LLOYD HARDIN MCNEIL
IDOC No. 103513
C-Block
Eagle Pass Correctional Facility
410 S. Bibb Avenue
P.O. Box 849
Eagle Pass, Texas 78853

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

LLOYD HARDIN MCNEIL Petitioner, v. JOSH TEWALT, Director, Idaho Department of Correction, Respondent.	Case No. _____ PETITION FOR WRIT OF HABEAS CORPUS (§ 2254—state custody)

I request that the United States District Court grant my Petition and issue a Writ of Habeas Corpus to Respondent based on the following grounds.

I. CONVICTION OR SENTENCE BENG CHALLENGED:

1. (a) Name and location of court that entered the judgment of conviction being challenged:

Fourth Judicial District of the State of Idaho, in and for the County of Ada, the Honorable Deborah A. Bail, District Judge

(b) Criminal docket or case number: CR-FE-11-6449

(c) Date of the judgment of conviction: April 16, 2012

(d) Date of sentencing: April 16, 2012

(e) Length of sentence: 54 years—25 years fixed, 29 years indeterminate

2. In this case, were you convicted of more than one count or crime? [X] Yes [ ] No

3. Identify all counts/crimes of which you were convicted/sentenced in this case:

(a) Voluntary Manslaughter (b) First Degree Arson (c) Grand Theft

4. What was your plea? [X] Not Guilty [ ] Guilty [ ] Alford Plea or No Contest

5. If you went to trial, what kind of trial did you have? [X] Jury [ ] Judge only

II. DIRECT APPEAL

1. Did you file a direct appeal from the judgment of conviction? [X] Yes [ ] No

2. If you did appeal, provide the following:

(a) Name of court that heard your appeal: Idaho Court of Appeals

(b) Docket or case number: 39881-2012

(c) Result: Judgment affirmed

(d) Date of result: November 8, 2013

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(e) Grounds raised:

(i) Insufficiency of evidence

(ii) Prosecutorial misconduct

(iii) Abuse of discretion—excessive sentence

(iv) Abuse of discretion—denial of Rule 35 motion

(f) If the Idaho Court of Appeals decided your appeal, did you file a petition for review with the Idaho Supreme Court? [X] Yes [ ] No If yes, answer the following:

(1) Result: Petition denied

(2) Date of result: February 24, 2014

(3) Grounds raised:

(i) Idaho Court of Appeals' opinion inconsistent with Idaho Supreme Court decisions

(ii) Constitutional rights violated by prosecutor's misconduct

(iii) Abuse of discretion—excessive sentence

(iv) Abuse of discretion—denial of Rule 35 motion

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III. FIRST POST-CONVICTION ACTION

1. If you filed any post-conviction petition, application, or motion concerning this judgment of conviction or sentence in any state court, give the following information:

(a) Name of court: Fourth Judicial District of the State of Idaho, in and for the County of Ada, the Honorable Deborah A. Bail, District Judge

(b) Date of filing: August 19, 2014

(c) Type of proceeding: Uniform Post-Conviction Procedure Act—I.C. § 19-4901

(d) Grounds raised:

(i) Sixth and Fourteenth amendments claim of ineffective assistance of counsel

(ii) Fourteenth Amendment denial of due process claim based upon insufficiency of the evidence

(iii) Fourteenth Amendment denial of due process claim based up prosecutorial misconduct

2. Did you file an appeal? [X] Yes [ ] No If you did appeal, answer the following:

(a) Name of court that heard your appeal: Idaho Court of Appeals

(b) Docket or case number: 45766-2018

(c) Result: Summary dismissal affirmed

(d) Date of result: _____ _____, 20___

(e) Grounds raised: Sixth and Fourteenth amendments violations for ineffective assistance of counsel

(f) If the Idaho Court of Appeals decided your appeal, did you file a petition for review with the Idaho Supreme Court? [X] Yes [ ] No If yes, answer the following:

(1) Result: Petition denied

(2) Date of result: _____ _____, 20___

(3) Grounds raised: Sixth and Fourteenth amendments violations for ineffective assistance of counsel

IV. CLAIMS FOR WHICH RELIEF IS REQUESTED IN THIS PETITION

For this petition, state every claim for which you allege that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four claims. State the legal basis/federal ground for your claim very briefly. Do not make extensive legal arguments on the petition form, but you may file a legal memorandum or brief either (1) with your petition, or (2) as your reply to the respondent's motion for summary dismissal or answer. Importantly, your petition should include all of the facts that support your claim.

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1. First Claim

(a) Legal basis: Fourteenth Amendment denial of due process of law where the state failed to prove elements of the offense necessary to convict per the Jackson standard

(b) Supporting facts: See Attachment A, pp. 7-15

(c) Did you bring this claim before the Idaho Supreme Court? [X] Yes [ ] No

(1) If you answered yes, state whether you brought the claim on direct appeal or in an application for post-conviction relief, petition, or motion: Direct appeal

(2) If you did not bring this claim before the Idaho Supreme Court, explain why: Not applicable

2. Second Claim

(a) Legal basis: Sixth and Fourteenth amendment ineffective assistance of counsel claim

(b) Supporting facts: See Attachment A, pp. 15-27

(c) Did you bring this claim before the Idaho Supreme Court? [X] Yes [ ] No

(1) If you answered yes, state whether you brought the claim on direct appeal or in an application for post-conviction relief, petition, or motion: Post-conviction, UPCPA—I.C. § 19-4901

(2) If you did not bring this claim before the Idaho Supreme Court, explain why: Not applicable

3. Third Claim

(a) Legal basis: Fifth and Fourteenth amendment denial of due process claim for prosecutorial misconduct

(b) Supporting facts: See Attachment A, pp. 28-32

(c) Did you bring this claim before the Idaho Supreme Court? [X] Yes [ ] No

(1) If you answered yes, state whether you brought the claim on direct appeal or in an application for post-conviction relief, petition, or motion: Post-conviction, UPCPA—I.C. § 19-4901

(2) If you did not bring this claim before the Idaho Supreme Court, explain why: Not applicable

4. Fourth Claim

(a) Legal basis: Fourteenth Amendment denial of due process of law where cumulative errors resulted in prejudice toward the defendant

(b) Supporting facts: See Attachment A, pp. 33-34

(c) Did you bring this claim before the Idaho Supreme Court? [X] Yes [ ] No

(1) If you answered yes, state whether you brought the claim on direct appeal or in an application for post-conviction relief, petition, or motion: Post-conviction, UPCPA—I.C. § 19-4901

(2) If you did not bring this claim before the Idaho Supreme Court, explain why: Not applicable

V. OTHER FEDERAL COURT ACTIONS RELATED TO CONVICTION OR SENTENCE

If you have previously filed any type of petition, application, or motion in federal court regarding the conviction or sentence, state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result. Attach a copy of the decision if possible.

¶ None.

VI. PENDNG COURT ACTIONS RELATED TO CONVICTION OR SENTENCE

If you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging, state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, and the current status.

¶ Petitioner filed his Motion for Relief From Judgment pursuant to Idaho Rules of Civil Procedure 60(b)(6) on February 19, 2019, in the Fourth Judicial District the County of Ada, for post-conviction case no. CV-PC-2014-15680, with no memoranda so far proffered; neither has any action been recorded, nor ruling entered by the district court to date.

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VII. REQUEST FOR APPOINTMENT OF COUNSEL

I [X] do [ ] do not request the appointment of counsel. I believe counsel is necessary to assist me for the following reasons: An indigent petitioner incarcerated in prison would almost certainly be unable to investigate facts not already in the record.

VIII. PRAYER FOR RELIEF

Petitioner asks that the Court grant the following relief: In consideration of the foregoing, and as pleaded in "Attachment A" to this petition, the Court should grant petitioner's request for a Writ of Habeas Corpus, and admit any other relief as justice so requires.

DECLARATION

I declare (or verify) under penalty of perjury that the foregoing is true and correct, and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on:

_____ _____, 20___.

Executed (signed) on _____ _____, 20___.

_____
LLOYD HARDIN MCNEIL
Petitioner

Attachment A

Table of Contents

I. A bit of the backstory

This case begins with a fire that ultimately led to petitioner's indictment for second-degree murder. Following a trial, the jury returned a guilty verdict on the lesser-included offense of voluntary manslaughter.

