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Tracie K. Lindeman  
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November 19, 2012

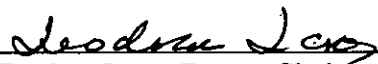
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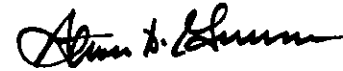
RE: STATE OF NEVADA vs. JAMES MONTELL CHAPPELL  
**S.C. CASE: 61967**  
D.C. CASE: C131341

Dear Ms. Lindeman:

Pursuant to your Order Re: Entry of Written Order, dated October 30, 2012, enclosed is a certified copy of the Findings of Fact, Conclusions of Law and Order filed November 16, 2012 in the above referenced case. If you have any questions regarding this matter, please do not hesitate to contact me at (702) 671-0512.

Sincerely,  
STEVEN D. GRIERSON, CLERK OF THE COURT

  
Teodora Jones, Deputy Clerk

  
CLERK OF THE COURT

1 FCL  
2 STEVEN B. WOLFSON  
3 Clark County District Attorney  
4 Nevada Bar #001565  
5 STEVEN S. OWENS  
6 Chief Deputy District Attorney  
7 Nevada Bar #004352  
8 200 Lewis Avenue  
9 Las Vegas, Nevada 89155-2212  
10 (702) 671-2500  
11 Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,  
10 Plaintiff,

11 -vs-

CASE NO: 95C131341  
DEPT NO: V

12 JAMES CHAPPELL,  
13 #1212860

14 Defendant.

15 FINDINGS OF FACT, CONCLUSIONS  
16 OF LAW AND ORDER

17 DATE OF HEARING: 10/19/12  
18 TIME OF HEARING: 10:00 A.M.

18 This Cause having come on for hearing before the Honorable CAROLYN  
19 ELLSWORTH, District Judge, for argument on the 19<sup>th</sup> day of October, 2012, the Petitioner  
20 not being present and in custody, represented by CHRISTOPHER R. ORAM, ESQ., the  
21 Respondent being represented by STEVEN B. WOLFSON, District Attorney, by and  
22 through STEVEN S. OWENS, Chief Deputy District Attorney, and the Court having  
23 considered the matter, including briefs, transcripts, arguments of counsel, and documents on  
24 file herein, this Court now makes the following Findings Of Fact and Conclusions Of Law.

25 In 1996, Chappell was convicted and sentenced to death for murdering his ex-  
26 girlfriend, Deborah Panos, by entering her mobile home through a window, sexually  
27 assaulting her, and then repeatedly stabbing her with a kitchen knife. Chappell v. State, 114  
28 Nev. 1403, 972 P.2d 838 (1998). The convictions and death sentence were affirmed on

1 appeal. Id. Remittitur issued on October 26, 1999. Thereafter, a timely post-conviction  
2 petition was filed and an evidentiary hearing was conducted. The district court then denied  
3 all post-conviction claims as to guilt, but granted a new penalty hearing due to ineffective  
4 assistance of counsel for failing to call certain mitigation witnesses. The decision was  
5 affirmed on appeal in an unpublished order on April 7, 2006. (SC #43493). After a new  
6 penalty hearing in 2007, the jury again returned a death sentence which was affirmed on  
7 appeal in an unpublished order on October 20, 2009. (SC # 49478). Remittitur issued on  
8 June 8, 2010. Chappell initiated the current post-conviction proceedings with a pro per  
9 petition filed on June 22, 2010.

#### 10 FINDINGS OF FACT

11 This Court finds that all claims regarding ineffective assistance of trial counsel, first  
12 penalty hearing counsel, and first appellate counsel are procedurally barred or moot due to  
13 the granting of a new penalty hearing. The current petition was filed more than ten years  
14 after Remittitur from direct appeal issued on October 26, 1999, in excess of the one-year  
15 time bar. Chappell fails to demonstrate good cause or prejudice for this excessive delay, and  
16 a petition addressing these claims was already heard and decided by this Court and the  
17 Nevada Supreme Court, thus his claims are successive. The State also affirmatively pleads  
18 laches under NRS 34.800, and this Court agrees that NRS 34.800 bars review since well over  
19 five (5) years have elapsed between the filing of the Nevada Supreme Court's decision on  
20 direct appeal and the filing of Chappell's claims in the instant June 22, 2010 petition. In  
21 1996, Chappell was granted a new penalty hearing and the Judgment of Conviction was  
22 vacated only insofar as the death sentence was concerned. Thus, the convictions have  
23 remained valid and final and any claims regarding ineffective assistance of trial counsel, first  
24 penalty hearing counsel, and first appellate counsel, are procedurally barred and are hereby  
25 denied.

