

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

FERNANDO NAVARRO HERNANDEZ,  
  
v.  
  
JOHN HENLEY, *et al.*,  
  
Respondents.

Case No. 3:09-cv-00545-MMD-CSD  
  
MERITS ORDER

**I. SUMMARY**

Petitioner Fernando Navarro Hernandez was sentenced in Nevada state court to death after a jury found him guilty of burglary while in possession of a weapon, first-degree murder with the use of a deadly weapon, second-degree kidnapping, and unlawful sexual penetration of a dead body. (ECF No. 53-3.) This matter is before the Court for adjudication of the merits of Hernandez's Fifth-Amended Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254, in which Hernandez alleges that his trial counsel—David Schieck and Christopher Oram—were ineffective, the jury was biased, there were voir dire errors, improper jury instructions were given, the prosecution committed misconduct, there was insufficient evidence to sustain his convictions, his appellate counsel was ineffective, the bench conferences during the trial were unrecorded, the defense should have been allowed to argue last, lethal injection is unconstitutional, Nevada's death penalty scheme is cruel and unusual, the Nevada Supreme Court improperly reweighed the jury's death sentence after striking an aggravating factor, and there were cumulative errors. (ECF No. 221 ("Fifth-Amended Petition").) This matter is also before the Court for adjudication of Hernandez's motion for leave to conduct discovery and motion for evidentiary hearing. (ECF Nos. 324, 325 ("Motions").) For the reasons discussed below,

1 the Court denies the Fifth-Amended Petition, denies the Motions, and grants a Certificate  
2 of Appealability for grounds 1a, 1b, 1e, 1f, 4, and 29.

## 3 **II. BACKGROUND**

### 4 **A. Factual Background<sup>1</sup>**

#### 5 **1. Guilt phase of the trial**

6 Sergeant David Swoboda with the Las Vegas Metropolitan Police Department  
7 (“LVMPD”) testified that he was driving from Las Vegas, Nevada to Laughlin, Nevada on  
8 October 6, 1999, at around 7:00 a.m., when he saw a black Ford Probe traveling above  
9 the speed limit. (ECF No. 255-1 at 40–43.) After the car passed Sergeant Swoboda, it  
10 sped up, traveling at upwards of 96 miles per hour. (*Id.* at 44.) Sergeant Swoboda caught  
11 up with the car, and once the car finally stopped, Hernandez, the driver of the car, “placed  
12 his hands in the air” and said, “just shoot me, just shoot me, just kill me.” (*Id.* at 46–47.)  
13 Hernandez then walked to the passenger side the car, “leaned up against the glass . . . ,  
14 and said I’m sorry, baby.” (*Id.* at 48.) Hernandez’s three-year-old daughter, A.H.,<sup>2</sup> was in  
15 the car and “crying heavily.” (*Id.* at 49.)

16 Sergeant Swoboda handcuffed Hernandez, who smelled like alcohol, and then  
17 attempted to calm A.H. (*Id.* at 49, 52.) Sergeant Swoboda asked Hernandez for  
18 identification and “noticed there [were] some superficial cuts about his face and a little cut  
19 on his hand.” (*Id.* at 50.) Hernandez told Sergeant Swoboda that he had gotten into a fight  
20 with his ex-wife. (*Id.*) Sergeant Swoboda ran Hernandez’s name and found that “there  
21 was an active protective order and stalking order against him that was filed by his ex-  
22 wife,” Donna Hernandez (hereinafter “Donna”). (*Id.* at 51.) Sergeant Swoboda “advised  
23 dispatch of the situation,” requesting that someone go to Donna’s house to check on her.  
24 (*Id.* at 52.) Sergeant Swoboda then checked on A.H. again and noticed “a blood stain on  
25

---

26 <sup>1</sup>The Court makes no credibility or other factual findings regarding the truth or  
27 falsity of this evidence from the state court. The Court’s summary is merely a backdrop  
28 to its consideration of the issues presented in the Fifth-Amended Petition.