On March 5, 2011, firefighters responded to a dispatch call of smoke coming from a house in a residential Boise neighborhood. A 911 caller recounted, "I could smell something; like a fire, you know. It smelled like—I could only describe it as an electrical fire, is what I thought it was." (Tr. p.256, ln.21-24.) Upon arriving at the scene, firefighters encountered heavy smoke in a bedroom, and put out residual flames confined mostly to a mattress and box springs. Firefighters removed the mattress to the yard. (Tr. p.281, ln.9-11.) An inspection of the bedroom determined the presence of a body. (Tr. p.305, ln.16-24.)

Investigators could find no ignition point for the fire. And neither could the coroner say just how the decedent, Natalie Claire Davis, died. That notwithstanding, police identified the petitioner, Lloyd Hardin McNeil, as the person who killed Ms. Davis—and who also started the fire. Additionally, McNeil got accused of stealing Ms. Davis' car. Authorities in Seattle, Washington, took McNeil into custody upon his surrender on a fugitive warrant. A grand jury would hand up the three-count indictment and Boise police returned the defendant to Idaho to answer the charges of second-degree murder, first-degree arson, and grand theft.

The jury acquitted McNeil of the second-degree murder count of the indictment, but convicted him of voluntary manslaughter, defined by Idaho as "the unlawful killing of a human being . . . without malice" and "upon a sudden quarrel or heat of passion." I.C. § 18-4006(1). The district court sentenced McNeil on the voluntary manslaughter conviction, and also on convictions

for first-degree arson, and grand theft. The unified—and consecutive—sentences committed McNeil to prison for a determinate period of twenty-five years, followed by another twenty-nine years of indeterminate time left solely to the discretion of the executive branch. In all, fifty-four years.

II. Making a federal case of it

A. Some ground rules

Where the petitioner files a federal habeas corpus action to challenge a state court judgment, Title 28 U.S.C. § 2254(d), as has been amended by the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, applies. Title 28 U.S.C. § 2254(d) limits relief to instances where the state courts' adjudication of the petitioner's claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) 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).

Where a petitioner contests the state courts' legal conclusions, including application of the law to the facts, § 2254(d)(1) governs. That section consists of two alternative tests: the "contrary to" test and the "unreasonable application" test.

Under the first test, a state court's decision is "contrary to" clearly established federal law "if the state court applies a rule different from the governing law set forth in [the Supreme Court's] cases, or if it decides a case differently than [the Supreme Court] [has] done on a set of materially indistinguishable facts." Bell v. Cone, 535 U.S. 685, 694 (2002).

Under the first test, to satisfy the "unreasonable application" clause of § 2254(d)(1) the petitioner must show the state court—although it identified "the correct governing legal rule" from Supreme Court precedent—nonetheless "unreasonably applie[d] it to the facts of the particular state prisoner's case." Williams (Terry) v. Taylor, 529 U.S. 362, 407 (2000). "Section 2254(d)(1) provides a remedy for instances in which a state court unreasonably *applies* [Supreme Court] precedent; it does not require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error." White v. Woodall, 572 U.S. 415, 426 (2014).

A federal court cannot grant habeas relief simply because it concludes in its independent judgment that the state court's decision is incorrect or wrong; rather, the state court's application of federal law must be objectively unreasonable to warrant relief. Lockyer v. Andrade, 538 U.S. 63, 75 (2003); Bell at 694. If fair-minded jurists could disagree on the correctness of the state court's decision, then relief is not warranted under § 2254(d)(1). Harrington v. Richter, 562 U.S. 86, 101 (2001). The United States Supreme Court emphasized that "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." Id. (internal citation omitted).

B. Seeing the trial record anew

A federal court may take up a habeas corpus claim de novo under several circumstances: (1) if the state appellate court did not decide a properly-asserted federal claim, (2) if the state court's factual findings are unreasonable under § 2254(d)(2), or (3) if an adequate excuse for the procedural default or a claim exists.

In such instances, the stricter provisions of § 2254(d)(1) do not apply. Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir 2002). Then, as in the pre-AEDPA era a district court can draw from

both United States Supreme Court, as well as circuit precedent, limited only by the non-retroactivity rule of Teague v. Lane, 486 U.S. 288 (1989).

Under de novo review, if the factual findings of the state court are not unreasonable, the court must apply the presumption of correctness found in 28 U.S.C. § 2254(e)(1) to any facts found by the state courts. Pirtle, 313 F.3d at 1167. Contrarily, if a state court determined facts by way of unreasonable application, or if there are no state court factual findings, the federal court is not limited by § 2254(e)(1), but may consider evidence outside the state court record, except to the extent that § 2254(e)(2) might apply. Murray v. Schriro, 745 F.3d 984, 1000 (9th Cir 2014).

III. How McNeil's case got here

"Title 28 U.S.C. § 2254(c) provides that a claim shall not be deemed exhausted so long as a petitioner 'has the right under the law of the State to raise, by any available procedure, the question presented.' Read narrowly, this language appears to preclude a finding of exhaustion if there exists any possibility of further state-court review." Castille v. Peoples, 489 U.S. 346, 350 (1989).

In the instant case, the record reflects that McNeil has assiduously availed himself of state appellate remedies—to include initial collateral review—from the date that trial court entered its judgment of conviction on April 16, 2012. On direct appeal from conviction following a jury trial, the Office of the State Appellate Public Defender represented McNeil, laying out, in part, that the evidence was insufficient to support a finding of guilt. The U.S. Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 25 L.Ed.2d 368 (1970). "Under Winship, which established proof beyond a reasonable doubt as an essential of Fourteenth Amendment due process, it follows that when such

a conviction occurs in a state trial, it cannot constitutionally stand." Jackson v. Virginia, 443 U.S. 307, 318, 61 L.Ed.2d 560, 573 (1979). The Idaho Court of Appeals denied McNeil's challenge to the sufficiency of evidence to support his conviction at trial. State v. McNeil, 155 Idaho 392, 313 P.3d 48 (Ct. App. 2013). The Idaho Supreme Court denied review. Review denied by State v. McNeil, 2014 Ida. LEXIS 67 (Idaho, Feb. 24, 2014).

"A judgment by a state appellate court rejecting a challenge to evidentiary sufficiency is of course entitled to deference by the federal courts, as is any judgment affirming a criminal conviction. But Congress in 2254 has selected the federal district courts as precisely the forums that are responsible for determining whether state convictions have been secured in accord with federal constitutional law. The federal habeas corpus statute presumes the norm of a fair trial in the state court and adequate state postconviction remedies to redress possible error." Jackson, 443 U.S. at 323, 61 L.Ed.2d at 576.

Pursuant to Idaho's Uniform Post-Conviction Procedure Act, I.C. § 19-4901, McNeil initiated collateral review proceedings in the trial court on August 19, 2014. (Ada County Case No. CV-PC-2014-15680.) Forty-one months to the day would pass—almost three-and-a-half years—before the court finally made its decision known to the parties. On January 19, 2018, the court dismissed McNeil's post-conviction application. During much of intervening period between the initial post-conviction filing and its dismissal, McNeil's application lay dormant. Though counsel was appointed by the court, McNeil moved four times to replace the lawyer. The work product of post-conviction counsel—incredulously—developed only an amended petition that glaringly ripped off, sentence for sentence, the prisoner's tentative handwritten-scrawl of the original post-conviction application. It simply became a Microsoft Word document.

The floundering lawyer remained as counsel, such nonperformance notwithstanding, and even turned on his client at bar with the impish assault that "[McNeil] really wants and feels entitled to a big-firm lawyer and approach to this case." See post-conviction ("PC") motion hearing of July 22, 2015, PC Tr., p.18, ln.15-16. In other words, precisely what any client desires of his lawyer the world over.

The court's inquiry of counsel extended no further than, "Well, how long has it been since you were with the Public Defender's Office?" Ibid. at PC Tr., p.19, ln.13-14. Three months later the court would receive counsel's second amended petition that included references to page numbers of transcripts and Idaho Rules of Evidence, and, incredibly, only a singular, catchall citation to the landmark U.S. Supreme Court decision Strickland v. Washington, 466 U.S. 668 (1984). The numbered claims, as laid out by post-conviction counsel, began: "Under Idaho Law and United States Supreme Court Case Law . . . ," without the relevant citations. (R., pp.169-223.)