26 Claims of ineffective assistance of counsel during the second penalty hearing are  
27 denied as this Court finds no deficient performance such that the outcome of the proceedings  
28 would have been different. Even though live testimony from James Ford and Ivri Marrell

1 was not presented, the jury heard a summary of their testimony the substance of which was  
2 also presented through other witnesses and therefore this Court finds no prejudice. Chappell  
3 fails to demonstrate what a more adequate investigation of his history in Arizona would have  
4 shown that would have achieved a better result at his penalty hearing.

5 This Court finds that counsel was not ineffective in failing to retain an expert in pre-  
6 ejaculation fluid in order to explain the presence of Chappell's semen in the victim despite  
7 his claim that he withdrew prior to ejaculating. Counsel called three separate expert  
8 witnesses to rebut the sexual assault aggravator by showing the sexual intercourse was  
9 consensual. A fourth expert specifically as to pre-ejaculation fluid containing sperm would  
10 not have changed the outcome in light of all the other evidence bearing on the issue of  
11 consent.

12 Nor was counsel ineffective in failing to obtain a P.E.T. scan or brain imaging for  
13 Fetal Alcohol Syndrome. Counsel did investigate Chappell's overall mental capabilities and  
14 presented experts who testified that Chappell had borderline personality disorder and an IQ  
15 of 80 in the low/average range. Considering that the jury found that Chappell was born to a  
16 drug and alcohol addicted mother, Chappell fails to demonstrate that obtaining a P.E.T. scan  
17 and/or brain imaging, even if these tests would have revealed that Chappell did have Fetal  
18 Alcohol Syndrome, would have led to a more favorable outcome at his penalty hearing.

19 Simply because the State was able to effectively cross examine Chappell's experts  
20 and impeach a lay witness with his prior inconsistent statement, does not demonstrate that  
21 defense counsel was in any way ineffective. This claim is belied by the nine witnesses  
22 called by counsel whose testimony resulted in the jury's finding of seven mitigating  
23 circumstances. Chappell fails to show a reasonable probability that the result of his penalty  
24 hearing would have been any different had the witnesses testified differently or had counsel  
25 better prepared them.

26 Counsel had no valid reason to object to the admission of the PSI reports, which on  
27 direct appeal were found not to have affected Chappell's substantial rights. Even if an  
28 objection might have been sustained, Chappell fails to demonstrate that the exclusion or

1 redaction of the PSI's would have changed the outcome of the penalty hearing.

2 The failure to object to lack of notice and cumulative victim impact testimony was not  
3 prejudicial. On appeal, the testimony was found not to be overly excessive and this Court  
4 finds the alleged errors would not have been found prejudicial under either a plain or  
5 harmless error analysis on appeal.

6 The failure to object to allegations of prosecutorial misconduct later raised on appeal  
7 did not result in any prejudice. On appeal, each of the instances of alleged improper  
8 arguments was found to not constitute error at all. Accordingly, any objection would not  
9 have been sustained and would not have resulted in any prejudice on appeal under either a  
10 plain or harmless error standard.

11 As to new claims of prosecutorial misconduct, an objection was made and sustained  
12 as to the first instance, therefore resulting in no reversible prejudice had the issue been raised  
13 on appeal. The other two instances of alleged misconduct actually constitute fair comment  
14 on the evidence and any objection would not have been sustained and would not have  
15 changed the outcome of the case.

16 Any prejudice from the failure to object to the prosecutor's impeachment of Fred  
17 Dean was minimal considering the witness was a convicted felon and the jury still found the  
18 existence of seven mitigating circumstances. Chappell has failed to demonstrate the  
19 outcome would have been different if the impeachment details had not been elicited.

20 Chappell's claims that the trial judge erred in admitting improper other bad act  
21 evidence, that the death penalty scheme in Nevada is unconstitutional, and that the jury was  
22 incorrectly instructed on premeditation and deliberation, were appropriate for direct appeal  
23 and are thus procedurally barred. Chappell fails to articulate good cause or prejudice to  
24 explain his procedural default and these claims must therefore be denied. Many of these  
25 claims were raised and denied on direct appeal, and thus are also barred by law of the case.

26 This Court finds that the cumulative prejudice of any alleged errors in counsel's  
27 performance at the second penalty hearing is insufficient to have altered the outcome of the  
28 case and therefore denies this claim.

