over her dying husband. TT, EOR 663-665. Furthermore, she positively identified State's Exhibit 22-A as the blue cap that Browning was wearing at the time of the attack on Hugo Elsen. TT, EOR 665. Browning's fingerprints were also recovered from a broken shard of glass from the door on the vendor's side of one of the jewelry display counters and from the top of another display counter. TT, EOR 643-645; SEOR 351. After witnessing the events just described, Mrs. Elsen fled out the back entrance of the jewelry store and ran next door for help. TT, EOR 666.

At approximately 4:30 p.m., Debra Coe was working at the office immediately south of the jewelry store when Mrs. Elsen "came over to our back door and told me … that there was a man standing over Hugo with a knife." TT, EOR 688-690. Debra went straight to the front door of her office to look out and witnessed a black man running "south" at a "fast trot." TT, EOR 691. Debra observed the man for about fifteen seconds before she lost sight of him. TT, EOR 691-692. In court, Debra described the man she saw as being about six feet tall, 27 years old, black, with a mustache, wearing a blue cap, Levi's, a jacket, with hair

stuck out about an inch over his ears underneath the cap. TT, EOR 696-697. Debra also positively identified Exhibit 22-A as the hat she saw Browning wearing as he ran by her front window. TT, EOR 696. She was later that day taken by police to a place for a show up identification were she saw Browning without a shirt, jacket or hat, but his hair pressed down, still sticking out around the ears, like he had just taken the hat off. TT, EOR 698-700. Browning was the second black man that was presented to Debra for identification, the first being a black man, actually wearing a blue cap, who she indicated was "definitely not" the person she had seen earlier. TT, EOR 701. In court, Debra identified Browning as the person she saw running by her front window. TT, EOR 697-698.

Charles Woods, owner of a jewelry store located three buildings south of The Elsen Jewelry Store, was standing in front of his store at the time of the murder. TT, EOR 710-711. At this time, Charles saw a black man who was wearing a dark colored hat, dark pants and a light colored shirt jog past him coming from the direction of the Elsens' store. TT, EOR 712-713. Charles Woods was also taken by police to a place for a show up identification and he positively identified Browning, without shirt or cap, as the man who he observed earlier. TT, EOR 717-718. Charles Woods also identified Browning in open court. TT, EOR 711.

c. Hugo Elsen identified a black man with a blue baseball cap as his attacker:

After Debra Coe saw Browning run by her window, she and Mrs. Elsen went back to the jewelry store to check on Hugo Elsen. TT, EOR 692. They found Mr. Elsen slouched against the wall where Mrs. Elsen had last seen him. TT, EOR 693-694. Ms. Coe approached Hugo, scooted him down so he wasn't leaning against the wall, put a pillow under his head and covered him with a blanket. TT, EOR 693. Hugo told Ms. Coe that "he had been stabbed" but Ms Coe told him to be quiet, lay still and that the ambulance was on its way. TT, EOR 694. Ms. Coe waited for two or three minutes with Hugo until the paramedics arrived. TT, EOR 694-695.

David Radcliff was one of the first officers on the scene responding to the Hugo Elsen Jewelry at 4:20 p.m. along with Officers Branon and Robertson, TT, EOR 723-724. Officer Radcliff then entered the store and found Hugo Elsen lying behind a counter at the north end of the business in a pool of blood. TT, EOR 724. Officer Radcliff then moved the "cabinet in front where all the jewelry was" to gain access to Mr. Elsen. TT, EOR 724-725. Officer Radcliff found Hugo still conscious but in "extremely serious" condition. TT, EOR 725. In response to Officer Radcliff's query, Mr. Elsen identified "a black man wearing a blue baseball

cap" as his attacker. TT, EOR 725. Officer Radcliff then observed the paramedics arrive and provide medical treatment to Mr. Elsen. TT, EOR 725-726.

d. Paul Browning fled to the Normandy Motel; admissions:

At the time of the murder, Randy Wolfe had been living at the Normandy Motel with his wife, Vanessa. TT, EOR 741. Randy Wolfe became acquainted with Browning three or four days prior to the murder when Browning and his girlfriend, Marcia Gaylord, checked into the motel. TT, EOR 745. Vanessa knew Marcia from Los Angeles where the two women had worked together. TT, EOR 745-746.

On the day of the murder, at approximately 4:30 p.m., Randy was working on his landlady's car in the parking lot in front of his apartment when he heard someone yelling at him from his apartment. TT, EOR 746-748. Randy climbed the stairs to his apartment and went inside and observed Browning sitting on the bed. TT, EOR 748. Browning was wearing a blue cap that said "Hollywood" on it. TT, EOR 750. Randy asked what was Browning doing in his apartment, and Browning replied: "Be cool. Be cool, because I just robbed just robbed for this jewelry and I think I killed this guy." TT, EOR 750.

Browning had jewelry dumped on the bed in front of him. TT, EOR 752. He admitted to Randy Wolfe that he had taken the jewelry from the store. TT,

EOR 375. Randy Wolfe described the items in the room as including "long blue boxes" and he identified in Court various watches, chains and rings that Browning had in his possession in Randy's motel room. TT, EOR 752-753. These same jewelry items were identified by Josy Elsen as items that were taken from her store at the time of the murder. TT, EOR 667-673.

As a ruse to get out of the motel room, Randy Wolfe told Browning that he was going to buy some heroin. TT, EOR 756-757. Browning requested Randy Wolfe buy him some also and Randy then left the room. On the way down the stairs, Randy ran into his wife Vanessa and told her: "Hey, look. D.C. [Browning's nickname] is up in the house. He's just robbed a place. He said he just killed somebody. Go up there and keep him cool for a minute. I am going to go get the police." TT, EOR 757.

Vanessa then entered the apartment and saw Browning sitting on the bed and removing his shirt. TT, EOR 796-797. Vanessa identified trial exhibit 22-A as the blue "Hollywood" cap Browning was wearing at the time. TT, EOR 797. She also observed Browning shaking water off of a knife and "putting the knife back into the case" which she identified in court. The defendant told her: "Help me get rid of this stuff. I think I just killed somebody. I am not going to do life. Get rid of this. I am not going to do life." TT, EOR 804. Vanessa then took the shirt, the

knife and the blue hat and placed the clothing items in a trash dumpster and the knife in a small closet under the stairway of the motel. TT, EOR 805-809.

Vanessa then went back upstairs to the apartment and assisted Browning in cutting the price tags off some jewelry the defendant had thrown on the bed. TT, EOR 810. Vanessa identified in court the jewelry items that had been previously identified by Mrs. Elsen as being the jewelry that was in Browning's possession; specifically noting a silver turquoise ring and a Masonic-style watch. TT, EOR 799-801. Vanessa put the price tags in an empty milk carton and threw the milk carton in the trash dumpster with the blue cap. TT, EOR 811. When Vanessa reentered the apartment after disposing of the milk carton, Browning was getting nervous. TT, EOR 813-814. Vanessa reassured Browning and she then went to go look for Randy Wolfe. TT, EOR 814-815.

e. Police response to the Normandy Motel:

During the course of the ongoing investigation, Officer Radcliff was outside the Elsen Jewelry Store with some other officers, when he observed Randy Wolfe, who he knew through a previous law enforcement contact, approach the group. TT, EOR 726. Randy Wolfe informed the group of officers, including Officer Radcliff and Sergeant Michael Bunker, "[h]ey, look, if this place has been robbed by a black guy, I have a black guy up in my house that's got a bunch of jewelry.

He said he just robbed the place." TT, EOR 759. As a result, several officers responded to the Normandy Motel, including Officer Radcliff, Sergeant Bunker and Randy Wolfe. TT, EOR 727, 760 and SEOR 365. Randy Wolfe then provided consent to the officers to enter his apartment at the Normandy Motel. TT, EOR 760.

Prior to entering the apartment, officers identified themselves and called the person inside the apartment numerous times and after receiving no response entered the apartment forcibly through a "door kick." TT, EOR 729. Upon entry, Paul Browning was observed sitting on the left corner of the bed just inside the door. TT, EOR 729-730. Several items of jewelry were immediately apparent scattered along the floor of the eastern most corner of the room. TT, EOR 730-731, see also Evidence Impound Report, EOR 1020 (identifying three watches "recovered on floor on east side of bed"). Browning was then taken into custody, read a *Miranda* warning by Sergeant Bunker and then driven by Officer Radcliff to the location of the show-up identifications by witnesses Coe and Woods previously mentioned. TT, EOR 731-732.

The jewelry, knife, clothing and discarded price tags were recovered by the responding officers. TT, SEOR 379-386. Browning's fingerprint was recovered

from the face of a Casio watch. TT, SEOR 377-379, 351 (identifying prints belonging to "Robert Johnson" a.k.a. Paul Browning).

f. Browning's attempt to escape:

After being taken into custody at the Normandy Motel, and having been presented to Debra Coe and Charles Wood for identification, Browning was then taken to the detective bureau and handcuffed to a bar in the room by Officer Radcliff. TT, EOR 732. Browning was momentarily left alone and he apparently picked the lock of one of the handcuffs with a tooth broken from his comb. TT, EOR 734. Browning was recovered by Sgt. Bunker in a stairwell leading to the outdoor parking area of the detective bureau. TT, SEOR 367-368.

2. 1999 evidentiary hearing findings of fact.

Browning was granted an evidentiary hearing to develop claims asserted in a "Revised Second Amended Petition" filed in state court. Evidentiary hearings were held on June 28, 1999 and on November 8, 1999 through November 12, 1999, whereupon Browning presented the testimony of 25 various witnesses in support of his petition. On October 24, 2002, the state district court made the following findings of fact relevant to the evidentiary hearing testimony of Browning:

///

a. Browning and his testimony regarding "a black Cuban" was found to be not credible.

The state district court made the following findings of fact regarding the evidentiary hearing testimony and credibility of Paul Lewis Browning:

> Defendant, [Browning], testified at the evidentiary hearing to his version of the events of 1985. That version included that he had previously been in the jewelry store and stolen a gold chain. On the date in question, he saw a yellow car on Las Vegas Boulevard and approached it. In the car was Randy Wolfe. Later, a black Cuban came back to the car and Randy told Defendant to meet him at his motel room. Conspicuously missing from Defendant's testimony was the fact that Fredrick Ross was in the car.
>
> Defendant testified that he told his attorney, Randy Pike, about various leads that he wanted investigated…
>
> Randy Pike, Defendant's trial counsel, testified inapposite to Defendant. Specifically, he testified that Defendant did not ever give him a cogent explanation of the events of the day in question.
>
> Mr. Pike testified that he met with Defendant at least twenty (20) times prior to trial.
>
> This Court finds that Defendant, [Browning], lacks credibility…

EOR 224-225, ¶¶ 3, 4, 5, 6 and 8.

///

///

b. Fredrick Ross and his testimony regarding "the black Cuban" was found to be not credible.

The state district court made the following findings of fact regarding the evidentiary hearing testimony and credibility of Fredrick Ross:

> At the evidentiary hearing, Frederick Ross, a former prison inmate, testified that in November of 1985, he got into a yellow car with Randy Wolfe and a black Cuban at Las Vegas Boulevard and Fremont. The car proceeded on Las Vegas and stopped. The black Cuban got out of the car and went into a shop. At this point, Defendant walked across the street and stopped at the car to talk to Mr. Wolfe. The Cuban came back to the car, had some words with Defendant, and got into the car. The Cuban had a brown bag with jewelry hanging out. At this point, Mr. Wolfe told Defendant to meet him back at Mr. Wolfe's room.
>
> Mr. Ross claims to have first encountered Defendant in 1989 in the Nevada State Prison in Carson City. At that time, he did not tell him about the information he allegedly had. It wasn't until 1992 that Mr. Ross allegedly came forward. However, Mr. Ross admitted that he was in contact with defense counsel in 1990 and did not relay this information. Mr. Ross did not complete an affidavit until 1996…
>
> By his own admission, Mr. Ross is a career experienced criminal. He had over one hundred arrests and multiple felony convictions. During the time in question, he sold drugs and used drugs. Moreover, he has repeatedly lied to the police as well as to various other people. In short, the Court did not find Mr. Ross to be a credible witness.
>
> This Court specifically finds that Mr. Ross lacks credibility…

> …there is no evidence from which to support that a black Cuban had any connection to the crime other than the self-serving testimony by Defendant and the wholly uncredible testimony of Fredrick Ross. Even Defendant's testimony was rebutted by Mr. Pike. Mr. Pike testified that Defendant made vague references to a black Cuban but never gave his complete story to Mr. Pike even though there were many pre-trial opportunities to do so. The supposition that anyone, other than Defendant, committed the crime is based on Defendant's belated self-serving testimony and not supported by any credible evidence…

EOR 225-226, 229, ¶¶ 9, 11, 12, 13, 30.

c. The state district court found no evidence the Wolfes received any undisclosed benefits which induced their testimony at trial.

The state district court made the following findings of fact relevant to prosecutor, Dan Seaton's, disclosure of benefits to the Wolfes to induce their testimony at trial:

> The prosecutor, Dan Seaton, testified at the evidentiary hearing. He testified that there were not any undisclosed deals, either express or implied, with Randy and Vanessa Wolfe, although he did endeavor to help them after the trial was over.
>
> …There is absolutely no evidence in the record that there were any deals, favors or quid pro quo. Based on the evidence, this Court hereby finds that there were no undisclosed deals made with the Wolfes.
>
> The State disclosed to the Jury all of the information relating to the credibility of Randy and Vanessa Wolfe

> including that they were both drug users, Vanessa was a prostitute, and that they had kept some of the stolen jewelry the Defendant had brought to their room and had lied about it while under oath at the preliminary hearing.
>
> There is no evidence that the Wolfes received any undisclosed benefits which induced their testimony at trial. The fact that Mr. Seaton, after the trial in this matter, discussed Randy Wolfe's participation with a sentencing judge in a case where Mr. Wolfe was the defendant and that he later helped him get a legitimate job is not relevant as this Court finds that Mr. Wolfe neither knew about or relied upon those facts. Indeed, it appears that Mr. Seaton did not even decide to help Mr. Wolfe until after he was done testifying.

EOR 226, ¶¶ 14-17.

d. Findings regarding Mr. Elsen's description of his assailant's hair was not material.

The state district court made the following findings of fact relevant to trial counsel, Randy Pike, and his pretrial investigation of Mr. Elsen's description of his assailant's hair:

> Former Las Vegas Metropolitan Police Officer Branon testified at the evidentiary hearing that he interpreted the statements by Mr. Elsen as describing the Defendant's hair as a "Jerry Curl." The jury at trial was aware that Defendant's hair was described as a "Jerry Curl." Even had the jury known that the description was an interpretation of a dying declaration by Mr. Elsen, it probably would not have affected the outcome of the trial.

EOR 227, ¶ 24.

e. Findings regarding the bloody footprint evidence.

The state district court made the following findings of fact relevant to trial counsel, Randy Pike, and his pretrial investigation of the bloody footprint evidence:

> Officer Branon testified at the evidentiary hearing that he was the first officer on scene. His recollection, some fifteen (15) years after the crime, was that the bloody footprints were present prior to the medical and other police personnel arriving on the scene. Even if Officer Branon's testimony would have been the same in 1986 when the trial occurred, it would not have proven that there was a different or second assailant. As such, it probably would not have affected the outcome of the trial.
>
> …The evidence before the jury was that the bloody footprints were not Defendant's. When asked why he did not determine whose footprints those were, Mr. Pike testified:
>
> > "I didn't interview the paramedics. There was a report – and I don't know whether it came into stipulation, or the testimony, that the shoes that Mr. Browning had on at the time that he was arrested did not match the track, and there was nothing to indicate that Mr. Browning had any shoes to match that."
> >
> > "In a criminal defense case it is overcasting a shadow of doubt, as opposed to proving. So if I had interviewed the ambulance driver, and it had been found that there had been – they had shoes that matched the track, then I would have proved definitely

> that it wasn't the Cuban that did it. So there is an art in a criminal case in not asking one too many questions on the cross-examination, much like the question you just asked."

That testimony demonstrates that Mr. Pike made a strategic decision not to identify the footprints because they were not his client's and he could argue that to the jury.

> …The fact is that if Mr. Pike had taken the shoes of paramedics or police officers to match against the footprint, the State, through those witnesses, would have learned about the effort and done the same investigation. If one of those shoes matched, Defendant's defense of the Cuban left the prints would have been compromised. It was a good trial strategy to leave the source of the prints unknown, which could then be argued to the jury. Thus, Mr. Pike was not acting unreasonably.
>
> More importantly, Defendant would have to show prejudice from Mr. Pike's failure to identify the source of the prints. It is Defendant's burden on post-conviction to prove his factual allegations. The only way to demonstrate prejudice would be to determine all of the people at the scene that night and check their shoes. Nobody that was present that evening testified and no shoes were admitted at the evidentiary hearing. As such, Defendant has not shown that the prints did not come from the paramedics, police officers, independent

> witnesses or anyone else. As such, Defendant cannot establish prejudice.

EOR 227-229. ¶¶ 25-28.

3. Nevada State Courts' findings of "overwhelming evidence."

The Nevada Supreme Court, on direct appeal, found that Browning's conviction was based on "overwhelming evidence" and summarized the facts of the case as follows:

> At approximately 4:20 p.m. on November 8, 1985, Hugo Elsen was senselessly stabbed to death while working in his jewelry store. Josy Elsen, Hugo's wife, was resting in the back room of the jewelry store at the time of the killing. When she heard a scuffling sound, Josy entered the showroom where she saw a black man wearing a blue cap squatting over Hugo and holding a knife. Josy immediately fled out the back of the store. Appellant Paul Lewis Browning was apprehended shortly thereafter. Based on *overwhelming evidence*, Browning was convicted of Hugo's killing.

Opinion, EOR 269 (*emphasis* added).

Fourteen years later, after evidentiary proceedings on "Browning's Revised Second Amended Petition," the state district court continued to find that Browning's guilt was based upon "overwhelming evidence:"

> …The facts at trial, which are undisputed, are as follows: On November 8, 1985, Ms. Elsen heard her husband pleading for his life in the store. She exited the back room and saw a black male stabbing her husband to death. This black male was seen fleeing from the store.

Defendant was found shortly thereafter in a motel room with the stolen jewelry and a tan jacket. Defendant was arrested and at the homicide bureau, Defendant extricated himself from handcuffs, left an interrogation room and was eventually apprehended attempting to flee down the back stairs.

The other facts proven at trial that were relevant were that Ms. Elsen testified that Defendant appeared to be the person who killed her husband. Ms. Coe and Mr. Woods identified Defendant as the man fleeing the store. His fingerprints were found at the scene. Most importantly, his fingerprint was found on a shard of glass that was broken during the murder. Randy and Vanessa Wolfe testified that Defendant had arrived at their motel room and told them that he had robbed the jewelry store and he thought he killed someone. He washed a knife that was consistent with the murder weapon and gave it to Vanessa Wolfe and asked her to get rid of it. She led the police to where she had hidden it. He then asked Randy Wolfe to go "cop" some heroin for him. Randy Wolfe left the motel room and contacted a police officer. Three days prior to the murder, a photograph had been taken of Defendant wearing the tan jacket.

Defendant asserts that Mr. Pike was ineffective for not arguing that the witnesses did not see jewelry boxes in Defendant's hand. Such an argument would not have been reasonably probable to have changed the outcome of the trial in view of the overwhelming evidence of Defendant's guilt: two eyewitnesses identified him as being the person they saw leaving the scene, the Wolfes testified that he arrived at their motel room a short time after the murder a couple of blocks from the murder scene with a large quantity of stolen jewelry, confessed to them, gave Vanessa Wolfe a knife consistent with the murder weapon and asked her to dispose of it, was apprehended at the Wolfes shortly thereafter by the

> police in possession of much of the stolen jewelry, a while later tried to escape from police custody, and his fingerprints were found at the murder scene."

Findings of Fact, Conclusions of Law and Order, EOR 224, ¶¶ 1, 2, EOR 230, ¶33.

And again, the Nevada Supreme Court, in its decision on the appeal of Browning's post-conviction petition, continued to find the evidence of Browning's guilt to be overwhelming:

> The evidence of Browning's guilt remains overwhelming: his fingerprints at the crime scene, identification by three witnesses placing him at or near the crimes, his admissions of guilt to the Wolfes, and his presence in a hotel room surrounded by the stolen jewelry.

Opinion, EOR 219.

B. Procedural Background:

1. State Court Proceedings:

a. District Court, Clark County, Nevada, Case No. C72536:

On December 16, 1985, an Information was filed charging Browning with Burglary; Robbery with Use of a Deadly Weapon; Murder with Use of a Deadly Weapon and Escape. EOR 901.

On December 31, 1985, Browning invoked his state right to a trial within sixty days and the matter was set for jury trial on March 3, 1986; calendar call was set for February 27, 1986. Reporter's Transcript, EOR 905.

The February 27, 1986, calendar call was continued one day to February 28, 1986, wherein the State moved to continue the trial date due to an error in calendaring; the state having mistakenly noted in their file that the trial date was March 31, 1986. Defense counsel objected to the continuance and noted efforts in procuring out of state witnesses. The Court overruled the objection, granted the continuance and set the trial for March 31, 1986. Reporter's Transcript, SEOR 428-432.

On March 4, 1986, Browning filed a Motion to Dismiss and Motion to Release Defendant from Custody based upon an asserted violation of his speedy trial right. EOR 914. After opposition by the state and a hearing, an order denying Browning's motion was filed on March 13, 1986. SEOR 427. As a result, Browning filed a motion to stay the trial proceedings and sought relief with the Nevada Supreme Court, resulting in the docketing of Nevada Supreme Court, Case No. 17153. On May 22, 1986, the Nevada Supreme Court filed its Order denying Browning's claim of a violation of his speedy trial right. Order Denying Alernative Petitions for Writs of Prohibition, Mandamus or Habeas Corpus. EOR 294.