The issues on appeal of the trial court's summary dismissal had to be necessarily constrained by the deficiencies of counsel's performance in the post-conviction action. That notwithstanding, "[a] petitioner who has committed a procedural default may excuse the default and obtain federal review of his constitutional claims only by showing cause and prejudice, or by demonstrating that the failure to consider the claims will result in a 'fundamental miscarriage of justice.'" Noltie v. Peterson, 9 F.3d 802, 806 (9th Cir. 1993) (quoting Coleman v. Thompson, 111 S.Ct. 2546, 2565 (1991)). The Idaho Court of Appeals would affirm the dismissal of McNeil's post-conviction claims, and the Idaho Supreme Court followed course when it denied review.

Owing to a fundamental miscarriage of justice, McNeil comes before this Court seeking habeas corpus relief.

IV. Claims

A. Sufficiency of evidence

Contrary To, And In Violation Of, The Due Process Clause Of The Fourteenth Amendment To The Constitution Of The United States, And Clearly Established Federal Law As Determined By The Supreme Court Of The United States In *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979), Petitioner Was Convicted Of A Criminal Charge Despite The Fact That No Rational Trier Of Fact Could Have Found The Requisite Elements Constituting The Offense Beyond A Reasonable Doubt.

(1) Voluntary manslaughter

No one says with even a modicum of certainty how the decedent died. The sum and substance of the coroner's testimony under direct examination at trial came to this: "That's why I say I don't have a manner of death—or cause of death." (Tr., p.559, ln.15-16.) The state's own expert toxicologist testified a person under influence of the decedent's combined levels of ethanol and diphenhydramine, or Benadryl, would be "very difficult to arouse, if not impossible to arouse without what we call painful stimulation." (Tr., p.606, ln.12-14.)

Yet, in affirming the jury's verdict of voluntary manslaughter, the Idaho Court of Appeals concluded "[Ms.] Davis could have died during her fight with McNeil," and, "there is sufficient evidence to support a finding that 'heat of passion' existed during fight, as shown by the physical and verbal nature of the argument[.]" State v. McNeil, 155 Idaho 392, 399, 313 P.3d 48, 55 (Ct. App. 2013). The decision presumes a heat-of-passion altercation, as testified to by the decedent's brother, who said he heard "[s]ome loud noises, banging, like the sound of stomping feet, or maybe somebody slamming a door repeatedly." (Tr., p.619, ln.9-11.) To the court's end, that constituted a sufficient "fight" for purposes of meeting the threshold for voluntary manslaughter. Though, to a rational mind, a fight necessarily implies a bout where one of the opponents *could not be* in such a "difficult to arouse, if not impossible to arouse" physical state to meet the occasion head on.

"Manslaughter is the unlawful killing of a human being . . . without malice. It is of three (3) kinds: (1) Voluntary—upon a sudden quarrel or heat of passion." I.C. § 18-4006(1).

In State v. Grube, 126 Idaho 377 (1994), the Idaho Supreme Court rejected a defendant's argument for voluntary manslaughter as a lesser-included offense by reasoning "there was absolutely no evidence to support an instruction on voluntary manslaughter because there was no indication the murder took place in the 'heat of passion.'" Id. at 381. Here, the trial court left the jury to infer "loud noises, banging, like the sound of stomping feet" met the requisite element of voluntary manslaughter, even in the face of considerable evidence that Ms. Davis "would be very difficult to arouse" (Tr., p.619, ln.19-20). That such a fairly passed-out person should goad McNeil into the throes of a "heat-of-passion" homicide belies the evidence.

With no manner of death determined by the coroner, the Court of Appeals turned its attention to "intentional death scenarios" as to how "[a] person could have killed Davis by placing a hand, pillow or another object over her mouth[.]" McNeil, 55 Idaho at 397, 313 P.3d at 53. "A person could have also killed Davis by compressing her chest, for example," and, "[a]s to accidental death, . . . [Ms.] Davis could have suffocated[.]" Ibid. Gumshoe vagaries crept into an opinion fraught with dangerous conjecture and unseemly speculation from a court of direct review.

The United States Supreme Court has long established that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof. In Winship, the Court held:

> It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

In re Winship, 397 U.S. 358, 375 (1970).

In Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979), the U.S. Supreme Court ruled evidence which tends to make the existence of an element of a crime slightly more probable than it would be without the evidence cannot, by itself, rationally support a conviction of a crime beyond a reasonable doubt, as is required by due process.

> The constitutional standard recognized in the Winship case was expressly phrased as one that protects an accused against a conviction except on "proof beyond a reasonable doubt . . ." In subsequent cases discussing the reasonable-doubt standard, we have never departed from this definition of the rule or from the Winship understanding of the central purposes it serves.

Jackson, 443 U.S. at 315-316.

The Jackson standard "must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law." Id. at 324 n.16. No rational trier of fact could have found McNeil acted with such rage, terror, or furious hatred, as to end the life of Ms. Davis where the record is completely devoid of any suddenly aroused and immediate provocation. (See "heat of passion" as defined by Black's Law Dictionary (10th ed. 2014).) Indeed, the question languishes still. The coroner: "Cause of death? No, sir. Manner of death was undetermined because I couldn't say what the cause of death was." (Tr., p.536, ln.5-7.) Whatever physiognomy the trial court may have weighed on balance as to McNeil, "[u]nder our system of criminal justice even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar." Jackson at 323-324.

Central to the state's case loomed the literal positioning of the decedent's body. Under the state's theory, the corpus delicti placed the body between the bedroom mattress and box spring. Yet, the fire captain who removed the smoldering mattress testified to encountering some

resistance when attempting to lift it. "It was stuck." (Tr., p.281, ln.18.) He also told the court that compared with other mattresses, this one "was lighter" in his experience. (Tr., 285, ln.5.)

A firefighter under the captain's command testified that he "heard a grunt, and by the time I got there the mattress was lifted." (Tr., p.312, ln.20-21.) This resistance and forced physical exertion—evidenced by "a grunt" sounded by the captain—stands as incongruous with other testimony about the wafting nature of the mattress by itself. A lead fire investigator offered his own assessment that "[t]he mattress was really lightweight." (Tr., p.888, ln.2.) He further concluded, "I believe that when the mattress was removed by fire crews, they took it ..., I believe they pulled the body ..." (Tr., p.889, ln.24—p.890, ln.3.) By the captain's own account at trial, conditions on-scene embarrassed sensory perception. "We opened the door. It was very thick with smoke, almost no visibility[.]" (Tr. p.279, ln.18-19.) The sum and substance of this evidentiary testimony leaves open the real probability that the decedent's body had been significantly disturbed in the smoky bedroom, with the fire captain having "jerked [the mattress] free" (Tr., p.284, ln.24) out from under Ms. Davis' remains, which had previously been in repose on top of the bed.

Further, the on-site evidence-collection procedures got thoroughly compromised in their application by crime-scene investigators. In a video and audio recording made of the scene after the fire, investigators manipulate the decedent's body. This happens as one of them exclaims that they had forgotten to set down a chalk-line. The exclamation remarkably evoked chuckling among members of the investigative team.

With no cause of death, and an incident-scene corrupted by a hasty fire captain and lackadaisical on-site investigators, no rational minds could have concluded beyond a reasonable

doubt that a criminal homicide had occurred. The sufficiency of the evidence falls well short of the Jackson standard.

(2) Arson

The origin of the fire also remains undetermined, though an investigator opined at trial that it had been "intentionally set" (Tr., p.868, ln.20-21), after no cause could be attributed to "[t]he heating pad, its power cord, the computer power strip, and the radio thing that was plugged into it." (Tr., p.864, ln.25—p.865, ln.2.) An agent of the federal government's Bureau of Alcohol, Tobacco, Firearms, and Explosives testified on direct examination in this manner: "Was it originated on the mattress? Was it originated on the box spring? Was it originated on light combustibles in the immediate area? I can't tell you for certain." (Tr., p.965, ln.12-15.) The agent said he "ruled out electrical" (Tr., p.973, ln.8-9), while the original 911 caller testified that, to him, "[i]t smelled like—I could only describe it as an electrical fire." (Tr., p.256, ln.22-24.)

"Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested." Daubert v. Merrell Dow Pharms. Inc., 509 U.S. 579, 593, 125 L.Ed.2d 469, 482-483 (1993). In the instant case, the ATF research lab did, in fact, carry out extensive scientific testing, and, yet, the special agent could only assist the jury insofar as to say:

> And, you know, there are—when you are trying to make an origin and cause determination, particularly in the cause of the fire, it's difficult, because we weren't there at the time of the fire to see the fire at its initial stage, when it first started.

(Tr., p.1000, ln.15-20.)

> We weren't at the fire scene at the time of its inception to see it happen.

(Tr., p.1002, ln.8-9.)

With Daubert, the U.S. Supreme Court brought to the fore scientific quests for truth, which must be juxtaposed to the legal factfinding inquiry bearing on jurors. The Daubert Court reasoned science may often prove itself fluid, while—

> Law, on the other hand, must resolve disputes finally and quickly. The scientific project is advanced by broad and wide-ranging consideration of a multitude of hypotheses, for those that are incorrect will eventually be shown to be so, and that in itself is an advance. Conjectures that are probably wrong are of little use, however, in the project of reaching a quick, final, and binding legal judgment—often of great consequence—about a particular set of events in the past.

Daubert, 509 U.S. at 597, 125 L.Ed.2d at 485. The investigators and agents who presented as state's expert witnesses before the trial court made only hypotheses about events in the past. They "weren't there" to see. Even, assuming arguendo, had the state definitively tied the fire's origins to being "human-caused" and "on-purpose" (Tr., p.975, ln.3-4), the record wholly fails to establish what person, or persons—let alone the defendant—put an open flame to the bedroom.

(3) Grand theft

The vehicle at the center of the grand theft count goes to who owned it. According to one Joseph R. Riso, the decedent had eluded his attempts at repossession for some two years prior to 2011. (R., p.223.) For an agreed upon fee, Riso would pay to have McNeil deliver the vehicle to him. While Ms. Davis had acquired the vehicle in 2007 from Riso's automobile dealership, it had been subjected to a hide-and-seek pursuit to satisfy a lawful debt. A repossession could have happened at any time, by any agent of Riso's choosing. That bona fide agency of moment went to McNeil.

The rightful owner—as Riso fairly explained to Boise police in an early email—had neither reported nor complained that the vehicle was stolen. Nothing of McNeil's efforts as regards the

automobile exhibited an "intent to deprive another of property or to appropriate the same to himself," but rather, to actually return it as a repo. (See I.C. § 18-2403(1).)

"While Idaho's theft statute is broad and covers many misdeeds, there must be a careful analysis of what was stolen and from whom before a charging decision is made and the jury is instructed." State v. Coats, Idaho Supreme Court, Docket No. 46488 (Idaho, decided July 10, 2019, on review from the Idaho Court of Appeals).

In the instant case, a Tiffany ring represents an item of some value which the state argued McNeil had wrongfully purloined from Ms. Davis. Count III of the indictment charges that McNeil took it "from the owner, Natalie Claire Davis," however, at trial, the decedent's mother took the witness stand and identified herself as the true and rightful owner of the Tiffany ring. "At that time I gave [the ring] to [Ms. Davis] kind of for herself, just to keep [it] for me. ... [S]o I gave [it] to Nat to hang onto." (Tr., p.225, ln.14-15, 20-21.)

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.

Cole v. Arkansas, 333 U.S. 196, 201 (1948).

As a matter of law, the prosecutor conceded in his closing argument that Ms. Davis had no superior right to the Tiffany ring. "The family heirloom ring, it was technically [the decedent's mother's] ring, still[.]" (Tr., p.1067, ln.23-24.) In Cole v. Arkansas, 333 U.S. 196 (1948) the Supreme Court has stated succinctly the law as to the validity of criminal charges and convictions.

> It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.

Id. at 647-648.

Here, the criminal indictment is devoid of any charge laying the theft of a valued ring on McNeil as regards a taking from the decedent's mother.

"[T]he indictment not only failed to inform the defendant of the actual misrepresentation that would be shown at trial, but it also affirmatively misled the defendant and obstructed his defense at trial." United States v. Adamson, 291 F.3d 606, 616 (9th Cir. 2002). As it is impossible to know by the verdict whether the jury found McNeil guilty of theft of a Tiffany ring—and from whom—or guilty of theft of a vehicle, or other, the conviction must be vacated in accord of due process.

The sum and substance of Claim A

It is well established that McNeil's trial counsel elected not to put on any proof in his own behalf. This Court can now turn to the record, examine it in the light most favorable to the prosecution, and determine whether any rational trier of fact could have found petitioner guilty beyond a reasonable doubt. From evidence of the occasionally-strained relationship between the decedent and McNeil, a trier of fact might rationally conclude that their cohabitation created sufficiently uncomfortable living-environs, though not to an absolute degree. Although this evidence has some relevance, it hardly approaches a threshold that would provide an inference that McNeil had a substantial reason for killing Ms. Davis, then setting fire to the bedroom and driving away. See Delk v. Atkinson, 498 F.Supp. 1282 (M.D. Tenn. 1980).

> The State proved beyond doubt that petitioner could have killed [decedent], and that he might have had some reason to do so. . . . Based upon a most searching review of this record under the Jackson standard, the Court must conclude that no rational trier of fact could have found petitioner guilty beyond a reasonable doubt.

Id. at 1292.

The state's proof showed that McNeil could have done something nefarious. As a matter of law, however, that showing by itself cannot provide the proof necessary for conviction, because of the fundamental principle that mere presence at the scene of a crime, standing alone, never suffices to prove guilt beyond a reasonable doubt. The teachings of Winship and Jackson must be that the concept of constitutional due process embodies this very principle. See Delk, *supra.*

B. Ineffective assistance of counsel

Contrary To, And In Violation Of, The Sixth Amendment To The Constitution Of The United States, And Clearly Established Federal Law As Determined By The Supreme Court Of The United States In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), Petitioner Was Denied Effective Assistance of Counsel.

(1) Failure to regard court's pretrial rule that excluded state's Exhibit 95 from evidence

The record presents trial counsels' inexplicable throwing in of the towel after having won the round. A pretrial notice alerted trial counsel that the state intended to use character evidence against McNeil under the permitted bad-act uses of Idaho Rules of Evidence 404(b). Trial counsel opposed this admission into evidence of a 911 call—together with an audio recording made by the responding officers—as involved Ms. Davis one before her death. Following a hearing on the evidence, the trial court ruled that Ms. Davis' "rather bizarre statement" to police would be excluded. "I don't see what hearsay rule it would fall under, and I don't see how it could be admissible by the State in its case in chief." (Tr., p.56, ln.15-19.)

Only three days later, trial counsel would stipulate "to the admission of the entire 9-1-1 phone call" and the recorded audio conversations between Ms. Davis and the police. (R., p.192.) This sudden, unforced trial error left the jury room to speculate that McNeil may have engaged in domestic violence prior to Ms. Davis' death. Yet, even when it came to the introduction of state's Exhibit 95 at trial, defense counsel indulged the prosecution with, "Your Honor, there is no

objection to this. Based on your ruling, we have stipulated to this." (Tr., p.675, ln.9-11.) The only "ruling" of record on Exhibit 95 had clearly excluded it.

"[I]f the process loses its character as a confrontation between adversaries, the [Sixth Amendment] constitutional guarantee is violated." United States v. Cronic, 466 U.S. 648, 656,657, 80 L.Ed.2d 657, 666 (1984). Trial counsel effectively voided a strategic win for the defendant.

(2) Failure to call a fire-investigation expert

A charge of arson necessarily invokes purposeful, violent, and aggressive conduct. See Begay v. United States, 553 U.S. 137, 128 S.Ct. 1581, 170 L.Ed.2d 490 (2008). In the instant case, however, trial counsel failed to make any purposeful or aggressive strike at the state's theory of the how McNeil acted to conceal the death of Ms. Davis by arson.

