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Attorney for Defendant
JAMES CHAPPELL

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA, Plaintiff, vs. JAMES CHAPPELL, Defendant.	CASE NO. C131341 DEPT. NO. XXV

MOTION FOR AUTHORIZATION TO OBTAIN A SEXUAL ASSAULT EXPERT AND FOR PAYMENT OF FEES INCURRED HEREIN.

COMES NOW, Defendant, JAMES CHAPPELL, by and through his attorney, CHRISTOPHER R. ORAM, ESQ., hereby requests this Honorable Court to issue an order appointing an expert in sexual assault for Mr. Chappell. Defendant also requests on Order authorizing payment in excess of the statutory maximum three hundred dollars ($300.00), not to exceed two thousand five hundred dollars ($2,500.00) per expert unless prior Court approval is granted.

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Docket 61967 Document 2013-34681

This motion is made and based pleadings and papers on file herein, the affidavit of counsel attached hereto, as well as any oral arguments of counsel adduced at the time of hearing.

DATED this 13th day of February, 2012.

Respectfully submitted

CHRISTOPHER R. ORAM, ESQ.
Nevada Bar #004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada, 89101

Attorney for Petitioner
JAMES CHAPPELL

NOTICE OF MOTION

YOU, AND EACH OF YOU, will please take notice that the undersigned will bring the foregoing **MOTION FOR AUTHORIZATION TO OBTAIN A SEXUAL ASSAULT EXPERT AND FOR PAYMENT OF FEES INCURRED HEREIN** on for hearing on the 28 day of February, 2012, at the Clark County Courthouse, 200 Lewis Avenue in District Court, Department XXV at the hour of 9 .m. or as soon thereafter as counsel may be heard.

Respectfully submitted

CHRISTOPHER R. ORAM, ESQ.
Nevada Bar # 004349
520 S. Fourth Street, 2nd Floor
Las Vegas, NV 89101

Attorney for Petitioner
JAMES CHAPPELL

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POINTS AND AUTHORITIES

Nevada Revised Statute 7.135 states:

> Reimbursement for expenses; employment of investigative, expert or other services: The attorney appointed by a magistrate or district court to represent a defendant is entitled, in addition to the fee provided by N.R.S. 7.125 for his services to be reimbursed for expenses reasonably incurred by him in representing the defendant and may employ, subject to the prior approval of the magistrate or the district court in an ex parte application, such investigative, expert or other services as may be necessary for an adequate defense. Compensation to any person furnishing such investigative, expert or other services must not exceed $300.00, exclusive of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is:
>
> 1. Certified by the trial judge of the court, or by the magistrate if the services were rendered in connection with a case disposed of entirely before him, as necessary to provide fair compensation of services of an unusual character or duration: and
>
> 2. Approved by the presiding judge of the judicial district in which the attorney was appointed . . .

In the instant case, Mr. Chappell is currently in his post-conviction proceedings. Mr. Chappell is facing a sentence of death. In light of the seriousness of Mr. Chappell's conviction and his sentence of death, I believe it is necessary that a sexual assault expert be permitted to act in the capacity for Mr. Chappell through his post-conviction proceedings.

The above mentioned sexual assault expert will incur fees associated with his/her services, thus it is necessary that this Court permit payment of his/her fees incurred herein. Moreover, Mr. Chappell is financially unable to obtain a sexual assault expert on his own behalf.

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WHEREFORE, for the foregoing reasons, Mr. Chappell requests this court to authorize an order granting the services of a sexual assault expert. Additionally, for this Court to allow payment for his/her fees in excess of the statutory maximum three hundred dollars ($300.00), not to exceed two thousand five hundred Dollars ($2,500.00) per expert unless prior Court approval is granted.

DATED this 13th day of February, 2012.

Respectfully submitted:

CHRISTOPHER R. ORAM, ESQ.
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Las Vegas, Nevada 89101

Attorney for Petitioner
JAMES CHAPPELL

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AFFIDAVIT OF CHRISTOPHER R. ORAM, ESQ.
IN SUPPORT OF MOTION FOR AUTHORIZATION TO OBTAIN AN INVESTIGATOR AND FOR PAYMENT OF FEES INCURRED HEREIN.

