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 2

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[1] Tables of Authorities and certificates have been removed from all Briefs in this Appendix.

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

APPELLEES' SUPPLEMENTAL ANSWERING BRIEF

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Appellees herein hereby submit their Supplemental Brief on the uncertified issues set forth in the Opening brief in this matter. Respondents incorporate their statement of the case and all argument from the Answering brief herein.

I.

STANDARD FOR ISSUANCE OF COA

The issuance of as certificate of appealability in a § 2254 case is set forth in 28 U.S.C. §2253(c). It requires a substantial showing of the denial of a constitutional right. The Supreme Court has interpreted the standard as follows:

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

Slack v. McDaniel, 529 U.S. 473, 484 (2000). See also, *James v. Giles*, 221 F.3d 1074, 1077-79 (9th Cir. 2000). The Supreme Court further illuminated the standard in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). There, the Court said:

> We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. As we stated in Slack, "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy §2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the

> district court's assessment of the constitutional claims debatable or wrong."

Miller-El, 537 U.S. 322, 338, (quoting *Slack*, 529 U.S. at 484).

In the disposition of claims by the district court, whether on procedural grounds or on the merits, no decision by the lower court was remarkable in any manner. The court applied well-known, existing law to rather run-of-the-mill claims, and tread upon no new territory. The district court's rulings were common, everyday rulings not notable in any respect. Its denial of a certificate of appealability reasonably flowed from the mundane nature of the litigation. Because of the mundane nature of the issues raised below and the district court's uncontroversial rulings, nothing presented here approaches the test set forth in *Slack*.

II.

STANDARD FOR MERITS DETERMINATION UNDER 28 U.S.C. § 2254

Since the adoption of the AEDPA amendments in 1996, a federal habeas court does no more than to engage in a highly deferential review of the earlier review process engaged in by the state courts of claims disposed of on the merits. Habeas corpus, for claims previously denied by state courts, is, in essence, a review of a review. Here, the decisions of the state courts were neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the Supreme Court, and this court may not therefore grant relief on the claims.

28 U.S.C. § 2254 (d). *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495 (2000). *Early v. Packer*, 537 U.S. 3, 123 S.Ct. 362 (2002). *McClain v. Prunty*, 217 F.3d 1209 (9th Cir. 2000).

The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) imposes new constraints on federal habeas corpus courts and limits the circumstances in which a federal court can grant relief to a petitioner who is in custody pursuant to the judgment of conviction of a state court. AEDPA imposes a "highly deferential" standard for evaluating state court rulings that is "difficult to meet" and "which demands that state court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 131 S.Ct. 1388, 1398 (2011). Under this highly deferential standard of review, a federal habeas court may not grant habeas relief merely because it might conclude that the state court decision was incorrect. *Id.* at 1411. An application for habeas relief must show that the state court decision was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). A state court's determination that a claim lacks merit precludes federal habeas relief as long as fair minded jurists could disagree on the correctness of the state court's decision. The prisoner must show that the state court ruling on the claim was so lacking in justification that

there was an error well understood and comprehended in existing law beyond any possibility for fair minded disagreement. *Harrington v. Richter*, 131 S.Ct. 770, 785, 786-87 (2011). Notably, the more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations. *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). The Supreme Court recently emphasized the extremely deferential nature of 2254 review, explaining that while that section "stops short of imposing a complete bar on federal court relitigation of claims already rejected in state court proceedings," the Court emphasized that AEDPA only permits a lower federal habeas court to grant a writ of habeas corpus "where there is no possibility that fair minded jurists could disagree that the state court's decision conflicts with th[e Supreme] Court's precedents." *Harrington*, 131 S.Ct. at 786.

Circuit precedent does *not* constitute clearly established Federal law as determined by the Supreme Court, and cannot form the basis for habeas relief under AEDPA. Nor can a federal habeas court rely on circuit decisions on the theory that they reflect what has been clearly established by the Supreme Court, if those decisions depart in any manner whatsoever from Supreme Court law. *Parker v. Matthews*, 132 S.Ct. 2148, 2155 (2012).

Under *Nevada v. Jackson*, 133 S.Ct. 1990 (2013), a habeas court also cannot rely on a Supreme Court decision as the basis for relief under AEDPA where that

decision only sets forth a broad, general right or is only tangentially related to the narrow issue at hand. In order to govern, the holding itself of the Supreme Court decision must be narrowly and directly on point.

III.

ARGUMENT

A. General Argument as to All Uncertified Claims.

Browning robbed a jewelry store in Las Vegas and killed the proprietor. As reflected in the Nevada Supreme Court's fact finding in the 2004 Order, EOR 187, et seq., the case against Browning was overwhelming. These facts included, inter alia, that he was identified at the scene and later by numerous eyewitnesses, he left his fingerprint in the jewelry store on a shard of glass, he fled to a nearby motel, the Normandy Motel, a short distance away down Las Vegas Boulevard, and he was almost immediately reported to police by the occupant of the room as having admitted to the crimes. Within moments of the report he was confronted in the room by police while surrounded by the stolen jewelry and jewelry bags. This level of incriminating evidence is singularly rare in a murder case, and it is relevant to any claim or argument where prejudice is an element, because it negates Browning's ability to show that element. Under claims governed by *Strickland v. Washington*, 466 U.S. 668 (1984), and under *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993), Browning has the burden to show prejudice, and that error by the

state court, if any, was not harmless. Based on the strength of the state's case, he can do neither.

B. Uncertified Issue I

THIS CLAIM SHOULD NOT BE CONSIDERED BECAUSE IT REMAINS UNEXHAUSTED AND WAS NEVER RULED ON BY THE STATE COURTS OR THE DISTRICT COURT BELOW.

Uncertified issue I was claim 8 in the Fifth Amended Petition. EOR 382, et seq. it challenges the jury instruction under Nevada law that defined deliberation in terms of premeditation, what has been termed the *Kazalyn* instruct after *Kazalyn v. State*, 108 Nev. 67, 825 P.2d 578 (1992). The *Kazalyn* instruction was replaced by the Nevada Supreme Court in *Byford v. State*, 116 Nev, 215, 994 P.2d 700 (2000), which required district courts to instruct separately on deliberation and premeditation. This court held in *Polk v. Sandoval*, 503 F.3d 903 (9th Cir. 2007) that the *Kazalyn* instruction relieved that State of an element of the crime, and was, therefore, unconstitutional. But after the Nevada Supreme Court clarified in *Nika v. State*, 124 Nev. 1272, 198 P.3d 839 (2008) that this court had misinterpreted State law, and that the new rule was prospective only as a change to existing law, this court amended its view in *Babb v. Lozowski*, 719 F.3d 1019 (9th Cir. 2013), distinguishing cases that were final from those that were not at the time of *Byford.* Subsequently, in *Moore v. Helling*, 763 F.3d 1011, 1013-14 (9th Cir. 2014) this court recognized that *Polk's* and *Babb's* rationale had been abrogated by the

Supreme Court in *White v. Woodall*, 134 S.Ct. 1697 (2014), which rejected the "unreasonable refusal to extend" theory under 28 U.S.C. § 2254.