The Ninth Circuit has repeatedly held that "[a] lawyer who fails adequately to investigate and introduce ... [evidence] that demonstrate[s] his client's factual innocence, or that raise[s] sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance." Hart v. Gomez, 174 F.3d 1067, 1070 (9th Cir. 1999); see also Lord v. Wood, 184 F.3d 1083, 1095-1096 (9th Cir. 1999) (holding that counsel's failure to call key witnesses whose testimony undermined the prosecutor's case constituted deficient performance). "The failure to investigate is especially egregious when a defense attorney fails to consider potentially exculpatory evidence." Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002).

During a pretrial hearing, the court indicated, "Quite clearly, this is a circumstantial case that is going to have to rely on a number of building blocks[.]" (Tr., p.57, ln.12-14.) This should have provoked trial counsel to thoroughly go at the subtleties of the science of fire—particularly, its causes—to tear down the building blocks of the state's theory. In fact, assistant trial counsel

went so far as to tell the jury in her opening that "[t]he defense will call Dennis Jones, a fire expert, and he will testify that he doesn't agree with the State's investigators." (Tr., p.183, ln.1-3.)

The case against McNeil indeed followed a circumstantial course. No physical evidence of McNeil's hand in the fire got put to the jury. No ignition source could be found. The persuasion for arson depended entirely on the state's contention McNeil had argued with the decedent earlier.

Two weeks before the start of trial, the defense's fire expert submitted his report to trial counsel. (R., 206-215.) It concluded, "In light of t[he] findings and unanswered questions, a determination of arson is premature." Trial counsel's opening statement more than suggested to the jury that the defense had something to say about the fire. Then said nothing. The fire expert, Dennis Jones, never came to be anything more than a footnote—somebody held out for the jury, but not called to testify.

It can fairly be reasoned that the testimony of the defense's fire expert "would have altered significantly the evidentiary posture of the case." Brown v. Myers, 137 F.3d 1154, 1157 (9th Cir. 1998). The state's case against McNeil was not so strong that the testimony of the available fire expert who trial counsel failed to call "would not have created reasonable doubt in the mind of a reasonable juror." Rios, 299 F.3d at 813. "[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." Cronic, 466 U.S. at 659.

Placement of the decedent's body so underscored the state's position that the prosecutor railed in his closing rebuttal, "This body being on top of the bed issue is dead by the time the mattress gets out the door." (Tr., p.1097, ln.21-24.) But that conclusion—insinuated throughout the entirety of the trial—runs counter to the findings of defense-expert Jones, who reported:

> The empirical evidence undermines the hypothesis that the victim was between the mattress and box springs during the fire. The mattress was removed before the scene could be documented [and] as a result the exact location of the victim is undetermined.

(See Dennis Jones Report, R., pp.206-215 at 214.)

Trial counsel could have no reasoned tactical, nor strategic, purpose in abandoning an expert defense-witness, and, in particular, one whose prepared report substantively challenged the only theory posited by the state. The inadequacy of trial counsel's adversarial courtroom posture alone sufficiently carries McNeil's initial burden of demonstrating that he was denied a fair trial.

(3) Failure to object to state's Exhibit 295 of custodial interrogation

A Miranda warning functions both to reduce the risk that an involuntary or coerced statement will be admitted at trial and to implement the Fifth Amendment's self-incrimination clause. See Miranda v. Arizona, 384 U.S. 436, 457-458, 86 S. Ct. 1602 (1966). "The Fifth Amendment right identified in Miranda is the right to have counsel present at any custodial interrogation." Edwards v. Arizona, 451 U.S. 477, 485-486, 68 L.Ed.2d 378, 101 S.Ct. 1880 (1981). Miranda itself indicated that the assertion of the right to counsel was a significant event and that once exercised by the accused, "the interrogation must cease until an attorney is present." 384 U.S. at 474.

> Whatever the defects, if any, of this relatively rigid requirement that interrogation must cease upon the accused's request for an attorney, Miranda's holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible.

Fare v. Michael C., 442 U.S. 707, 718, 61 L.Ed.2d 197, 99 S.Ct. 2560 (1979).

It is undisputed that McNeil invoked his Fifth Amendment rights during the custodial interrogation. With state's Exhibit 295, the jury heard McNeil declining to answer questions and

desiring to consult with an attorney. While he made no inculpatory statements, the jury could likely infer guilt by his silence. And trial counsel let it happen. The U.S. Supreme Court has held:

> [W]e must recognize that harmless-error rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one.

Chapman v. California, 386 U.S. 18, 22, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967).

The failure to object to Exhibit 295 left the case—an otherwise "close one"—subject to "unfair and mischievous" inferences. In this highly circumstantial case, permitting the prosecution a full-sail assault on McNeil's constitutional right to remain silent can only be ascribed to trial counsels' ineffectiveness.

(4) Failure to investigate origin of state's Exhibit 3

Discovery in this case leaves open the possibility that a screen-shot taken from the cellular telephone belonging to Ms. Davis' father, one Ken Davis, may have been altered pretrial. At trial, Ken responded to a question on direct examination about a text message purportedly sent to him from Ms. Davis. "I received a text message from her to please call 911 to her house." (Tr., p.203, ln.17-18.) As the TracFone account of Ms. Davis had run out of calling minutes, "to her house" meant the landline telephone at 1209 Lincoln Avenue. In cyber-parlance, to "call 911" has come to mean "right away," or "hurry," or to otherwise suggest some emergent situation requiring an immediate action.

However, the prosecutor rephrased, and translated Ken's testimony as, "Call police to my house." (Tr., p.205, ln.13.) The meaning changed. A lot.

No records from discovery either provide facial evidence that the "police" text originated from Ms. Davis' TracFone, or that it had, in fact, been received by Ken. Exhibit 3 got introduced

as only one of forty-nine text messages sent by Ms. Davis from that particular TracFone. Two others made discovery. Forty-six remain unaccounted for. While the jury saw a facsimile of Exhibit 3 only through Ken's appearance on the witness stand, the state never independently certified it as a bona fide text message. Nor did trial counsel get at his graphics-design background.

Trial counsel performed ineffectively for failing to investigate the origins of Exhibit 3.

(5) Failure to object to state's Exhibit 110

Though pornography permeates the American zeitgeist as a multibillion-dollar business, it lacks gravitas in most staid societal circles. References to pornography conjure peculiar, and very visceral, passions among persons of every class. By definition, implied bias: to-wit, "prejudice that is inferred from the experiences or the relationships of a judge, juror, witness, or other person." (See "implied bias" as defined by Black's Law Dictionary (10th ed. 2014).)

The state introduced an entire computer hard drive, Exhibit 110, as evidence of McNeil's online visits to pornographic websites. While trial counsel put up some fuss as to relevance, no objection came with regard to prejudice, or "implied bias," toward McNeil. Then, in closing, the prosecutor uses this salacious Internet evidence to impugn the silent defendant, rhetorically saying to the jury, "[W]hat else does he do on the 14th?" "The defendant then uses his Internet quite a bit." (Tr., p.1064, ln.7, 11-12.) This served only to prejudice McNeil in the minds of the jurors.

In another venue, one could argue skin-flicks may necessarily serve some *ars poetica* beauty. However, such First Amendment protections of McNeil's artisanal exploits hardly benefit him here. He got made to be a person of lesser degree entirely by the state, in a murder trial, where Internet porn had no place, but to defame. That was the whole point, after all.

Trial counsel was ineffective for failing to object to state's Exhibit 110.

(6) Failure to investigate inconsistencies as regards the times of alleged events

The trial record and witness testimony contravene the stated whereabouts of Ms. Davis' brother in the morning hours on the date decedent's body got discovered. The brother, Matthew Hess, worked at McDonald's. His supervisor, Mariesa Hansen, first told police that Hess arrived for work "around 7:25-7:30ish" on March 5th. (R., p.222.) At trial, she revised her testimony to say Hess showed up for work "[b]etween 8:20 and 8:30." (Tr., p.645, ln. 2.) Trial counsel failed to hone in on inconsistencies in the record by passing on an opportunity to cross-examine Hansen. This error demonstrates an ineffective assistance of counsel claim of merit as Hess testified he had heard McNeil and Ms. Davis arguing at some nonspecific time on the morning of his sister's death.