STATE OF NEVADA)
)ss:
COUNTY OF CLARK)

CHRISTOPHER R. ORAM, ESQ., having been duly sworn, deposes and says:

1. Your Affiant is an attorney duly licensed to practice law in the State of Nevada.

2. COMES NOW, Defendant, JAMES CHAPPELL, by and through his attorney, CHRISTOPHER R. ORAM, ESQ., hereby requests this Honorable Court to issue an order appointing an expert in sexual assault for Mr. Chappell. Defendant also requests on Order authorizing payment in excess of the statutory maximum three hundred dollars ($300.00), not to exceed two thousand five hundred dollars ($2,500.00) per expert unless prior Court approval is granted.

3. In the instant case, Mr. Chappell is currently in his post-conviction proceedings. Mr. Chappell is facing a sentence of death. In light of the seriousness of Mr. Chappell's conviction and his sentence of death, I believe it is necessary that a sexual assault expert be permitted to act in the capacity for Mr. Chappell through his post-conviction proceedings.

4. The above mentioned sexual assault expert will incur fees associated with his/her services, thus it is necessary that this Court permit payment of his/her fees incurred herein. Moreover, Mr. Chappell is financially unable to obtain a sexual assault expert on his own behalf.

5. Therefore, it is essential that Mr. Chappell be permitted an investigator.

6. That this motion is being made in good faith and not for purposes of delay.

7. Further your affiant sayeth naught.

DATED this 13th day of February, 2012.

CHRISTOPHER R. ORAM, ESQ.

SUBSCRIBED AND SWORN to before me
this 13th day of February, 2012.

NOTARY PUBLIC in and for said
County and State

JESSIE LEE VARGAS
Notary Public-State of Nevada
APPT. NO. 09-9721-1
My App. Expires February 18, 2013

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Attorney for Defendant
JAMES CHAPPELL

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA, Plaintiff, vs. JAMES CHAPPELL, Defendant.	CASE NO. C131341 DEPT. NO. XXV

RECEIPT OF COPY

The above **MOTION FOR AUTHORIZATION TO OBTAIN A SEXUAL ASSAULT EXPERT AND FOR PAYMENT OF FEES INCURRED HEREIN** is hereby acknowledged this 15 day of February, 2012.

Clark County District Attorney

By _____
200 Lewis Avenue
Las Vegas, Nevada 89155

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Attorney for Defendant
JAMES CHAPPELL

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA, Plaintiff, vs. JAMES CHAPPELL, Defendant.	CASE NO. C131341 DEPT. NO. XXV

SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT'S WRIT OF HABEAS CORPUS

COMES NOW, Defendant, JAMES CHAPPELL, by and through his counsel of record, CHRISTOPHER R. ORAM, ESQ., hereby submits his supplemental brief in support of Defendant's Writ of Habeas Corpus (Post-Conviction).

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This Supplement is made and based upon the pleadings and papers on file herein, the Points and Authorities attached hereto, and any oral arguments adduced at the time of hearing this matter.

DATED this 15th day of February, 2012.

Respectfully submitted:

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Attorney for Petitioner
JAMES CHAPPELL

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STATEMENT OF THE CASE

Appellant James Chappell was charged, on October 11, 1995, via Information with one count each of burglary, robbery with use of a deadly weapon, and open murder with use of a deadly weapon (1 ROA 38). The State based its murder charge on alternative theories of felony murder and premeditated and deliberate murder (1 ROA 39). On November 8, 1995, the State filed its Notice of Intent to Seek Death Penalty (1 ROA 44). It charged aggravating circumstances of murder in the course of a robbery, murder in the course of burglary, murder while the person was engaged in sexual assault or the attempt thereof, and torture or depravity of mind (1 ROA 44-45). Prior to trial, Chappell filed a motion to dismiss several of the aggravating circumstances (1 ROA 250). He argued in part that the aggravating circumstance of sexual assault should be dismissed because Chappell was not charged with sexual assault and no evidence was presented during the preliminary hearing that would support the aggravating circumstance (1 ROA 256). The State opposed the motion, but did not address the sexual assault issue (2 ROA 309-319). The Court denied the motion.