The jury trial eventually commenced on December 8, 1986 and continued through December 12, 1986, resulting in the return of verdicts finding Browning

guilty of Count I – Burglary; Count II – Robbery with Use of a Deadly Weapon; Count III – First Degree Murder with the Use of a Deadly Weapon; and Count IV – Escape. Minutes, SEOR 441-442. The State filed its Notice of Intent to Seek the Death Penalty in open court and the continued penalty phase proceedings were therefore set for December 16, 1986. Minutes, SEOR 442.

On December 16, 1986, the jury returned a verdict to impose a sentence of death. Minutes, SEOR 442.

Sentencing was held on January 27, 1987 resulting in the signing and entry of a judgment of conviction, warrant of execution and order of execution in open court. Minutes, SEOR 443.

b. Direct Appeal – Nevada Supreme Court, Case No. 18157:

Pursuant to a timely filed notice of appeal and an order of stay of execution, a direct appeal was docketed in Nevada Supreme Court, Case No. 18157.

In litigating his direct appeal, Browning filed an opening brief, was additionally permitted to file supplemental briefing, and asserted a number of issues regarding speedy trial rights, suggestive identification issues and other claims which are not relevant to the instant appeal.

On June 24, 1988, the Nevada Supreme Court filed its Opinion affirming the judgment against Browning. EOR 269.

c. Post-conviction proceedings, District Court, Clark County, Nevada, Case No. C72536:

On May 17, 1989, Browning, with the aid of privately retained counsel, filed a Petition for Post-Conviction Relief and for Evidentiary Hearing. SEOR 312.

Due to an apparent lack of funds to pay for the services of his privately retained counsel, the law firm of Brobeck, Phleger & Harrison, on or about July of 1992 undertook the representation of Browning on a pro-bono basis pursuant to their participation in the NAACP Legal Defense and Educational Fund Inc. See Affidavit of Chris A. Knudsen, SEOR 421; Ex Parte Motion For Withdrawal and Appointment of Counsel for Petitioner. SEOR 308.

Upon the appointment of the Brobeck firm as counsel for Browning, the initial post-conviction petition, filed by Browning in 1989, was amended on numerous occasions ultimately resulting in a "Revised" Second Amended Petition for Writ of Habeas Corpus (Post-Conviction), filed on October 19, 1999. SEOR 144-307.

Browning's final articulation of his claims presented in the state district court was contained in this "Revised Second Amended Petition for Writ of Habeas Corpus" and included the following claims relevant to Browning's instant appeal:

> Ground 11: Mr. Browning's Rights to Effective Assistance of Counsel and to A Fair Trial Were Violated

> by Counsel's Failure to Prepare Adequately for Trial and to Adequately Investigate Numerous Leads.

As Ground 11, in addition to other issues, Browning specifically asserted his counsel was ineffective in regard to discovering and developing exculpatory evidence regarding the Wolfes and the "bloody shoe print" evidence. Revised Second Amended Petition, SEOR 183-193, ¶¶ 3, 7, 10, 13, 18.

> Ground 12: Mr. Browning's Rights to Effective Assistance of Counsel and to A Fair Trial Were Violated by Counsel's Failure to Adequately Prepare for Trial and to present a Defense.

As Ground 12, Browning provided some treatment of his counsel's asserted failure to discover and develop evidence to impeach the Wolfes. Revised Second Amended Petition, SEOR 193-197, ¶¶ 4, 9.

> Ground 33: The Prosecution Suppressed and Failed To Disclose Material Evidence That Was Favorable To The Defense Case.

As Ground 33, Browning alleged the prosecution suppressed and failed to disclose impeachment evidence regarding the Wolfes' convictions, arrests, informant activities and benefits received. Revised Second Amended Petition, SEOR 260-262, ¶¶ 2, 3.

On June 28, 1999, and November 8, 1999 through November 12, 1999, an evidentiary hearing was held for Browning to present witnesses in support of his

petition for post-conviction relief. See Minutes, SEOR 458, 460-466. The following witnesses were subpoenaed and testified during the evidentiary hearing: Paul Browning, Defendant/Petitioner; James Gripp; James Ausem; Karen Van De Pol; Betty Jackson; Kathleen Browning; Betty Gregoire; Dr. Robert Shomer; Michael Sweedo; Donald Beury; Randal Pike; John Cotsirilos; Daniel Seaton; Gregory Branon; Michael Pescetea; Martin Schopp; Deborah Cochran; Wilma Holly; Evelyn Harris; Leroy Johnson; Anthony Dean; Martha Haynesworth; Carol Lasley-Slider; and Tomica Gamlin.

On December 7, 2001, the state district court entered its Order denying Browning's post-conviction petition. EOR 255.

The district court's Findings of Fact, Conclusions of Law and Order were filed on October 24, 2002. EOR 223.

d. Appeal, Nevada Supreme Court, Case No. 39063

On January 4, 2002, Browning filed a timely notice of appeal from the order denying his petition for post-conviction relief resulting in the docketing of Nevada Supreme Court, Case No. 39063.

On December 9, 2002, Browning filed Appellant's Opening Brief asserting the following claims relevant to his instant appeal:

- Prosecutorial misconduct for the State to withhold relevant, material and exculpatory evidence helpful to

> the defense regarding the State's deal with the Wolfes and the bloody footprints.

Appellant's Opening Brief, SEOR 44-49.

> - Ineffective assistance of trial counsel during the guilt phase of his trial in that trial counsel failed to interview key witness Officer Branon regarding Mr. Elsen's dying declaration and the bloody footprints.

Appellant's Opening Brief, SEOR 50-52.

> - Ineffective assistance of trial counsel during the guilt phase of his trial in that trial counsel failed to interview the Wolfes.

Appellant's Opening Brief, SEOR 53-54.

On June 10, 2004, the Nevada Supreme Court filed its Opinion on Browning's petition for post-conviction relief affirming in part, vacating in part and remanding for further proceedings. EOR 187. Therein, the Nevada Supreme Court granted Browning relief regarding the effective assistance of his counsel during the penalty phase of Browning's trial and therefore Browning's death sentence was vacated and the matter remanded for a new penalty hearing.

e. Proceedings on Remand – New Penalty Hearing, District Court, Clark County, Nevada, Case No. C72536:

On remand from the Nevada Supreme Court, the new penalty hearing was conducted on April 10, 2006 through April 14, 2006. Minutes. SEOR 482-4486. The jury again returned a verdict imposing the sentence of death and a judgment of

conviction was entered on August 22, 2006. EOR 182.

f. Direct Appeal, Nevada Supreme Court, Case No. 48019:

On September 7, 2006, Browning filed a Notice of Appeal challenging his August 22, 2006, judgement of conviction resulting in the docketing of Nevada Supreme Court, Case No. 48019.

On May 16, 2007, Browning filed an opening brief asserting a number of issues from the second penalty hearing that are not relevant to the instant appeal.

On July 24, 2008, the Nevada Supreme Court upheld Browning's death sentence in *Browning v. State*, 188 P.3d 60 (2008). Opinion, EOR 139. A petition for rehearing was denied on October 22, 2008. EOR 138.

g. Petition for Extraordinary Relief, Nevada Supreme Court, Case No. 54740:

On October 13, 2009, Browning filed a *pro per* Petition for Extraordinary Relief with the Nevada Supreme Court, resulting in the docketing of Nevada Supreme Court, Case No., 54740. On November 13, 2009, the Nevada Supreme Court filed its Order Denying Petition. EOR. 136.

h. Petition for Writ of Habeas Corpus, District Court, Clark County, Nevada, Case No. C72536:

On November 18, 2009, the Office of the Federal Public Defender entered its appearance in District Court, Clark County, Nevada, Case No. C72536, and

filed a Petition for Writ of Habeas Corpus on behalf of Browning.

On November 24, 2009, Browning filed, *pro per*, Defendant's Motion for Court to Set Date Certain for Sentence of Death to be Carried Out; and Motion to Strike Unauthorized Petition for Writ of Habeas Corpus and Notice of Appearance by the Federal Public Defenders' Office disavowing the petition filed by the Federal Public Defender's Office.

On March 3, 2010, the district court issued its Findings of Fact, Conclusions of Law and Order striking the petition as unverified. EOR 133.

No other proceedings have been filed in the Nevada state courts since March 3, 2010.

2. Federal Court Proceedings:

a. United States District Court, District of Nevada, Case No. 3:05-cv-00087:

Browning initiated the instant proceedings on February 10, 2005, with the filing of a proper person petition for writ of habeas corpus. Docket, SEOR 495.

The Office of the Federal Public Defender was appointed as counsel on July 15, 2005. Docket, SEOR 496

On February 9, 2007, the district court, pursuant to Browning's request, entered an order determining that the habeas petition would proceed with regard to

guilt phase issues only due to the ongoing state court proceedings relating to penalty phase issues. Docket, SEOR 175.

On March 10, 2008, Browning filed an Amended Petition for Writ of Habeas Corpus asserting only claims related to the guilt phase of his Nevada capital conviction. Docket, SEOR 498.

On August 26, 2008, Browning was granted leave to file a Second Amended Petition. Docket, SEOR 500.

On November 5, 2008, Browning filed his Second Amended Petition. Docket, SEOR 500.

On January 27, 2009, Respondents' filed a Motion to Dismiss the Second Amended Petition, Docket, SEOR 502, including an Index of the State Court record. SEOR 501

On July 7, 2009, pursuant to the stipulation of the parties, the district court granted Petitioner leave of court to file a Third Amended Petition, containing all known grounds for relief, "…including issues related to petitioner's newly-imposed death sentence." Respondents' motion to dismiss was denied without prejudice. Docket, SEOR 504.

On October 19, 2009, Browning filed his Third Amended Petition. Docket, SEOR 504.

On February 10, 2010, counsel for Browning filed a Motion for Leave to Withdraw as Counsel for Petitioner. Docket, SEOR 505.

Additionally, on February 10, 2010, Browning filed a Motion for Stay and Abeyance. Docket, SEOR 505. On February 22, 2010, the Court entered its order granting the Federal Public Defenders' motion to withdraw as an attorney and denying the motion for stay without prejudice. Docket, SEOR 506.

On April 7, 2011, the Court ordered the appointment of Jacqueline K. Walsh and Mark A. Larranaga to represent Browning. Docket, SEOR 506.

On April 27, 2011, the Court granted Browning, via the assistance of newly appointed counsel, leave to file a Fourth Amended Petition. Docket, SEOR 508.

On October 14, 2011, Browning filed his Fourth Amended Petition. Docket, SEOR 508.

On November 28, 2011, with the leave of court, Browning filed his Fifth Amended Petition which is the petition currently pending before this Court. EOR 300.

On March 7, 2012, Respondents filed an Answer to Fifth Amended Petition for Writ of Habeas Corpus, addressing the merits of Browning's properly presented claims and asserting defenses to other claims. EOR 407.

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On August 24, 2012, Browning filed a "Reply Brief," a motion for summary judgment and various discovery related motions. Docket, SEOR 510.

On November 26, 2012, Respondent's filed a "Response to Reply" as contemplated in the district court's initial briefing schedule. Docket, SEOR 512.

On January 24, 2013, the district court denied Browning's motion for summary judgment and various discovery related motions. EOR 121.

On April 5, 2013, the district court entered its order determining that Browning's fifth amended petition was a mixed petition containing a number of unexhausted claims. EOR 88. As a result, Browning was provided with an "election" to abandon the unexhausted claims or to file a motion for a stay pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005). On September 3, 2013, pursuant to Browning's motion to reconsider, the district court amended its order regarding the exhaustion status of some of Browning's fifth amended petition claims, but still determined that Browning's fifth amended petition was a mixed petition. EOR 76.

On October 11, 2013, Browning filed "Petitioner's Objection to Stay and Abeyance and Alternative Notice of Abandonment of Claims Deemed Unexhausted, Per Court Orders." SEOR 515.

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On August 1, 2014, the district court accepted Browning's abandonment of his unexhausted claims and considered the remaining claims on the merits. Order, EOR 15. The district court found Browning's claims to lack merit, denied the fifth amended petition and granted a certificate of appealability on the issues noted above.

On August 1, 2014, Browning filed a motion to reconsider the district court's order denying the fifth amended petition. Docket, SEOR 515.

On August 29, 2014, Browning also filed a motion for leave to file a sixth amended petition. Docket, SEOR 516.

On January 13, 2015, the district court denied Browning's motion to reconsider and his motion for leave to file a sixth amended petition. EOR 1.

b. Ninth Circuit Court of Appeals, Case No. 15-199002

On February 5, 2015, Browning filed a notice of appeal challenging the district court's order denying his petition and resulting in the docketing of the instant action on February 9, 2015. ECF No. 1.

Browning filed his opening brief and excerpts of record for review on September 11, 2015. ECF No. 10.

On October 19, 2015, this Court granted Browning's motion to file a corrected over length brief and the brief was filed. ECF No. 13, 14.

Appellees Answering brief is currently due pursuant to this Court's orders. ECF No. 21.

IV.

SUMMARY OF THE ARGUMENT

Browning fails to recognize the significance of the findings of fact made by the state district court after his evidentiary hearing proceedings in 1999. Particularly damning is the state district court's finding that Browning, and his proffered version of events, lacks credibility. Browning does not challenge the state district court's various findings of fact but instead attempts to reargue his claims without regard to the deferential standard for relief in federal habeas corpus. As he has not shown that the state court decision against him was based on an unreasonable determination of the facts in light of the evidence presented at his evidentiary hearing in 1999, Browning's federal petition must be denied. *See Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) ("A state decision based on a factual determination will not be overturned unless it is objectively unreasonable.").

Given the set of facts found by the Nevada state courts, Browning cannot show that the Nevada Supreme Court's decision was contrary to, or involved an

unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States.

The *Strickland* issues before this Court are not complex constitutional issues. The Nevada Supreme Court properly identified *Strickland,* and its progeny, and made appropriate findings regarding the performance of counsel and evaluated any prejudice that may have resulted from any deficient performance. Trial counsel was obviously prepared to cross-examine the Wolfes and he vigorously identified all their blemishes. While the Nevada Supreme Court determined that trial counsel was deficient in failing to discover the word for word dying declaration of Hugo Elsen, it determined the deficiency was not prejudicial given the overwhelming evidence. And, the Nevada Supreme Court, consistent with *Strickland* and did not second guess trial counsel's reasonable and articulated trial strategy regarding his handling of the bloody shoe print evidence. The Nevada Supreme Court's handling of Browning's *Strickland* claims was not objectively unreasonable.

As to the *Brady* issues before this Court, the Nevada Supreme Court found in both instances the failure to disclose information was not material. Officer Branon's failure to report his observations of bloody shoe prints at the scene became immaterial in light of evidence that Hugo Elsen's wife and Ms. Debra Coe rendered aid to Mr. Elsen and walked all over the scene prior to Officer Branon's

arrival. Regarding the prosecutor's failure to disclose his practice of assisting cooperating witnesses after they have rendered substantial assistance in a case, the failure became immaterial in light of the extensive cross-examination of the Wolfes and the marginal, if any, effect the information would have had. Given the record of facts, the Nevada Supreme Court's decisions were not objectively unreasonable.

Lastly, as to Browning's single *Napue* claim, there is no evidence that Officer Branon, or any other officer, ever provided any information to state prosecutors that bloody shoe prints were present at the scene prior to the response of law enforcement. Browning never established an intent on the part of the state prosecutor to present false or misleading information. As a result, the Nevada Supreme Court was not objectively unreasonable in denying Browning's post-conviction petition.

V.

ARGUMENT

A. Standard of Review:

This Court's review of a denial of a petition for writ of habeas corpus by a state prisoner is *de novo*. *Edwards v. LaMarque*, 439 F.3d 504, 510 (9th Cir. 2005).

B. Standard in Habeas Corpus - 28 U.S.C. § 2254:

The Antiterrorism and Effective Death Penalty Act, ("AEDPA"), sharply limits the circumstances in which a federal court may issue a writ of habeas corpus to a state prisoner whose claim was "adjudicated on the merits in state court proceedings." *Johnson v. Williams*, 133 S.Ct. 1088, 1094 (2013)(slip op. at 7). Section 2254(d) "does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits.'" *Harrington v. Richter*, 131 S.Ct 770, 785 (2011). "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington,* 131 S.Ct at 784-85.

Habeas corpus is designed to guard against extreme malfunctions in the state criminal justice system and is not available for simple harmless error. *Brecht v. Abrahamson*, 507 U.S. 619, 634 (1993).

1. 28 U.S.C. § 2254(d)(1):

28 U.S.C. Section 2254(d)(1) defines two categories of cases in which a state prisoner may prevail on his federal habeas claims when the state court has adjudicated those claims on the merits. A court may grant relief if the relevant state court decision was either: (1) contrary to clearly established federal law, as

determined by the Supreme Court; or (2) involved an unreasonable application of clearly established federal law as determined by the Supreme Court. Justice O'Conner further defined these standards in *Williams v. Taylor*:

> Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the 'unreasonable application' clause, the federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

529 U.S. 362, 412-13 (2000).

The habeas petitioner has the ultimate burden to show that the state court applied clearly established law to the facts of his case in an objectively unreasonable manner. *Woodford v. Visciotti*, 537 U.S. 19, 24-25, 123 S. Ct. 357, 360 (2002).

> 'Under §2254(d)(1)'s unreasonable application clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.' . . . Rather, that application must be **objectively unreasonable**.

Lockyear v. Andrade, 538 U.S. 63, 75, 123 S. Ct. 1166, 1175 (2003) (citation omitted) (**emphasis** added) (citing *Williams*, 529 U.S. at 409; *Bell v. Cone*, 535 U.S. 685, 699 (2002); and *Woodford v. Visciotti*, 537 U.S. 19, 24-25, 123 S. Ct. 357 (2002)).

The phrase in section 2254(d)(1), "clearly established Federal law, as determined by the Supreme Court of the United States," refers to the holdings of the Supreme Court at the time the state court decision was made. *Williams*, 529 U.S. at 412. Dicta will not suffice. *Id.* Moreover, the state court is not required to cite Supreme Court cases or even be aware of them, "so long as neither the reasoning nor the result of the state–court decision contradicts them." *Early v. Packer,* 357 U.S. 3, 8, 123 S. Ct. 362, 365 (2002).

Additionally, § 2254(d)(1) review is limited to the record that was before the state court that adjudicated the claim on the merits. *Cullen v. Pinholster*, 131 S.Ct. 1388, 1398 (2011)(AEDPA requires an examination of the state-court decision at the time it was made … the record under review is limited to the record in existence at the same time i.e., the record before the state court).

2. 28 U.S.C. § 2254(d)(2):

Section § 2254(d)(2) authorizes federal courts to grant habeas relief in cases where the state-court decision "was based on an unreasonable determination of the

facts in light of the evidence presented in the State court proceeding." *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004). A state decision based on a factual determination will not be overturned unless it is objectively unreasonable. *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). Differing inferences or indication from the facts lead to an AEDPA conclusion that the state disposition is reasonable. *Yarborough v. Alvarado*, 541 U.S. 652, 665 (2004). Where state court findings are supported by the record, a state disposition must prevail even though the record could perhaps be interpreted otherwise. *Garvin v. Farmon*, 258 F.3d 951, 958 (9th Cir. 2001).

A federal court may not second-guess a state court's fact-finding process unless, after review of the state-court record, it determines that the state court was not merely wrong, but actually unreasonable. *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004). Section § 2254(e)(1) requires that "a determination of a factual issue made by a state court shall be presumed to be correct," and that this presumption of correctness may be rebutted only by "clear and convincing evidence." *Id*. The presumption applies even if the finding of fact was made by a state appeals court rather than a state trial court. *Bragg v. Galaza*, 242 F.3d 1082, 1087 (9th Cir. 2001), *amended by* 253 F.3d 1150 (9th Cir. 2001). Where a state court plainly misapprehends or misstates the record in making their findings, the

misapprehension must go to a material factual issue that is central to a petitioner's claim such that it undermines the fact-finding process for the resulting factual finding to be found unreasonable. *See Taylor v. Maddox* at 1001.

C. Analysis of Claims:

1. Officer Branon's failure to report his observations of the bloody shoe prints in 1985 was not material and therefore does not result in a *Brady* violation.

As Argument "IB," Opening Brief, DktEntry 10-2, pp. 33-62, Browning argues he was denied due process of law and claims the prosecution concealed exculpatory information, in violation of *Brady,* regarding bloody shoe prints at the scene.

Browning never asserted this claim in a post-conviction petition in the Nevada state district court. In his "Revised Second Amended Petition," Browning asserted a claim of ineffective assistance of trial counsel related to the discovery and development of exculpatory "bloody shoe print" evidence.[1] Also, he generally asserted the prosecution suppressed and failed to disclose material evidence that was favorable to the defense, but did not specifically raise any issues regarding "bloody shoe print" evidence.[2]

[1] Ground 11. Revised Second Amended Petition, SEOR 183-193, ¶¶ 3.

[2] Ground 33. Revised Second Amended Petition, SEOR 260-262.

The claim, as it now presents to this Court, apparently developed during the evidentiary hearings on his Revised Second Amended Petition. During the hearings, LVMPD Officer Gregory Branon testified he was the first officer on the scene of Hugo Elsen's murder and further disclosed, for the first time, that the bloody footprints were present prior to medical and other police personnel arriving on the scene. Of Officer Branon's belated disclosure, the state district court found as follows:

> … [Officer Branon's] recollection, some fifteen (15) years after the crime, was that the bloody footprints were present prior to the medical and other police personnel arriving on the scene. Even if Officer Branon's testimony would have been the same in 1986 when the trial occurred, it would not have proven that there was a different or second assailant. As such, ***it probably would not have affected the outcome of the trial.***

Findings of Fact, Conclusions of Law and Order, EOR 227, ¶25 (***emphasis added)***. In other words, the state district court did not find the information material.

a. The state district court's finding is supported by the state court record and was affirmed by the Nevada Supreme Court.