The state, in rebuttal, inculcated upon the jury "there is that narrow window of time where only [McNeil] and [Ms. Davis] were there, and the next thing you know, the house is on fire[.]" (Tr., p.1096, ln.15-17.) Obviously, nailing down a precise time of when the charged crime may have occurred, and, more to the point, who could have done it, weighs in the balance even now. The question has relevance. Yet, trial counsel stumbled when given an opportunity to pull at a thread in the state's narrative: to-wit, timing. In Delk, *supra*, a "narrow time interval" very much mirrors the state's "narrow window of time" in the instant case.

> [T]he narrow time interval between his departure and Stone's arrival irrefutably shows that if someone else did it, he or she operated under very narrow time constraints. *However, that inference falls short of proving* that Sam Delk did it.

Delk v. Atkinson, 498 F.Supp. at 1291 (emphasis added). The state simply implied crystal-ball fancies and left the jury to make its inferences. Trial counsel had a duty to investigate these discrepancies between written statements, the police narrative, and witness testimony. Here, the investigative efforts of trial counsel fell short.

The police narrative of a detective's interview with Hess provides no insights as to where the brother may have been, or at what time he left the house. "We talk about how it came to be that he had not clocked into work until after 8 AM on the morning in question. He had no clear explanation." (R., p.227.) And trial counsel never went in search of one. This failure fatally compromised the defense McNeil previously staked in choosing to remain silent.

(7) Failure to call witness Joseph R. Riso

Both the police narrative-report (R., p.224) and the witness statement of Joseph R. Riso (R., p.223) complement the affirmative position that McNeil held from the get-go—that the vehicle assigned by the state as belonging to the decedent, had actually been sought after for years to be taken in repossession. The statement of Riso explained he "received the call from an unnamed male individual (McNeil) to inform me of a vehicle that we had been trying to repossess for about 2 years. He described it as a vehicle belonging to Natalie Davis." In the police narrative, "McNeil maintained that the vehicle was not stolen, that he was aware it was subject to being repossessed."

That trial counsel would obviate a rational defense to grand theft—without the slightest nod to Riso's favorable testimony—rises to a substantive Sixth Amendment ineffective-assistance claim as articulated in Strickland, *supra*. Trial counsels' performance here meets the deficiency standard, and, further, prejudices McNeil since the jury found him guilty of grand theft. The only reasoned inference jurors could make when told someone took another's car—was that McNeil stole it. The testimony of Riso would have put McNeil's apprehension of the vehicle in a sound context. Whether Riso repossessed the vehicle personally, or gave McNeil agency to do so, the fact remained in 2011 that Ms. Davis herself no longer enjoyed possession in law. Jurors never had this laid out. Trial counsel passed on Riso, who could have undone the grand theft count.

(8) Failure to secure DNA testing of cigarette butts

Where the state presents DNA fragments connecting a defendant to the scene, defense counsel must pursue an investigation as to how that evidence got there. Moreover, defense counsel has the incumbent task to explain it away to the jury. Here, trial counsel failed.

The state premised its theory of a corpus delicti as being arranged. "We know that's a staged scene. You know that's a staged scene." (Tr., p.1069, ln.9-10.) "[H]e put that cigarette in her mouth[.]" (Tr., p.1069, ln.25—p.1070, ln.1.) Indeed, the cigarette butt discovered with the decedent's body had the DNA of McNeil. Among smokers, a single cigarette can pass the lips of more than one person. Nothing of that should stand out as farfetched.

Yet, trial counsel neglected to test other butts in the house to vitiate evidence of McNeil's DNA on one cigarette, in particular. The state angled only a single cigarette butt having the DNA of both McNeil and Ms. Davis in front of the jury. By inference, jurors could have concluded McNeil set it in her mouth. But for trial counsels' ineffective assistance, the jury might have also concluded that Ms. Davis herself picked up and lit a cigarette previously smoked by McNeil, as most every butt on the premises would have had the DNA of each of them. This failure to test for DNA, so as to present a reasoned and plausible context for shared cigarettes, left the jury to surmise that a deliberately-placed butt must have been the unseemly contrivance of McNeil.

(9) Failure to move for a mistrial after juror made identification of McNeil in custody

> The law generally forbids visible shackling during a criminal defendant's trial.
>
> The courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment.

Deck v. Missouri, 544 U.S. 622, 631 (2005).

Early in the timeline of the guilt-phase proceedings, McNeil communicated to trial counsel "that a female juror had seen me in custody in the backseat of an Ada County Sheriff's SUV. Both [counselors] claim to have given this information to [the judge], yet there is no record nor any inquiry made." (R., p.141.) The district court dismissed this incident as irrelevant since McNeil proffered nothing demonstrating "he saw a juror in *his* case." (R., p.325 (emphasis added).) In response to the court's notice, McNeil averred he and the juror,

> made eye contact, and she turned to the woman (non-juror) that was walking with her and mouthed, "That's him". I brought this to the attention of Trial Counsel. They said they addressed it with the Judge. The court's response was, "This seems like a vigilante [sic] group, I think they would've brought something like that to me." No record was made.

(R., p.347.) In denying this claim on post-conviction, the trial judge ruled McNeil "failed to show he was *actually prejudiced* by the juror seeing him in the police vehicle (R., p.326 (italics in original)), while neither allowing for an evidentiary hearing on the issue. However, where prejudice may exist outside the purview of the trial court, the U.S. Supreme Court has opined:

> Efforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different if Riggins' motion had been granted would be purely speculative. We accordingly reject the dissent's suggestion that Riggins should be required to demonstrate how the trial would have proceeded differently[.]

Riggins v. Nevada, 504 U.S. 127, 137, 118 L.Ed.2d 479, 491 (1992).

There, as here, the trial court failed to make findings sufficient to support its determination that the petitioner had not been prejudiced. The probable impact to the juror—on seeing McNeil presented as a prisoner in the sheriff's vehicle—makes impossible a declaration that such a visual was harmless beyond a reasonable doubt. See Hernandez v. Beto, 443 F.2d 634 (5th Cir. 1971) (holding that prison clothing infringed a fundamental right—the presumption of innocence).

(10) Failure to move for mistrial after improper juror communication with third party

The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon subtle factors that a defendant's life or liberty often depends. In the instant case, members of Ms. Davis' immediate family testified. Twice, McNeil asserts he came near jurors in his case outside the courtroom. "The second time, I saw a male juror in front of the courthouse. He was speaking to a man whom we had earlier identified as the decedent's uncle." (R., p.347.)

"One of the most fundamental rights in our system of criminal justice is the right to trial before an impartial jury." Godoy v. Spearman, 861 F.3d 956, 958 (9th Cir. 2017). It is unclear from the existing record whether McNeil, in fact, suffered prejudice because of the tête-à-tête that occurred outside the courthouse involving the juror and Ms. Davis' uncle. Thus, McNeil "is entitled to an evidentiary hearing to 'determine the circumstances [of juror's misconduct], the impact thereof upon the jur[y], and whether or not it was prejudicial.'" Id., 861 F.3d at 960 (quoting Remmer v. United States, 347 U.S. 227, 230, 98 L.Ed.654, 656, 74 S.Ct. 450 (1954)).

"Whether a juror is prejudiced or partial in the sense that one of the parties is denied a fair and impartial trial, is not a procedural matter to be determined by statutory construction. It is one of vital substantive law under the Constitution, to be resolved according to the highest standards of human conduct. It is a question first addressed to the good sense of the trial judge, subject to review under the supervisory power inherent in appellate jurisdiction." United States v. Chapman et al., 158 F.2d 417, 419 (1946). The trial court reasoned on post-conviction review that McNeil failed to prove any "presumption of prejudice" as related to communication between the juror and the decedent's uncle. (R., p.383.) But it did so without the "good sense" of an evidentiary hearing.

Due process of law implies and requires a trial by an impartial jury. Trial counsel, however, deflected an admonition by McNeil to inform the court, saying, "I can't take that to [the judge] it will cause a mistrial and I don't want to retry this case." (R., p.347.) This failure of trial counsel to approach the judge—as counseled by his own client—further hamstrung McNeil by vitiating what would have been a substantive claim on direct appeal. Had a motion for mistrial been denied, McNeil could have preserved the ruling for review. This rises to ineffective assistance.