<sup>2</sup>The Court refers only to the minor child by her initials

1 the back seat.” (*Id.* at 55.) At that time, A.H. told Sergeant Swoboda that “daddy hurt  
2 mommy real bad.” (*Id.*)

3 A horizontal gaze nystagmus test was performed on Hernandez, and because  
4 Hernandez “failed all six points” of the test, he was arrested for DUI. (*Id.* at 56–57, 76.)  
5 After Sergeant Swoboda allowed Hernandez to give A.H. a kiss, Hernandez stated, “I  
6 killed them. I killed her.” (*Id.* at 58.) Sergeant Swoboda informed Hernandez of his  
7 *Miranda* rights, and during the drive to the police substation in Laughlin, Hernandez  
8 repeatedly told Sergeant Swoboda “to kill him” and acted in a bizarre manner. (*Id.* at 59,  
9 64, 67.)

10 LVMPD Detective Thomas Allen, who assisted Sergeant Swoboda during  
11 Hernandez’s traffic stop, testified that Hernandez had scratches on his face and a cut on  
12 his right hand, and Hernandez explained that the scratches were from A.H. and the cut  
13 happened at work. (ECF No. 255-1 at 77, 80–81.) A.H., who “had some blood stains on  
14 the back of her pajamas . . . and a few on the front,” told Detective Allen that she and  
15 Hernandez were on their way to Mexico and that Hernandez “hurt mommy real bad” and  
16 “beat up mommy on the stairs.” (*Id.* at 88, 94–95.)

17 LVMPD Officer Steven Leyba, who conducted Hernandez’s sobriety tests at the  
18 police substation in Laughlin, testified that Hernandez told him that “he had two to three  
19 beers, and he had begun drinking at . . . 11 p.m. the night before and had stopped drinking  
20 at 1:00 a.m. that morning.” (ECF No. 255-1 at 125, 129.) Hernandez “had blood shot  
21 watery eyes,” slurred speech, and smelled of alcohol. (*Id.* at 129–30.) Hernandez did not  
22 pass the walk-and-turn test, one-legged-stand test, or a second horizontal gaze  
23 nystagmus test. (*Id.* at 132–35.) Two breathalyzer tests were then performed at around  
24 9:00 a.m., indicating that Hernandez had a .15 and .16 blood alcohol content. (*Id.* at 137.)

25 LVMPD Officer Bernard Whalen III, who transported Hernandez from the police  
26 substation in Laughlin to the Clark County Detention Center, testified that, during that  
27 drive, Hernandez asked him “to let him out of the vehicle so that he could attempt to run  
28 away and for [Officer Whalen] to shoot him.” (ECF No. 255-1 at 156, 160.) Hernandez

1 also “kept commenting his life was over.” (*Id.*) After getting to the Clark County Detention  
2 Center booking area, Hernandez “beg[a]n to bash the back of his head against the  
3 concrete wall.” (*Id.* at 162.)

4 LVMPD Detective Thomas Thowsen interviewed Hernandez, and Hernandez told  
5 him that “he was at his ex-wife’s house the night before, and her boyfriend Francisco  
6 showed up. They got into a fight so he took his daughter and left.” (ECF No. 256-1 at 21–  
7 22.) Detective Thowsen later met with Francisco Landeros, who explained that he was  
8 not Donna’s boyfriend but, rather, her roommate, following Donna and Hernandez’s  
9 recent divorce. (*Id.* at 27–28.)

10 LVMPD crime scene analyst Kelly Neil took photographs of Hernandez at the Clark  
11 County Detention Center, showing a laceration on his right hand, “some scratches  
12 primarily located on the left side of his face and neck and some red marks and abrasions  
13 on his arms and on his back or on his torso.” (ECF No. 255-1 at 176.) Hernandez also  
14 had blood stains on the right side of his shirt and the front side of his pants. (*Id.* at 178.)