This claim was unexhausted when presented to the district court in the Fifth Amended Petition for Writ of Habeas Corpus. EOR 115-16. Browning had argued that the claim was exhausted when similar facts were presented under the guise of a *Strickland* claim of ineffective assistance of trial counsel. The district court correctly noted that raising a *Strickland* claim does not exhaust a claim alleging the underlying facts as a substantive due process type claim, citing to *Kelly v. Small*, 315 F.3d 1063, 1068, n. 2 (9th Cir. 2003) and *Rose v. Palmateer*, 395 F.3d 1108, 1111-12 (9th Cir. 2005). The district court further rejected the argument that the claim was exhausted in an extraordinary petition to the Nevada Supreme Court which the Court declined to consider it, citing to *Castille v. Peoples*, 489 U.S. 346, 349-50 (1989). *Id.*

Here, Browning shifts his argument. He now argues that the claim was technically exhausted because there were no state court remedies remaining, so that the district court ought to have engaged in an analysis of procedural default instead. He further argues that under the futility doctrine, the Nevada Supreme Court would rule against him at any rate, so that the claim should be allowed to proceed.

Browning's argument is wrong. First, the argument that state law provided no remedy is simply erroneous. Successive and untimely petitions are susceptible to an argument of cause and prejudice to overcome the bars. *State v. Eighth Judicial District Court, Riker, RPII*, 121 Nev. 225, 231-33, 240-42, 112 P.3d 1070 (2005). *Clem v. State*, 119 Nev. 615, 620, 81 P.3d 521 (2003). NRS 34.726. NRS 34.810. There is always an opportunity to argue for cause and prejudice. Browning's citation to *Stewart v. Warden*, 94 Nev. 516, 517 (579 P.2d 1244 (1978) is not inapposite. When a defendant does not object to a jury instruction at trial, the issue can be reviewed, but is reviewed under a different standard in the appeal. Under NRS 178.602, and *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003), these instructions can be raised and they will be reviewed under a plain error standard. Further, had Browning showed cause and prejudice for not raising the claim properly, the Nevada Supreme Court would hear the claim. *St. Pierre v. State*, 96 Nev. 887, 890-92, 620 P.2d 1240 (1980). Browning fails to explain in the briefing why he did not raise the claim and argue the ineffective assistance of trial counsel as cause.

The record appears to show that the real reason Browning failed to raise the claim was *strategic*. He wanted to move forward in federal court rather than return to State court to exhaust: When the Respondents argued in the Answer that the claim remained unexhausted, Browning told the district court:

> In any event, Mr. Browning has no intention of taking his constitutional claims and the evidence of his innocence back to the Nevada state courts. He tried without success to have them fairly heard by those courts for some twenty five years…

Reply to Answer, SECOND SEOR 4.

Second, not only was there a remedy that Browning could avail himself of, that being post-conviction habeas corpus and the potential to show cause and prejudice, but he is wrong in his theory of futility. He argues that the Nevada Supreme Court had already rejected the same claim, citing to *Nika* and *Byford*. Opening Brief at 89-90. He is incorrect. Here, Browning does not raise a *Kazalyn*/*Polk* claim; *Polk* after all is no longer good law. Browning was convicted in 1986, long before *Kazalyn* was in existence. EOR 969. Moreover, this court in *Riley v. McDaniel*, 786 F.3d 719, 723-24 (9th Cir. 2015), noting that *Polk* was partially overruled in *Babb* because of *Nika*, ruled that a conviction that *predated* *Kazalyn* was unconstitutional because the instruction on premeditation violated the Nevada Supreme Court's decision in *Hern v. State*, 97 Nev. 529, 635 P.2d 278 (1981). Notably, *Riley* post-dated *Polk*, *Nika*, and *Moore v. Helling*. Understanding that *Polk* at that time (May of 2015) was wholly abrogated, it nonetheless granted relief on a *Hern* claim.

Because *Hern* predated *Kazalyn*, it is a different claim that relies on a different theory in a different timeframe. Because the petitioner in *Riley* raised a

successful *Hern* claim, Browning could have done the same, and the argument regarding the application of the futility doctrine simply does not apply. He cannot correctly claim that "The futility exception applies when…the highest state court has recently decided the same legal question adversely to the petitioner", relying on *Nika* and *Byford*, Op. Brief at 90, where the issues are *different*. *Polk*, *Nika*, *Byford*, and *Moore* all arose under the change in the law represented by *Byford*. None of these cases relied on *Hern*, which predated all of them, including *Kazalyn*. Because the Nevada Supreme Court had not rejected a *Hern* claim around the time of *Nika* and *Byford*, futility does not apply. The claim remains unexhausted and should not be reviewed.

Uncertified Issue 2a

> **THIS CLAIM SHOULD NOT BE CONSIDERED BECAUSE IT REMAINS UNPRESERVED WHERE IT WAS NOT PRESENTED TO THE DISTRICT COURT IN THE FIFTH AMENDED PETITION; HAD IT BEEN PRESENTED, IT WOULD FAIL.**

Uncertified issue 2A alleges that, in violation of due process, the prosecutor engaged in misconduct by arguing to the jury that the victim's blood was on the tan jacket found in the Wolfe's room and owned by Browning, based on a picture depicting him wearing the jacket. The claim goes on to allege that in the state court post-conviction proceedings, DNA testing showed that the blood on Browning's jacket did not come from the victim.

This claim should not be certified for appeal because it was not raised in the Fifth Amended Petition for Habeas Corpus before the district court, and it remains unpreserved because the claim earlier raised has metamorphasized into a wholly new claim.

In the Fifth Amended Petition, claim 4 alleged, inter alia, prosecutorial misconduct in the form of *Brady* violations and *Napue* violations. EOR 337. Claim 4 incorporated a portion of the factual allegation of claims 1 and 6. EOR 337. In turn, claim 1 alleged not misconduct, but ineffective assistance of trial counsel. EOR 306. Claim 1, as background facts to one sub claim of trial counsel's alleged deficiency, alleged that the prosecutor introduced the jacket that contained type B blood, like the victim's. Claim 1 then reviews the prosecutor's closing argument that Browning possessed a jacket with the victim's blood on it. EOR 310. The claim goes on to chastise trial counsel for not conducting a pretrial investigation to learn that the prosecutor's argument was factually wrong. EOR 310.

Claim 6 alleged that trial counsel was ineffective for not responding to the State's argument about the blood on the jacket, EOR 360, alleging that the argument was objectionable because it constituted the prosecutor's personal belief in the weight of the evidence.

The claim has not been preserved. Claim 4's *Napue* [1]allegations relating to prosecutorial misconduct vis-à-vis the blood on the jacket relates solely to the *introduction of testimony* by the criminalist and unnamed witnesses, presumably Minouru Aoki, the second criminalist who tested the jacket as it alleged in the incorporated portion of the claim, that the blood was the same type as the victim's. Claim 4 does not challenge the prosecutor's *argument to the jury* about the jacket.[2]

The result of the manner in which prosecutorial misconduct was alleged in the amended petition, much of it through the incorporation process, is that the instant claim was not preserved where it was not raised in the Fifth Amended Petition, and was not before the district court. On this ground the request to expand the COA to include this claim should be instantly denied.

In claim 1 in the amended petition, EOR 310, 312-313, part of the state's closing argument is set forth. But that claim challenged trial counsel, not the prosecutor. Because facts relating to the state's closing argument do not appear in claim 4, Browning must rely on the allegations in either claim 1 or claim 6 for the claim to be incorporated in, and therefore presented, to the district court. While the argument of the prosecutor is set forth in claim 1 as background facts to trial counsel's alleged deficiency in not responding to it, that argument is not alleged in

[1] *Napue v. Illinois*, 360 U.S. 264 (1959).