The jury trial began on October 8, 1996, and was presided over by the Honorable A. William Maupin (2 ROA 355). The jury was instructed on theories of premeditated murder and felony murder (7 ROA 1703, 1721, 1722). The jury was also instructed on robbery in general (7 ROA 1711). On October 16, 1996, the jury returned verdicts of guilty on charges of burglary, robbery, and first degree murder (7 ROA 1747-1749). No special verdict form was given to the jury, so it is unknown as to whether the jurors relied upon the premeditation theory, the felony murder theory, or both in finding Chappell guilty of first degree murder.

The penalty phase of the first trial began on October 21, 1996 (7 ROA 1757). On October 24, 1996, the jury returned its verdicts in which it found mitigating circumstances of murder committed while the defendant was under the influence of extreme mental or emotion disturbance and "any other mitigating circumstances" (9 ROA 2126, 2170-2171). It found aggravating circumstances of burglary, robbery, sexual assault, and torture or depravity of mind and returned a verdict of death (9 ROA 2127-2129, 2167-2169). Formal sentencing took place on December 30, 1996 (9 ROA 2179). The district court sentenced Chappell to the maximum terms

for burglary and robbery with use of a deadly weapon and ordered that those sentences run consecutively to the death sentence (9 ROA 2188).

The judgment of conviction was filed on December 31, 1996 (9 ROA 2190). Chappell filed a timely notice of appeal on January 17, 1997, which was docketed as number 29884 (9 ROA 2200). On December 30, 1998, the Nevada Supreme Court issued its opinion affirming the conviction (9 ROA 2273); Chappell v. State, 114 Nev. 1403, 972 P.2d 838 (1998). The Nevada Supreme Court concluded that the district court erred in failing to hold a Petrocelli hearing, but found admission of evidence of uncharged misconduct to be harmless. Id. at 1406, 972 P.2d at 840. It also concluded that there was sufficient evidence to support the aggravating circumstances of burglary, robbery and sexual assault, but insufficient evidence to support the aggravating circumstance of torture or depravity of mind. Id. at 1407, 972 P.2d at 841. In addressing the robbery aggravating circumstance, the Nevada Supreme Court noted Chappell's argument that the evidence showed that he took Panos' car as an afterthought and therefore could not be guilty of robbery, but rejected that argument because the Nevada supreme Court had held "that in robbery cases it is irrelevant when the intent to steal the property is formed." Id. at 1408, 972 P.2d at 841. Although the Nevada Supreme Court found torture or depravity of mind aggravating circumstance to be invalid, it re-weighed the remaining three aggravating circumstances and the two mitigating circumstances, found the aggravating circumstances clearly outweighed the mitigating circumstances, and found that a sentence of death was proper. Id. at 1410-1411, 558 P.2d at 842. The Nevada Supreme Court also rejected other issues raised by Chappell on appeal. Id. The Nevada Supreme Court denied rehearing on March 17, 1999 (9 ROA 2288).

Chappell's petition for certiorari was denied on October 4, 1999. Chappell v. Nevada, 528 U.S. 853 (1999). The Nevada Supreme Court's remittitur issued on November 4, 1999 (10 ROA 2353).

Meanwhile, on October 19, 1999, Chappell filed a proper person post-conviction petition for writ of habeas corpus (9 ROA 2258). The post conviction matter was assigned to the Honorable Mark Gibbons (10 ROA 2354). A supplemental petition was filed on April 30, 2002 (10 ROA 2417). Among other issues, Chappell contended that his conviction was invalid

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because the jury instruction defining premeditation and deliberation was constitutionally infirm as it did not provide a rational distinction between first and second degree murder (10 ROA 2456-2459)(citing Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000)). He also asserted that the sentence of death was unconstitutional because of the use of overlapping aggravating circumstances (10 ROA 2465). The State filed its response to the petition on June 19, 2002 (10 ROA 2481). The evidentiary hearing took place before the Honorable Michael Douglas on September 13, 2002 (11 ROA 2554). Subsequently, on June 3, 2004, the district court entered its Findings of Fact, Conclusions of Law and Order (11 ROA 2745). It denied the petition as to the guilt phase issues, granted the petition as to the sentence, and ordered a new sentencing hearing (11 ROA 2748, 2278).