15 LVMPD Officer James Churches responded to a welfare check on Donna’s house  
16 following Hernandez’s arrest for a DUI. (ECF No. 255-1 at 107, 109.) After nobody  
17 answered the door, Officer Churches looked through a window and saw a woman lying  
18 unconscious on the stairwell landing. (*Id.* at 111.) The woman had “a large amount of  
19 blood on her body,” “[s]he was not completely dressed,” and “she was laying in a very  
20 unnatural looking position.” (*Id.*) LVMPD Officer Kerry Reusch, who was at Donna’s house  
21 with Officer Churches, testified that, following Officer Churches’ observations, he kicked  
22 in the door to Donna’s house and saw Donna “on the stairway leading to the second floor.”  
23 (*Id.* 117.) Donna “was partially clothed and . . . there was a knife which appeared to be  
24 broken in half laying next to her.” (*Id.* at 119.) Donna did not have a pulse. (*Id.* at 120.)

25 Dr. Lary Simms, Clark County’s Chief Medical Examiner, performed Donna’s  
26 autopsy and testified that Donna’s “cause of death was strangulation” and that she also  
27 suffered from “significant contributing conditions including multiple stab and incised  
28 wounds and blunt head trauma.” (ECF No. 257-1 at 69, 72, 76.) One “stab wound went

1 into [her] chest into the central portion of the lung,” causing Donna’s left lung to collapse.  
2 (*Id.* at 87–88.) According to Dr. Simms, “this wound [was] a very directed wound toward  
3 the heart,” and “[t]he only way that can come about is if [Donna] has ceased to struggle,  
4 so the assailant [could] aim the weapon where he want[ed] it to go.” (*Id.* at 89–90.) Donna  
5 also suffered stab wounds to the left and right sides of her neck. (*Id.* at 88.) Further, a  
6 knife “was retrieved from [Donna’s] vagina” that “went to the left side of [Donna’s] cervix  
7 and coursed up into the area of the left ovary,” perforating the vagina wall and ending up  
8 partially in her abdominal cavity. (*Id.* at 93–94.) Dr. Simms testified that this final stabbing  
9 “more likely” occurred after Donna had already died. (*Id.* at 94.)

10 Annie Griego, Donna’s mother, testified that Donna and Hernandez were married  
11 in October of 1991 and divorced in October 1998. (ECF No. 256-1 at 144–45, 147.)  
12 Following their divorce, regarding custody of A.H., Hernandez would pick up A.H. “at day  
13 care on Wednesdays at noon and bring her back to [Griego’s] home on Friday[s] at five  
14 o’clock” in the evening. (*Id.* at 149.) Approximately six months before the murder, on  
15 March 24, 1999, Hernandez called Griego at 11:20 p.m. and “told [her] that he had seen  
16 [Donna] and [Landeros] together . . . and that the was going to kill [Donna].” (*Id.* at 153.)  
17 Hernandez called Griego again 5 to 10 minutes later and “told [her] that he had a lot of  
18 money in Mexico and he was going to take [A.H.] to Mexico and raise her there because  
19 her mom was an unfit mother.” (*Id.* at 153–54.) Hernandez called Griego a third time and  
20 “asked [her] what kind of school [she] had sent [her] daughter to for her to be doing all  
21 these bad things.” (*Id.* at 154.) Following these phone calls, on March 26, 1999, Donna  
22 got a protective order against Hernandez. (*Id.* at 157.) That protective order was extended  
23 and set to expire in April 2000. (*Id.* at 160.) When Griego picked up A.H. from child  
24 protective services following Hernandez’s arrest, A.H. told Griego “that her daddy dead  
25 [sic] her mommy.” (*Id.* at 166.)

26 Landeros, whose sister was married to Hernandez’s brother, testified that there  
27 was no romantic relationship between he and Donna and that he had only rented a room  
28 from her for about four months. (ECF No. 256-1 at 182–183.) From October to December

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.