The state district court's finding of a lack of materiality is supported by the full testimony of Officer Branon. At the 1999 evidentiary hearing, Officer Branon described his response to the scene, making his way to the corner of the store, and

observing "…an elderly white female, who was later identified as Josie Elsen, pacing back and forth about the store." Transcript, EOR 1455. Officer Branon further described how he waited for "backup" to arrive and: "[u]pon their arrival I tapped on the front door. Id, EOR 1456. "She [Josie Elsen] heard my tapping and spotted me through the front door and opened it up." Id. Officer Branon further acknowledged observing a towel, and maybe a pillow, that were near Mr. Elsen. Id, EOR 1475.

Viewed in the context of Ms. Debra Coe's trial testimony, the lack of the materiality of Officer Branon's belated observations becomes apparent. During the 1986 jury trial, Debra Coe described going to check on Mr. Elsen's condition and finding him slouched against the wall where he was last seen by his wife. Trial Transcript, EOR 692-694. Ms. Coe approached Hugo, scooted him down so he wasn't leaning against the wall, put a pillow under his head and covered him with a blanket and waited with him until the authorities arrived. Id, EOR 693-694. In Ms. Coe's attempts to render aid, she also obviously walked in close proximity to the blood pooling around Mr. Elsen. Given Ms. Elsen's activities, as described by Officer Branon, and Debra Coe's activities in the jewelry store prior to the response of the authorities, the crime scene was not the pristine scene now urged by Browning. Had the defense, and the State prosecutor, been made aware of

Officer Branon's observations, the defense theory would have remained the same; the prints belong to "the black Cuban;" just as Browning's counsel argued to the jury in 1986. The State's counter argument, however, would have changed. The prints obviously belonged to Josy Elsen and/or Debra Coe. There is no reason to believe the jury would have found Browning's "black Cuban" defense any more compelling with the State's counter argument being tied to Josy Elsen and/or Debra Coe as oppose to paramedics being the source of the bloody footprints. Hence, the lack of materiality of Officer Branon's 1999 revelatory testimony.

b. The Nevada Supreme Court's finding that is not objectively unreasonable.

The Nevada Supreme Court also considered Browning's claim of materiality, affirmed the decision of the district court and specifically found the information "was not material:"

> "Browning contends that the State withheld the fact … that bloody shoe prints near the victim were already present when the first police officer arrived at the crime scene. We have already concluded that this information was not material in rejecting Browning's contention that his trial counsel was ineffective. We further conclude that under *Brady* the State did not withhold the information because it was reasonably available to the defense…"

Opinion, EOR 216. Given the state district court's findings of fact the Nevada Supreme Court was not objectively unreasonable in likewise so finding.

Browning is overly critical of the Nevada Supreme Court's decision for concluding that "the State did not withhold the information because it was reasonably available to the defense." Respondents understand the Nevada Supreme Court's statement regarding the "reasonable availability" of the shoe print evidence to reflect the general state of the evidence to the defense as disclosed by the State. The State disclosed the evidence of the bloody shoe prints' existence. The State also disclosed information that the bloody shoe prints did not belong to Browning. Browning was provided information that Officer Branon responded to the scene. It is only the narrow issue of what information was available to the State, in the form of Officer Branon's observations regarding the timing of the creation of the prints, which is the concern.

Nevertheless, it is the finding of a lack of materiality by the Nevada Supreme Court, which results in the court's decision not being objectively unreasonable. Browning attempts to discount the Nevada Supreme Court's finding by attempting to distinguish *Strickland* prejudice from *Brady* materiality. Browning does not identify any case law substantiating any real distinction between the two elements and he fails to inform this Court that the *Strickland*

prejudice standard is actually derived from the *Brady* materiality standard.[3] In summary, the Nevada Supreme Court identified Browning's *Brady* claim, identified materiality as a prong to be considered, and determined the evidence was not material, citing its previous consideration of an at least analogous element. The accusation that the Nevada Supreme Court did not consider Browning's *Brady* claim, and therefore is not entitled to AEDPA deference, is meritless.

c. The evidence of Browning's guilt continues to be overwhelming and undermines his claim of materiality.

As discussed in the Statement of Facts above, the Nevada courts have uniformly found the evidence of Browning's guilt to be overwhelming. As late as 2004, after the truth about the blood evidence on the tan jacket had been determined, the Nevada Supreme Court continued to find Browning's conviction to be supported by overwhelming evidence:

> The evidence of Browning's guilt remains overwhelming: his fingerprints at the crime scene, identification by three witnesses placing him at or near the crimes, his admissions of guilt to the Wolfes, and his

[3] The Supreme Court acknowledges in *Strickland*: "…the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

> presence in a hotel room surrounded by the stolen jewelry.

Opinion, EOR 219. Nevertheless, Browning continues to argue that the evidence is not as overwhelming as it once was and readdresses tired arguments regarding specific pieces of evidence that have already been considered by multiple triers of fact. His arguments are not persuasive.

i. "His fingerprints at the crime scene."

The Nevada Supreme Court has consistently and appropriately identified Browning's fingerprints[4] at the crime scene as a component of the overwhelming evidence against him. Browning does not contest that his fingerprints were at the crime scene but asserts that his prints where left in Hugo Elsen's jewelry store on a previous visit to the store and that his two prints were among 23 others that were found in the store. Browning does not address the highly probative and inculpatory fact that his prints were found on a broken shard of glass from the door on the vendor's side of one of the jewelry display counters and from the top of another display counter in the Elsen Jewelry Store. Transcript, EOR 643-645; SEOR 315. It is not only the existence of Browning's prints in the store that points to his guilt, but the location of the prints; especially the print on the shard of glass

[4] Browning maintained an aka of "Robert Johnson." At trial, the fingerprint testimony identifies "Robert Johnson" as the owner of the relevant prints. SEOR 315.

that was broken out of the "vendor's side" of the display case disrupted during the robbery and murder and directly proximate to the location were Hugo Elsen was left to die.

ii. The "identification by three witnesses, [make that four], placing him at or near the crimes."

The Nevada Supreme Court has also consistently and appropriately considered the "identification by three witnesses placing [Browning] at or near the crimes" as a component of the overwhelming evidence of Browning's guilt. We should add a fourth witness placing Browning at or near the crime. Browning himself. Browning's testimony at his 1999 evidentiary hearing, was that during the time in question, "around" 4:15, he was walking on Las Vegas Boulevard, saw Randy Wolfe in a yellow Datsun B210, was pushed out of the way by his favorite "Cuban" and left the area going "south" at "a brisk walk." Transcript, SEOR 126-134. There is no conflict of evidence between the parties. Browning was "at or near" the crime scene when Mr. Elsen was murdered.

Given the above admission, Browning's attack on Ms. Coe's identification testimony is particularly weak. Debra Coe never testified that she saw Browning in the jewelry store. She testified she looked out the front door of her office and witnessed Browning running "south" at a "fast trot." Transcript, EOR 691. Her testimony is completely consistent with his testimony that he was in the area

heading south at a brisk walk. Given the consistency of accounts, his efforts to characterize her as confused and first identifying a white man as the person she witnessed are disingenuous. Reading her transcribed statement to police reveals that she "definitely" saw a black man and the reference to a "blonde and white" man were not based on her observations. EOR 989. Browning's efforts to characterize Ms. Coe as a racist, due to her poor attempt at humor in a stressful situation, misses the point as obviously all black people do not look alike to her because she identified Browning as the person she saw on that day and not another black man that was presented to her who was actually wearing a blue cap. Given Browning's own admission that he was running from the area, it is curious all the effort that has been spent on discrediting Ms. Debra Coe. The Nevada Supreme Court was not objectively unreasonable in relying on Debra Coe's identification testimony as a component of its finding of overwhelming evidence.

A similar argument applies to the identification testimony of Charles Wood. He saw a black man who was wearing a dark colored hat, dark pants and a light colored shirt jog past him coming from the direction of the Elsen's store. Transcript, EOR 712-713. Like Ms. Coe, he was also taken by police to a place for a show up identification and he positively identified Browning, without shirt or cap, as the man who he observed earlier. Transcript, EOR 717-718. While

Browning has spent less effort attempting to discredit Mr. Wood's identification testimony, it would be pointless. By Browning's own admission he was running from the Elsen Jewelry store and most likely Mr. Wood saw him also. The Nevada Supreme Court was not objectively unreasonable in relying on Charles Wood's identification testimony as a component of its finding of overwhelming evidence.

Mrs. Elsen's in court testimony identifying her husband's killer was not "as good as it gets," as argued by the prosecutor during closing argument, but it was probative to establish that Browning murdered Hugo Elsen. Mrs. Elsen had a limited view of her husband's killer, a point she admitted at trial. Nevertheless her testimony, at a minimum, undisputedly establishes that she saw a "black guy" with a "blue cap" and a raised knife over Hugo Elsen. Transcript, EOR 661. Additionally, her observations are valid that the "black man with a blue cap" had hair that "was a little bit puffed out on the bottom" under the blue cap. Transcript, EOR 663. Her testimony is highly consistent with Ms. Coe's observations of Browning with his hair stuck out about an inch over his ears underneath his cap and, given the totality of the identification testimony, her testimony is compelling. The Nevada Supreme Court was not objectively unreasonable in relying on Mrs. Elsen's identification testimony as a component of its finding of overwhelming evidence.

iii. Browning's admissions of guilt to the Wolfes.

The Nevada Supreme Court has consistently and appropriately considered Browning's "admissions of guilt to the Wolfes" as a component of the overwhelming evidence of his guilt. As noted in the Statement of Facts above, Browning essentially ran to the Normandy Hotel and attempted to enlist the assistance of his friends, the Wolfes, in hiding the evidence of his crimes. He made admissions to both Randy Wolfe and Vanessa Wolfe to his involvement in a robbery and that he may have killed someone. Defense counsel competently attempted to impeach both Randy and Vanessa Wolfe, yet the jury found Browning guilty and sentenced him to death.

Browning's version of events involving a "black Cuban" was specifically found by the state district court to be not credible. Given the evidence of his admissions presented at jury trial, and the specific finding that his version of events provided during the 1999 evidentiary hearing was not credible, the Nevada Supreme Court is not objectively unreasonable in relying on the evidence of Browning's admissions to the Wolfes as a component of its finding of overwhelming evidence.

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iv. Browning's presence in a hotel room surrounded by the stolen jewelry.

Lastly, the Nevada Supreme Court has consistently and appropriately considered Browning's "presence" in the Wolfes' "hotel room surrounded by the stolen jewelry" as a component of the overwhelming evidence of his guilt. While Browning takes some issue with the characterization of the Nevada Supreme Court finding he was "surrounded by" the stolen jewelry, the evidence is that he was in the Wolfes' hotel room, as the Wolfes had reported to law enforcement, and that items of the stolen jewelry where immediately found in his presence when he was taken into custody by law enforcement. Browning was actively attempting to conceal the evidence of his crimes; having Vanessa assist him with removing tags from the stolen jewelry and discarding the tags. Vanessa also assisted Browning in discarding his shirt and hat and a knife. As a result, the Nevada Supreme Court was not objectively unreasonable in relying on the evidence of Browning's proximity to the stolen jewelry as a component of its finding of overwhelming evidence.

v. The bloody shoe print evidence does not lessen the overwhelming nature of the evidence.

The bloody shoe print evidence was never part of the State's case. The State always acknowledged the prints did not belong to Browning. The fact that the

prints may not have belonged to paramedics who responded to the scene does not change the "overwhelming" nature of the evidence. Based on the previously discussed testimony of Officer Branon, there is no evidence these prints belonged to anyone else other than Mrs. Elsen and/or Debra Coe.

Browning, in his answering brief, relies on extra-judicial evidence to argue the prints are too large to belong to Josy Elsen or Debra Coe, claiming that the fact is somehow established through the use of an expert and affidavits of the two ladies. The assertion is contrary to the state district court's findings of fact:

> ….It is Defendant's burden on post-conviction to prove his factual allegations. The only way to demonstrate prejudice would be to determine all of the people at the scene that night and check their shoes. Nobody that was present that evening testified and no shoes were admitted at the evidentiary hearing. As such, Defendant has not shown that the prints did not come from the paramedics, police officers, independent witnesses or anyone else.

Reporter's Transcript, EOR 228-229, ¶ 28. It was not until after the conclusion of state court proceedings on the guilt phase issues that Browning provided the an affidavit of a purported expert witness who opines that the bloody shoe prints could not have been made by a women wearing a woman's size "8W or 9 ½ shoe." No such evidence was ever presented in the Nevada state courts. As § 2254(d)(1) review is limited to the record that was before the state court that adjudicated the claim on the merits, Browning's proffered affidavit does not change the state

court's finding of fact: "Defendant has not shown that the prints did not come from the paramedics, police officers, independent witnesses or anyone else." *See Cullen v. Pinholster*, 131 S.Ct. 1388, 1398 (2011)(AEDPA requires an examination of the state-court decision at the time it was made … the record under review is limited to the record in existence at the same time i.e., the record before the state court).

Review of the crime scene photos show average sized shoe prints next to a six inch ruler. There is nothing to indicate that they were made by a man or a woman, nor to indicate that they could not have been made by Josy Elsen and/or Debra Coe. In not presenting any evidence at the evidentiary hearing, it appears that Browning continues to use the legal strategy that he condemns his trial counsel for; as long as the source of the prints are uncertain, he can continue to argue they belong to the mysterious "black Cuban." He is making the same argument to this Court that his trial counsel made in the 80's. The argument is just not persuasive given the other evidence in the case. As such, the Nevada Supreme Court was not objectively unreasonable in continuing to hold that Browning's conviction was based on overwhelming evidence.

vi. The tan jacket.

While it was initially thought that some blood evidence was a component to the overwhelming evidence against Browning, the exclusion of the blood evidence

on Browning's tan jacket solves the conflict of Josy Elsen, Debra Coe and Charles Wood seeing Browning wearing a blue jacket at the time he murdered Hugo Elsen. As was evident from his activities with Vanessa Wolfe in trying to conceal evidence, Browning was actively disposing of evidence that would link him to his crimes prior to his capture by police. Browning obviously disposed of the blue jacket that he was wearing when he murdered Hugo Elsen and it was never recovered. Regardless, the Nevada Supreme Court ultimately became aware that the blood evidence on Browning's tan jacket did not belong to Hugo Elsen. Given the other evidence of Browning's guilt, the Nevada Supreme Court was not objectively unreasonable in continuing to find the evidence to be overwhelming.

d. Conclusion.

The Nevada Supreme Court was not objectively unreasonable in determining that Officer Branon's failure to report his observations of bloody shoe prints in 1985 did not result in a *Brady* violation. The State disclosed the existence of the prints and information concluding that the prints did not belong to Browning. Officer Branon's failure to report his observations of bloody shoe prints at the scene became immaterial in light of evidence that Hugo Elsen's wife and Ms. Debra Coe rendered aid to Mr. Elsen and walked all over the scene prior to Officer Branon's arrival. Additionally, given the overwhelming evidence of Browning's

guilt, the Nevada Supreme Court was not objectively unreasonable in rejecting Browning's claim of a *Brady* violation.

2. The Prosecution did not intentionally present misleading testimony regarding the bloody shoe prints in violation of *Napue*.

As Argument "IC," Opening Brief, DktEntry 10-2, pp. 63-69, Browning argues he was denied due process of law claiming the prosecution intentionally presented misleading evidence regarding the bloody shoe prints at the scene.

As with the related *Brady* claim, Browning never asserted this *Napue* claim in a post-conviction petition in the Nevada state district court. The *Napue* claim, as it now presents to this Court, apparently developed during the evidentiary hearings on Browning's Revised Second Amended Petition. As discussed above, during the evidentiary hearings in 1999, LVMPD Officer Gregory Branon, for the first time, disclosed that he was the first officer on the scene of Hugo Elsen's murder and that the bloody shoe prints were present prior to medical and other police personnel arriving on the scene. As a result, Browning first articulated his *Napue* claim to the Nevada Supreme Court in his opening brief on appeal from the decision on his post-conviction petition. Appellant's Opening Brief, SEOR 49. Review of Browning's presentation of his *Napue* claim regarding the "bloody Footprints" shows that it was summarily presented and clearly supplemental to his

related *Brady* claim and what he must have perceived to be his other more serious assertions of *Napue* violations.

a. Browning's *Napue* claim regarding the bloody shoe prints was considered by the Nevada Supreme Court and denied without comment.

The Nevada Supreme Court was cognizant of Browning's *Napue* claim regarding the "bloody footprints," as well as a number of other claims of prosecutorial misconduct, and found the claims to lack merit without any specific comment. Opinion, EOR 187, 213-216. As is typical appellate practice, and as recognized by United States Supreme Court, rather than addressing specifically all the numerous claims of prosecutorial misconduct raised by Browning, the Nevada Supreme Court identified various claims "worthy of discussion" and specifically addressed those claims. Id at 213 ("Among the claims of prosecutorial misconduct raised on direct appeal, this court only considered two worthy of discussion." And, regarding the claims on collateral appeal the court noted "Some other independent claims of prosecutorial misconduct, however, require some discussion."). While Browning's "bloody footprint," claim under *Napue,* was not one of the claims the Nevada Supreme Court deemed worthy of discussion, the presumption is that the claim was considered on the merits. Even without any specific discussion of the claim, the Nevada Supreme Court's decision denying relief on Browning's "bloody

footprint" claim is entitled to AEDPA deference by this Court. *See Johnson v. Williams*, 133 S.Ct. 1088, 1094 (2013) *see also Harrington v. Richter*, 131 S.Ct 770, 784-85 (2011) ("When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.").

b. The claim is without merit.

While the claim is entitled to AEDPA deference it is also patently without merit even upon a *de novo* review. LVMPD Officer Branon's observations regarding the bloody shoe prints were not made known to anyone until 1999; almost fifteen years after the murder of Hugo Elsen. Officer Branon testified at the 1999 evidentiary hearing that he failed to include any reference to the observation of the bloody shoe prints in his three page report of the incident. Transcript, EOR 1472, 1478-1479. Officer Branon further represented he told the "general detail detectives," without naming anyone in particular, and that he "would have" told "Specialist Horn" about his observations. There is no evidence that Specialist Horn, or any "general detail detectives," included Officer Branon's purported observations in their reporting. Officer Branon also never testified that he told the prosecutor, Dan Seaton, about his observations of bloody shoe prints. This

complete lack of any reporting undermines Browning's assertion of a *Napue* claim for a knowing presentation of perjured testimony by the State.

Browning reads too much into the prosecutor's use of Officer David Radcliff as the State's witness in its case-in-chief as opposed to Officer Branon. Officer Branon's testimony was duplicative of Officer Radcliff's testimony as both officers entered the Hugo Elsen Jewelry store at the same time. Additionally, Officer Radcliff had significantly more involvement in the investigation of the case; making his selection as a witness for the State's case-in-chief a reasonable tactical decision. There is no evidence in the record supporting Browning's claim that the State intentionally presented false or misleading evidence in the selection of Officer Radcliff as a witness as opposed to Officer Branon.

Browning represents to this Court that Officer Branon was the first officer to arrive at the scene but misrepresents he therefore solely had the opportunity to observe the interior of the Hugo Elsen Jewelry store. While Officer Branon apparently arrived at the Hugo Elsen Jewelry store first, he waited for "backup" prior to entering the store. See Transcript, EOR 1456. Officer David Radcliff testified at the jury trial in 1986. He noted that two other units were already at the jewelry store when he arrived; Officers Branon and Robertson. See Transcript, EOR 723-724. Both Officer Branon and Officer Radcliff have previously testified

that they entered the Hugo Elsen Jewelry store together. Both had an equal opportunity to observe the scene as the initial law enforcement response. The state's selection of Radcliff as a witness as opposed to Officer Branon does not evidence any intent on the part of the prosecutor to present false or misleading evidence.

Additionally, Specialist Horn testified in 1985 that based on the information he was given at the scene, he did not attempt to determine the source of the bloody shoe prints beyond determining that they did not belong to Browning. See Transcript, EOR 636-640. There is no independent evidence that Officer Branon told Specialist Horn anything about bloody shoe prints. Officer Branon's belated testimony about his observations at best creates a conflict of evidence. The federal district court, in denying Browning's federal claim, actually noted the conflict of evidence and determined Officer Branon's testimony was not credible. EOR 27.

It is the knowing use of false or perjured testimony against a defendant to obtain a conviction which is unconstitutional under *Napue*. *Morales v. Woodford*, 36 F.3d 1136, 1152 (9th Cir. 2003). Given the development of the facts, that Officer Branon did not report his observations regarding the presence of bloody footprints until the evidentiary hearing in 1999, Browning's *Napue* claim is

without merit. The Nevada Supreme Court was not objectively unreasonable in denying this claim

3. Any failure by prosecutor Dan Seaton to disclose any evidence implying an agreement or an understanding with Randall Wolfe was not material and therefore does not result in a *Brady* violation.

As Argument "II," Opening Brief, ECF No. 10-2, pp. 70-75, Browning argues he was denied due process of law, claiming the government concealed exculpatory information in violation of *Brady,* regarding the credibility of Randall Wolfe.

The state district court judge, after an evidentiary hearing, considered Browning's claim of a *Brady* violation and made the following findings of fact prior to denying the claim:

> The prosecutor, Dan Seaton, testified at the evidentiary hearing. He testified that there were not any undisclosed deals, either express or implied, with Randy and Vanessa Wolfe, although he did endeavor to help them after the trial was over.
>
> …There is absolutely no evidence in the record that there were any deals, favors or quid pro quo. Based on the evidence, this Court hereby finds that there were no undisclosed deals made with the Wolfes.
>
> The State disclosed to the Jury all of the information relating to the credibility of Randy and Vanessa Wolfe including that they were both drug users, Vanessa was a prostitute, and that they had kept some of the stolen

> jewelry the Defendant had brought to their room and had lied about it while under oath at the preliminary hearing.
>
> There is no evidence that the Wolfes received any undisclosed benefits which induced their testimony at trial. The fact that Mr. Seaton, after the trial in this matter, discussed Randy Wolfe's participation with a sentencing judge in a case where Mr. Wolfe was the defendant and that he later helped him get a legitimate job is not relevant as this Court finds that Mr. Wolfe neither knew about nor relied upon those facts. Indeed, it appears that Mr. Seaton did not even decide to help Mr. Wolfe until after he was done testifying.