On June 18, 2004, the State filed its notice of appeal to the Nevada Supreme Court (11 ROA 2757). On June 24, 2004, Chappell filed a notice of cross-appeal (11 ROA 2761). On April 7, 2006, the Nevada Supreme Court issued its Order of Affirmance in which it upheld the district court's decision (11 ROA 2783). Of relevance to this petition, is the Nevada Supreme Court's conclusion that there was no merit to the arguments presented concerning jury instructions (11 ROA 2790)(citing Garner v. State, 116 Nev. 770, 788-789, 6 P.3d 1013, 1025 (2000)). The Nevada Supreme Court also found the aggravating circumstances of burglary and robbery to be invalid under McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004)(11 ROA 2792-2795). The remittitur issued on may 4, 2006 (11 ROA 2797).

Prior to the second penalty hearing, several pretrial motions were filed. Chappell filed a motion to strike the sexual assault aggravator (12 ROA 2801). The State opposed the motion (12 ROA 2890). The district court denied the motion (12 ROA 2905, 3019; 15 ROA 3840).

Chappell filed a motion to remand for consideration by the Clark County District Attorney's Death Review Committee (12 ROA 2817). The State opposed the motion (12 ROA 2884). The district court denied the motion (12 ROA 2905, 3015, 15 ROA 3837).

Chappell filed a motion for discovery of potential penalty hearing evidence (12 ROA 2826). The State opposed the motion (12 ROA 2888). The district court denied the motion (12 ROA 3026). On February 23, 2007, the State filed its notice of evidence in support of

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aggravating circumstances (12 ROA 3032).

Jury selection began on March 12, 2007 (19 ROA 3932). During the course of the trial, Chappell objected to the use of hearsay evidence during the penalty hearing on confrontation clause grounds and noted that the Nevada Supreme Court had recently rejected this argument, but presented it so as to preserve the issue for further review (13 ROA 3050). Chappell also objected to the presentation of victim impact evidence by persons who were not family members of Panos (13 ROA 3107-3108, 3177; 15 ROA 3678). The district court found that it had discretion to admit victim impact evidence from non-family members (13 ROA 3272-3273). Over objection by defense counsel. The district court permitted the State to use Chappell's testimony from the first trial (15 ROA 3632). Defense counsel had argued that the testimony was the result of ineffective assistance of counsel. The district court also overruled defense counsel's objection to questions asked by the prosecution and answered by Chappell concerning the allegation that Chappell had a lot of time to think about his testimony and to decide what he would say (15 ROA 3632). Chappell's counsel argued that this was a comment on Chappell's right to remain silent but the district court rejected the argument after noting that the claim was found to be without merit in post-conviction proceedings (15 ROA 3632-3633).

Jury instructions were read in open court on March 21, 2007 (15 ROA 3742). Following closing arguments, the jury returned their verdicts (15 ROA 3737, 3821). They found the aggravating circumstance of murder committed during the perpetration of a sexual assault (15 ROA 3737, 3822). The mitigating special verdict form listed the following mitigators: Chappell suffered from substance abuse, he had no father figure in his life, he was raised in an abusive household, was the victim of physical abuse as a child, he was born to a drug/alcohol addicted mother, he suffered from a learning disability, and was raised in a depressed housing area (15 ROA 3739-3740, 3822-3823). The jury did not find the mitigating circumstance that Chappell's mother was killed when he was very young, that he was the victim of mental abuse as a child, and other mitigating circumstances that were asserted to exist by Chappell's counsel (15 ROA 3755). The jury found that the mitigating circumstances did not outweigh the aggravating circumstance (15 ROA 3738, 3822-3823). The special verdict form for the weighing equation did

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not indicate that it was the State's burden to establish beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances (15 ROA 3738). The jury returned a sentence of death (15 ROA 3741).

Formal sentencing took place on may 10, 2007 (19 ROA 4015, 4018). The judgment of conviction was filed the same day (15 ROA 3854). The district court ordered the judgment stayed pending appeal (19 ROA 4019; 15 ROA 3861). A timely notice of appeal was filed on June 8, 2007 (16 ROA 3872).