[2] This would be an impossibility, as both *Brady* and *Napue* deal solely with evidence, as opposed to argument.

claim 1 to be improper under the Due Process Clause, but rather relates to a Sixth Amendment claim. That claim chastises defense counsel, not the State.

Likewise, in claim 6's incorporated portions, it is again alleged that counsel was deficient for not responding to the State's argument. Here, however, Browning does allege, for the only time, a claim of prosecutorial misconduct, albeit indirectly—that the argument relating to the blood on the jacket constituted the prosecutor's *expression of his personal belief in the weight of the evidence*. EOR 360-61. This is the sole allegation in claim4 and its incorporated portions that alleges misconduct relating to the prosecutor's argument about the blood on the jacket.

The instant uncertified issue here set forth as claim 2A alleges something *different* about the prosecutor's argument about the jacket: this claim asserts that the prosecutor engaged in *intentionally misleading argument* before the jury in order to create a false impression relating to the blood on the jacket in violation of due process. ECF No. 8-2, pp. 91-93. This new claim was never alleged as a claim for relief in the Fifth Amended Petition, and review should be denied on that ground.

Moreover, even if the claim somehow had been preserved, it would fail to state a claim. The claim alleges misconduct through "misrepresent[ation]." Op Brief at 93. The claim alleges that the State argued in closing argument to the jury

that the blood on Browning's tan jacket was that of the victim because the scientific evidence showed that it was type B blood, like the victim's, and that later DNA testing showed it was not the victim's blood, so that the prosecutor engaged in knowing misrepresentation of the facts during closing argument. This assertion is apparently premised on an illogical counter-chronological theory that evidence that was true and correct in 1986 according to then-existing scientific knowledge--blood-typing evidence--somehow became misrepresentative of the truth with new scientific methods like DNA testing many years later. This core assertion is illogical.

The claim in essence alleges that the prosecutor was not clairvoyant. As Browning concedes, the Nevada Supreme Court held that the evidence the prosecutor relied on was not false. Op. Brief at 92. This is a correct statement of fact, and it was based on the scientific testimony of the criminalist. Moreover, the claim is premised, ironically, on a false rendition of the facts by Browning here. What the prosecutor actually told the jury was different than what is reflected in the claim:

> Browning claims that the prosecutor presented false evidence regarding blood found on Browning's coat, which was type B blood like the victim's. The prosecutor argued to jurors that the blood on the coat belonged to the victim, ***though he also conceded that other people have type B blood.*** DNA testing after the trial revealed that the blood was not the victim's. Because this is an independent claim of prosecutorial

> misconduct, Browning must demonstrate good cause for failing to raise it earlier and actual prejudice. Browning sought DNA testing of the bloodstain in November 1999. He does not attempt to establish good cause and explain why he did not raise the claim earlier. But even if Browning could show good cause, he cannot demonstrate prejudice. 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. Therefore, no prosecutorial misconduct occurred.

EOR 213-14. See also, EOR 870 (concession that others have type B blood).

Two facts demonstrate that this claim fails to state a claim: first the prosecutor conceded that other people have type B blood;[3] second, there can be no *Napue* claim simply because scientific knowledge advances. Browning fails to explain how it is possible that the prosecutor should have been able to foresee new scientific advancements in the field of identification not in existence at the time of trial, especially in light of his concession that blood typing evidence was not conclusive. It appears that the State's argument was not as hyperbolic as Browning now claims. In distinction to Browning's counter-chronological argument, the argument of the prosecutor was neither false, misleading, or improper, and it created no false impression.

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///

[3] This important fact was omitted from the claim.

Uncertified Issue 2b

THE DARDEN CLAIM THAT THE STATE'S ARGUMENT REGARDING THE PRESUMPTION OF INNOCENCE SHOULD NOT BE CONSIDERED WHERE IT DID NOT RISE TO A DUE PROCESS VIOLATION

In closing argument the prosecutor disparaged the presumption of innocence. The Nevada Supreme Court condemned the comments in the direct appeal, but held they did not require reversal. The Court said:

> We also denounce the State's references to the 'presumption of innocence' as a farce. The fundamental and elemental concept of presuming the defendant innocent until proven guilty is solidly founded in our system of justice and is never a farce. Even this outrageous but unpreserved act of misconduct, however, does not prejudice Browning to the extent justifying reversal.

EOR 272.

Rather than view the comments in isolation, some context may be helpful. This was the larger statement of the prosecutor:

> 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[4] when his guilt is shown that the farce of that presumption is known and it's been done in this case.

[4] This might be "only."

> Hugo Elsen was sixty years old. He was a Swiss watchmaker. He came here to the United States with his wife, Joey, back in the fifties…

EOR 846. Respondents agree that these comments were improper. They appear to be a sloppy way of arguing that the State met its burden of proof and had overcome the presumption of innocence. Notably, however, the larger context of the comments contained several correctives. First, the prosecutor backtracked and immediately corrected himself, telling the jury that Browning was presumed to be innocent. In that same vein, the jury instructions instructed on this same rule that the defendant was presumed to be innocent until the State overcame the presumption with evidence amounting to proof beyond a reasonable doubt. EOR 957. The jury was further instructed that Browning's being charged was not evidence of guilt. EOR 937. Finally, the jury was charged with the instruction that arguments of counsel are not evidence. EOR 959.

That a prosecutor engages in improper comments in closing argument does not, ipso facto, result in reversal. In *Darden v. Wainwright,* 477 U.S. 168 (1986), the Supreme Court reviewed a closing argument alleged to have violated the defendant's due process rights due to its inflammatory and improper commentary. Notably, this argument in a capital case went on for a lengthy period of time, and appeared to be, for the most part, unrelated to the evidence or burden of proof in the case. It was an extreme example of how a closing argument can be abusive.

Yet the Supreme Court in a per curium decision rejected the request for reversal.

The Supreme Court said:

> The prosecutors then made their closing argument. That argument deserves the condemnation it has received from every court to review it, although no court has held that the argument rendered the trial unfair. Several comments attempted to place some of the blame for the crime on the Division of Corrections, because Darden was on weekend furlough from a prison sentence when the crime occurred. Some comments implied that the death penalty would be the only guarantee against a future similar act. Others incorporated the defense's use of the word 'animal'. Prosecutor McDaniel made several offensive comments reflecting an emotional reaction to the case. These comments undoubtedly were improper. But as both the District Court and the original panel of the Court of Appeals (whose opinion on this issue still stands) recognized, it 'is not enough that the prosecutor's remarks were undesirable or even universally condemned.' *Darden v. Wainwright*, 699 F.2d at 1036. The relevant question is whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). Moreover, the appropriate standard of review for such a claim on writ of habeas corpus is 'the narrow one of due process, and not the broad exercise of supervisory power.' *Id*. at 642.
>
> Under this standard, we agree with the reasoning of every court to consider these comments that they did not deprive petitioner of a fair trial. The prosecutor's argument did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent.

Darden, 477 U.S. 168, 181-82.

Notably, part of the court's analysis in rejecting the claim included that the trial court had instructed that arguments were not evidence, and that their decision was to be made on the basis of the evidence alone. Moreover, the Court noted that he weight of the evidence against *Darden* was heavy, which reduced the likelihood that the jury's decision was influenced by argument. It is notable that none of the reviewing courts before the Supreme Court had held that relief should be granted.