Findings of Fact, Conclusions of Law and Order, EOR 226, ¶¶ 14-17. The state district court's findings of "no evidence" of "any deals, favors or quid pro quo" is supported by the evidentiary hearing record and entitled to deference by this court.

The Nevada Supreme Court likewise denied Browning's claim; but on a different basis. The Nevada Supreme Court, like the district court below, did not find evidence of an "explicit agreement." Nevertheless, the Nevada Supreme Court found "the State is required to disclose to the defense any evidence implying an agreement or an understanding" and on that basis determined "the prosecutor withheld information regarding benefits given to an important witness for the State, Randy Wolfe." Opinion, EOR 215-216.

However, the Nevada Supreme Court found the failure to disclose was not material as follows:

> The next question is whether there is a reasonable probability of a different result if this information had been disclosed. We conclude the answer is no. Wolfe's credibility was extensively challenged at trial. The jury was made aware that he had initially kept some of the stolen jewelry in this case for himself and lied under oath about doing so. On cross-examination, defense counsel also established that Wolfe had a history of heroin and other illegal drug use and had used heroin just four days before testifying, had stolen property and pimped his wife to support his drug use, had three prior felony convictions, and still faced sentencing for one of those convictions. Thus, though the jurors were not told that Wolfe would receive benefits for his testimony, he was stiffly impeached on other grounds…

Id.

The Nevada Supreme Court was not objectively unreasonable in rejecting Browning's *Brady* claim. The State's failure to disclose related to a very narrow point. The Nevada Supreme Court found that "any evidence" of an "implied" agreement or understanding should have been disclosed. The Nevada Supreme Court's decision does not change the state district court's finding that "there is absolutely no evidence in the record that there were any deals, favors or quid pro quo" between Dan Seaton and Randall Wolfe. While not specifically articulated, the disclosure required by the Nevada Supreme Court would have been to disclose Mr. Seaton's tendency to assist cooperating witnesses with legal and/or other matters.

///

Despite the non-disclosure of the very narrow point identified by the Nevada Supreme Court, Browning's counsel established on the cross-examination of Randall Wolfe that: Wolfe had been permitted to plead guilty to a lesser charge when he originally was eligible to be sentenced as a "habitual criminal;" Wolfe's sentencing was still pending; despite a history of failing to appear in court as ordered, Wolfe was released on his own recognizance; and, despite confessing to felony possession of stolen property and perjury, there appeared to be no intent to charge Wolfe with those offenses. See Trial Testimony of Randall Wolfe, EOR 773-776, 780-785. In light of counsel's cross-examination of Randall Wolfe, it was not objectively unreasonable for the Nevada Supreme Court to determine that there was no reasonable probability that the outcome of the trial would have been affected by the additional information that the prosecutor, unbeknownst to Wolfe, could put in a good word for Wolfe at the time of his sentencing, or assist with a job search, because of his testimony at Browning's trial. As a result, the Nevada Supreme Court was not objectively unreasonable in denying Browning's *Brady* claim.

4. Browning's Claims of Ineffective Assistance of Trial Counsel are without merit.

As Argument "III," Opening Brief, ECF No. 10-2, pp. 76-85, Browning argues he was denied the effective assistance of counsel by his trial counsel's

failure to investigate and prepare for trial, which allowed the jury to be misled regarding the source of the bloody shoe prints, the victim's description of his murderer, the alleged murder weapon[5] and the credibility and involvement of Browning's primary accusers.

To prevail on a claim of ineffective assistance of counsel, Browning must demonstrate that his trial counsel's representation fell below an objective standard of reasonableness and that, but for any errors, the results of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 691-94 (1984). Because the state court considered his various claims of ineffective assistance on the merits, Browning must also show that the state court's denial of his claims was contrary to or an unreasonable application of *Strickland*. This evaluation of counsel's actions has been described as "doubly deferential," according a presumption of correctness to counsel's actions as well as to the state decision considering them. *See Bell v. Cone*,

[5] The district court did not certify for appeal an ineffective assistance of trial counsel claim relating to counsel's investigation and preparation for trial of an "alleged murder weapon." Browning had asserted in paragraphs 5.12 through 5.12.4 of Claim 1 of his Fifth Amended Petition that his counsel was ineffective for failing to conduct pretrial investigations regarding a knife. The federal district court dismissed the claim as unexhausted. Order, EOR 96, ll. 3-20. After the filing of a motion for reconsideration, the federal district court did determine that only Browning's claim of ineffective assistance of counsel "…to the extent that it is based on trial counsel's failure to interview the Wolfes before trial in a manner that allegedly would have impeached testimony regarding the knife" was not unexhausted. Order, EOR 84, ll. 13-18.

535 U.S. 685, 698-99 (2002); *Cheney v. Washington*, 614 F.3d 987, 995 (9th Cir. 2010); *Edwards v. LaMarque*, 475 F.3d 1121, 1126 (9th Cir. 2007)(en banc).

Under *Strickland*, the petitioner must satisfy the following two-prong test to prevail on an ineffectiveness claim:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless the defendant makes **both** showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687 (emphasis added). Courts are free to address the performance component and the prejudice component in any order, and they are free to address only one component if the defendant makes an insufficient showing on one which ends the inquiry. If it is easier to dispose of an ineffectiveness claim on one ground or the other, that course should be followed. *Strickland*, 466 U.S. at 697.

Any review of the attorney's performance must be "highly deferential" and must adopt counsel's perspective at the time of the challenged conduct, in order to avoid the distorting effects of hindsight. *Strickland*, 466 U.S. at 689. It is the petitioner's burden to overcome the presumption that counsel's actions might be

considered sound trial strategy. *Id.* A claim of ineffectiveness asserting a failure to investigate must show what information would be obtained with investigation, and whether, assuming the evidence is admissible, it would have produced a different result. *See Hamilton v. Vasquez*, 17 F.3d 1149, 1157 (9th Cir. 1994); *Wade v. Calderon*, 29 F.3d 1312, 1316-17 (9th Cir. 1994).

a. Trial Counsel Was Not Ineffective but "zealously defendant his client."

In the district court below, Browning asserted that his counsel only spent five hours "…on any form of factual investigation or preparation for this capital case." In the corresponding footnote in Appellant's opening brief to this Court, Browning gives his trial counsel a little more credit and hedges that trial counsel: "…spent less than a dozen hours on all types of factual investigation in the year that ultimately elapsed before trial." Opening Brief, DktEntry 10-2, p. 80, n. 44. Review of trial counsel's testimony and the state court record belies Browning's assertions of neglect and establishes that Browning does not give his trial counsel enough credit.

The state district court held an evidentiary hearing on a number of Browning's claims of his trial counsel's ineffectiveness. Only three of his claims are currently before this Court. Nevertheless, the state district court made the

following specific finding of fact related to Browning's continued assertion that trial counsel failed to present a defense in his case:

> Defendant asserts that Mr. Pike was ineffective because he failed to present a defense at trial. This is totally untrue. Mr. Pike zealously defended his client. He argued issues pertaining to identification, called a specialist in Black hair styles to support the "Jerry Curl" defense, and vigorously attacked the credibility of the Wolfes. EOR 232, ¶ 41.

The state district court's finding of fact is supported by the record of the 1999 evidentiary hearing proceedings. Trial counsel, under persistent direct examination by Browning's post-conviction counsel emphasized: "Just understand, I had put a lot of effort in this case. I represented Paul in the best way I felt that I could." Transcript, EOR 1325, ll. 16-19. When queried as to if trial counsel had put on a "winning" defense, trial counsel explained: "Well, let me tell you, you can't put together a defense that can win when you have a client that is not giving you all the information that he knows and seems to dole it out as he feels appropriate. Then I was left with what I had. And so I presented – I presented the winning-est defense that I thought I could." Transcript, EOR 1403, ll. 15-21.

During the 1999 evidentiary hearing, trial counsel testified that he initially met with Browning, went over police reports with him, and developed a defense to target the inconsistencies in the State's case including, why Browning was in the

area, how he knew the Wolfes and how he was "set up to take the fall for a Cuban." Transcript, SEOR95-97 (EOR only has p. 235). Trial counsel explained that as Browning never told him what actually happened, the defense had to focus on reviewing police reports, incident reports and statements and consulting with the client. See Transcript, EOR 1391-1392. Trial counsel also procured funding for a polygraph examination for Browning early in the case; January 17, 1986. Order, SEOR 433. And, trial counsel testified that he regularly met with Browning to discuss the case, more than 20 times prior to trial, anywhere from 15 minutes to an hour and a half a visit. Transcript, EOR 1389-1390.

At the evidentiary hearing, trial counsel described his use of the "open file policy" of the District Attorney's Office to review the entire prosecution file outside the presence of the deputy district attorney. Transcript, EOR 1297-1298. Trial counsel testified he consulted the METRO police department to identify "internal reports" that may have not been turned over to the District Attorney's Office. Id. EOR 1298. Trial counsel personally visited the Hugo Elsen Jewelry store "prior to the trial to check it out and review." Id. EOR 1298-1299.[6] Trial counsel met with the State's fingerprint expert and determined to explain his

[6] Trial counsel explained: "I just walked in like a customer, got a sense impression of it and then left." Id. "I just tried to put it together in my mind with the photographs that I had seen." Id.

client's presence in the jewelry store as opposed to contesting the identity of the maker of the finger prints. Id. EOR 1309-1310.[7] Trial counsel additionally hired a hairdresser as an expert witness to further present his defense that the crime was committed by a "jeri-curled" Cuban.

The record shows that Browning's trial counsel was far from the unprepared trial counsel who spent less than 12 hours to prepare for his client's capital jury trial. The state district court's finding that Browning's trial counsel was "zealous" in the representation of his client is supported by the record and should be granted deference by this Court.

b. The Nevada Supreme Court was not objectively unreasonable in determining that trial counsel was not ineffective in his pre-trial preparation to cross examine the Wolfes.

The Nevada Supreme Court considered Browning's claim that trial counsel was ineffective in his preparation to cross examine Randall and Vanessa Wolfe and ruled as follows:

> "…Browning claims that counsel should have interviewed Randy and Vanessa Wolfe, the State's key witnesses. Counsel testified that to avoid becoming a witness himself, he had a policy of not personally interviewing witnesses. Instead, he had his investigator conduct all interviews. This is a reasonable tactic. The

[7] A reasonable decision as Browning's theory of the case was that his prints were in the Hugo Elsen Jewelry store due to a prior visit to the store with Marsha Gaylord.

> investigator gathered enough information to permit trial counsel to adequately cross-examine the Wolfes on their version of events, their drug usage, their informer status, their lying, and their convictions and arrests. Therefore, Browning has failed to show that counsel was ineffective."

Opinion, EOR 195.

The transcript of the cross-examination of the Wolfes, at trial, supports the Nevada Supreme Court's treatment of Browning's claim of ineffective assistance of counsel. Trial counsel was able to elicit evidence that Randall Wolfe was a heroin user, a thief, lived off the proceeds of his prostitute wife and a convicted felon. Transcript, EOR 769-772. He further elicited evidence that Randall Wolfe received special treatment on a pending case in exchange for his testimony in the Browning case, establishing that Randall Wolfe was allowed to enter a plea to a lesser charge, was not treated as a "habitual criminal" as permissible under Nevada law, was not prosecuted for perjury and was given an "own recognizance release" even though he had 28 previous "failure to appears" on his record. Transcript, EOR 774-782. Finally, trial counsel even established that Randall Wolfe perjured himself in Browning's preliminary hearing by lying under oath. Transcript, EOR 774-775.

As to Vanessa Wolfe, she was likewise vigorously crossed by trial counsel, establishing her use of heroin and cocaine, that she used heroin on the day of the

murder, that she had "run con games" in California, that she knew Randall had kept jewelry from the robbery of the Elsens' jewelry store and she was questioned about her receipt of witness fees and favorable treatment in exchange for her testimony. Transcript, EOR 817-827.

Trial counsel's evidentiary hearing testimony in 1999 further supports a finding that trial counsel, while maintaining a practice of not personally interviewing witnesses, was nevertheless actively engaged in his pre-trial preparations to cross examine the Wolfes. Trial counsel testified that he obtained information about the Wolfes, including their prior testimony in other cases, which he used to prepare to cross examine them. EOR 1322, ll. 7-16. Additionally, trial counsel obtained court records and reports from other deputies in the district attorney's office of unrelated cases involving the Wolfes acting as witnesses for the State. Transcript, EOR 1324, ll. 5-14 (referencing a specific case being handled by Deputy District Attorney Karen Vandepol).

While Browning now contends that his counsel's cross-examination of the Wolfes was ineffective, the record of trial counsel's cross-examination belies the contention. There are obviously other ways to prepare for a cross examination besides personally conducting interviews with witnesses. Trial counsel's use of his investigator and use of court records certainly prepared him to successfully depict

the Wolfes as untrustworthy and felonious state informants who received benefits from the State and therefore had a motivation to lie. The Nevada Supreme Court was not objectively unreasonable in finding: "Browning has failed to show that counsel was ineffective." Order Denying Petition, EOR 195.

c. The Nevada Supreme Court was not objectively unreasonable in determining that trial counsel was not ineffective in his pre-trial investigation regarding the bloody shoe prints.

The Nevada Supreme Court considered Browning's claim that his trial counsel was ineffective for failing to further investigate the bloody shoe print evidence and ruled as follows:

> "Browning also contends that his trial counsel was ineffective in failing to learn that bloody shoe prints near Elsen were already present when Officer Branon arrived at the crime scene. Because the prints did not match Browning's shoes and could not have been left by paramedics, who arrived after Officer Branon, Browning argues that this information indicated that another person committed the murder. We conclude that this information was not material and that trial counsel acted reasonably. Counsel explained at the evidentiary hearing that once he determined that the shoe prints did not match Browning's shoes, he chose not to investigate the prints further. He feared that investigation might establish that the prints had been left by police or paramedics, rather than some unidentified person. As long as the source of the prints was unknown, counsel could argue to the jury that the actual murderer had left them. Although it is now evident that the prints were present before police and paramedics arrived, counsel's basic reasoning remains sound because the bloody shoe

> prints were likely left by Mrs. Elsen and/or Coe, who were with Elsen before the first officer arrived. Counsel made a reasonable, tactical decision to leave the source of the prints uncertain.

Opinion, EOR 194-195.

The Nevada Supreme Court's decision is supported by the record. Reporter's Transcript of Proceedings, EOR 1324-1326. Trial counsel procured a stipulation that the shoes Mr. Browning had on at the time that he was arrested did not match the tracks in Mr. Elsen's store and further investigation could jeopardize the defense theory of the case that some Cuban committed the murder. Id. As recognized in Browning's instant petition the fact that the bloody shoe prints did not match Browning was "powerful evidence." Such evidence could have been lost if counsel was determined to discover the actual maker of the prints; whether a paramedic, an officer, Mrs. Coe or Ms. Elsen. Especially, if counsel doubts the truth of the story of the "Cuban" as being the murderer, counsel would obviously doubt any further investigation would reveal the maker of the prints to belong to the illusive "Cuban." As such, trial counsel specifically identified his tactical decision to not further investigate the footprint evidence. In such circumstances *Strickland* instructs that a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and the defendant must overcome the presumption that the challenged action "might be

considered sound trial strategy." *Strickland* 466 U.S. at 689. The Nevada Supreme Court properly applied *Strickland* and found trial counsel's conduct was a "reasonable, tactical decision." The Nevada Supreme Court's decision was not objectively unreasonable.

d. The Nevada Supreme Court was not objectively unreasonable in determining that trial counsel was not ineffective in his decision to not interview Officer Branon to learn that Branon received from Hugo Elsen the description of the murderer's hair, and that the description did not match Browning's hair.

The Nevada Supreme Court considered Browning's claim and found that trial counsel was deficient in failing to interview Officer Gregory Branon and discovering that the use of the term "jeri-curl" to describe Browning's hair was Officer Branon's term and not the term of the dying Hugo Elsen. Opinion, EOR 193-194. The Nevada Supreme Court found that Browning was not prejudiced by his counsel's deficiency as follows:

> "We conclude that trial counsel was deficient here but that this deficiency alone was not prejudicial. The issue of Browning's hairstyle was extensively explored at trial. Elsen was the only person who described the hair protruding from Browning's hat as loosely curled and wet. Mrs. Elsen stated that it simply "puffed out in the back" of his cap. Coe testified that Browning's hair stuck out about an inch below his cap. The showup identification was the first time that witnesses viewed him without his hat. Coe testified that at the showup she could tell that Browning had just taken a cap off because

> his hair was matted down. Given this evidence and the overall strong evidence of Browning's guilt, we conclude that there is no reasonable probability of a different result if counsel had discovered and presented the evidence that "jeri-curl" was the officer's term, not the victim's."

Opinion, EOR 194.

The Nevada Supreme Court's holding is supported by the state court record. Officer Branon was a defense witness and testified about Hugo Elsen's description of his murderer, which included "…what was described as a shoulder length Jeri-type curl." Transcript, EOR 831-832. Trial counsel established that a "Jeri-type curl" is a chemically treated hair style that has a loose curl and has a wet and shiny look to it. Transcript, EOR 832. Trial counsel even called in a hairstylist to establish the fact that Hugo Elsen's description of his murderer's hair was inconsistent with the descriptions of the other witnesses. Transcript, SEOR 358-362. Mrs. Elsen was always positive about the description of her husband's murderer's hair; describing Browning as wearing a "blue cap" with "hair a little bit puffed out in the back." Transcript, EOR 663. Her description was further corroborated by the testimony of Mrs. Debra Coe, who identified seeing Browning leaving the scene with a blue cap on and hair that "stuck out over his ears underneath the cap, stuck out about an inch." Transcript, EOR 696-697.

Based on the above conflicting evidence, trial counsel successfully created an identification issue for the jury to consider. There is no ineffectiveness in the creation of the factual issue for the jury. The jury was directly presented with the issue of whether Hugo Elsen's murderer had a "Jeri-curl" or an "afro." As admitted by Browning at the evidentiary hearing, he was at the scene, jogging down the street. Had Hugo Elsen's actual dying declarations, as remembered 14 years later by Officer Branon, been admitted into evidence as opposed to the term "Jeri-curl" the issue of fact presented to the jury would have been whether Hugo Elsen's murderer had "wet, shoulder length, loosely curled hair" or an "afro." It is the same conflicting evidence and there is no reason to believe that the jury would have solved the conflict any differently than they did. The jury obviously determined that Hugo Elsen's murderer had hair consistent with Browning's. Given the state court record, the Nevada Supreme Court was not objectively unreasonable in determining that any deficiency attributed to trial counsel in regard to the hair evidence was not prejudicial.

VI.

CONCLUSION

Browning fails to recognize the significance of the findings of fact made by the state district court after his evidentiary hearing proceedings in 1999.

Particularly damning is the state district court's finding that Browning, and his proffered version of events, lacks credibility. Browning does not challenge the state district court's various findings of fact but instead attempts to reargue his claims without regard to the deferential standard for relief in federal habeas corpus. As he has not shown that the state court decision against him was based on an unreasonable determination of the facts in light of the evidence presented at his evidentiary hearing in 1999, Browning's federal petition must be denied. *See Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) ("A state decision based on a factual determination will not be overturned unless it is objectively unreasonable.").

Given the set of facts found by the Nevada state courts, Browning cannot show that the Nevada Supreme Court's decision was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. Browning's remaining claims are without merit and his petition must be denied.

DATED this _____ day of February, 2016.

ADAM PAUL LAXALT
Attorney General

By: ___/s/ Thom Gover_____
THOM GOVER
Chief Deputy Attorney General

No. 15-99002

CAPITAL CASE

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL LEWIS BROWNING,

Appellant,

v.

RENEE BAKER, Warden,

Respondent.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the District of Nevada
Robert C. Jones, District Judge

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Respondent's Brief ("Resp. Br.") admits to more, and more powerful, exculpatory facts than underlay many successful actual innocence claims.

Respondent admits that the prosecutor's closing statement to the jury that "the same blood as [victim] Hugo Elsen had flowing through his veins that day was now spotted on the jacket … belonging to Mr. Browning" (3ER 871)—which he said should lead it to convict in "five minutes" (3ER 899-900)—was false, and proved to be so by postconviction DNA testing. Resp. Br. 53-4.

Respondent admits that the bloody shoe prints that led away from the victim's body and out the door were not Browning's and, contrary to what the prosecution told the jury, they "were present prior to medical and other police personnel arriving on the scene" (Resp. Br. 41)—and at least one police officer knew that all along (Resp. Br. 54-55).

Respondent admits that the dying victim told police that the killer had "wet, shoulder length, loosely curled hair" (Resp. Br. 75-6), which Browning did not. Respondent does not dispute that Browning's jury never even heard that the victim gave this description of his killer. See App. Br. 19-20.

Respondent also does not dispute that the only living eyewitness to the crime, the victim's wife, picked two other men from a photo array in which

Browning's photo was included, and that she could not positively identify him at trial even after repeatedly seeing him in court. See App. Br. 25, 31-32.

And Respondent admits that, unbeknownst to the jury, the prosecution's two most important witnesses, Randall and Vanessa Wolfe, were police informants and "'the prosecutor withheld information regarding benefits given to … Randy Wolfe'" following his testimony. Resp. Br. 61 (quoting 1ER 215-16).

Even under AEDPA's strict limitations on the availability of habeas corpus, the District Court was wrong to allow this much proven factual and constitutional error to stand uncorrected.

I. RESPONDENT'S BRIEF RELIES ON FACTUAL FINDINGS WRITTEN BY THE PROSECUTION AND IRREGULARLY ENTERED BY THE STATE POSTCONVICTION TRIAL COURT, RATHER THAN THOSE OF THE NEVADA SUPREME COURT. THOSE PROSECUTION-PREPARED FINDINGS ARE UNWORTHY OF DEFERENCE.