(11) Failure to investigate a defense to the grand theft charge

Turn to television, the Internet and Ring security. Video images tell a story. In the instant case, McNeil pointed trial counsel to probable video of himself and the decedent, Ms. Davis, on a visit together to Vista Pawn. Even though trial counsel had been alerted to the video evidence, no investigation came of it. The trial court dismissed this claim on post-conviction review as "it would not have made a difference in the outcome[.]" (R., p.321.) But that eighty-sixes, out of hand, any weight the jury might have given to once-preserved images of Ms. Davis attempting to pawn her family heirloom ring.

In his application for post-conviction relief, McNeil provided evidence through a private investigator that recorded video at Vista Pawn would have been available under subpoena, and memorialized, at the time the defendant first met trial counsel on March 30, 2011. Instead, trial counsel did nothing. The investigator, on oath, stated:

> 7) I interviewed [employee] of Vista Pawn.
>
> 8) He indicated to me four years ago Vista Pawn utilized video. It included the interior of their store. Furthermore, he indicated archival video was stored for forty-five days.
>
> 9) I believe video was available at the time Trial Counsel had the case.

(R., p.230.) A proper investigation—pretrial—might have led to information relevant to one of felony charges against McNeil, namely, grand theft. But for this failure to investigate, a reasonable probability exists of a different outcome on the grand theft count.

In furtherance of his claim that an investigation would have recovered the evidence relative to grand theft, McNeil provided the post-conviction trial court an affidavit of a Vista Pawn employee. Had trial counsel "showed up looking for the video we would have held the video from February 18 and supplied him with it under subpoena." (R., p.355.)

Against heart-rending testimony from the decedent's mother suggesting a particular piece of jewelry "is one of the two diamond Tiffany rings that were mine that I had given to Natalie" (Tr., p.223, ln.3-4), McNeil indicated to trial counsel that Ms. Davis had been more than willing to part with the ring. He explained she "was not in good financial condition." (R., p.335.) With evidence to rebut the "heirloom" story, trial counsel could have put reasonable doubt before the jury as to whether McNeil indeed acquired the ring by taking—or whether Ms. Davis simply asked him to accept it from her to satisfy an outstanding debt. Trial counsel was ineffective here.

(12) Failure to engage plea negotiations

A second-degree murder count portends a possible life sentence, but nowhere within, or without, the trial record does McNeil's trial counsel even hint at plea negotiations. Denial of guilt by the defendant has no relevance in determining whether a plea deal may best serve the interests of the accused. A voluntary, knowing and intelligent plea can be entered and accepted by the trial court, especially when a defendant may be gripped by fear of the alternative. See North Carolina v. Alford, 400 U.S. 25, 27 L.Ed.2d 162, 91 S.Ct. 160 (1970). On the Alford theory, a defendant may plead guilty while protesting innocence simply to avoid the expenses or vicissitudes of trial.

C. Prosecutorial misconduct

Contrary To, And In Violation Of, The Fifth Amendment And Clearly Established Federal Law As Determined By The Supreme Court Of The United States In *Griffin v. California*, 380 U.S. 609, 14 L.Ed.2d 106, 85 S.Ct. 1229 (1965), Petitioner Was Deprived Of His Federal Constitutional Rights Through The Prosecuting Attorney's Repeated Adverse Comments Made Against The Petitioner From His Failure To Testify; And Was Further Deprived Of Protection Of The Due Process Clause Of The Fourteenth Amendment To The Constitution Of The United States By The Prosecutor's Inflammatory Words Which Were Intended To Invoke Sympathy And Sway Passions And Prejudices.

(1) Nor shall be compelled in any criminal case to be a witness against himself

The Fifth Amendment says "nor shall be compelled ... to be a witness," but in the instant case, the record demonstrates the state gibed McNeil, nonetheless, for his courtroom quietude. The Idaho Court of Appeals concluded prosecutorial comments like, "There has been no testimony other than that," and, "He's the only one who lived through it," fall short of any error.

But it is well established that the privilege against self-incrimination prohibits a prosecutor from commenting on a defendant's failure to testify. Griffin v. California, 380 U.S. 609, 615, 14 L.Ed.2d 106, 85 S.Ct. 1229 (1965). "Any comment on the absence of defense evidence, beyond pointing out that the Government's proof is uncontradicted, risks speculation by a juror that the defendant must be guilty or else he would have testified." United States v. Castillo, 866 F.2d 1071, 1084 (9th Cir. 1988).

In State v. McMurry, 143 Idaho 312, 143 P.3d 400 (Ct. App. 2006), the court opined that improper commentary brought to bear on a defendant's failure to testify may "result in an indirect Griffin violation depending on the number and nature of those comments." Id. at 315. Thus, Idaho's inveterate practice de jure must needs allow for treble constitutionally-violative comments to go up before the jury, without caveat by the trial court. That's the case here, where one, two, then three Fifth-Amendment gibes got aimed at McNeil in the state's closing.

First, the prosecutor says,

> He puts that body between the mattress and box springs. We know that's a stage scene. You know that's a staged scene. *There has been no testimony other than that.*"

(Tr., p.1069, ln.8-11 (emphasis added).) Then, he goes again,

> And, of course, we know she was dead before the fire, so the fire didn't kill her, and she had been dead some time before the fire because the lividity had set in, *so there is a small window there nobody can really know except the defendant. He's the only person who lived through it.*"

(Tr., p.1081, ln.14-20 (emphasis added).) And, finally, on rebuttal,

> [T]here is that *narrow window of time where only he and her were there*, and the next thing you know, the house is on fire[.]

(Tr., p.1096, ln.15-17 (emphasis added).)

The Idaho Court of Appeals goes only so far as to say "even if [prosecutor's comment] tangentially implicates a constitutional violation, without so holding, we determine that any such error is harmless." State v. McNeil, 155 Idaho 392, 401, 313 P.3d 48 (Ct. App. 2013). Nevertheless, the Ninth Circuit has put a caveat to such "harmless" holdings. "Repeated resort to the type of argument employed here may compel some court some day to conclude that the risk that this tactic will cause jurors to focus on the defendant's failure to testify *is intolerable*. Castillo, 866 F.2d at 1084 (emphasis added).

Even before Castillo, the Sixth Circuit wrote of indirect comments on a defendant's failure to testify as "troublesome," and affirmed the district court's rule "that the prosecutor's statements constituted improper references to the petitioner's decision not to testify. We are unable to conceive of any other reasonable inferences which could be drawn from the prosecutor's comments." Raper v. Mintzes, 706 F.2d 161, 167 (6th Cir. 1983). In Raper, the prosecutor argued,

"The physical facts don't contradict it. No one's disputed it in any sense." Id. at 165. In McNeil's trial, the prosecutor hammered, "You know that's a staged scene. There has been no testimony other than that." The nature of both references plays almost identical. Rather than allude to a "troublesome" tactic here, the Court should grant McNeil habeas relief due to the government's "intolerable" assault on his Fifth Amendment right not to be a witness against himself.

(2) Passion and prejudice

Statements improperly designed to appeal to passions particularly risk sparking visceral outrage among members of the jury and encourage them to convict based on emotion rather than evidence. See Zapata v. Vasquez, 788 F.3d 1108, 1115 (9th Cir. 2015). "[T]his impacts a defendant's Fourteenth Amendment right to a fair trial." State v. Perry, 150 Idaho 209, 227, 245 P.3d 961 (2010).

In several instances, the prosecutor insinuated at his closing a passioned and inflammatory commentary concerning the imagined-ethos of Ms. Davis at her death. The remarks—fabricated from whole cloth, designed to inflame the passions of the jury and delivered in the waning moments of trial—unquestionably stand out here as egregious misstatements.

> She was a helpless victim, helpless adult, like a baby. ... [S]he was in no condition to fight back, so it made it easy for the defendant.

(Tr., p.1079, ln.9-15.) Then, in the very last ninety seconds of rebuttal—just before it got the case to deliberate—the jury heard:

> And that just because she was vulnerable and an easy target, it's no reason to let him get away with murder.