Browning's case is on all fours with *Darden*, with the notable exception that in Browning's case the comments were less egregious, were far shorter, and contained the prosecutor's own corrective that Browning was presumed innocent. Here the prosecutor's comments were short and made in passing; in distinction, the comments in *Darden* lasted throughout the entire closing argument. Because relief was denied in Darden, this claim should not be reviewed.

Uncertified Issue 3

THE THIRD UNCERTIFIED ISSUE SHOULD NOT BE CONSIDERED WHERE IT IS BALD AND CONCLUSORY AND FAILS TO STATE A CLAIM.

The third uncertified issue relates to trial counsel's alleged "wholesale failure to investigate and prepare for trial." As pled in the opening brief, the core of the claim fails instantly under any standard.

The claim that counsel failed to prepare for trial in "wholesale" fashion is belied by his testimony, where counsel testified in the state court evidentiary

hearing that he met with Browning, they discussed the case and defenses, counsel reviewed the State's discovery, counsel interviewed witnesses, developed a defense strategy based on the evidence, and planned to defend the case on the inconsistencies in the discovery from the State. EOR 1265, et seq. He engaged in pretrial motion practice. EOR 914. Clearly the claim suffers from more than a little bit of hyperbole.

The claim raises three types of alleged deficiencies of trial counsel. First, and primarily, the claim focuses primarily on categorical, inferential allegations inferring deficient performance, ie, that counsel's time records show he spent insufficient time preparing, that counsel had an investigator but did not use him for basic tasks like interviewing (unnamed) witnesses, that counsel's basic strategy of casting reasonable doubt on the State's case was the wrong approach, generally, and that the investigation began too late in the process. Second, the claim raises bald and conclusory allegations regarding the blood evidence on the coat and counsel's not having hired an expert to perform testing that was more discriminating than ABO testing, such as enzyme testing, where it is not alleged that testing would have actually shown any positive result, or even that a sufficient sample from the coat was obtainable or sufficiently preserved to be utilizable.[5] Third, in a footnote on page 101, Browning lists 10 single-sentence instances of

[5] DNA was not available in 1986 for general forensic use.

alleged deficient performance that fails to include any explanation, or even an attempt, to show prejudice under the *Strickland* standard.

As to the first category of sub-claims, they fail to state a claim under the Supreme Court's decision in *Cronic v. United States*, 466 U.S. 648 (1984). In *Cronic*, the Supreme Court held that a claim of ineffective assistance of trial counsel can never be premised on categorical, inferential arguments of the kind that Browning raises here. To the extent that this claim depends on such inferential arguments, it fails instantly. The categorical factors at issue in *Cronic* included the youth and inexperience of counsel, the complexity of the case, the time counsel had to prepare, the time the government took to investigate the case, the gravity of the charge, and access to witnesses. *Cronic*, 663-64. According to the Supreme Court, reliance on such categorical factors without proof of specific *Strickland*-type instances of error, along with specific proof of actual prejudice would strip *Strickland* of its strong presumption that counsel rendered effective representation. Here, with this first category of sub claims, Browning attempts just that—to strip *Strickland* of its presumption. These sub claims, therefore, fail to state a claim under *Cronic*.

As to the second set of sub claims relating to the blood evidence on Browning's coat, these sub claims are classic bald and conclusory claims. While they allege that trial counsel did not pursue enzyme testing of the blood residue,

the claim is silent on whether such testing could have been done based on the condition of the coat, the condition of the blood samples, the amount of blood matter in the sample, and other forensically-related factors. Likewise, the claim fails to allege that results from such testing would have produced results that were beneficial to the defense. Without allegations and proof that this testing would have been relevant to the defense—and beneficial—the claim is wholly conclusory and fails to state a *Strickland* claim.

As to the third set of sub claims that appear in the footnote at the bottom of page 101, each of these claims is, at most, a single sentence in length, devoid of supporting facts relating to deficient performance, and more importantly, wholly devoid of any allegations whatsoever relating to prejudice. In *Hill v. Lockhart*, 474 U.S. 52 (1985), the Supreme Court held that a *Strickland* claim of ineffective assistance of counsel fails to state a claim where it fails to allege the special circumstances that support the existence of the prejudice prong. In *Hill* the defendant/petitioner pled guilty to the charged crime based on counsel's statement that he would be eligible for parole after serving one-third of the sentence, when in fact as a second offender he was required to serve one-half of the sentence before being eligible for parole. His *Strickland* claim alleged that he pled guilty based on the erroneous advice. The Supreme Court held that the *Strickland* claim failed to state a claim because it did not allege prejudice as that term is defined under

Strickland.[6] Missing from the claim were two showings: (1) that the defendant would not have pled guilty had the advice been correct, and (2) the specific special circumstances supporting the conclusion that he placed particular emphasis on the factor alleged to constitute counsel's deficient performance. *Hill*, at 60. Under *Hill*, the short, bald and unsupported footnoted claims fail to allege prejudice, and therefore fail to state a claim under Supreme Court law.

As argued above, the sheer strength of the State's case makes a showing of prejudice an impossibility as to any claim. These claims allege nothing but minor, almost trivial perceived deficiencies in counsel's representation. As the Nevada Supreme Court noted in its 2004 Order on post-conviction, EOR 187, et seq., counsel was not ineffective in his representation, he was engaged, and he was prepared for trial. Bald, conclusory, and inferential claims do not refute this conclusion.

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[6] The standard for both *Strickland* prongs is the same whether the conviction is obtained by way of jury trial or a guilty plea. *Hill*, 57-58.

CONCLUSION

Based on the above noted analysis, the three certified claims should not be reviewed.

DATED this 26th day of January, 2017.

ADAM PAUL LAXALT
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Senior 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 SUPPLEMENTAL REPLY BRIEF REGARDING UNCERTIFIED ISSUES

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

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I. THE UNCERTIFIED ISSUES ARE NOT "MUNDANE" OR UNWORTHY OF THIS COURT'S CONSIDERATION.

Respondent's Supplemental Answering Brief ("RSB") correctly quotes the standard for issuing a certificate of appealability ("COA") for issues decided on the merits. RSB 1. It omits the standard for issues rejected on procedural grounds:

> When the district court denies a habeas petition on procedural grounds . . . , a COA should issue when . . . jurists of reason would find it debatable *whether the petition states a valid claim* of the denial of a constitutional right and . . . find it debatable *whether the district court was correct in its procedural ruling*.

Slack v. McDaniel, 529 U.S. 473, 484 (2000) (emphasis added). When a District Court rejects a claim based on a debatable procedural ruling, this standard requires only a "quick look" to determine if the petition states a viable constitutional claim. *Sechrest v. Ignacio*, 549 F.3d 789, 803 (9th Cir. 2008).

The District Court rejected Browning's first uncertified claim, and parts of the third, on procedural grounds, so this standard applies. They plainly meet it. See Arguments IV and VII, below.

Respondent would have the Court add new elements to the COA standard, arguing that none should issue because the rulings here are "mundane," "common, everyday rulings not notable in any respect …." RSB 1–2. None of those adjectives are in the standard. Neither are they applicable to the claims here, which involve a capital conviction based on a jury instruction this Court has held unconstitutional; a prosecutor's false statement to a jury that a victim's blood was

on the defendant's jacket; the same prosecutor's denigration of the presumption of innocence as a "farce" and "façade;" and a defense lawyer's wholesale failure to investigate and discover readily available evidence of his client's innocence. If such breakdowns in criminal trials are "mundane" and "common" in Nevada, that is all the more reason for review.