The Opening Brief was filed on June 9, 2008. The following issues were raised on direct appeal from the second penalty phase.

A. Whether Chappell's Conviction for First Degree Murder Must Be Reversed Because the Jury Was Not Properly Instructed On The Elements Of The Capital Offense

B. Whether Chappell's Conviction For First Degree Murder Must Be Reversed Because the jury Was Not Properly Instructed On The Elements of Felony Murder

C. Whether Chappell's Sentence of Death Must Be Vacated Because NRS 177.055(3) is Unconstitutional

D. Whether Chappell Was Entitled To Review By The District Attorney's Death Review Committee

E. Whether Chappell's Death Sentence is Unconstitutional Because Of The Trial Court Failed To Dismiss Jurors For Cause Who Would Always Impose A Sentence of Death

F. Whether Chappell's Conviction Is Unconstitutional Because The State Was Permitted To Introduce Unreliable Hearsay Evidence During The Penalty Hearing In Support of The Aggravating Circumstances and as Other matter Evidence

G. Whether The District Court Erroneously Admitted Presentence Investigation Reports

H. Whether The District Court Allowed Improper Victim Impact Testimony

I. Whether the State Committed Prosecutorial Misconduct By Making Arguments Based Upon Comparative Worth Arguments

J. Whether The State Committed Prosecutorial Misconduct By Making Arguments Based Upon Comparative Worth Arguments

K. Whether The State Committed Extensive Prosecutorial Misconduct

L. Whether The District Court Failed To Instruct The Jury That The State was Required To establish Beyond On Beyond a Reasonable Doubt That Mitigating Circumstances Did Not Outweigh Aggravating Circumstances

M. Whether The Jury's Failure to Find Mitigation Circumstances Was Clearly Erroneous and Requires That The Death Sentence Be Vacated

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N. Whether There Is Insufficient Evidence To Support The Sexual Assault Aggravator

O. Whether The Sexual Assault Aggravating Circumstances Is Invalid Under McConnell v. State

P. Whether The Judgment Must Be Reversed Because of Cumulative Error.

The Answering Brief was filed on August 22, 2008. Chappell's Reply Brief was filed on October 23, 2008. The Nevada Supreme Court filed its Order of Affirmance on October 20, 2009. The Order Denying Rehearing was filed on December 16, 2009. On May 11, 2010, the Petition for Writ of Certiorari was denied. On June 8, 2010, the Nevada Supreme Court filed its remittitur.

Chappell filed a timely Petition for Writ of Habeas Corpus on June 22, 2010. This supplemental brief follows.

STATEMENT OF THE FACTS

James Chappell confessed to killing his girlfriend, Debra Panos, the mother of his three children (4 ROA 864). James met Debra when they were sixteen years old and in high school (13 ROA 3053). They both lived in Lansing, Michigan (13 ROA 3053). Debra became pregnant with their first child, James (13 ROA 3054).

Eventually, Debra's parents moved to Tucson, Arizona and Debra followed. James and Debra became reunited in Arizona and they had their second child, Anthony (13 ROA 3054).

The couple lived in Tucson from approximately 1990-1994 (13 ROA 3054). In October of 1994, the couple moved to Las Vegas, Nevada. A third child was born to this union (13 ROA 3058). While in Las Vegas, James Chappell killed Debra Panos.

During trial, James Chappell testified to his conduct which resulted in the first degree murder conviction of Debra. James grew up in Lansing, Michigan (15 ROA 3641). He met Debra at JW Sexton High School (15 ROA 3641). He was sixteen years old at the time. Debra was caucasian and James is African American (15 ROA 3641). Debra's family did not approve of the relationship (15 ROA 3641-3642).

James did not obtain a high school diploma or GED (15 ROA 3642). In Michigan, James had numerous jobs (15 ROA 3642). However, James began to use marijuana and crack cocaine at

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a young age (15 ROA 3642). While Debra only tried marijuana on one occasion (15 ROA 3642). Debra followed her parents from Lansing, Michigan to Tucson, Arizona (15 ROA 3642). Debra paid for James to come by plane from Michigan to Tucson (15 ROA 3643). James stayed with the Panos family for approximately two months while in Arizona (15 ROA 3643). In Tucson, James had a job for approximately four months as a dish washer at a local hotel (15 ROA 3643).