1 All of Chappell's claims can be resolved without expanding the record, especially  
2 considering Chappell's claims have been either waived, are procedurally barred, or are  
3 otherwise not cognizable as bare or conclusory allegations. Even accepting all of Chappell's  
4 allegations as true, the alleged errors of counsel would not have changed the outcome of the  
5 second penalty hearing. Thus, it is not necessary to expand the record in order to resolve this  
6 petition and the request for an evidentiary hearing is denied.

7 Finally, Chappell's motions for discovery and for appointment of various experts and  
8 an Investigator are all denied. The discovery request is non-specific, the motions for experts  
9 and an Investigator are bare and conclusory, and this Court has determined that an  
10 evidentiary hearing and expansion of the record are unnecessary to resolve the claims in the  
11 petition. There is no demonstrable need or good cause for a P.E.T. scan or "full neurological  
12 exam" in light of a pre-existing neurological examination and mental health experts obtained  
13 by prior counsel. Even if brain imaging could reveal that Chappell suffers from Fetal  
14 Alcohol Syndrome, which has no specific or uniformly accepted diagnostic criteria, this  
15 Court has already accepted such allegations as true and found it would not have changed the  
16 outcome, especially considering the jury found as a mitigating circumstances that Chappell  
17 was born to a drug and alcohol addicted mother. Chappell fails to make any specific  
18 allegation as to what these experts and investigators would uncover that could possibly  
19 change the outcome of his case.

#### 20 CONCLUSIONS OF LAW

21 NRS 34.726(1) states that unless good cause is shown for the delay, a petition that  
22 challenges the validity of a judgment or sentence filed more than one year after entry of the  
23 judgment of conviction, or if appeal has been taken more than one year after the Supreme  
24 Court issues its remittitur, is time-barred. Good cause for the delay exists if the petitioner  
25 demonstrates to the satisfaction of the court that the delay was not his fault and the dismissal  
26 of the petition as untimely would unduly prejudice him. Id. The one-year time bar is strictly  
27 construed. Gonzales v. State, 118 Nev. 590, 593, 590 P.3d 901, 902 (2002).

28 A second or successive petition may be dismissed if the judge or justice determines

1 that it fails to allege new or different grounds for relief and that the prior determination was  
2 on the merits, NRS 34.810(2). A defendant must also demonstrate good cause and actual  
3 prejudice to overcome the successive petition bar. Id.

4 NRS 34.800 creates a rebuttable presumption of prejudice to the State if a defendant  
5 allows more than five years to elapse between the filing of the Judgment of Conviction, or a  
6 decision on direct appeal from a Judgment of Conviction, and the filing of a post-conviction  
7 petition. The statute requires that the State plead laches in its motion to dismiss the petition.

8 A conviction qualifies as final when judgment has been entered, the availability of  
9 appeal has been exhausted, and a Petition for Certiorari to the Supreme Court has been  
10 denied or the time for the petition has expired. Colwell v. State, 118 Nev. 807, 59 P.3d 463  
11 (2002). The 9<sup>th</sup> Circuit Court of Appeals has recognized that a conviction remains final even  
12 though a case may be sent back for re-sentencing. Phillips v. Vasquez, 56 F.3d 1030 (9<sup>th</sup>  
13 Cir. 1995). A conviction for murder is a final judgment even when the death penalty  
14 sentence has been reversed and is not yet final. People v. Jackson, 60 Cal.Rptr. 248, 250,  
15 429 P.2d 600, 602 (1967). When a judgment is vacated only insofar as it relates to the death  
16 penalty, "the original judgment on the issue of guilt remains final during retrial of the  
17 penalty issue and during all appellate proceedings . . ." People v. Kemp, 111 Cal.Rptr. 562,  
18 564, 517 P.2d 826, 828 (1974).

19 In order to assert a claim for ineffective assistance of counsel, a defendant must prove  
20 that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong  
21 test set forth in Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2063-64  
22 (1984). Under this test, the defendant must show: first, that his counsel's representation fell  
23 below an objective standard of reasonableness, and second, that but for counsel's errors,  
24 there is a reasonable probability that the result of the proceedings would have been different.  
25 See Strickland, 466 U.S. at 687-688, 694. "Effective counsel does not mean errorless  
26 counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded  
27 of attorneys in criminal cases.'" Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432,  
28 537 P.2d 473, 474 (1975), quoting McMann v. Richardson, 397 U.S. 759, 771 (1970).

1 A defendant who alleges a failure to investigate must demonstrate how a better  
2 investigation would have benefited his case and changed the outcome of the proceedings.  
3 Molina v. State, 120 Nev. 185, 87 P.3d 533 (2004). Such a defendant must allege with  
4 specificity what the investigation would have revealed and how it would have altered the  
5 outcome of the trial. United States v. Porter, 924 F.2d 395, 397 (1st Cir. 1991).  
6 Furthermore, it is well established that a claim of ineffective assistance of counsel alleging a  
7 failure to properly investigate will fail where the evidence or testimony sought does not  
8 exonerate or exculpate the defendant. Ford v. State, 105 Nev. 850, 784 P.2d 951 (1989).