II. CIRCUIT PRECEDENT CAN BE CONSIDERED REFLECTIONS OF CLEARLY ESTABLISHED SUPREME COURT LAW.

Respondent is of course correct that habeas review is conducted with reference to clearly established Supreme Court law. RSB 4. But it overreaches when it says this review may not follow circuit precedents which "depart in any manner whatsoever from Supreme Court law." *Id.*

Circuit cases which "purport[] to reflect the law clearly established by this Court's holdings" can be considered as a reflection of its clearly established law. *Glebe v. Frost*, 135 S. Ct. 429, 431 (2014). What is prohibited is consideration of those that "bear[] scant resemblance" to the Supreme Court precedents they are based on and "d[o] not even purport to reflect clearly established law as set out in the [Supreme] Court's holdings." *Parker v. Matthews*, 567 U.S. 37, 132 S. Ct. 2148, 2155–56 (2012) (per curiam).

Respondent exaggerates again when it says that a relevant Supreme Court holding "must be narrowly and directly on point." RSB 5. "[T]he lack of a Supreme Court decision on nearly identical facts does not by itself mean that there

is no clearly established federal law, since 'a general standard' from this Court's cases can supply such law." *Marshall v. Rodgers*, 133 S.Ct. 1446, 1449 (2013) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

III. RESPONDENT'S SUPPLEMENTAL BRIEF CONTINUES TO RECITE INCULPATORY "FACTS" THAT HAVE BEEN REPEATEDLY AND CONCLUSIVELY DISPROVED.

Respondent begins its substantive argument by repeating its mantra that none of the errors matter because "the case against Browning was overwhelming." RSB 5. As shown, this is an unreasonable characterization of the evidence—at least as the record has stood since state postconviction. See AOB 47–52; ARB 35–47; 2ndSER at 5–14. Simply saying "overwhelming" over and over won't make it otherwise.

The "eyewitnesses". Again: Only one witness claims to have seen the killer inside the jewelry store (as opposed to outside, walking or jogging by). See AOB 10–11, 49, 54. It was Judy Elsen, the victim's widow. Mrs. Elsen picked two other people—and not Browning—out of a photo array she was shown shortly after the crime. AOB 11. She could not positively identify Browning in court even after seeing him many times. See *id.* Respondent long ago admitted this (see *id.* at 54), but forgets that when it doesn't suit its purpose.

The fingerprints. It is true that Browning's fingerprint was found inside the victim's store—but so were many others', and Browning's were not in blood or

otherwise tied to the crime itself. AOB 12. Marcia Gaylord told Browning's trial lawyer she was in the store with him shortly before the murder, but she never testified due to a combination of ineffective counsel and prosecution trickery. AOB 60–61.

The Wolfes. It is also true that Browning was reported to the police by "the occupant[s] of the room" where he and a few pieces of the stolen jewelry were found. RSB 5. Of course, those "occupants" were Randy and Vanessa Wolfe, the police informants whom Browning says framed him.

Browning's arrest. It is not true that Browning was "surrounded by the stolen jewelry and jewelry bags" when police found him. *Id.* Police records show there were exactly 7 pieces of the jewelry in the Wolfes' bedroom when the police entered. AOB 11, 4ER 1020–23; 4ER 1031; 2ndSER 87–88. They were scattered on the floor, not the bed (and there is conflicting evidence about whether Browning was on the bed). AOB 8n.5; 2ndSER at 87–88; 3ER 730; 4ER 1027; Doc. 59–198. The bulk of the jewelry—some 65 pieces —was recovered not from Browning but from the Wolfes, later that night. AOB 8n.5; 2ndSER 87–88.

Unmentioned in Respondent's summary is that Browning was arrested within minutes of this bloody murder, without a drop of blood or other trace of the crime on his person or clothes (though his jury was falsely told otherwise). AOB 52. Also omitted is the fact the dying victim himself gave a detailed

description of his killer that Browning did not fit. *Id.* at 53. Absent as well are the bloody male shoeprints leading from the victim's body, which the evidence now shows must have been made by the killer, and were not Browning's. See AOB 29–31. Also missing is the expert testimony that the alleged murder weapon doesn't match the victim's wounds, and no other weapon was found. AOB 56–57.

Fairly considered, the truth is the opposite of Respondent's claim: in few capital cases that have come before this Court have there been so many reasons to believe a jury with all the facts, and proper instructions on the law, would have reached a different verdict.

IV. UNCERTIFIED ISSUE 1: RESPONDENT ADMITS THAT, ON THE MERITS, THIS CASE IS INDISTINGUISHABLE FROM *RILEY v. McDANIEL*, AND IT OFFERS NO VIABLE DEFENSE OF THE RULING THAT THIS CLAIM IS UNEXHAUSTED.

A. The Merits of Browning's Due Process Claim.

Respondent doesn't attempt to distinguish this case from *Riley v. McDaniel*, 786 F.3d 719 (9th Cir. 2015) *cert. denied* 136 S. Ct. 1450 (2016), on the merits of the claim Browning was denied due process by the instruction on the element of deliberation in first degree murder. See RSB 9–10 ("Because the petitioner in *Riley* raised a successful *Hern* claim, Browning could have done the same ….") At the time of both Browning's and Riley's trials and appeals it was "clear … deliberation was a discrete element of first-degree murder in Nevada." *Riley*, 786 F.3d at 723 (citing *Hern v. State*, 97 Nev. 529, 635 P.2d 278 (1981)).

In *Hern,* the Nevada Supreme Court held that "[i]t is clear from the statute [NRS 200.030(1)(a)] that all three elements, willfulness, deliberation, and premeditation, must be proven beyond a reasonable doubt before an accused can be convicted of first degree murder. *Compare, State v. Wong Fun*, 22 Nev. 336, 40 P. 95 (1895)." *Hern*, 635 P.2d at 280. *Wong Fun* similarly held, almost a century before, that "'willfully, deliberately, and premeditatedly' [are] conditions that … must be found by the jury to exist, before they are justified in rendering a verdict of murder in the first degree." 40 Pac. at 96.

Although the Nevada Supreme Court disagrees with the due process decision in *Riley*, *see, e.g.*, *Leavitt v. State*, 386 P.3d 620 (2016), it has never disputed *Riley's* basic premise: that before 1992 "Nevada law required the state to prove deliberation as a discrete *mens rea* element." *Riley*, 786 F.3d at 724. Instead, it said this:

> "[P]rior to *Byford [v. State*, 116 Nev. 215, 994 P.2d 700 (2000)] this court *had not required separate definitions of the terms* and had instead viewed them as together conveying a meaning that was sufficiently described by the definition of "premeditation" eventually approved in *Kazalyn* and *Powell*."

Leavitt, 386 P.3d 620–21 (emphasis added). Due process does not always require separate jury instructions defining each element. *Middleton v. McNeil*, 541 U.S. 433, 437 (2004). But it does require instructions that make clear each element must be separately found, and cannot be conclusively presumed one from another. *Sandstrom v. Montana*, 442 U.S. 510 (1979).

The Nevada Supreme Court also has said "the meaning of the terms and the phrase 'willful, deliberate, and premeditated' has evolved through judicial interpretation,'" *Nika v. State,* 124 Nev. 1272*,* 198 P.3d 839, 845 (2008). But pointing to "evolutionary refinements" in the definition of an element does not answer the question on which due process analysis depends: what were the elements at the time of trial? *See Bunkley v. Florida*, 538 U.S. 835, 840–41 (2003); *Fiore v. White*, 531 U.S. 225 (2001).