Eventually James returned to Michigan but Debra begged him to return to Arizona (15 ROA 3644). James and Debra had three children but were not ever married (15 ROA 3644). James was unable to hold a job in Tucson and essentially became a babysitter for the children (15 ROA 3645). James continued to use drugs while in Tucson (15 ROA 3645). In fact, James admitted to selling family furniture to obtain drugs (15 ROA 3645).

James admitted he had been physically abusive to Debra. According to James, he felt "extremely bad" about his physical abuse (15 ROA 3645).

In October of 1994, the couple moved to Las Vegas, Nevada, because James believed that people at Debra's jobs were invading upon their private lives (15 ROA 3645).

In Las Vegas, James briefly worked for the Ethyl M Chocolate Factory (15 ROA 3646). However, James spent a significant period of time at the Vera Johnson projects ingesting drugs (15 ROA 3646).

On January 9, 1995, James admitted throwing a thermal coffee cup at Debra and breaking her nose (15 ROA 3646). Police responded and arrested James for domestic violence (15 ROA 3647).

On June 1, 1995, James pinned Debra down in the bedroom and showed her a knife (15 ROA 3647). James pled guilty to domestic violence for that incident (15 ROA 3647).

James would call Debra from jail and became infuriated when men would answer the phone (15 ROA 3647). James sent letters referring to Debra as a slut and a whore (15 ROA 3648). On August 30, 1995, James appeared in Las Vegas Municipal Court where Debra had also been summoned (15 ROA 3648). The next day, August 31, 1995, James was released from custody and ordered to attend an inpatient drug treatment program (15 ROA 3648). Instead, James went to the Vera Johnson projects and drank some beer. James then proceeded directly to

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839 North Lamb, the trailer that he shared with Debra (15 ROA 3648).

James crawled through the window of the trailer which he had done on several previous occasions (15 ROA 3649). According to James, he came into contact with Debra in the trailer and they talked for approximately twenty minutes. They engaged in sexual intercourse and then she performed oral sex on James (15 ROA 3649-3650). Thereafter, Debra called the daycare center where the children were located (15 ROA 3650). On their way to pick up the children, James found a letter which he believed proved that Debra had been unfaithful to him (15 ROA 3641). James claimed he stopped the car and brought Debra back into the trailer (15 ROA 3641). James did not remember what occurred during the killing but felt panic when he realized what had occurred (15 ROA 3651-3652). James denied stealing anything from the trailer but did take all of the social security cards of the children and Debra (15 ROA 3652).

James explained that "he felt extremely bad, lower than dirt, if I could give up my life for hers, I would, in a heartbeat" (15 ROA 3642).

James then proceeded back to the Vera Johnson projects to get high on cocaine (15 ROA 3653). James denied being high on cocaine when he killed Debra (15 ROA 3653).

Letters were found on the floor in the trailer. James indicated he tossed the letters at Debra before she performed oral sex on him (15 ROA 3667). Although James rode a bike from the projects to the trailer prior to the murder, he used Debra's car to leave the scene of the murder (15 ROA 3668). In one of the letters previously sent to Debra, James wrote "one day soon I'll be at the front door and what in Gods name will you do then" (15 ROA 3668).

Dr. Giles Sheldon Green performed the autopsy on Debra Panos. Debra was five feet five inches tall and 140 pounds. Debra died as a result of multiple stab wounds. Debra had suffered from a total of thirteen stab wounds (15 ROA 3670-3671). There was bruising and abrasions throughout Debra's body (15 ROA 3670-3671). Dr. Green concluded that she died as a result of stab wounds to the neck (15 ROA 3672). A sexual assault kit was taken by crime scene analysts with negative results (15 ROA 3673).

The bruising on Debra's body preceded death by approximately fifteen to thirty minutes (15 ROA 3674). Most of the thirteen stab wounds were located in the neck area, however, there

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was one stab wound to the abdomen and another stab wound to the groin.