9 In Hargrove v. State, 100 Nev. 498, 686 P.2d 222, the Nevada Supreme Court held  
10 that claims asserted in a petition for post-conviction relief must be supported with specific  
11 factual allegations which, if true, would entitle the petitioner to relief. "Bare" and "naked"  
12 allegations are not sufficient, nor are those belied and repelled by the record. Id.

13 In Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975), the Nevada  
14 Supreme Court held that where the Court decides an issue on the merits, the Court's ruling is  
15 law of the case, and the issue will not be revisited. The Court further stated that "the law of  
16 first appeal is the law of the case on all subsequent appeals in which the facts are  
17 substantially the same." Id. at 315, 535 P.2d at 798.

18 If a petition can be resolved without expanding the record, then no evidentiary  
19 hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann v. State,  
20 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). NRS 34.770 provides the manner in which  
21 the district court decides a post conviction proceeding: 1. The judge or justice, upon review  
22 of the return, answer and all supporting documents which are filed, shall determine whether  
23 an evidentiary hearing is required. A petitioner must not be discharged or committed to the  
24 custody of a person other than the respondent unless an evidentiary hearing is held; 2. If the  
25 judge or justice determines that the petitioner is not entitled to relief and an evidentiary  
26 hearing is not required, he shall dismiss the petition without a hearing.

27 The United States Supreme Court recently explained that an evidentiary hearing is not  
28 required simply because counsel's actions are challenged as being an unreasonable strategic



1 decision. Harrington v. Richter, 131 S.Ct. 770, 788 (2011). Although courts may not  
2 indulge post hoc rationalization for counsel's decision making that contradicts the available  
3 evidence of counsel's actions, neither may they insist counsel confirm every aspect of the  
4 strategic basis for his or her actions. Id., citing Wiggins v. Smith, 539 U.S. 510, 123 S.Ct.  
5 2527 (2003). There is a "strong presumption" that counsel's attention to certain issues to the  
6 exclusion of others reflects trial tactics rather than "sheer neglect." Id., citing Yarborough v.  
7 Gentry, 540 U.S. 1, 124 S.Ct. 1 (2003). Strickland calls for an inquiry in the *objective*  
8 reasonableness of counsel's performance, not counsel's *subjective* state of mind. 466 U.S. at  
9 688, 104 S.Ct. 2052.

10 **ORDER**

11 THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction  
12 Relief shall be, and it is, hereby denied. The various motions for discovery, for appointment  
13 of experts, and for an Investigator are also denied.

14 DATED this \_\_\_\_\_ day of November, 2012.


15  
16   
17 DISTRICT JUDGE  
18

19 STEVEN B. WOLFSON  
20 Clark County District Attorney  
21 Nevada Bar #001565

22 BY 

23 STEVEN S. OWENS  
24 Chief Deputy District Attorney  
25 Nevada Bar #004352

26  
27 CERTIFIED COPY  
28 DOCUMENT ATTACHED IS A  
TRUE AND CORRECT COPY  
OF THE ORIGINAL ON FILE

  
CLERK OF THE COURT

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**CERTIFICATE OF FACSIMILE TRANSMISSION**

I hereby certify that service of Findings of Fact, Conclusions of Law, and Order, was made this 14<sup>th</sup> day of November, 2012, by facsimile transmission to:

CHRISTOPHER R. ORAM, ESQ.  
FAX #(702) 974-0623



Employee for the District Attorney's  
Office

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\*\*\* TX REPORT \*\*\*  
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**OFFICE OF THE DISTRICT ATTORNEY**  
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**TO:** CHRISTOPHER R. ORAM, ESQ. **FAX#:** (702) 974-0623

**FROM:** Steven S. Owens

**SUBJECT:** James Chappell, 95C131341, Findings

**DATE:** November 14, 2012

\*\*\*\*\*  
\*\*\* TX REPORT \*\*\*  
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TRANSMISSION OK

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**TO:** CHRISTOPHER R. ORAM, ESQ. **FAX#:** (702) 974-0623  
**FROM:** Steven S. Owens  
**SUBJECT:** James Chappell, 95C131341, Findings  
**DATE:** November 6, 2012

Chris,  
The following Findings will be submitted to Judge Ellsworth on November 13, 2012.  
Sincerely,