No Nevada case has said that before 1992 "deliberation" was not a separate element of first degree murder. But just like *Riley's* jury, Browning's was told: "if the jury believes … the killing has been preceded by … premeditation ... it is … deliberate … murder." 4ER 943. That instruction violates due process, because it eliminates an element by conclusively presuming it from proof of another. *See Riley*, 786 F.3d at 734; *Sandstrom*, 422 U.S. at 521.

By Nevada's own definition, proof of premeditation does not establish deliberation. Premeditation requires "no appreciable space of time"; deliberation requires a "determination" to kill after "weighing the reasons for and against" for at least "a short period of time," that is "not formed in passion," or is "carried out after there has been time for passion to subside and deliberation to occur." *Byford*, 994 P.2d 714–15. That is consistent with the standard legal definitions of these terms, as the Nevada Supreme Court has noted. "Deliberation is only exercised in

a cool state of the blood, while premeditation may be either in that state of the blood or in the heat of passion." BLACK'S LAW DICTIONARY 513–14 (4th ed. 1968) (quoted in *Nika*, 198 P.3d at 845).

This distinction would have made a significant difference in Browning's case. The evidence of the killer's state of mind was circumstantial—the victim's multiple stab wounds. 3ER 859–862. There was no evidence of deliberation, nothing indicating the wounds were inflicted "in a cool state of blood" rather than a sudden struggle. Like Riley, Browning was denied due process by this instruction and it had a substantial and injurious effect on the fairness of his trial.

B. Exhaustion.

Respondent's defense that this claim is unexhausted contradicts what it told the District Court, and what it told this Court in another recent habeas appeal. Here it says "had Browning showed cause and prejudice for not raising the claim properly, the Nevada Supreme Court would hear the claim …." RSB at 8. But below it argued the District Court should not stay Browning's petition pending further state litigation because there were no state remedies available. See 2ER 487. Nevada told this Court the same thing in an identically postured case, *Hawes v. Palmer*, 622 F. App'x 637 (9th Cir. 2015), and this Court relied on it:

> *As the government notes ... Nevada's procedural rules would bar any new state petition*…. Therefore, the district court should have treated the unexhausted claims as exhausted for federal habeas purposes . . . .

622 F. App'x at 638.[1]

This Court has refused to allow states to defeat habeas claims by taking such shifting positions. *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir 1990). What the government argued below and conceded in *Hawes* is the law and reality in Nevada. If there was any doubt, the Nevada courts' treatment of similar claims based on *Riley* has dispelled them. *See Leavitt*, 386 P.3d at 621 (rejecting due process claim on procedural grounds and saying "we do not agree with *Riley* and therefore it would not provide good cause.")[2]; *Crump v. State,* 2016 WL 1204502 (Nev.), *cert. denied,* 137 S. Ct. 596 (2016).

Browning learned that law and reality as he tried for over twenty years to have the state courts consider this and other constitutional claims. See 2ndSER at 157–164. That is why he declined to stay his federal petition to go back to the Nevada courts once again. *Id.* That decision was "strategic" (RSB 8) only in the sense that it was a choice to take the risk that this Court would agree this claim is

[1] Respondent falsely accuses Browning of self-contradiction, saying he "shifts his argument" by contending this "claim was technically exhausted because there were no state court remedies remaining …" RSB 7. In fact, Browning made that argument, among other places, in the briefing Respondent submitted as a Supplemental Excerpt of Record. See 2ndSER at 004 ("it is clear there are no unexhausted issues in this petition … for the additional reason [of] … the one year statute of limitations …."); see also Dkt. 163 at 4 ("because there are no longer any state remedies available to petitioner, all these claims are "technically exhausted").

[2] *Leavitt* involved a trial which, like Browning's, occurred before 1992. 386 P.3d at 620.

unexhausted, rather than accept the certainty of years more delay only to have the Nevada courts reject this claim once again. See AOB 87–91 (describing Browning's previous attempts to raise this issue). It was a decision which both the statute[3] and caselaw[4] say should not bar consideration by this Court.

Respondent cites *St. Pierre v. State*, 96 Nev. 887, 620 P.2d 1240 (1980), as the only authority for its argument that the Supreme Court of Nevada would consider this claim if brought there again. RSB 8. That underscores just how unreceptive the Nevada courts are to new constitutional claims. *St. Pierre* was a direct appeal, but even so applied a modified habeas default standard which included considerations of cause and prejudice. 620 P.2d at 1243.

That Respondent cannot point to a single postconviction case this century in which the Nevada courts have considered an otherwise procedurally barred claim in similar circumstances demonstrates how futile taking this issue back to the Nevada courts would have been.

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[3] See 28 U.S.C. §2254(b)(1)(B) (a petition may be granted if "the applicant has exhausted the remedies available … or … circumstances exist that render such process ineffective to protect the rights of the applicant.").

[4] See AOB 90; *see also Plymail v. Mirandy*, ___ F.3d ___, 2016 WL 6892492 *1 (4th Cir. 2016) (over 20-year delay excuses exhaustion) (citing *Lee v. Stickman*, 357 F.3d 338, 342 (3d Cir. 2004) (eight-year delay)); *Coe v. Thurman*, 922 F.2d 528, 531 (9th Cir. 1990) (four-year delay).

C. Default.

As it did below, Respondent rests on exhaustion and makes no attempt to justify the District Court's refusal to address the merits of this claim on the basis of procedural default. It thus doubles down on its waiver of the default defense. See AOB 88. Browning has proffered several grounds to overcome any default argument (*id*. at n.47), and Respondent has countered none of them. "Because the State has not asserted procedural default either before the district court or on appeal [the Court should] … proceed to address Petitioner's argument on its merits." *McDaniels v. Kirkland*, 813 F.3d 770, 776 (9th Cir. 2015).

V. UNCERTIFIED ISSUE 2A: THE NEVADA SUPREME COURT'S DECISION REGARDING THE PROSECUTION'S ARGUMENT TO THE JURY ABOUT THE BLOOD ON THE JACKET WAS CONTRARY TO CLEARLY ESTABLISHED SUPREME COURT LAW. THIS CLAIM WAS RAISED AND DECIDED ON THE MERITS THERE AND IN THE DISTRICT COURT BELOW.

The facts underlying Browning's claim that he was denied due process by the prosecutor's false and misleading arguments about the blood on the tan jacket bear repeating, before we answer Respondent's new argument that this claim was not raised below.

This is what Browning's prosecutor told the jury in his closing argument:

> *Mr. Elsen's blood and Mr. Browning's jacket*. There are other people in this world with B blood, I grant you that. Mr. Browning's blood is O, so we know for a fact that he didn't bleed on that jacket. Mr. Elsen had B blood and we know that he bled that day. And we know that … one or two or both of [the witnesses] … said the person had jeans on and a light jacket. We

> have here a light jacket before us and the blood is right down here in an area which might be close to a person as you are leaning over and you are stabbing that it would splatter up in that particular area.
>
> *So the same blood as Hugo Elsen had flowing through his veins earlier that day was now spotted on the jacket* found in Randy and Vanessa's apartment told to us by Vanessa as belonging to Mr. Browning…..