Rather than the rulings of the Nevada Supreme Court, Respondent's Brief relies primarily on "Findings" that were prepared by the Clark County District Attorney's Office and signed verbatim by the state postconviction trial judge, more than a year after the postconviction hearing was over and after Browning's lawyers filed their first brief on the postconviction appeal.[1] A chart cross-referencing the

[1] See Resp. Br.12-20, 33, 41, 52, 60-61, 67. (Part of one of Respondent's quotes from the postconviction trial court findings is incorrectly formatted. The last two paragraphs on pages 17-18 are not quotes from some other document, as the double indentation appears to suggest.)

trial court findings which Respondent quotes, and their source in the prosecutor's submissions, is attached to this Brief as Appendix A. For many reasons, these irregularly-entered findings cannot sustain the judgment below.

A. The postconviction trial court findings were written by the prosecution and were not based on the judge's actual ruling.

After the state postconviction hearing and post-hearing submissions, in October, 2001, the trial judge issued a Minute Order that denied all of Browning's claims. The Minute Order did not make specific findings on any issue, but stated only that the judge found "insufficient evidence to grant a new trial in this matter in light of the Nevada Supreme Court's prior rulings as to the overwhelming evidence to support the jury's verdict in this case." 9ER 1964.

Two weeks later, the Clark County District Attorney's Office submitted an extensive set of proposed Findings and Conclusions purporting to decide all the legal and factual issues in the case in the State's favor. See 9ER 1965. The prosecution's proposal was thirty-three pages long and contained forty-eight (48) Findings and fifty-five (55) Conclusions of Law. *Id.* at 4-36. Not one of them was taken from or based on the judge's ruling as officially recorded. Compare 9ER 1964 with 9ER 1965. Many of the Findings, and all of the Conclusions of Law, were lifted verbatim from the prosecution's post-hearing opposition memo. Compare 9ER 1965 with 9ER 1925; see Appendix A.

Browning's counsel objected that the prosecutor's proposed findings went far beyond the judge's ruling and submitted a Proposed Order which exactly tracked the judge's Minute Order ruling. 9ER 1998. The postconviction trial judge rejected the prosecution's proposed Findings and entered Browning's Proposed Order instead. 1ER 255-56.

After Browning appealed and his lawyers filed their Opening Brief, the prosecution filed a motion for a remand for entry of additional factual findings. See Dkt. 59-169 at 8-13. Browning's counsel objected, but the Nevada Supreme Court overruled their objections, struck their proposed Opening Brief, and remanded the case "to the district court for the limited purpose that it prepare and enter an amended order specifying its factual findings and legal conclusions in compliance with NRS 34.830(1)." 1ER 254.

On remand, the prosecution submitted a set of proposed findings that was only slightly changed from the one the trial court rejected before the appeal. See Appendix A. Browning's counsel again objected and submitted proposed Findings of their own, but this time the trial judge adopted and signed the Findings and Conclusions written by the prosecution, and did so without making any substantive change. *Id.* Only two of the 47 Findings, and only one of the 55 Conclusions of Law, contain citations to the evidentiary record. See 1ER 228, 231, 236.

Every one of the postconviction trial court findings that is quoted in Respondent's Brief was taken *verbatim* from the prosecution's proposal. See Appendix A. Most of them were copied directly from the prosecution's opposition memo. *Id.* As is apparent from the Respondent's quotations, none of them contained a single citation to the postconviction record or evidence.

The District Court below did not rely on these prosecution-created findings, and this Court should not do so, either. The Supreme Court has "criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken the form of conclusory statements unsupported by citation to the record." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 572 (1985). This Court has similarly "disapproved of the mechanical adoption of findings and conclusions prepared by the victorious party." *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1444 (9th Cir. 1985). Although *Anderson* and its progeny have held that findings prepared by a party and signed by a federal district judge are still entitled to review under the 'clearly erroneous' standard of Federal Rules of Civil Procedure 52(a), the Supreme Court has never determined whether "this kind of adopted order is not entitled to AEDPA deference." *Jones v. GDCP Warden*, 753 F.3d 1171, 1183 (11th Cir. 2014). In *Jefferson v. Upton*, 560 U.S. 284 (2010), however, the Court held that the process by which party-written findings were entered can affect "whether the state court's factual findings warrant

a presumption of correctness," and remanded for a hearing on that subject. 560 U.S. at 294.

This Court does not appear to have considered this issue in the context of federal habeas review, either; but even where *Anderson* and FRCP 52 apply directly, it has said it will "review[] a district court's findings of fact 'with special scrutiny' when a district court 'engage[s] in the regrettable practice of adopting the findings drafted by the prevailing party wholesale.'" *Silver v. Executive Car Leasing Long-Term Disability Plan*, 466 F.3d 727, 733 (9th Cir. 2006) (quoting *Sealy, Inc. v. Easy Living, Inc.,* 743 F.2d 1378, 1385 (9th Cir.1984)).

On most of the issues raised in this appeal, there is no reason for this Court even to consider the state district court's postconviction findings because they did not provide the basis of the state appellate court's ruling. But if the Court finds any of those findings to be material to its review, it should apply special scrutiny to their language and their evidentiary basis, before giving them deference under 28 U.S.C. § 2254(d). None of the ones Respondent relies on can bear such scrutiny.

B. The postconviction trial court findings Respondent relies on are inconsistent with the findings of the Nevada Supreme Court and with the evidence in the state court record.

Federal habeas review focuses on "the decision of the highest state court to have provided a reasoned decision." *McKinney v. Ryan*, 813 F.3d 798, 819 (9th Cir. 2015) (citing *Ylst v. Nunnemaker,* 501 U.S. 797, 804–06 (1991)).

> It is well settled that we look to the "last reasoned opinion," and where a higher state court has ruled on a petitioner's motion on grounds different than those of the lower court, we review the higher court's decision alone.

Salts v. Epps, 676 F.3d 468, 479 (5th Cir. 2012); *see also Dow v. Virga*, 729 F.3d 1041, 1047 n.3 (9th Cir. 2013).

The last reasoned opinion addressing Browning's postconviction claims was the decision of the Nevada Supreme Court in his postconviction appeal. 1ER 187-221. That decision did not adopt, or rejected, many of the postconviction trial court findings Respondent relies upon here.

For example, Respondent quotes the state postconviction trial court finding —which was lifted verbatim from the prosecution's opposition memo (9ER 1936)—that "[t]here were no undisclosed deals made with the Wolfes," and "[t]here is absolutely no evidence … that there were any deals, favors or *quid pro quo*." Resp. Br. 14. However, the Nevada Supreme Court held that there was "evidence implying an agreement or an understanding" and "[t]he prosecutor withheld information regarding benefits given to … Randall Wolfe" (1ER 215), as the postconviction evidence plainly showed. See App. Br. 16-17, 56, 71-73.

Respondent quotes the postconviction finding that "Ms. Elsen testified that Defendant appeared to be the person who killed her husband" (Resp. Br. 19)—another finding lifted directly from the prosecution's opposition memo, 9ER 1926—ignoring the fact that the State admitted during postconviction that "Ms.

Elsen *never positively identified* Defendant" (9ER 1933-34 [emphasis added]), and the Nevada Supreme Court accepted that admission (1ER 199).[2]

Respondent quotes the finding that "Ms. Coe and Mr. Woods identified Defendant as the man fleeing the store" (Resp. Br. 19, quoting 1ER 224)—again using words taken verbatim from the prosecutor's postconviction briefing (9ER 1926)—but as the Nevada Supreme Court recognized, at most those two witnesses described a person "leaving the *vicinity*" of the jewelry store, not the store itself (1ER 188-89) (emphasis added). See 2ER 365 (it "[l]ooked like [the man] ran by [the victim's] door and it didn't look like he came out of it …. It looked like he must've ran past it."); 3ER 711(the man was "jogging down the street.")

Respondent quotes that Browning was found "in possession of much of the stolen jewelry" (Resp. Br. 20)—another finding taken directly from the prosecutor's findings (9ER 2027). But in fact only seven (7) of the seventy-two (72) pieces of jewelry ultimately recovered were in the room where Browning was arrested; none was on his person (4ER 1020-23; 1031); and the sixty-five (65) other pieces of recovered stolen jewelry were handed over to police, later, by

[2] The concession that Mrs. Elsen never positively identified Browning was part of the State's successful opposition to the defense ineffective counsel claim. 9ER 1933-34. The State should not be permitted to withdraw that concession in federal habeas. *See Russell v. Rolfs*, 893 F.2d 1033, 1038 (9th Cir. 1990) (state estopped from taking conflicting positions in state and federal habeas).

Randall and Vanessa Wolfe (who also kept an unknown number of other items of jewelry for themselves). 1ER 215; 3ER 822; 8ER 1773.

Respondent even goes so far as to quote the finding by the postconviction court that counted among the evidence of Browning's guilt the fact that "three days prior to the murder, a photograph had been taken of Defendant wearing the tan jacket" which was found with him in the Wolfes' room (Resp. Br. 19)[3]—apparently forgetting that postconviction DNA testing has shown the blood on the tan jacket was not the victim's, which eliminated any connection between the tan jacket and this crime.[4] 1ER 213.

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[3]This is another finding taken verbatim from the State's Opposition Memo, in which the tan jacket was featured in a list of what the State claimed was "overwhelming evidence". 9ER 1926.

[4]Respondent recalls the DNA testing later in its Brief, and brazenly claims it "solves the conflict" between the witnesses' statements that the killer was wearing a blue jacket and the evidence the tan jacket was Browning's. Resp. Br. 54. Respondent's "solution"—that "Browning obviously disposed of the blue jacket that he was wearing when he murdered Hugo Elsen and it was never recovered" (*id.*)—is another reversal from the State's contentions at trial, and is nothing but result-oriented speculation. Objectively viewed, the tan jacket is another item of evidence suggesting the killer was someone other than Browning—since there was little time and no place to dispose of a blue jacket where the police could not find it in the two blocks between the crime scene and the Normandy Motel. And Respondent's statement that "Browning was actively disposing of evidence" (Resp. Br. 54) is, like so much of its case, based on nothing but the word of Vanessa Wolfe (see 3ER 804-812)—the person who admitted to disposing of several items of evidence related to the robbery and whom the police found to have done so. *Id.*

Respondent also quotes the prosecutors' findings: "Most importantly, his fingerprint was found on a shard of glass that was broken during the murder." Resp. Br. 19. But forensic expert testimony presented in state postconviction proceedings discounted the prosecutor's trial argument that the alleged location of the fingerprints was significant (5ER 1234-39), and the Nevada Supreme Court acknowledged that there was no way to tell when the prints were made and they could have been there for days (1ER 198).

Respondent quotes the trial court's prosecutor-written finding that the knife Vanessa Wolfe gave the police was "consistent with the murder weapon" (Resp. Br. 19), although the knife was not even found to be admissible at trial (2ER 316) and forensic examination has shown the knife actually was *not* consistent with the victim's wounds (6ER 1665-66). The Nevada Supreme Court's description of Ms. Wolfe's testimony about the knife pointedly omitted any suggestion that it was. See 1ER 189.

The list could go on. The state postconviction trial court findings on which Respondent rests its case were a partisan document, fashioned by the prosecution from its own legal pleadings rather than the actual evidence. They are neither objective nor reasonable nor attributable to the highest state court to rule in Browning's case, which largely rejected them. For all those reasons they are not subject to deference under 28 U.S.C. §2254(d).

C. The postconviction trial court made no credibility findings relevant to the issues in this appeal.

Respondent makes much of the prosecutor-written finding—which had no source in the postconviction trial judge's Minute Order ruling—that Browning's postconviction testimony was not credible. See Resp. Br. 12; 1ER 225. But once again the Nevada Supreme Court never adopted that finding or based any ruling on Browning's credibility.[5] 1ER 187

Browning's postconviction testimony (8ER 1822) reasonably explains how he was framed for this crime by Randall Wolfe, and is consistent with the defense his lawyer so poorly presented at trial. It is also consistent with a great deal of evidence in the case, much of which the jury never heard. However, we recognize the Nevada courts were not bound to accept it, and that Browning's testimony was not kept out of trial due to any of the constitutional errors at issue here, so it cannot impact the determination of whether any of those constitutional violations "undermine confidence in the verdict." *Wearry v. Cain,* 136 S. Ct. 1002, 1006 (2016). Because of that, none of the arguments made in this appeal have been dependent on Browning's testimony.

[5] The Nevada Supreme Court did comment negatively on the credibility of defense postconviction witness Frederick Ross. 1ER 218. As should be plain from Browning's Opening Brief, none of his claims or arguments relies or depend on Ross' testimony.

Despite this, it is worth noting that, as Respondent points out (Resp. Br. 47), Debra Coe's and Charles Woods' trial testimony is fully consistent with what Browning testified to at postconviction —just as Ms. Coe's statements and testimony were *inconsistent* with the State's theory at trial. As previously recounted, Ms. Coe described a man running on the sidewalk in front of the store sometime after Mrs. Elsen saw the killer flee out the front door. See App. Br. 10; 2ER 365; 3ER704. She said the man passed from north to south but did not appear to come out the store itself. 3ER 704; 4ER 987. Mr. Woods saw much the same thing, from on the sidewalk, a few yards farther south. 3ER 710-11. That squares with Browning's postconviction testimony and the evidence about how Randall Wolfe set him up to be framed for this crime by directing him back to the Normandy Motel as he was walking to meet Marsha Gaylord. See SEOR 136; 141-42; 8ER 1830-31. So does the fact that the person Coe and Woods identified as Browning had nothing in his hands and no blood on his person. 3ER 718; 4ER 985-94; 6ER 1645.

Respondent's argument about Ms. Coe and Mr. Woods thus underscores an important point: the only actual living eyewitness to this crime, and the only person whose identification testimony truly mattered at trial, was the victim's wife, Mrs. Elsen. And although the prosecutor told the jury Mrs. Elsen's identification was "as good as you can ask for" (3ER 868) and the Nevada Supreme Court cited

it in rejecting counter Browning's claims of prejudice (1ER 195, 219), the identification was extraordinarily flawed[6]—so much so that in state postconviction the prosecution conceded that Mrs. Elsen *never positively identified* Browning at all. See 9ER 1933-34.

Respondent also states at one point that the District Court determined Officer Gregory Branon's postconviction "testimony was not credible." Resp. Br. 59. As the context of Respondent's statement indicates, however, the District Court questioned the credibility of only Officer Branon's testimony about who he told about seeing the bloody shoeprints at the scene. See 1ER 27, 29. The District Court did not question the credibility of Officer Branon's testimony that the prints were present before police arrived. Neither did the Nevada courts. To the contrary, as we have pointed out and Respondent does not dispute, the Nevada Supreme Court clearly accepted Officer Branon's testimony about when the prints were made. See App. Br. 31; 1ER 194-5, 216.

[6] See App. Br. 11, 17-18, 54; pages 37-38, 56-57, below.

II. RESPONDENT'S ARGUMENTS REGARDING THE STATE'S NONDISCLOSURES AND MISREPRESENTATIONS ABOUT THE SOURCE OF THE BLOODY SHOEPRINTS ARE WRONG AND UNREASONABLE IN LIGHT OF THE EVIDENCE IN THE STATE RECORD AND CLEARLY ESTABLISHED SUPREME COURT LAW.

Respondent's efforts to discount the significance of the bloody shoeprints at the murder scene are so disingenuous that we are constrained to repeat the core undisputed facts about them. The shoeprints led from the body of the victim out the door from which the killer escaped. 1ER 27; see 4ER 1013. The prints were not Paul Browning's. 1ER 228. At trial, the prosecutor put on testimony and argued to the jury "in essence, that the bloody shoeprints were likely made by paramedics or off duty detectives." 1ER 26, 27-29. But it was disclosed in state postconviction that the prints were already there when the first police officers arrived, and at least one officer knew that all along. 1ER 195. That officer said he reported what he saw to the "detail detectives," and also "would have" told Spec. David Horn, the police witness who the prosecution had testify that the prints were likely made by first responders. 1ER 27-29. The prosecution did not call the officer who first saw the shoeprints, Officer Branon, and tellingly asked him no questions when the defense called him to testify on a different subject. 3ER 833; see App. Br. 19-20.

Respondent does not dispute any of this. It admits that "Officer Branon[] fail[ed] to report his observations of the bloody shoe prints" (Resp. Br. 34) and that "Officer Branon's observations regarding the timing of the creation of the prints" were a form of "information … available to the State." (Resp. Br. 44). Respondent does not deny that a failure by a police officer to disclose such exculpatory evidence is sufficient to establish a *Brady* violation. See App. Br. 45. It does not seriously defend the Nevada Supreme Court's erroneous and unreasonable statement that exculpatory information known only to a police officer is "reasonably available to the defense" and therefore exempt from *Brady*'s rule.[7] It does not argue this claim is unexhausted or procedurally barred.[8]

Instead, Respondent argues that the nondisclosed fact about when the shoeprints were made "was not material and therefore does not result in a *Brady*

[7] Respondent cites nothing contrary to the authority that holds *Brady's* disclosure obligations apply even to exculpatory evidence which diligent defense counsel could find. See App. Br. 35-36. Instead, Respondent says it "understands the Nevada Supreme Court's statement regarding the 'reasonable availability' of the shoe print evidence to reflect the general state of the evidence to the defense as disclosed by the State." Resp. Br. 45. Even if that "understanding" were correct, the statement would contravene clearly established Supreme Court law. *See, e.g.*, *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999) (*Brady* violation is not excused, but aggravated, by fact the prosecution has disclosed other evidence to the defense pursuant to an "open file" policy).

[8] Respondent's discussion of this *Brady* claim begins with a summary of how the claim developed during state postconviction. Resp. Br. 40-41. The purpose of this discussion is unclear. There is no dispute this claim was timely raised and decided on the merits in state court. *Id.*

violation." Resp. Br. 40. It offers three rationales for this position—two based on the findings of the state postconviction courts, and another of Respondent's own making. None bears scrutiny.

A. The state postconviction trial court's finding that "the only way to demonstrate prejudice would be to determine all of the people at the scene that night and check their shoes" is illogical and unreasonable.

Respondent's primary argument regarding the bloody shoe prints is based on this prosecution-submitted postconviction finding:

> *The only way* to demonstrate prejudice would be to determine all of the people at the scene that night and check their shoes. Nobody that was present that evening testified and no shoes were admitted at the evidentiary hearing. As such, Defendant has not shown that the prints did not come from the paramedics, police officers, independent witnesses or anyone else.

Resp. Br. 52 (quoting 1ER 228-29) (emphasis added). This finding is irrelevant, irrational and unreasonable as a matter of law.

The finding is irrelevant because it was not adopted or endorsed by the Nevada Supreme Court. As noted above, federal habeas review focuses on "the decision of the highest state court to have provided a reasoned decision." *McKinney*, 813 F.3d at 819. The Nevada Supreme Court never suggested that it would be necessary to check the shoes of all the paramedics and police who responded to the scene in order to prove that they did not make shoeprints that were there before they arrived.

Presumably, the Nevada Supreme Court did not adopt this finding because it is illogical. Logically, proof that "the prints were present before police and paramedics arrived" (1ER 195) is proof that "the prints did not come from the paramedics [or] police" (1ER 229). People can't leave shoeprints in a place they have not been, and it is not necessary to check their shoes to know that.

Because it is illogical, if this trial court finding were subject to deference under 28 U.S.C. §2254(d)(2), it should be rejected as "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

The statement that it was "Defendant's burden … to prove" "that the prints did not come from … anyone else" (1ER 229) is also unreasonable as a matter of law: Evidence need not establish innocence conclusively, or even probably, in order to be material under *Brady*'s rule.

> *Bagley* 's touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.

Kyles v. Whitley, 514 U.S. 419, 434 (1995).

For all these reasons, even if these findings were entitled to deference in federal habeas, they fail, and the issue they address is reviewable *de novo*.

B. Respondent's claim that the prosecutor could have told the jury "obviously the prints were made by Jodie Elsen and/or Debra Coe" is false as a matter of fact and irrelevant as a matter of law.

Alternatively, Respondent claims that Officer Branon's disclosure about the prints was immaterial because, if the disclosure had been made before trial, the prosecutor would have simply done an about-face and told the jury "the prints obviously belonged to Jody Elsen and/or Debra Coe." Resp. Br. 43.

This is an idea of Respondent's creation; the Nevada courts never said the shoeprint evidence was immaterial on this ground. In addressing the soundness of defense counsel's alleged strategic decision not to investigate the source of the prints, the Nevada Supreme Court did comment that investigation might have shown that "the bloody shoeprints were likely left by Mrs. Elsen and/or Coe." 1ER 195. But it never said or suggested that made Officer Branon's revelations immaterial.

If the Nevada Supreme Court had made such a materiality ruling, it would have been contrary to clearly established Supreme Court law for the same reason discussed above: Exculpatory evidence does not have to conclusively, or even probably, establish innocence. *Kyles v. Whitley*, 514 U.S. at 434. "Even if the jury—armed with all of this new evidence—could have voted to convict," that alone is not enough to provide "confidence that it would have done so." *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016) (quoting *Smith v. Cain*, 132 S. Ct. 627, 630

(2012)). The possibility the State could have retreated to an unsupported and counterfactual argument that the prints were made by Mrs. Elsen or Ms. Coe does not eliminate the reasonable probability that the jury would have found the prints raised reasonable doubt about who committed this crime—even without the positive proof Browning later presented, which showed that the prints could not have been made by either of the women. 6ER 1653-59; see page 19-20, below. And because part of the test of *Brady* materiality is what competent counsel could have done with the disclosure (*Kyles*, 514 U.S. at 441), it must be assumed that proof would have been brought out once counsel knew none of the men who entered the scene could have been the source of these large shoeprints.

Respondent's new argument fares no better if the Nevada Supreme Court's statement is considered as a finding of fact. As shown in Appellant's Opening Brief, there is no evidence in either the state or federal record suggesting that the prints could have been made by either of the women.[9] What evidence there is on the subject indicates, as the District Court below found, "that the bloody shoeprints likely were *not* left by Mrs. Elsen or Mrs. Coe." 1ER 25 (emphasis added); see App. Br. 43n.32.