Officer Russell Lee was dispatched to the Ballerina mobile home park on August 31, 1995 (13 ROA 3185-3186). At approximately 3:00-3:30 p.m., detective Lee began looking in the trailer to find any relevant evidence (13 ROA 3186). Officer Lee was responding to the welfare check requested by Ms. Duran (13 ROA 3186). Officer Lee opened the window and entered the trailer where he witnessed Debra laying on the ground (13 ROA 3186-3187). Homicide was contacted (13 ROA 3187).

Detectives James Vaccaro and Phil Ramos were the detectives assigned to this homicide (14 ROA 3413). Detectives learned that James Chappell had been seen leaving the trailer at approximately 1:30 p.m. on the day of the murder (14 ROA 3415). Detective concluded that James was inside the trailer for approximately forty minutes (14 ROA 3415). Detectives noticed that there were letters strewn across the floor of the bedroom. Detectives believed that the trailer had been ransacked (14 ROA 3417). A torn letter was located next to Debra's body (14 ROA 3417). A knife was located a few feet from Debra's head (14 ROA 3418). During the investigation, both detectives proceeded to Lucky's Supermarket where James Chappell was in custody for shoplifting (14 ROA 3421).

Vaginal swabs revealed the DNA of James Chappell. Detectives concluded that James had ejaculated into Debra's vagina (14 ROA 3425). This fact directly contradicted James' statement that he had not ejaculated.

A letter located in the trailer was addressed to Debra from Devon and appeared to suggest that the two had intimate relations (14 ROA 3429).

Shortly before the murder, the department of parole and probation agreed to permit Mr. Chappell to proceed to impatient treatment as opposed to taking him there (14 ROA 3406-3407). William Duffy was a unit manager at parole and probation. On October 31, 1995, at 9:00 a.m., Mr. Duffy received a call that James was in custody and had to be released from city jail (14 ROA 3407). Mr. Duffy assigned two probation officers to pick him up (14 ROA 3407). Mr. Duffy spent approximately an hour discussing the case with James (14 ROA 3409). James told Mr. Duffy that he would turn himself into the program. Mr. Duffy described James as "very

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convincing" (14 ROA 3410). Thereafter, Mr. Duffy released James to the street. Within a few hours, Debra was killed.

The prior transcript of Mike Pollard was read to the jury (13 ROA 3114). Mr. Pollard was employed with Debra at GE Capital (13 ROA 3115). Mr. Pollard described his relationship with Debra as "inseparable" (13 ROA 3117). Mr. Pollard had never met James Chappell (13 ROA 3117). On one occasion, Mr. Pollard was smoking a cigarette in front of work and he observed James slap Debra when they were both in a car (13 ROA 3118). Mr. Pollard was aware that James had broken Debra's nose on a separate occasion (13 ROA 3119). Mr. Pollard was also aware that Debra's children had been briefly placed in child haven because the kids were unattended (13 ROA 3123).

Mr. Pollard believed that Debra did not want to stay with James (13 ROA 3124). According to Mr. Pollard, James had taken the children's shoes back to obtain money, which Debra had purchased (13 ROA 3125). James allegedly would sell belongings such as food, clothing, diapers, or furniture to obtain money for drugs (13 ROA 3126).

Mr. Pollard believed that Debra could not leave the trailer to hide from James because she had too much money invested in it (13 ROA 3129). On August 31, 1995, Debra picked Mr. Pollard up from work and proceeded to his residence (13 ROA 3130-3131). On that day, Debra had become aware that James had been released from custody (13 ROA 3131). Debra was sitting on Mr. Pollard's sofa holding her knees and shivering (13 ROA 3131). Mr. Pollard told Debra to wait until he could finish taking a shower and then he would then take her home (13 ROA 3132). However, when Mr. Pollard got out of the shower she was gone (13 ROA 3133). This was the last time Mr. Pollard saw Debra (13 ROA 3133).

On September 1, 1995, officer Paul Osuch responded to the Lucky's store on Lamb and Bonanza referenced a shoplifter in custody (14 ROA 3275). The shoplifter identified himself as Ivory Morrell (14 ROA 3277). Officer Osuch had been briefed on a homicide that occurred at the Ballerina Mobile Home park (14 ROA 3277). Officer Osuch determined that the shoplifter should be arrested for shoplifting and drug paraphernalia. Located on the shoplifter was a glass tube commonly used to ingest crack cocaine (14 ROA 3279). The shoplifter was observed trying

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to dispose of four social security cards while in custody (14 ROA 3283). All the social security cards were in the last name of Panos. Thereafter, officer Osuch contacted his sergeant to determine the victim's last name in the homicide (14 ROA 3284). Officer Osuch learned that Panos was the last name and then contacted homicide detectives who responded to the Lucky's store. The shoplifter was later identified as James Chappell.