3ER 870–71 (emphasis added). This is how the prosecutor ended his rebuttal argument, the last words the jury heard before retiring to deliberate:

> [W]hen you get into the jury room, look real closely at this photograph with Paul Browning … and tell me, tell Mr. Browning that the photograph in this picture is not this jacket right here. *The jacket that had Mr. Hugo Elsen's blood on it that Paul Browning was wearing* when he killed him. This proves his guilt probably as much as anything ….
>
> Do that first, please, after picking a foreman when you go into the jury room. Look at that. And *if that's, in fact, his jacket, if this is the same jacket that's in that folder … you don't need 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 (emphasis added). As Respondent now admits, the blood on the jacket was not Mr. Elsen's blood at all. See RSB 15.

Respondent's argument that this claim was not raised below is puzzling. Respondent admitted to the District Court that it was rejected on the merits in Browning's state postconviction appeal, and that it was properly raised in federal court. See 2ER 468. Respondent's new argument—that this claim's incorporation of facts set forth elsewhere in the petition filed below was somehow ineffective, RSB 11–12—was never made below. Instead, after the District Court found the claim exhausted (1ER 102), the issue was joined on its merits. See 2ndSER 083–

85; Dkt. 150 at 20. The District Court ruled accordingly—adopting almost verbatim Respondent's argument that the Nevada Supreme Court's "ruling was reasonable." 1ER 33 (quoting 1ER 213–14).

If Respondent had a valid argument that this claim was not adequately raised in the Amended Petition, it should have made it below, where Browning could have amended his petition further. Instead, Respondent allowed the merits to be adjudicated without objection, waiving any argument that the claim was outside the scope of the pleadings. Cf. FRCP 15(b)(2).

On the merits, Respondent's argument dissembles in a way that highlights the inconsistency between the state court's ruling and established Supreme Court law. Respondent correctly says the Nevada Supreme Court found no due process violation because "the evidence [the prosecutor] … relied on was not false." 1ER 214. But then Respondent leaps to the conclusion that "*the argument of the prosecutor* was neither false, *misleading, or improper, and it created no false impression*." RSB 15 (emphasis added).

The Nevada Supreme Court never said this prosecutor's argument was not "misleading" and "created no false impression," and neither did the District Court. Instead, they focused only on whether the blood-type testimony referenced was literally true. 1ER 33. But as Respondent's closing sentence acknowleges, it is clearly established that due process can be violated when a prosecutor uses literally

accurate testimony to mislead or create a "false impression." *Alcorta v. Texas*, 355 U.S. 28, 31 (1957); *see Gall v. Parker*, 231 F.3d 265, 313 (6th Cir. 2000); *Phillips v. Ornoski*, 673 F.3d 1168, 1184 (9th Cir. 2012); *United States v. Bartko*, 728 F.3d 327, 335 (4th Cir. 2013) ("'[D]ue process is violated … where the prosecution … uses evidence which it knows creates a false impression of a material fact'" [quoting *Hamric v. Bailey*, 386 F.2d 390, 394 (4th Cir.1967)]); *see also United States v. Kojayan*, 8 F.3d 1315, 1321 (9th Cir. 1993).

The seminal case is *Miller v. Pate*, 386 U.S. 1 (1967). In *Miller*, like here, the prosecution presented testimony that blood of the victim's type was found on underwear alleged to be the defendant's. *Id*. at 4. The prosecutor used this apparently truthful[5] testimony to argue that the shorts, which had red-brown stains, were "'heavily stained with blood.'" *Id.* at 6. He thus took factually accurate testimony and created a false impression about its significance. *See id.* at 5. Similarly, here, Browning's prosecutor's misleading arguments converted factually accurate, marginally probative testimony about the blood type on the jacket into certain proof of Browning's guilt—evidence the prosecutor said was so conclusive that it alone justified conviction in "five minutes."

[5] Although in *Miller* postconviction testing found no blood on the shorts, because of the lapse of time the defense expert "concede[d] on cross-examination that he could not swear that there had never been any blood on [them]." *Id.* at 4; *see U. S. ex rel. Miller v. Pate*, 226 F. Supp. 541, 545 (N.D. Ill. 1963).

Respondent, like the Nevada Supreme Court, says that in Browning's case this didn't matter because at one point prosecutor Seaton acknowledged "other people have Type B blood." RSB 14 (quoting 1ER 213). Actually, what he said was "[t]here are other people *in this world* with type B blood." 3ER 870 (emphasis added). The jury was never told what portion of "people in this world" have different blood types. All the prosecutor's criminalist said was there are four blood types and the blood on the jacket was "the same type as Mr. Elsen." SER 344. Therefore, Seaton knew the jury had no reason in the evidence to doubt him when he said the jacket had "Mr. Hugo Elsen's blood on it" and that Browning's association with the jacket[6] by itself justified an immediate conviction.

In *Miller* the state similarly protested that the jury was aware there was paint on the underwear as well as blood; but the Court nonetheless held that the prosecutor's suggestions that the paint stains *were* blood violated due process. 386 U.S. at 5. So did the deliberate misrepresentations here—delivered most compellingly in the final words spoken to the jury before it adjourned. *See United*

[6] Respondent ignores the other prosecutorial deception challenged in paragraph 5.45 of the Amended Petition: the false testimony that the jacket was on the bed the prosecution claimed Browning was sitting on when arrested. See 2ER 2065–66. The District Court ignored it, too. 1ER 32–33. Yet the falsehood is plain on the record. See 10ER 2065–66 (Ms. Adkins' false "top of the bed" testimony, repeated at Seaton's request); 4ER 1022 (police inventory showing jacket on Wolfes' closet floor), 10ER 2069 (police photo showing same).

States v. Sanchez, 659 F.3d 1252, 1259 (9th Cir 2011) (quoting *United States v. Carter*, 236 F.3d 777, 788 (6th Cir. 2001)).

VI. UNCERTIFIED ISSUE 2B: RESPONDENT CONCEDES THAT BROWNING'S PROSECUTOR IMPROPERLY "DISPARAGED THE PRESUMPTION OF INNOCENCE" BUT IT IGNORES THE FACT THAT PRESUMPTION IS A "SPECIFIC RIGHT OF THE ACCUSED" WHOSE DENIGRATION CANNOT SO EASILY BE FOUND HARMLESS.

Like the Nevada courts and the District Court below, Respondent says that Browning's prosecutor's argument to the jury that the presumption of innocence is a "farce" and a "façade" was "improper" but not unconstitutional. See RSB 18–19. Also like those courts, Respondent applies the wrong prejudice standard and thereby reaches the wrong constitutional result. See AOB 95–96.

Respondent rests this argument wholly on one case, *Darden v. Wainwright*, 477 U.S. 168 (1986), which it says is "on all fours" with Browning's. RSB 19. It derives this from "part of the [*Darden*] court's analysis": the fact the jury "was instructed that arguments were not evidence," the "weight of the evidence against Darden was heavy," and "none of the reviewing courts before … had held that relief should be granted." RSB 18.

Admittedly, the last statement in this "analysis" is true: no court has granted Browning relief on this claim; that is why he is the Appellant. But Respondent's

two other selected parts[7] of the *Darden* analysis don't apply to Browning. As noted previously, the "arguments are not evidence" instruction made no difference because Browning's prosecutor's improper statements were not about evidence. AOB 96. They were about the law, and they "implicate[d] …[a] specific right[] of the accused"—a right whose "enforcement lies at the foundation of the administration of our criminal law," *Coffin v. United States*, 156 U.S. 432, 453 (1895). That is what the Court in *Darden* emphasized the arguments there did *not* do. *Darden*, 477 U.S. at 182.