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[9] Respondent's Brief at one point says the evidence showed the two women "walked all over the scene." Resp. Br. 54. That is untrue: there was no evidence either of the women walked toward or near the front door from which the killer fled, which is where the prints led to. 1ER 27. To the contrary, both women testified they went out the *back* of the store. 3ER 661, 666, 692, 695.

Respondent's Brief argues for the first time that *Cullen v. Pinholster,* 131 S.Ct. 1388 (2011) forbids consideration of some of that evidence—a forensic expert declaration and statements by Mrs. Elsen and Ms. Coe about their shoe size (6ER 1654-59)—on the ground it was not submitted in state court. Resp. Br. 52-53. But the expert declaration mostly described what is shown in photographs that were in the state record. See 6ER 1654; 8ER 1725-29. The photos were of a ruler placed next to some of the bloody shoe prints, which was placed there by police and showed the prints were close to a foot long (8ER 1725)—obviously much larger than any standard women's shoes.

Those photos—and the testimony that neither of the women went out the door like the bloody prints did, see note 9, above—could easily lead a reasonable juror could conclude that the prints were not likely left by a woman. Because of that, the evidence Respondent objects to is not crucial to Petitioner's claim. But neither should it be barred under *Pinholster*, for several reasons.

One is that the evidence was offered and considered below without objection.

> [W]hen an evidentiary hearing is properly held in federal court, review under 28 U.S.C. § 2254(d)(1) must take into account the evidence admitted at that hearing. As the dissent points out, refusing to consider the evidence received in the hearing in federal court gives § 2254(e)(2) an implausibly narrow scope and will lead either to results that Congress surely did not intend ….

Pinholster, 563 U.S. at 203 (concurring opinion of Justice Alito).

Another is that Browning was never given a fair opportunity to submit this evidence in state court, because the possibility the prints were made by the two women was not raised until the state postconviction appeal, when it was too late to disprove it.[10] *See Cullen v. Pinholster*, 563 U.S. 170, 214-15 (dissenting opinion of Justices Sotomayor, et al.) (§2254(d) should not bar presentation of evidence by "petitioners who diligently attempt in state court to develop" it but are unfairly prevented from doing so); *see also id.* at 186 n.10 (suggesting in such circumstances the evidence may be allowed because the claim would not be considered "adjudicated on the merits"). Browning and his postconviction counsel diligently pursued the issue of the source of the prints at the postconviction evidentiary hearing but had no fair opportunity to submit evidence responding to the Nevada Supreme Court's post-hearing speculation.[11]

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[10] The state did not suggest that the prints could have been made by Mrs. Elsen or Ms. Coe in the postconviction hearing or in its postconviction brief to the Nevada Supreme Court. See State's Response Brief to NSC, Dkt. 59-177. The speculation was first raised in oral argument on the state habeas appeal, when a Deputy Clark County District Attorney finally conceded his office was responsible for the nondisclosure of Officer Branon's testimony about the bloody shoeprints. He said that it didn't matter because the prints were "probably" made by Mrs. Coe. 7ER 1691. He cited no evidence for this and pointed to nowhere the State had so contended in the trial or postconviction proceedings. *Id.*

[11] *Cf. Cole v. Arkansas*, 333 U.S. 196, 202 (1948) ("To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court.")

Despite that, Browning himself went the extra mile and filed a Petition for Extraordinary Relief in the Nevada Supreme Court. 7ER 1704. That Petition included the expert declaration and statements about the women's shoe sizes to which Respondent is now objecting. 9ER 2055. That Petition gave the state court an opportunity to correct its speculation about the possible source of the prints, but it declined to exercise its discretion to do so. See 1ER 136.

The fact that court twice passed up the opportunity to consider this evidence—first by speculating on a factual issue without fair notice, and then by declining to consider the merits of the Petition for Extraordinary Relief—should not prevent this Court from considering it in determining whether the state courts' findings and legal rulings were reasonable and worthy of federal deference.

In any event, *Pinholster* does not bar presentation of additional evidence in federal court in support of claims which a state court has rejected based on an unreasonable reading of its own record. *See Brumfeld v. Cain*, 135 S.Ct. 2269, 2275 (2015). The Nevada Supreme Court's statement that the prints were "likely left by Mrs. Elsen and/or Coe" was an unreasonable finding of fact because the state record contained nothing in to support it and the photographic and circumstantial evidence that indisputably was in the state court record contradicted it. See 8ER 1725-29; note 9, above. Similarly, "[b]ecause … the state court had unreasonably applied [established federal law] … under section 2254(d)(1) based

solely on the state court record, *Pinholster* is inapplicable." *Crittenden v. Chappell*, 804 F.3d 998, 1010 n.5 (9th Cir. 2015) (quoting *Smith v. Cain*, 708 F.3d 628, 635 (5th Cir. 2013)). As previously explained, if the statement is taken out of the context in which it was made and read as a legal ruling on materiality (as Respondent wants it to be), it contravenes clearly established Supreme Court law that holds evidence does not have to be conclusive of innocence to be exculpatory. See page 17, above.

Finally, we respectfully submit that Respondent takes *Pinholster* a bridge too far when it asks this Court to hold that the exposure of the prosecution's misleading jury submissions on the subject were immaterial because the prosecutor could have shifted to another argument which the record before this Court also shows to be false. AEDPA did not repeal the statutory and constitutional requirement that habeas petitions be disposed of "as law and justice require." 28 U.S.C. §2243. Just as "[t]he shield of *Miranda* cannot be perverted into a license to use perjury by way of a defense," *Harris v. New York,* 401 U.S. 222, 226 (1971), the evidentiary restrictions of *Pinholster* cannot be converted into a license to replace one prosecution falsehood with another.

C. The Nevada Supreme Court's bald statement that the acknowledged fact "the prints were present before police and paramedics arrived" was "not material" was not an adjudication of that issue; or, if it was, it was contrary to the evidence and clearly established Supreme Court law.

Respondent's Brief alludes to "the finding of a lack of materiality [of the source of the shoeprints] by the Nevada Supreme Court" (Resp. Br. 44), but it never quotes that alleged "finding." What it quotes is that court's statement that "we have *already concluded* that this information was not material in rejecting Browning's contention that his counsel was ineffective." Resp. Br. 43 (emphasis added). But as we have shown, the passage of the opinion in which the Nevada Supreme Court says it "already concluded" this said only that "We conclude this information was not material and that trial counsel acted reasonably"—and then went on to discuss why it approved of counsel's allegedly strategic[12] failure to uncover the facts about the shoeprints. App. Br. 38-41. We maintain this was not an "adjudication" of the *Brady*/materiality issue—or if it was, it was one which cannot be sustained, even with § 2254(d) deference. See App. Br. 38ff.

[12] We say "allegedly" because the great preponderance of record evidence shows that defense counsel's failures were not strategic, but simply incompetent. See pages 50-58, below.

1. *Brady* materiality.

Respondent doesn't answer Browning's argument that the text surrounding the statements rebuts the presumption that this was a state court adjudication of the *Brady* materiality issue. See App. Br. 39-41. As we have noted, the Nevada Supreme Court conspicuously omitted any reference to the bloody shoe prints from the passage in its opinion listing the errors rendered harmless by the allegedly "overwhelming evidence." See App. Br. 73. Respondent's quotation of this "overwhelming evidence" passage in its discussion of the shoeprint claims (Resp. Br. 45-46) gives the misleading impression that the passage related to those claims; it did not. See 1ER 219. Rather than being part of an adjudication, therefore, that passage is further evidence the Nevada Supreme Court never actually decided the issue of the materiality under *Brady* of Officer Branon's postconviction revelation regarding the shoeprints.

If the Nevada Supreme Court's interlocking references to "materiality" were considered an adjudication on the merits of that "prong" of the *Brady* claim, the same result would follow, but through a different analysis. When a state appellate court dismisses a constitutional claim in summary fashion, review of that ruling looks to the "last reasoned opinion" issued in state court. *Brumfield v. Cain,* 135 S.Ct. at 2276; *see Ylst v. Nunnemaker,* 501 U.S. at 806. If the Nevada Supreme Court's oblique statement about the materiality of the shoeprint evidence was a

decision on the merits of that issue, it certainly was not a "reasoned" one. It was simply an unexplained conclusory phrase ("was not material") inserted at the beginning of a discussion of a wholly different subject, the adequacy of trial counsel's performance. See App. Br. 38; 1ER 194. "Looking through" that summary statement, see *Ylst*, 501 U.S. at 804, the only remaining explanation for the state courts' ruling that the bloody print evidence was immaterial is the irrational and plainly false one the prosecution wrote and the postconviction trial judge signed. See pages 16-17, above.

Therefore, whether or not the Nevada Supreme Court's statement about the materiality of the bloody shoe print evidence is considered an adjudication of the merits of that prong of Browning's *Brady* claim, it is not one that warrants deference under § 2254(d).

2. *Napue* materiality.

Respondent makes similarly-flawed arguments regarding the due process claim based on *Napue v. Illinois*, 360 U.S. 264, 271 (1959) arising from the prosecution's misleading testimony about the likely source of the bloody shoeprints. See App. Br. 63-69.

Respondent's Brief brings up another new argument on this issue. It contends for the first time that the Nevada Supreme Court adjudicated the merits of this *Napue* claim when it referred to some previously-made prosecutorial

misconduct claims it said were not "worthy of discussion." Resp. Br. 56. That is not what Respondent argued below or what the District Court below found on this issue. Respondent argued below that Browning *never raised* a *Napue* claim regarding the shoeprints, so the issue was unexhausted. See 2ER 467. The District Court rejected that argument and said the *Napue* claim was adjudicated by the Nevada Supreme Court's discussion of the related *Brady* claim. 1ER 12.

We have previously argued that the District Court was mistaken and the record shows that the state courts did not actually adjudicate the merits of this *Napue* claim at all. See App. Br. 63-65. The record lends even less support to Respondent's new theory of adjudication. The *Brady* and *Napue* challenges regarding the shoeprints were joined together in the briefing submitted by Browning's postconviction appellate lawyers. See Dkt. 59-174 at 10-11, 16. The Nevada Supreme Court's opinion did not distinguish between those issues or suggest in any way the *Napue* claim was one not "worthy of discussion." To the contrary, when the opinion used that phrase it said it was referring to a different set of prosecutorial misconduct claims—ones raised and rejected "on direct appeal."[13] The *Napue* claim challenging the misrepresentation of the source of the shoeprints was not (and could not have been) raised on direct appeal, but was first (and

[13] See 1ER 216: "Among the claims of prosecutorial misconduct *raised on direct appeal*, this court only considered two worthy of discussion." (Emphasis added.)

properly) raised in state postconviction. See App. Br. 30-1. Respondent admits this. Resp. Br. 40-1.

Johnson v. Williams, 133 S. Ct. 1088 (2013) held that the presumption that an unmentioned claim was adjudicated in state court is rebuttable. In doing so the Court's opinion gave examples of circumstances in which the presumption could be rebutted. The first of those examples involved a situation where the state court discussed a separate claim arising from the same core of facts, and the review standard applicable to the decided claim was "*less* protective" of defendants' rights than the standard applicable to the claim left undiscussed. *See id*. at 1096 (original emphasis). That was not the situation in *Johnson*, but it is exactly the situation here: *Napue's* review standard is more protective than *Brady's*; where a *Napue* violation is found "reversal is virtually automatic." *Hayes v. Brown,* 399 F.3d 972, 978 (9th Cir. 2005) (citations and internal quotations omitted).

That fact alone distinguishes *Johnson* and rebuts the presumption this *Napue* claim was adjudicated in state court within the meaning of § 2254(d).[14] In addition, the California court's decision in *Johnson* cited to other California cases which explicitly addressed the federal question at issue there. *Johnson*, 133 S. Ct. at 1098. The one case authority cited in the Nevada Supreme Court's discussion of

[14] Of course, the fact a claim—or an aspect of a claim—was not adjudicated in state court doesn't mean it is procedurally barred. *See, e.g., Cone v. Bell*, 556 U.S. 449, 472 (2009).

prosecutorial misconduct regarding the shoeprints in Browning's case, *Steese v. State*, 114 Nev. 479, 960 P.2d 321 (1998), contains no reference to *Napue's* standard or principles at all.

If we are correct that the state courts did not adjudicate the *Napue* claim, there is no basis for deference and the claim is reviewable in federal habeas *de novo*. *Amado v. Gonzales*, 758 F.3d 1119, 1130 (9th Cir. 2014). Again, however—much as with the *Brady* claim—even if a different analysis applies, the result is the same.

That is: If Respondent or the District Court is right and the claim was adjudicated in state court, § 2254(d) deference applies. *Id.* The question then becomes whether that adjudication was contrary to, or an unreasonable application of, clearly established Supreme Court law. *Id.* It plainly was, under either the District Court's theory of adjudication, or Respondent's new one.

By the District Court's reading of the record (1ER 12), the Nevada Supreme Court adjudicated the *Napue*/materiality issue by referencing its statement that there was no prejudice from this aspect of Browning's trial lawyer's alleged ineffective assistance.[15] But clearly established Supreme Court law holds that the

[15] The Nevada Supreme Court's opinion said nothing about whether the prosecution's testimony and argument about the bloody prints was knowingly misleading. It thus provided no basis on which to find an adjudication of that "prong" of the claim. *See, e.g.*, *Shelton v. Marshall*, 796 F.3d 1075, 1084 (9th Cir. 2015) (unadjudicated prong of *Brady* claim reviewed *de novo*).

Napue standard and the *Strickland* standard are not the same. Reversal is required on a *Napue* claim if there is 'any reasonable likelihood that the false testimony could have affected the judgment of the jury.' *Sivak v. Hardison*, 658 F.3d 898, 911 (9th Cir 2011) (citations and internal quotations omitted). That is different from the prejudice standard applicable to *Brady* claims and claims of ineffective assistance of counsel. *See id.* at 912; *Amado*, 759 F.3d at 1142 (dissenting opinion) (*Brady's* materiality standard is the same as *Strickland's*). If the District Court is correct, therefore, the Nevada Supreme Court adjudicated the *Napue* claim but applied the wrong legal standard. A state court decision that applies a legal standard that is contrary to established Supreme Court law is not entitled to deference under 28 U.S.C. § 2254(d)(1). *Shirley v. Yates*, 807 F.3d 1090, 1103 (9th Cir. 2015). In *Dow v. Virga*, 729 F.3d 1041 (9th Cir. 2013), this Court held *de novo* review of a *Napue* claim was appropriate, for exactly this reason. *Id.* at 1049.

Respondent's new reading of the record seeks to escape that result but fails. No court that issues reasoned decisions could summarily dismiss this *Napue* claim as "unworthy of discussion." Although the District Court below denied this claim on the merits, it recognized that it is a claim that is "worthy of discussion" by issuing a Certificate of Appealability. See 28 U.S.C. §2253(c)(2). So, implicitly, did the Nevada Supreme Court, when it discussed and erroneously rejected the related *Brady* claim. 1ER 216. If a claim that the prosecution failed to disclose

certain exculpatory evidence is "worthy of discussion," so must be a claim that the prosecution presented false and misleading testimony and argument about that same exculpatory evidence.

Officer Branon's belated revelation about the shoe prints was undeniably significant. His testimony was unrebutted, and the Nevada Supreme Court accepted it. That took away the prosecution's only explanation for a vivid, dramatic item of positively exculpatory evidence—evidence which did not just cast doubt but positively indicated that someone other than Browning was the true murderer. That was not just a possible argument defense counsel might have made, it was the actual (though unsupported) theory of Browning's defense. *Cf., e.g., Cone*, 556 U.S. at 474-75 (nondisclosure prejudicial because evidence would have supported defense evidence and rebutted prosecution's counter-argument).

Officer Branon's testimony meant that, at the least, the jury that sentenced Paul Browning to death was misinformed by Spec. Horn's testimony about the likely source of the shoeprints. If Spec. Horn had not testified as he did, the jury would have heard only that the bloody shoe prints heading away from the body and out the front door through which the killer escaped were not Paul Browning's. Horn's testimony totally defused the defense argument about the bloody prints, which had been featured in Pike's opening statement. See App. Br. 69.

If defense counsel had been able to pursue and support that argument, a rational juror could not have ignored it and could have found reasonable doubt based on that evidence alone. It is therefore undeniable that there is *some* "reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976).

The only question on the *Napue* claim, then, is whether Spec. Horn, or Officer Branon, or prosecutor Seaton, "knew or should have known" that the testimony they gave (and withheld) and the arguments they made about the source of the bloody shoeprints were false or misleading. Neither the postconviction trial court, nor the Nevada Supreme Court, ever purported to answer that question. No reasonable court could adjudicate this *Napue* claim without doing so—and the answer was unavoidable. The evidence that prosecutor Seaton and Spec. Horn knew what Officer Branon saw was strong, though not conclusive.[16] But the

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[16] As we have shown, there were strong circumstantial indications in the record that prosecutor Seaton knew what Branon saw; and Officer Branon testified he told the "detail detectives" and "would have" told Horn as well. See App. Br. 65-66. No witness testified to the contrary. Seaton's notes (which were submitted to the state postconviction judge *in camera*) show he had Branon listed as a starred ("*") witness (see 8ER 1806), but he did not call him and asked him no questions when the defense did so. See App. Br. 66. Seaton testified at the postconviction hearing but was never asked if he knew about what Branon saw, and he never denied he did. 6ER 1407-1452. Given Seaton's self-proclaimed thoroughness in preparation (App. Br. 20; 6ER 1408) and his record of misconduct and nondisclosure in this case and others (2ER 337-38 n.17), it would be hard to credit that denial had it been made.

evidence that Officer Branon knew the truth was undisputed, and the prosecutor was charged with the responsibility of finding that out as a matter of law. The "individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police ….," *Kyles,*, 514 U.S. at 437; *Milke v. Ryan*, 711 F.3d 998, 1006 (9th Cir. 2013); *cf. Gimenez v. Ochoa*, ___ F.3d ___ , 2016 WL 2620284, at *4 (9th Cir. No. 14-55681, May 9, 2016) ("We have found due process violations from the introduction of false testimony … where a *fact* witness told lies (even unknowingly so)…." [original emphasis]). Thus, again, if the Nevada court's did adjudicate this *Napue* claim by deeming not "worthy of discussion," that adjudication resulted in a decision that was contrary to and an unreasonable application of Supreme Court law, and was not entitled to deference under 28 U.S.C. §2254(d).

3. "Overwhelming evidence"

One thing that is clear about the Nevada Supreme Court's statement that Officer Branon's revelations were "not material" is that it was *not* based on a finding of "overwhelming evidence". That is clear because, as noted above, the Nevada Supreme Court's postconviction decision conspicuously left those issues out of the list of errors that it found harmless on that basis. See 1ER 219. Thus, even if the Court finds that the state courts adjudicated the general issue of *Brady/Napue* materiality, it cannot defer to the state court's decision on that issue

on the basis of "overwhelming evidence." *See Shelton*, 796 F.3d at 1084 ("We will not read the state court opinion as meaning something other than what it plainly said.").

Respondent nonetheless asks the Court to do so. Resp. Br. 45. It shouldn't—though, again, on this record it hardly matters. Even considering only the *admitted* flaws in the trial evidence, Respondent's alleged proof of Browning's guilt is far from "overwhelming." To the contrary, it is less persuasive and weighty than the evidence of Browning's innocence.

a. The evidence Respondent cites is far from "overwhelming"

Respondent claims fingerprints at the crime scene, identification testimony, the testimony of Randall and Vanessa Wolfe, and Browning's presence in the Wolfes' hotel room with stolen jewelry, constitute "overwhelming evidence" that he murdered Hugo Elsen. App. Br. 45-46. [17] That is a vast overstatement.

[17] Respondent does not include in its list of the "overwhelming evidence" that it says makes the shoeprint evidence immaterial the testimony that Browning attempted to escape from the police station after his arrest (although it twice alludes to that testimony elsewhere in its Brief, see Resp. Br. 11, 20). Neither did the Nevada Supreme Court. See 1ER 219. Rightly so: It has long been recognized that such "flight" evidence, while admissible, has little value in proving guilt. *See Wong Sun v. United States,* 371 U.S. 471, 483 n. 10 (1963); *Alberty v. United States,* 162 U.S. 499, 511 (1896); *United States v. Dillon*, 870 F.2d 1125, 1126 (6th Cir. 1989).

Fingerprints in the store

Respondent's first item of "overwhelming evidence" is the two fingerprints found at the scene that were matched to Paul Browning. Resp. Br. 46. Respondent acknowledges that there were twenty-one other unidentified fingerprints collected at the scene and that neither of Browning's prints was bloody or otherwise attached to the killer. 3ER 641-45; 5ER 1227.[18]

Despite this, Respondent claims it is a "highly probative and inculpatory fact that his prints were found on a broken shard of glass from the door on the vendor's side of one of the jewelry display and from the top of another display counter in the Elsen Jewelry Store." Resp. Br. 46. That is what the prosecution was able to argue at trial, because Browning's trial counsel hired no forensic experts and did not investigate the scene of the crime. State postconviction counsel did hire such an expert, and that expert's unrebutted testimony thoroughly debunked the prosecution's claim that the prints were in a place where customers could not reach. 5ER 1235-1237.

[18] The Nevada Supreme Court acknowledged that there was no way to tell when the fingerprints were made, and they could have been there for days before the murder. 1ER 198. Browning had been in the shop (which was only two blocks from the Normandy Motel) the day before the murder—but the only witness who could confirm that was Marsha Gaylord (SEOR 100), who disappeared and never testified at trial or postconviction due to a combination of prosecutorial deception and defense ineptitude. See App. Br. 60-61.