(Tr., p.1101, ln.23-25.)

> He stole her last breath, her most valuable possession. What do we know about some of the last breaths she had? Some were spent telling him to get out. Some

were spent calling the police on him. Fibbing, but calling. Some were spent calling Montana authorities. And the defendant couldn't have that. That's no way of spending your last breath.

(Tr., p.1102, ln.13-20.)

Trial counsel made no objection. And "the judge's consequent failure to intervene, may have been perceived by the jury as acquiescence in the truth of the imagined scene—or at least, in the validity of such speculation about the victim's last minutes. Especially significant is the timing of the comments, which were made during rebuttal after defense counsel's last opportunity to address the jury." Zapata, 788 F.3d at 1116. The last-gasp appeal to passion went further with the prosecutor's invoking Ms. Davis' "dogs and family heirloom ring. Thank you." (Tr., p.1103, ln. 12-13.)

In Zapata, as here, the prosecutor painted a word-picture of the deceased's last moments. In this case, of a swaddled newborn dependent upon her caregiver. Nobody tugs at the heartstrings "like a baby" in civil society. Indeed, the Ninth Circuit regarded a prosecutor's rhetorical reference of "who knows what would have happened to the *little boy* that was coming out of that McDonald's," as an "improper appeal to jurors' emotions and fears." United States v. Nubari, 574 F.3d 1065, 1077 (9th Cir. 2009) (emphasis added).

"A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence." United States v. Koon, 34 F.3d 1416, 1443 (9th Cir. 1994). Even so, the prosecutor in McNeil's case fashioned a closing argument that zeroed in on the most tenuous of persons among us—an *infant*. This prejudiced McNeil.

(3) Misstatements

Some statements stand as just plain wrong. The prosecutor out-and-out lied with his first words on rebuttal: "I guess they concede the grand theft." (Tr., p.1095, ln. 17-18.) That contention is totally belied by the record. That never happened. "The prosecution deliberately misrepresented the truth." Miller v. Pate, 386 U.S. 1, 6, 17 L.Ed.2d 690, 694, 87 S Ct 785 (1967). And with a fourteen-year prison term on the grand-theft count hanging as the sword of Damocles, such an utterance by the prosecutor can hardly be made harmless. The reckless remark left McNeil legally exposed to a prison sentence almost equivalent to that of manslaughter.

Indeed, the district court imposed the full fourteen years.

The prosecutor then attacked the professional credentials of trial counsel. Waxing on the maxim that American boys want to grow up to be firemen, the prosecutor poked defense counsel's argument regarding soot patterns. "That's a whole other area of fire engineering, and some day maybe defense counsel can be a fire engineer and know that[.]" (Tr., p.1096, ln.24—p.1097, ln.2.) The whole verbal assault both denigrated and fairly humiliated defense counsel before the jury.

The prosecutor also suggested to the jury that defense counsel wove a tale which suited the moment to save his client. "We want to hold people accountable when they murder someone, yes, but we don't want it to happen. We don't want to make it up. *And he has to say that to try to get his client out of trouble.*" (Tr., p.1098, ln.1-5 (emphasis added).) By inference, jurors could have conceived of the courtroom as a place of forensic brinkmanship where grand rhetoric wins the day. This diminished factfinding as being only a part of the jury's job, and a parsing of counsels' words the rest.

The jury got invited to render a verdict on something other than evidence and law.

D. Cumulative errors

Under the cumulative errors doctrine, an accumulation of irregularities, each of which might be harmless in itself, on occasion, and, in the aggregate, evidences the absence of a fair trial in contravention of defendant's right to due process. See State v. Martinez, 125 Idaho 445, 453, 872 P.2d 708, 716 (1994). The cumulative error doctrine applies where more than one error embarrassed the proceedings. But non-fundamental errors not preserved in the trial record must fail review under the cumulative error analysis.

"In some cases, although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant." United States v. Frederick, 78 F.3d 1370, 1381 (9th Cir. 1996). "Even though some of the errors in this case could be considered harmless in isolation, the combination of errors," particularly without the balancing of probative value and prejudicial effect, requires an evidentiary hearing at the very least. See United States v. Green, 648 F.2d 587, 597 (9th Cir. 1981).

"[A] defendant is entitled to a fair trial but not a perfect one." Brown v. United States, 411 U.S. 223, 231 (1973). Even so, the United States Supreme Court, "has not followed a rigid rule that an otherwise fair trial remedies errors not occurring at the trial itself. It has inquired instead whether the trial cured the particular error at issue." Lafler v. Cooper, 182 L.Ed.2d 398, 408 (2012). In the instance of the juror who made "eye contact" with McNeil in a sheriff's vehicle (*supra* at Claim B(9)), the trial judge failed any inquiry that could have served a curative purpose. Merely articulating to trial counsel that "[t]his seems like a vigilante [sic] group, I think they would've brought something like that to me" lacks even base sincerity. It most certainly falls short of inquiry. Indeed, the trial court dismissed any opportunity for inquest on post-conviction review.

As the state's case against McNeil can be evaluated as less than overwhelming, "the jury's verdict is therefore more likely to have been affected by the trial court's errors." Parle v. Runnels, 505 F.3d 922, 934 (9th Cir. 2007). It would be objectively unreasonable to conclude that the combined effect of trial errors did not violate McNeil's due process rights. Because of myriad dings in the trial armor—to include the insufficiency of evidence, the ineffective assistance of trial counsel, and prosecutorial misconduct—McNeil submits his case is now ripe for review on the cumulative effect of prejudice—particularly, as sloughed by the state courts.

V. A chilling undercurrent

While reviewing jurists give due deference to the trial court, in this case, McNeil commends a singular and disturbing sentence to particular study: to-wit, a telling preconscious reference by Hon. Deborah A. Bail, district judge, to a haunting mystery from another part of the globe. In the order dismissing application for post-conviction relief (R., pp.379-383), the trial judge insinuates a contretemps and confuses the decedent, Natalie Davis, with the never-recovered Natalie Holloway. There, about May 30, 2005, an 18-year-old student on a tropical vacation disappeared, and that notorious case turned the world on another man, Joran van der Sloot, though no formal charges in that particular got brought against him.

The judge writes: "In regards to Claim # 15, McNeil failed to describe the juror's contact with *Ms. Holloway's* relative so that the presumption of prejudice arose." (R., p.381 (emphasis added).) Such a curious, malapropos insinuation begs the question of prejudice here, where the trial judge invokes the name of a young woman whose disappearance wrought an outpouring of sympathies from the four corners of the earth.

Writings by the trial judge—throughout the record—cant toward misandry and prejudice.

Weeks before, the judge had interpolated an unseemly taunt in her notice of intent to dismiss (R., pp.303-327) by making up facts in no wise asserted by the parties at trial, or elsewhere in the record. Under right circumstances, a rational factfinder could weigh the mens rea of a judge who had alluded to a defendant's guilt by specious reference. Here, the trial judge assailed McNeil for "prying the ring from Natalie's cold, dead finger." (R., p.322.) This came by way of denying McNeil's claim that Ms. Davis had previously tried to pawn the family heirloom ring, and that this had no relevance to his conviction. Even where passions run at high pitch, the trial court shreds the blindfold and tips the scales with such film-noir jargon. A "cold, dead finger," says the judge. But even motion picture writers of Bogart's era would necessarily sneer: "Theories are okay, but when you make out the report, stick to the facts." (Excerpt from The Man Who Cheated Himself, copyright unknown.)

As articulated by the Supreme Court of Kansas, the canons of judicial conduct impose high standards on judges:

> The judge should be the exemplar of dignity and impartiality, should exercise restraint over judicial conduct and utterances, should suppress personal predilections, and should control his or her temper.

State v. Miller, 49 P.3d 458, 467 (Kan. 2002). Here, acerbic words, writings, and consequent inaction, by the trial judge on claims of constitutional significance, fall regrettably short of those high standards. Indeed, the trial judge dredged the depths of judicial bias.

VI. Final prayer

Thus, for the reasons set forth herein, and in consideration of judicial bias and prejudice by the trial judge, and the futility of further proceedings in the state courts where relief has been sought, McNeil prays this Court grant him an order for a Writ of Habeas Corpus.