And as we have shown, the evidence against Browning left after state postconviction was far from overwhelming and nowhere near as "heavy" as the evidence against Darden. See AOB 47–62; compare *Darden*, 477 U.S. at 172–74.

The prosecutors' statements in *Darden* may have prejudiced the jury—as the evidence of the crime no doubt did, as well—but they did not tell it to disregard one of the most fundamental principles of criminal law. The Nevada court's failure to consider that, and all of the *Darden* factors, unreasonably applied clearly established Supreme Court law; and its conclusory statement that the evidence was

[7] The parts of *Darden's* analysis Respondent omits are that "the prosecutor's remarks were responsive to the opening summation of the defense" and the defense was given the "opportunity to make a final rebuttal argument turning much of the prosecutors' closing argument." 477 U.S. at 182. Neither is true here.

strong enough to overcome this error was an unreasonable determination of fact based on the record before it. 28 U.S.C. § 2254(d).

VII. UNCERTIFIED ISSUE 3: RESPONDENT'S ARGUMENT THAT BROWNING'S INEFFECTIVE COUNSEL CLAIMS WERE "BALD AND CONCLUSORY" AND "FAIL[] TO STATE A CLAIM" GROSSLY MISREPRESENTS THE RECORD.

As previously described, in both the Nevada courts and the petition below Browning alleged a wholesale failure by his appointed trial counsel, Randall Pike, to do even minimal pretrial investigation. AOB 76, 97–8. Neither Pike nor his investigator interviewed the only eyewitness to the crime, Mrs. Elsen, or Browning's principal accusers, the Wolfes, or the police officers who responded to the scene—including one officer defense counsel called to testify but in ignorance failed to ask the most important questions. See 2ndSER at 9–10,16, 18. Pike told the courts repeatedly that Browning's most crucial witness was Marsha Gaylord—and then never made any apparent effort to get her to trial. AOB 13,61. He made no attempt to hire an expert regarding the blood on the jacket, or the knife the prosecutor said was the murder weapon, or the bloody shoe prints, or the supposedly inculpatory fingerprints, or the tainted eyewitness identifications. 2ndSER at 16, n.6, 28–29. He did not let his investigator find and interview witnesses about Randy Wolfe's attempts to sell stolen jewelry after the crime, and

Wolfe's alleged association with a Cuban who reportedly had a yellow Datsun. 2ndSER at 17, 46.[8] And the list goes on. See AOB 77–85, ARB 57–59.

Respondent says Browning's complaints are exaggerated because Pike "met with Browning … reviewed the State's discovery, … interviewed witnesses, developed a defense strategy … planned to defend the case on the inconsistencies in the discovery by the police [and] … engaged in motion practice." RSB 20. Stripped of verbiage, what that boils down to is this: In the few hours he spent on the case before trial (see AOB 12–13), Pike talked to his client, reviewed some police reports, interviewed a few secondary witnesses[9] and filed unsuccessful suppression and speedy trial motions.

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[8] In his postconviction testimony, Pike claimed he "sent his investigator into the streets" to get information about Wolfe's "Cuban" associate, and the state court credited that (1ER 192), completely ignoring the contrary testimony of the investigator himself (8ER 1784–85). *See Taylor v. Maddox,* 366 F.3d 992, 1008 (9th Cir. 2004) (state court may discount or disbelieve conflicting evidence but cannot "act as if it didn't exist").

[9] Pike interviewed one of the scene witnesses who said they saw Browning go past the shop just after the robbery, Debra Coe (AOB at 9–10), but then at trial failed to bring out a wealth of information calling her identification testimony into question. See 2ndSER at 34–36. Pike also spoke with Marsha Gaylord and learned what he swore was vital exculpatory information—which he never brought to trial. See AOB 13. The investigator who did most of the handful of defense interviews told Pike that the investigation was woefully inadequate and more investigation was absolutely necessary, but Pike refused. 2ndSER 016.

We doubt what Respondent describes could constitute effective assistance in a capital murder case, even if it were true and all the things Pike didn't do are ignored. But the Nevada courts and the District Court below never reached that issue. Instead they treated Browning's claim of wholesale denial of effective representation as a list of isolated criticisms of Pike's performance which they disposed of individually—on procedural grounds, or by positing implausible "tactical" justifications, or by saying no prejudice. See 1ER 24–25, 31–39, 42–46, 192–203.

Respondent next says Browning's ineffective assistance claims are "bald and conclusory." RSB 20–23. Of all Respondent's misrepresentations, this may be the most obvious. Respondent has made it more so by providing a supplemental excerpt of record containing one of the memoranda filed below delineating Browning's ineffectiveness claims. That memorandum goes on for 37 pages describing deficiencies in Pike's representation and the prejudice that resulted. 2ndSER at 14–51. That was in addition to 16 pages of allegations of ineffectiveness in the Amended Petition (2ER 306–322), as well as Browning's motions to allow discovery, expansion of the record and an evidentiary hearing, to strike defenses, and to reconsider the District Court's dismissal of the claim. See 2ER 496, 498, 505, 538, 549, 570, 574. This fits no definition of "bald" or "conclusory."

Respondent also tries a new way to divide and conquer Browning's ineffectiveness claim—by splitting it into three groups; "categorical, inferential allegations," "conclusory allegations regarding the blood evidence on the coat" and "10 single-sentence instances of alleged deficient performance," and then suggesting different reasons each should fail. RSB at 20–21.

Respondent says the "categorical, inferential" allegations—like the pathetically small amount of time Pike spent on pretrial preparation and his expressed belief that "proving" is never part of a defense lawyer's job, see AOB 80, 85, 97–98—should be dismissed because they aren't tied to "specific *Strickland*-type instances of error, along with specific proof of actual prejudice." RSB 21. But of course they are, and the briefing spells that out in great detail. See 2ndSER 014–051; AOB 76–85, 97–100; ARB 53–60.

Respondent says the "conclusory allegations regarding the blood evidence on the coat" are deficient because "the claim is silent on whether such testing could have been done" and does not allege it "would have produced results that were beneficial to the defense." RSB 22. But those statements are also untrue. The petition and briefing specified many types of testing available at the time of trial and alleged that such tests would have produced exculpatory results, like the testing done during state postconviction. See 2ndSER 25–27.

Finally, Respondent says the "third set of sub-claims" listed in a footnote fail because they are "devoid of any allegations whatsoever relating to prejudice." RSB 22. But that footnote is obviously a summary, each item of which references corresponding allegations in the Amended Petition that include detailed descriptions of both Pike's errors and the difference they made. See AOB 101n.54. A more complete description, such as the one in Browning's Reply Brief below (2ndSER at 16–51), would have required dozens of extra pages that would not be allowed on an uncertified issue. See Ninth Circuit Rule 22-1(e).

What Respondent never addresses is law of this Circuit holding the prejudicial impact of instances of trial counsel ineffectiveness may be cumulative, and should be considered as such. *Pizzuto v. Arave*, 385 F.3d 1247, 1260 (9th Cir. 2004); *Mak v. Blodgett*, 970 F.2d 614, 625 (9th Cir. 1992).

We have not found a capital case before this Court in the modern era in which trial counsel made so many fundamental errors, resulting in such proven and identifiable prejudice, as Browning's. This Court should consider all those errors, not just some of them—and it should review, and reverse, the District Court's summary rejection of this claim.

DATED this 9th day of February, 2017.

Respectfully submitted,

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