Presumably because of that, neither of the state postconviction courts attributed any significance to the specific location of Browning's prints. Nonetheless, they continued to mechanically count the fact that "his fingerprints [were] *at the crime scene*"—in other words, the fact that he had at some point been inside the shop—as item of "overwhelming evidence" of guilt. 1ER 219 (emphasis added); see also 1ER 224, 230. But fingerprint evidence that merely places a defendant at the crime scene at some undetermined time hardly constitutes overwhelming proof that he was the person who committed the crime. "[I]n a case resting upon the premise that the defendant impressed his fingerprints on an object at the time of the commission of the crime and supported solely by evidence that the defendant's fingerprints were found on that object, the record must contain sufficient evidence to permit a jury, applying the beyond a reasonable doubt standard, to draw the inference that the defendant touched the object during the commission of the crime. " *Mikes v. Borg*, 947 F.2d 353, 361 (9th Cir. 1991) (citing numerous cases). *Cf. Lowery v. Cardwell,* 535 F.2d 546, 548 (9th Cir. 1976) (fact that defendant had been in the place from which the victim was apparently shot "does not remotely approach the overwhelming character of proof" necessary for a finding of harmless error under standard of *Chapman v. Californi*a, 386 U.S. 18 (1967)).]

Identification by three witnesses

Respondent's next item of "overwhelming evidence" is "identification by three witnesses (Coe, Woods and Elsen)[19] placing [Browning] at or near the crimes." Resp. Br. 47.[20] But as discussed above, two of these three witnesses—Debra Coe and Charles Woods—claimed only to have seen Browning on the sidewalk *in front* of the store, walking past it, north to south. See pages 11-12, above. Ms. Coe told police "[i]t didn't look like he came out the door" of the jewelry store, and"it's hard for me to see how he could've came [sic] out of the

[19]Notably missing from the Respondent's Brief (and the Nevada Supreme Court opinion), is the testimony of Brad Hoffman, who said he saw a person outside the store about 20 minutes before the robbery (3ER 839) who he described as "Cuban," about 5'-7", with a slight build, wearing a Levi's shirt and a blue baseball cap (3ER 835)—and Browning was not the person he saw (3ER 839; 6ER 1646).

[20] Respondent sarcastically says that Browning's postconviction testimony that he was on Las Vegas Boulevard around 4:15 p.m. makes four witnesses placing him in the area. Resp. Br. 47. But there was never any question Browning was in the area. The Normandy Motel, where Browning and the Wolfes had rooms, was only two blocks from the jewelry store on the same side of the street. The defense contention that Browning was framed necessarily meant that somewhere around the store and the motel Browning encountered the Wolfes and ended up in their room with some of the stolen jewelry. Browning always maintained that this occurred when he was walking to meet Marsha Gaylord and saw Wolfe and Wolfe's "Cuban" associate in a small yellow car, and they directed him back to the motel. 8ER 1830-31; 1833-37. As Respondent implicitly concedes, that direction would take Browning past the front of the jewelry shop, which is where Debra Coe and Charles Woods said they saw him.

door…." 4ER 987, 990; see 2ER 365.[21] Moreover, neither Coe nor Woods saw blood on his person or jewelry, velveteen jewelry trays, or a knife in his hands.[22] 4ER 985-994; 6ER 1645.

The only witness who the prosecution could even claim put Browning inside the jewelry store was the victim's wife, Mrs. Elsen. The prosecutor told the jury that Mrs. Elsen's identification testimony was "as good as you can ask for" (3ER 868), but in fact it was far from that, even considering the always-low reliability of eyewitness identification testimony, see App. Br. 48-49. Mrs. Elsen told police she "did not think she would be able to identify the subject" or even "pick him out" (2ER 376; 4ER 997), and she was unable to describe his facial features, height or weight (4ER 997). Her view of the killer was limited and she could only see him from the side. 3ER 662. Less than a month of the incident, she was shown a group of photos that included Browning and did not pick him, but selected three other men instead. 4ER 996-998. By the time she testified at trial, Mrs. Elsen's had attended eighteen pre-trial hearings in which Browning was identified as the

[21] Respondent admits "Debra Coe never testified that she saw Browning in the jewelry store." Resp. Br. 47. However, once again, Respondent's Brief elsewhere quotes a contradictory, false "Finding" written by the prosecutors, that "Ms. Coe and Mr. Woods identified Defendant as the man *fleeing the store*." Resp. Br. 19 (emphasis added).

[22] Two green colored velveteen display trays and some seventy two pieces jewelry were taken in the robbery. 4ER 980, 1021-1023. One of the trays was found [by police] in the Wolfes' bathroom, nowhere near Browning. 4ER 1021.

charged defendant, and despite the prosecutor's hyperbole her trial testimony was equivocal at best. See App. Br. 17-18. That is why, in postconviction, the State conceded that "Ms. Elsen never positively identified" Browning before or during trial. 2ER 563 n.6; Dkt. 59-163 at 14-16. Respondent's attempt to renege on that concession should be rejected.

Admission of guilt to Wolfes

The suggestion that Wolfes' uncorroborated testimony is a significant component of "overwhelming evidence" strains credulity. Even the Nevada Supreme Court acknowledged there were many reasons to doubt anything the Wolfes said. 1ER 215-16; see also App. Br. 50. One was the admitted fact that Randall Wolfe committed perjury in Browning's case, lying about the fact that he had jewelry stolen in the crime and actually had worn some of it to Browning's preliminary hearing. 2ER 449. The Nevada Supreme Court acknowledged that there was evidence Randall Wolfe had an "understanding" with the prosecutor the jury should have known about (1ER 215), despite his adamant denials of any deal (3ER 785-87, 827-28.) Both Wolfes were experienced police informers, drug addicted felons, with extraordinary police records. See App.Br. 55-56; 8ER 1809-21. And on top of that, there was circumstantial evidence—and it was the defense position—that the Wolfes were directly involved in the crime and had framed Browning for it. 3ER 622-25. To count the uncorroborated testimony of such

informants as a significant component of "overwhelming evidence" is to blink reality. *See, e.g.*, S.R. Gross, et al., *Exonerations in the United States, 1989-2003*, 95 J.CRIM. L. CRIMINOLOGY 523, 551 (2005) ("For murder, the leading cause of the false convictions we know about is perjury—including perjury by supposed participants or eyewitnesses to the crime who knew the innocent defendants in advance."); App. Br. 4n.1.

Browning's presence in hotel room with stolen jewelry

Respondent's final piece of "overwhelming evidence" is the supposed fact Browning was caught by police "surrounded" by the stolen jewelry. Resp. Br. 51. But this allegedly admitted fact is a gross exaggeration. It is true that Browning was in the Wolfe's hotel room with some of the stolen jewelry—seven (7) out of the seventy-two (72) pieces recovered by police.[23] 4ER 1020-23; 1031. Browning was not in physical possession of any of those seven pieces, and no fingerprints or other trace evidence tied him to it.[24] The remaining sixty-five (65) pieces of

[23] Mrs. Elsen testified the recovered jewelry was not all that was taken. 3ER 669-72. There was evidence defense counsel knew of but did not present, that Randall Wolfe sold some of the jewelry as well. 5ER 1333-34; 6ER 1647; 6ER 1588-89.

[24] Respondent's Brief misleadingly suggests that Browning's fingerprint on the face of a broken Casio watch found in the Wolfes' room ties him to the robbery. Resp. Br. 10-11. However, the watch was Browning's own and was not connected to the robbery in any way—and for that reason was not even admitted into evidence at trial. See App. Br. 9 n.6. Neither state court included this fingerprint in their roster of the evidence against Browning.

jewelry were not in Browning's direct or constructive possession but instead were turned over to police later, by the Wolfes. Thus, to the extent proximity to the jewelry pointed to guilt of the murder, it pointed more strongly to the Wolfes than to Browning.

Browning's presence in the Wolfes' hotel room with some of the stolen jewelry, and Coe and Woods' descriptions of him running past the store, are fully consistent with Browning's contention that he was framed. The fact his fingerprints were in the shop prove only that he had been in there at some unspecified time, as he admitted. Discovery, forensic expert testimony and DNA testing in postconviction discounted the prosecution's trial contentions about the tan jacket, the location of Browning's fingerprints, the knife, and Mrs. Elsen's identification. The only remaining evidence tying Browning to the murder is the testimony of Randall and Vanessa Wolfe. That is reflected in the fact that more than half of the state postconviction court's summary of the "overwhelming" evidence (which, again, was copied verbatim from the prosecutor's opposition brief, see 9ER 1925) consists of the Wolfes' uncorroborated testimony about what they say Browning did and said to them in their hotel room. See Resp. Br. 19. Although a jury could choose to credit that testimony, it can hardly be objectively characterized as "overwhelming evidence." To the contrary, it is a type of

evidence that is most often associated with false accusations and wrongful convictions. App. Br. 4 n.1.

b. The evidence Respondent cites is less persuasive than the evidence which the jury heard that has now been discredited.

The evidence that Respondent now claims was "overwhelming" is far less persuasive than the evidence the prosecution at trial claimed as proof of Browning's guilt—which has now been discredited or abandoned.

As noted above, the prosecution told the jury that by far the most important and conclusive evidence of Browning's guilt was "Hugo Elsen's blood" on a tan jacket that Browning was wearing in a picture taken days before the murder. 3ER 899. The prosecutor argued that evidence alone warranted conviction in "five minutes." *Id.* at 900. That argument surely resonated: few items of circumstantial evidence are as damning as finding the victim's blood on a defendant's clothes. No other evidence against Browning was nearly as incriminating.

Yet it is now known, and the State concedes, the blood on the jacket "did not belong to Hugo Elsen." Resp. Br. 54. The prosecutor's argument, and the inference of guilt, were false. Indeed, to the extent Browning's association with the jacket proves anything, it is an exculpatory fact, because the prosecution witness said the killer's jacket was blue, and no blue jacket was found in any of the police searches or turned in by the Wolfes. See note 4, above.

Similarly, as pointed out above, the prosecution's second most powerful bit of circumstantial evidence—the allegedly incriminating location of one of Browning's fingerprints—was debunked in postconviction. That meant the prints really showed nothing but that Browning was in the shop at some previous time. See pages 34-36, above. That took away most of the prints' probative value—another large part of the prosecution's case at trial.

Forensic evidence also now shows that the knife Vanessa Wolfe gave to police, which the prosecution suggested at trial was the murder weapon, was inconsistent with the wounds on Hugo Elsen's body. See App. Br. 57. The State has abandoned the argument made at trial that Mrs. Elsen's courtroom identification of Browning was "as good as you can ask for." 3ER 868. Instead, it conceded that Mrs. Elsen never even made a positive identification. See note 2, above. One after another, the pillars of the prosecution's case at trial have crumbled.

In sum, Browning's postconviction evidence discounts more than half of the prosecution's case for conviction—the victim's blood, the defendant's prints, the lone eyewitness and the alleged murder weapon. The rote repetition of the mantra that the evidence remains "overwhelming" cannot disguise that.

c. The evidence Respondent cites is less persuasive than the evidence of Browning's actual innocence.

The evidence of Browning's guilt has been eroded so completely that it is substantially outweighed by the evidence pointing to his innocence.

As just recounted, on the guilt side of the ledger are: (1) two fingerprints which showed that Browning had been in the store at some time; (2) two witnesses who said they saw him run past the store shortly after the crime; (3) one uncertain and highly questionable cross-racial eyewitness identification; (4) the word of two much-less-than-credible police informants who were in possession of most of the goods stolen in the crime; and (5) Browning's presence in the informants' hotel room with a handful of the stolen jewelry.

On the innocence side of the ledger are: (1) bloody shoeprints that followed the killer's track out the shop door, which were not made by Browning or anyone else known to have lawfully been at the scene; (2) a victim's dying description of the killer that did not match Browning; (3) two witnesses who saw Browning pass in front of the shop with no blood on him and nothing in his hands; (4) the fact Browning was arrested minutes after the bloody crime with no injuries and no trace of blood on his person or clothing; (5) the fact Browning had none of the stolen jewelry on his person and there were no prints or trace evidence tying him to any of it; (6) the fact a tan jacket Browning was known to wear was in the Wolfes' hotel room with him when he was arrested, and the killer was said to be wearing a

blue jacket; (7) the fact the Wolfes were in possession of the vast majority of the stolen jewelry and only belatedly turned most of it over to police; (8) the fact Randall Wolfe was known to have a Cuban associate, and a man described as a "Cuban" was seen near the murder scene shortly before the crime, (3ER 835, 6ER 1645, 8ER 1785); (9) the Wolfes' recent history of giving false testimony for the Clark County prosecuting authorities in another case involving an alleged knife assault (App. Br.14 n.9); and (10) evidence that the knife which Vanessa Wolfe told police was the murder weapon could not have been.[25]

We question whether any rational juror could find this mix of evidence proved Browning's guilt beyond a reasonable doubt. Certainly, it cannot be said that every juror would necessarily convict on the remaining evidence, so the exculpatory facts suppressed by the prosecution are immaterial. The Nevada courts did not say that; and neither should this Court.

III. RESPONDENT UNDERSTATES THE SCOPE AND SIGNIFICANCE OF THE PROSECUTOR'S PRESENTATION OF MISLEADING EVIDENCE REGARDING HIS IMPLIED AGREEMENT OR UNDERSTANDING WITH A KEY INFORMANT WITNESS.

Respondent's Brief begins its citation-free discussion of the prosecutor's failure to disclose his understanding with informant-witness Randall Wolfe, in

[25] This roster does not include the lost testimony of Marsha Gaylord explaining Browning's fingerprints in the jewelry shop and his presence in the area, or the testimony of Frederick Ross, and Browning himself, about the Wolfes' involvement in the crime.

violation of *Giglio v. United States*, 405 U.S. 150 (1972), by quoting a prosecutor-drafted postconviction holding that no such violation occurred (Resp. Br. 60-61)—even though the Nevada Supreme Court found that one did (1ER 215). Respondent then tries to reconcile this by arguing that this was only a "narrow" violation, a mere failure to disclose evidence of an "implied" agreement and understanding. Resp. Br. 62.

That argument ignores the significance of this deception on the record of this case. This Court has long recognized that "tacit" agreements between prosecutors and informants can materially affect credibility and are subject to *Giglio's* rule. *See United States v. Shaffer*, 789 F.2d 682, 689 (9th Cir. 1986). Indeed, an unspoken "understanding" can have even more impact than an express one.

> In the case of an explicit agreement, the testifying witness will know what he can expect to receive in exchange for his testimony, and will know the conditions he must fulfill. When a witness is instead led to believe that favorable testimony will be rewarded in some unspecified way, the witness may justifiably expect that the more valuable his testimony, the more valuable his reward. The threat of incorrect jury verdicts is further increased by tacit agreements because, when testifying, a witness whose agreement is tacit, rather than explicit, can state that he has not received any promises or benefits in exchange for his testimony.... Likewise the prosecutor can argue to the jury that the witness is testifying disinterestedly, which artificially increases the witness's credibility—artificially, that is, because the premise of the argument is false.

Douglas v. Workman, 560 F.3d 1156, 1186-87 (10th Cir. 2009) (quoting *Bell v. Bell*, 512 F.3d 223, 244-45 (6th Cir. 2008) (dissenting opinion) (internal citations omitted.)).

Moreover, as Respondent admits, Randall Wolfe was not just a witness but a "state informant[]." Resp. Br. 71. The record of Wolfe's sentencing hearing, before which prosecutor Seaton met *ex parte* with the judge and got leniency for Wolfe, showed that Seaton's "understanding" with Wolfe was an ongoing one. The sentencing judge said Seaton told him Wolfe should get leniency for his crimes because he had been of assistance on "several occasions" in a "few cases." 6ER 1527, 1542. As the Nevada Supreme Court recognized, one of those cases was obviously Browning's. 1ER 215. As noted in our Opening Brief, another was a trial that occurred the week Browning's trial originally was supposed to begin, in February, 1986. See App. Br. 14n.9. In that trial, Wolfe and his wife both testified for the prosecution about an alleged assault with a knife and—much as in Browning's case—they supplied the police with what they said was the weapon. 6ER 1579-81; 8ER 1862. The jury in that case acquitted (6ER 1586)—and the next day Seaton sought and received a continuance of Browning's scheduled trial on the false ground that the Wolfes could not be found (see 4ER 917; App. Br. 14).

The caselaw in this area, which Respondent says nothing about, makes the touchstone of materiality of such undisclosed impeachment whether the concealed information was cumulative of something the jury nonetheless heard. See App. Br. 73-74; *Banks v. Dretke,* 540 U.S. 668702-03 (2004) (holding impeachment evidence was not "merely cumulative" where the withheld evidence was of a

different character than evidence already known to the defense). All the jury heard about the Wolfes' incentives were denials (see 3ER 787)—when in fact, as the Nevada Supreme Court found, there was evidence of an "impl[ied] … agreement" and "understanding" that should have been disclosed. 1ER 215. It is true that the jury also heard that Randall Wolfe was a repeat criminal and drug addict, but those facts don't explain why he would lie to frame Browning or why the prosecution would let him do so, which is what Browning's defense counsel needed to explain. Wolfe's history and ongoing work as a police informant could provide that explanation: it is far from unknown for law enforcement to look the other way when repeat informants commit crimes, including very serious crimes.[26]

Respondent correctly assumes that because the Nevada Supreme Court rejected this claim on the merits its decision is subject to deference under §2254(d). Resp. Br. 63. But simply declaring a decision "was not objectively unreasonable" (*id.*) does not make it so.

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[26] *See, e.g., Banks,* 540 U.S. at 682, 699 (paid police informant allowed to deal drugs and instigate robberies); *United States v. Sessa*, 711 F.3d 316, 322 (2d Cir. 2013) (FBI agent falsely denied allowing confidential informants under his supervision to commit crimes … [including] serious crimes); *Donahue v. United States*, 634 F.3d 615, 616 (1st Cir. 2011) (describing "the unholy alliance between the Federal Bureau of Investigation (FBI) and a notorious mobster, James J. "Whitey" Bulger"); *United States v. DeSapio*, 435 F.2d 272 (2d Cir.1970) ("expressly approv[ing] the practice of allowing well-placed informants to engage in criminal activity," *United States v. Doe*, 1999 WL 243627 at *8 [E.D.N.Y. Apr. 1, 1999]); *cf. Kyles*, 514 U.S. at 426-27, 442 (police ignored indications that informant committed crime and planted evidence).

The Nevada Supreme Court squarely based its decision on reasoning that was contrary to clearly established law when it held that the *Giglio* violation was not prejudicial because (it said) Wolfe was "stiffly impeached *on other grounds*." 1ER 216 (emphasis added). The clearly established law is the opposite: the fact undisclosed evidence "would have provided the defense with a new and different ground of impeachment," means it was *not* cumulative and its nondisclosure, or false testimony about it, *was* prejudicial to the defense. *Benn v. Lambert*, 283 F.3d 1040, 1056 (9th Cir 2002); *Banks*, 540 U.S. at 702–03; see App. Br. 74.

The Nevada Supreme Court also failed to consider the likely impact on the jury of Wolfe's false denials of any understanding with the prosecution, and the prosecutor's endorsement of them. The question of whether there is a "reasonable probability of a different result if the information in question had been disclosed" (1ER 216), is not the same as the question whether "a presentation to a fact-finder of false testimony knowing it to be false … could ... in any reasonable likelihood have affected the judgment of the jury...." *Dow v. Virga*, 729 F.3d at 1041, 1047 (quoting *Giglio*, 405 U.S. 150 at 153; and *Napue v. Illinois*, 360 U.S. 264, 271 (1959)). In *Dow*, this Court held that a state court's decision was contrary to clearly established law, and was not entitled to §2254(d) deference, because of this error alone.

In addition, in addressing prejudice, the Nevada Supreme Court never considered the materiality of the false testimony and undisclosed facts about Wolfe's understanding, and the other *Brady* and *Napue* violations in the case, "collectively" *Kyles*, 514 U.S. at 436, as established law requires, *Sivak v. Hardison*, 658 F.3d 898, 912 (9th Cir. 2011) because it did not recognize that all the other violations occurred. See Argument II, above. The court's opinion included a section on "cumulative prejudice," in which it listed several constitutional and nonconstitutional errors and found them nonprejudicial because of the supposedly "overwhelming evidence" of guilt. 1ER 219. But that list did not include the nondisclosures and misleading testimony and argument about the source of the bloody shoeprints—even though the court had said it was rejecting that claim partly on grounds of "materiality." See page 24, above.

For all these reasons, this Court should not defer to the Nevada Supreme Court's determination that the *Giglio* violations regarding Randall Wolfe were not prejudicial but should consider that question *de novo*. If it does that, we submit it cannot fail to conclude that the prosecution's deceptions regarding this critical witness—considered together with its nondisclosure and misleading arguments about the bloody shoeprints, the victim's dying declaration, and the tan jacket—wholly undermine any confidence in the fairness of this trial and the reliability of its verdict. See Argument IIC, above.

IV. RESPONDENT'S ARGUMENT THAT BROWNING'S TRIAL COUNSEL DESERVES "CREDIT" MAKES A MOCKERY OF THE CONCEPT OF EFFECTIVE COUNSEL IN A CAPITAL MURDER CASE.

Respondent denies that Browning's trial counsel Randall Pike was guilty of "neglect" and says he deserves "more credit" for his "zealous" representation of Paul Browning. Resp. Br. 66. But even the Nevada Supreme Court found that Pike was ineffective in a key aspect of his investigation and trial preparation (1ER 193-94)—though it failed to recognize the full scope of that ineffectiveness and the prejudice that flowed from it.[27] For this Court to give "credit" to the representation shown on this record would greatly lower the standards of capital representation established by its precedents and those of the Supreme Court of the United States.

This was a capital murder case in which Respondent acknowledges the lone defense counsel spent almost no time on factual investigation before trial.[28] He was allotted only $500 for investigative and expert assistance and refused to ask for more, although his investigator urged him to do so. See App. Br. 80 n.44. He

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[27] The Nevada Supreme Court also found Pike ineffective for failing to object to improper arguments by the prosecutor, in which he shifted the burden of proof to the defense and called the presumption of innocence "a farce"—but it found that those failures were not prejudicial, either. 1ER 198, 201-01.

[28] Respondent correctly points out that Appellant's Brief overstates the amount of time Pike's records show he spent on pretrial investigation. The correct numbers are "twelve (12) hours on all … aspects of pretrial preparation" other than his unsuccessful speedy trial writ, out of which "only five (5) hours [were spent] on any form of factual investigation or preparation." 2ER 307. Respondent did not dispute these numbers below. See 2ER 444.

spent half of that money on a polygraph examination of his client that at best had no apparent purpose and was inconclusive. See App. Br. 98. He hired only one expert, a hair stylist whose unhelpful trial testimony about "jeri curls" was relevant only because of counsel's failure to interview a key defense witness (Officer Gregory Branon) before calling him to testify.

The Nevada Supreme Court held that extraordinary failure—failing to even talk to an important police officer witness before calling him to testify at trial—"was deficient" but "this deficiency alone was not prejudicial." 1ER 193-94. Conflating *Strickland's* "performance" and "prejudice" prongs, Respondent portrays this as a determination that "trial counsel was not ineffective in his decision not to interview Officer Branon" to which this Court should defer. Resp. Br. 74. In fact, as the District Court recognized, it is the opposite—a determination that counsel *was* ineffective that is both reasonable and correct in light of the clearly established federal law cited in Appellant's Brief (at 78), which law Respondent ignores.

Respondent defends the Nevada Supreme Court's holding that Browning was not prejudiced by this aspect of counsel's defective performance, arguing that it made no difference that the jury was misinformed about the victim's dying description of his killer. Resp. Br. 75. In so doing, Respondent repeats a clear factual error in the Nevada Supreme Court's opinion: that, at trial, "Officer

Branon … testified about *Hugo Elsen's description* of his murderer ….” Resp. Br. 75 (emphasis added); see 1ER 193 (“Officer Branon testified at trial that he received from the dying Elsen a description of the killer”). As we have pointed out, Officer Branon testified he “received” a description of the murderer but never said it came from Hugo Elson. See App. Br. 20-21; 3ER 831. This is so hard to fathom we repeat: as a result of defense counsel's failure to interview Officer Branon before calling him, *the jury was never told that the description of the killer that did not match Browning came from the dying victim*. That was why the prosecutor was able to tell the jury to ignore the description by saying it just came from “*some white person*, not really knowing the true definition of Jeri curl” (3ER 894-95 [emphasis added])—another fact of record unmentioned by Respondent.

Hugo Elsen undoubtedly knew the definition of the words he actually used to describe his killer's hair: “loosely curled,” “shoulder length,” and “wet looking.” 1ER 45; 6ER 1461-62. As the Nevada Supreme Court noted, no witness ever described Browning's hair “as loosely curled and wet” (1ER 194) –let alone “shoulder length.”[29] None could: photos of Browning taken during his arrest show he had a dry-looking, relatively short, “Afro” style haircut. See 8ER 1723-24. The

[29] Respondent tries to suggest these might not have been Mr. Elsen's words, claiming they were only “remembered 14 years later by Officer Branon.” Resp. Br. 76. But the critical phrase “shoulder length” is in the transcript of the original police radio call the day of the murder. See 8ER 1722.

Nevada Court's failure to recognize the prejudice to Browning's defense from Pike's failure to bring out the truth about this description was based on an unreasonable determination of fact in light of the evidence presented in state court—the mistaken belief that the jury heard that the description of the killer that didn't match Browning came from the victim, when Pike never brought that out. 28 U.S.C. §2254(d)(2).

The Nevada Supreme Court also unreasonably failed to recognize that Pike's failure to interview Officer Branon resulted in his failure to learn, and to convey to the jury, that the bloody shoeprints were made before the police and medics entered the crime scene. That court came close to recognizing this when it ruled (erroneously, we submit, see page 15, above) that there was no *Brady* violation with respect to the source of the shoeprints, because that information was "reasonably available to the defense, as Browning acknowledges by claiming that his counsel should have interviewed the officer and discovered it." 1ER 216. Yet it inexplicably forgot that allegation in its discussion of Browning's ineffective assistance claim. See 1ER 194-95.

Pike did not have to do anything to learn what Officer Branon knew about the shoeprints except what the Nevada Supreme Court held he should have done: interview Officer Branon and ask what he saw when he responded to the crime scene, before calling him to the stand to testify. If he had done so, Pike and the

jury would have learned that the shoeprints were there before the first responders, and the prosecution's explanation for them was false.

And that is just one aspect of Pike's wholesale failure to investigate and prepare the defense in this capital case. Pike also never interviewed either of Browning's two principal accusers, Randall and Vanessa Wolfe (5ER 1322), and didn't have his investigator interview them, either. 6ER 1509, 1513. The Nevada Supreme Court uncritically accepted Pike's claim he did not interview the Wolfes because he has investigators interview for him (1ER 295), ignoring the undisputed fact Pike *had* an investigator who didn't interview the Wolfes, either. 6ER 1509.

As a result of this failure, the jury never learned that the Wolfes were serial police informants, and at least one of them, Randall Wolfe, had an "implied agreement or understanding" (Resp. Br. 62) with the prosecutor. Nor did it hear that, just before Browning's case was supposed to go to trial the previous spring, the Wolfes had falsely accused another man of an assault involving a knife—a knife they gave to police, claiming it came from the defendant, just as they did in Browning's case. See App. Br. 14 n.9.

Officer Branon and the Wolfes were only three of the key witnesses Pike failed to interview or have interviewed. Neither he nor his investigator interviewed any of the other main police officer witnesses, either—and any one of them well might have revealed the truth about the bloody shoeprints and the dying

declaration. Pike did not allow his investigator to look further into the Wolfes' association with the "Cuban" whom Browning told him he believed was the person who actually committed the murder.[30] See 8ER 1785.

Pike didn't interview Mrs. Elsen either. Nor, contrary to what Respondent claims, did he come close to effectively confronting her identification testimony at trial. Pike knew or should have known that Mrs. Elsen said shortly after the incident that, given her limited and obstructed view, she would not be able to identify the killer, and that a month after the crime she looked at a photo array from which she picked two other men and not Browning. App. Br. 11.[31] Yet the

[30]Respondent defends Pike's failures saying Browning "never told him what actually happened" (Resp. Br. 68), but that is belied by the record. Pike admitted Browning told him he had been framed by the Wolfes and the crime was actually committed by a "Cuban" associate of theirs who had a yellow car. See 6ER 1275-76, 1353-54. He knew Browning had been in the jewelry store with Marsha Gaylord the day before the murder and was in the area shortly after the robbery. See 6ER 1277, 1280-81, 1285. Moreover, even if Pike's claim was true, it doesn't explain his malfeasance: what did he need to hear from Browning to know that he should interview Officer Branon, or the Wolfes, or Mrs. Elsen, or consult forensic experts regarding critical physical evidence or subpoena Marsha Gaylord or do any of the many other basic things he failed to do to prepare Browning's defense?

[31] Respondent also praises trial counsel for personally visiting the jewelry store "prior to the trial to check it out and review." Resp. Br. 68. This was hardly "zealous" investigation. Trial counsel visited the store during business hours and was unable to adequately view the crime scene, including the location of Mrs. Elsen, the victim and the perpetrator. 5ER 1299. Pike himself admitted that a crime scene sketch—which he did not bother to get in discovery—would have "provided a factual basis to thoroughly cross-examine [Mrs. Elsen] on her to view and provide a basis for which to move for the exclusion of her [in-court] identification," which his brief scene visit did not. 6ER 1634-1636.

only questions he asked of Mrs. Elsen related to the jewelry that was stolen and a single question about whether she looked at photographs of "black men" to which she falsely replied that she hadn't. 3ER 673-675. Instead, the jury was told by the prosecution that Mrs. Elsen will never forget Browning's face and that her identification was "as good as you can ask for." 3ER 868.

Respondent does not deny that the only fact witnesses Pike did interview was Marsha Gaylord, who confirmed three important things Browning told him: she had been in the jewelry store with Browning a day before the murder, she was released from jail the day of the crime and was going to meet Browning in the area, and the Wolfes had a Cuban acquaintance with shoulder length jeri curl hair. See App. Br. 60-61. Pike stated repeatedly that Gaylord was Browning's most critical witness (6ER 1636-40)—yet he never subpoenaed her for trial, never told his investigator to find her, and never asked for discovery or the court's assistance in doing so.

Nor did Pike retain or consult any forensic or expert witnesses (other than the unnecessary hair stylist)—experts who, the postconviction testimony showed, could have informed the jury that the knife given to police by Vanessa Wolfe could not have been the murder weapon, and that the blood on the tan jacket was not the

victim's,[32] or that Mrs. Elsen's identification testimony was wholly unreliable. See App. Br. 57; 1ER 257-67, 5ER 1156ff, 1234-39.

This is what Respondent would have this Court call "zealous" representation in a capital murder case: five hours of fact investigation; no forensic experts; no interview of the key prosecution witnesses; no interview of a potentially hostile witness called by the defense; no efforts to bring the person who counsel recognized was the defendant's most important witness to testify at trial; refusal of an experienced investigator's advice to conduct further investigation; no objections to grossly improper prosecutorial arguments at trial. And that is not even all of Pike's proven failures. See App. Br. 101n.54. No court could reasonably find such representation anything but ineffective.

As noted above, the Nevada Supreme Court did not do so. It recognized Pike had been "deficient," though not all the ways he had been so, and not all the prejudice that flowed from it. In finding Pike's ineffectiveness nonprejudicial, the

[32] The Nevada Supreme Court refused to consider Browning's claim that Pike was ineffective for failing to have tests done on the blood on the tan jacket that would have shown it was not Mr. Elsen's. It did so on inconsistent procedural grounds—saying first that it was not based on "cogent legal argument" (1ER 203), though the briefing on it included citations to and parenthetical explanations of six reported cases and a legal treatise (App. Br. 99-100), and then that it had been raised for the first time in a reply brief (1ER 214n.53), though it was included in the opening brief as well (see App. Br. 99). The briefing showed beyond dispute that such blood testing was available and had been admitted in criminal cases in Nevada, prior to Browning's trial. *Id.; see, e.g., Santillanes v. State*, 102 Nev. 48, 49, 714 P .2d 184 (1986).

Nevada Supreme Court considered the harm caused by each of his failures separately, rather than collectively, as clearly established law requires. *Doe v. Ayers*, 782 F.3d 425, 460 (9th Cir. 2015).

The Nevada Supreme Court's rejection of Browning's ineffectiveness claim was unreasonable under 28 U.S.C. § 2254(d) in at least three respects—in its determinations of fact regarding the content of Officer Branon's testimony and the harm from Pike's failure to interview him; and the unreasonable application of clearly established law to the effectiveness and prejudice determination. It refused to consider the merits of what would in most cases be a major claim of ineffective assistance, but here was just one of many—the failure to seek adequate testing of the blood on the tan jacket—on a lame and irregular procedural ground. Its decision therefore did not properly pose a bar to further development of the issue, and relief, in federal habeas. The District Court erred in summarily dismissing it.

MOTION REGARDING UNCERTIFIED ISSUES

V. THE COURT SHOULD REQUIRE THE STATE TO RESPOND TO BROWNING'S MOTION TO EXPAND THE CERTIFICATE OF APPEALABILITY.

As this Court's rules permit, Respondent chooses not to answer any of Browning's uncertified claims. See Ninth Circuit Rule 22-1(f). However, we respectfully request that the Court exercise its discretion and require it to do so.

A. The Supreme Court's denial of certiorari in *Baker v. Riley*, 136 S.Ct. 1450 (March 21, 2016) establishes that a certificate of appealability, and relief, should be granted on Browning's *Sandstrom v. Montana* claim.

After Appellant's and Respondent's Briefs were filed, the Supreme Court denied the Respondent's petition for *certiorari* review of this Court's decision in *Riley v. McDaniel*, 786 F.3d 719, 724 (9th Cir. 2015). *Baker v. Riley*, 136 S.Ct. 1450 (March 21, 2016). As previously explained (App. Br. 86-91), exactly the same constitutional error on which relief was granted in *Riley* was committed in this case: the jury was given an instruction which "defined deliberation as a part of premeditation, rather than as a separate element." *Riley,* 786 F.3d at 723. As in *Riley*, this instruction was given at a time (1986) when there is no question that "deliberation was a discrete element of first-degree murder in Nevada." *Id.* The omission of this element from the jury instructions in Browning's case, as in Riley's, therefore violated the due process principles of *Sandstrom v. Montana*, 442 U.S. 510 (1979). *See Riley*, 786 F.3d at 724.

The error was more obviously prejudicial in Browning's case than it was in Riley's, because in Browning's case there was no evidence from which a rational juror could find beyond a reasonable doubt that the murder was "deliberate," as that term is defined by Nevada law.

> To convict a defendant of first-degree murder under Nevada law, a jury must find that he committed the murder with "coolness and reflection." *Byford [v.*

> *State,* 116 Nev. 215, 994 P.2d 700 (2000)] at 714. The defendant must have engaged in a "dispassionate weighing process and consideration of consequences before acting"; if his decision to kill was "formed in passion," and that passion had not subsided by the time the murder was carried out, it was not deliberate. *Id.*

Riley, 786 F.3d at 725.

The District Court considered none of this but rejected this claim as unexhausted. 1ER 115-16. Browning's Opening Brief and pleadings below provided substantial arguments to the contrary, pointing to his efforts to preserve all constitutional issues in his case, his lawyers' repeated failure to do so with respect to this claim, his attempt to submit it to the Nevada Supreme Court in 2009, and the state procedural bars that would make another attempt to do that futile. See App. Br. 87-91.

There is no substantial difference between the procedural posture of this issue in Browning's case and Riley's: "Riley's challenge to the premeditation instruction given at his trial was presented not in his first state habeas petition, which was adjudicated on the merits, but in his second state habeas petition, which was denied on a procedural ground, and not adjudicated on the merits." *Riley,* 786 F.3d at 722. Browning's challenge to the premeditation instruction given at his trial was presented not in his first state habeas petition, which was adjudicated on the merits, but in his Extraordinary Relief petition, which was denied on a procedural ground, and not adjudicated on the merits. Riley was granted habeas

relief because this Court has held Nevada's procedural bar to successor petitions is inadequate and irregularly applied. *Id.* There is no reason to believe anything different about the Nevada Supreme Court's rules for handling of Extraordinary Relief Petitions.[33]

If any of Browning's arguments about exhausting procedural default, cause and prejudice, or actual innocence are correct, he is entitled to federal habeas relief from his murder conviction because of this clear constitutional error. That conviction and the death sentence imposed on him for it should not be allowed to stand on this wholly technical ground, without at least an answer to these arguments. Respondent should be required to file such an answer and this Court should expand the Certificate of Appealability to consider this claim.

B. Respondent should not be allowed to ignore Browning's uncertified prosecutorial misconduct claims.

Respondent's Brief does not mention or acknowledge prosecutor Dan Seaton's extraordinary misconduct during jury argument in this case: his emphatic misrepresentation that the blood on the tan jacket was "*the same blood* as Hugo

[33] The Nevada Supreme Court exercises unfettered discretion in deciding whether or not to grant Petitions for Extraordinary Relief or reject them on their merits or on other grounds. *Schuster v. Eighth Judicial Dist. Court*, 123 Nev. 187, 190, 160 P.3d 873 (2007). It exercises that discretion based on criteria such as "judicial economy and sound judicial administration," *Redeker v. Eighth Judicial Dist. Court*, 122 Nev. 164, 167, 127 P.3d 520 (2006), "urgency or strong necessity, or an important issue of law require[ing] clarification …." *Rugamas v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark*, 305 P.3d 887, 892 (2013).

Elsen had flowing through his veins earlier that day," "*Hugo Elsen's blood*;" and his dismissal of the presumption of innocence as a "façade" and a "farce." See App. Br. 91-97. This Court should require an explanation of why these should not require relief, or at least be considered in the balance in determining whether the numerous other constitutional errors in Browning's case should do so.

As noted above, whether relief is required for denials of effective counsel and violations of *Brady* and *Napue's* due process principles depends on whether the combined effect of those violations undermines confidence in the jury's verdict. *See Doe,* 782 F.3d at 460. The due process principles applicable to prosecutorial misrepresentations in jury argument are essentially the same as those that apply to *Brady* and *Napue* violations. *See Brown v. Borg*, 951 F.2d 1011, 1017 (9th Cir. 1991). The same measure of prejudice therefore should apply to prejudicial misrepresentations of fact in prosecutorial arguments. That standard is whether the misrepresentations undermine confidence in the jury's verdict. *See, e.g., United States v. Coffey*, 823 F.2d 25, 28 (2d Cir. 1987). The prejudice standard applicable to other forms of argument error is similar, and is also grounded in due process. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). The constitutional logic that requires the prejudice flowing from such due process violations to be considered collectively therefore should apply equally to these.

Even if these uncertified claims do not themselves warrant relief—and we respectfully maintain they do—they should be weighed in the balance to determine whether in combination with the other Sixth Amendment and Due Process violations in this case, that confidence is undermined. *Cf. Mak v. Blodgett*, 970 F.2d 614, 625 (9th Cir. 1992). The Court should not ignore them, and should not let Respondent do so, either.

C. Respondent's Brief puts in issue the wholesale ineffectiveness of Browning's trial counsel .

Respondent's Brief effectively puts in issue the entirety of defense counsel Pike's trial performance, arguing that it was "zealous" and he should be give "credit" for it. See pages 50-58, above. Those arguments eliminate any distinction between the certified and uncertified aspects of Browning's ineffective assistance claim. Those aspects ultimately must be considered collectively, in combination with other deficiencies in defense counsel performance that undermined the fairness of Browning's trial and confidence in its outcome. *Doe*, 782 F.3d at 460.

"Under prevailing case law, individual deficiencies in representation which may not by themselves meet the *Strickland* standard may, when considered cumulatively, constitute sufficient prejudice to justify issuing the writ." *Pizzuto v. Arave*, 385 F.3d 1247, 1260 (9th Cir. 2004). We respectfully submit that Pike's representation fell below *Strickland's* standard, and prejudiced his client, in many ways in addition to those specified in the District Court's certificate. See pages 50-

58, above; App. Br. 97-101. But whether those additional deficiencies separately warrant habeas relief or not, they should be considered in weighing the prejudice caused by the failures of counsel found by the Nevada Supreme Court and the District Court below, and Respondent should be required to address them.

DATED this 16th day of May, 2016.

Respectfully submitted,

MacDONALD, HOAGUE & BAYLESS

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APPENDIX A

SOURCES OF POSTCONVICTION TRIAL COURT'S FINDINGS OF FACT CITED IN RESPONDENT'S BRIEF

PC Trial Court FFCL (1ER 223-51)	Prosecution 2002 Prop. FFCL 9ER 2020-48)	Prosecution 2001 Prop. FFCL (9ER 1965-97)	Prosecution 4/2001 Opposition Memo (9ER 1925-63)	Resp. Brief cite
Paragraph	**9ER Page**	**9ER Page**	**9ER Page**	**Page**
1 (1ER 224)	Verbatim (2021)	Verbatim (1966)	Verbatim (1926)	18-20
2 (1ER224)	Verbatim (2021)	Verbatim (1966)	Substantially Verbatim (1926)	18-20
3 (1ER 224)	Verbatim (2021)	Verbatim (1966)	Verbatim (1927)	12
4 (1ER 224)	Verbatim (2021)	Verbatim (1966)	Substantially Verbatim (1927)	12
5 (1ER225)	Verbatim (2022)	Verbatim (1967)		12
6 (1ER 225)	Verbatim (2022)	Verbatim (1967)	Substantially Verbatim (1927)	12
8 (1ER 225)	Verbatim (2022)	Verbatim (1967)	Similar (1928)	12
9 (1ER225)	Verbatim (2022)	Substantially Verbatim (1967)	Substantially Verbatim (1928)	13-14
11 (1ER225-6)	Verbatim (2022)	Verbatim (1967)	Verbatim (1928)	13-14
12 (1ER 226)	Verbatim (2023)	Substantially Verbatim (1968)	Substantially Verbatim (1928)	13-14
13 (1ER226)	Verbatim (2023)	Verbatim (1968)	Similar (1929)	13-14
14 (1ER 226)	Verbatim (2023)	Partially Verbatim (1968)	Similar (1936)	14,61
15 (1ER 226)	Verbatim (2023)	Partially Verbatim (1968)	Substantially Verbatim (1936)	14,61
16 (1ER226)	Verbatim (2023)	Substantially Verbatim (1968)		15,61
17 (1ER226)	Verbatim (2023)	Similar (1968)		15,61
24 (1ER 227)	Verbatim (2024)	Similar (1969) ("would not"/ "probably would not")		15

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25 (1ER227-8)	Verbatim (2024)	Similar (1970) ("would not"/ "probably would not")		16-18,41
26 (1ER 228)	Verbatim (2025)	Verbatim (1970)	Verbatim (1937)	16-18
27 (1ER 228)	Verbatim (2025)	Substantially Verbatim (1970)	Substantially Verbatim (1938)	16-18
28 (1ER228-9)	Verbatim (2025)	Substantially Verbatim (1971)	Substantially Verbatim (1938)	16-18,52
30 (1ER 229)	Verbatim (2026)	Similar (1971) ("speculation"/ "Defendant's … self-serving testimony"	Similar (1940)	13-14
33 (1ER 230)	Verbatim (2027)	Similar (1972)		18-20
41 (1ER 232)	Verbatim (2029)	Similar (1975)		67

Each column compares the designated Postconviction Trial Court Finding in that row with the indicated source (the prosecution's Opposition Memo and its two sets of proposed Findings and Conclusions).

"Verbatim" = the Postconviction Trial Court Finding tracks the indicated source word for word.

"Substantially verbatim" = the language of the Postconviction Trial Court Finding is almost exactly the same as the indicated source and the differences do not change the meaning.

"Partially verbatim" = part but not all of the Postconviction Trial Court Finding tracks the indicated source word for word

"Similar"= the Postconviction Trial Court Finding and the indicated source use different words but say substantially the same thing; possibly significant word differences are noted.