Latrona Smith worked at Angel Care daycare facility on August 31, 1995 (13 ROA 3190). The Panos children regularly attended this daycare (13 ROA 3190). On August 31, 1995, between the hours of 12:30 and 1:00 p.m., Latrona Smith received a phone call from Debra Panos (13 ROA 3190). Debra asked Latrona what time she needed to pick up the children (13 ROA 3191). Debra asked Latrona to call her back and tell her that she needed to come pick up the children because she was scared (13 ROA 3191). Debra asked Latrona to make up some type of excuse so that she would be able to leave her house to come to the daycare (13 ROA 3191). Thereafter, Latrona called Debra back approximately five minutes later and told her to come pick up her children (13 ROA 3191). Debra told Latrona that she was on her way but she never made it (13 ROA 3192). Latrona could hear a male voice in the background and he sounded upset yet he was not yelling (13 ROA 3192-3194).

Deborah Turner knew James from an apartment complex located at Lamb and Bonanza (13 ROA 3194). James would "hang out most of the time" at the apartment complex (13 ROA 3195). James was known as "hip hop" because he was always dancing (13 ROA 3196). James was a "crack head" (13 ROA 3197).

On August 31, 1995, in the evening, Deborah Turner agreed to buy shrimp and pie from James (13 ROA 3195). Deborah also agreed to rent a car from James for twenty-five dollars (13 ROA 3195-3196).

Ladonna Jackson knew James from the Vera Johnson housing project (13 ROA 3198). On August 31, 1995, she observed James pull up in a vehicle. He was not acting unusual (13 ROA 3201). Ladonna knew that James would rent the car so that he could buy crack (13 ROA 3203). Ladonna had previously seen James sell children's diapers (13 ROA 3204).

On September 1, 1995, Ladonna observed detectives in the complex looking for the car

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(13 ROA 3202). When Ladonna learned that James was alleged to have killed Debra she immediately told detectives that the car was around the corner (13 ROA 3203).

Tanya Hobson was employed as a social worker and program manager for Catholic charities (14 ROA 3454). Ms. Hobson worked at Safe Nest, a temporary shelter for domestic violence victims (14 ROA 3454). On January 9, 1995, Debra Panos called Ms. Hobson over the phone and a document was filled out requesting a temporary restraining order (14 ROA 3461). According to the document, James had hit Debra in the face and was taken to jail (14 ROA 3461). The application for the restraining order included Debra's employment and three children (14 ROA3462). This application was faxed to the court (14 ROA 3463). However, Debra never showed up and the protective order became void (14 ROA 3465).

Over the defense objection, the State was permitted to elicit victim impact from several witnesses who were not family members of the victim. Mike Pollard knew Debra Panos from working at GE Capital (15 ROA 3679). Mike was notified by Lisa Duran that Debra's body had been found murdered (15 ROA 3679). Mike was saddened that Debra's children would grow up without a mother (15 ROA 3679). Mr. Pollard described Debra as a very sweet person who loved her children. Mike described Debra as a good friend (15 ROA 3679). Mr. Pollard claimed that he had to quit his job because he could not concentrate and that he moved out of Nevada based on the impact of Debra's death (15 ROA 3679).

Carol Monson is Debra Panos' mother's sister (her aunt) (15 ROA 3681). Carol described Debra as a very giving person (15 ROA 3681). Carol explained that her sister (Debra's mother) had lost her husband two years before the murder (15 ROA 3683). Carol indicated that the death of Debra caused Debra's mother exceptional grief (15 ROA 3683). Carol was permitted to read letters written by family members who were unable to attend (15 ROA 3684). In fact, letters from Christina Reese, Doris Waskowski, and Caroline Monson's own letter were read to the jury. Caroline's letter was read to the jury even after she was given an opportunity to testify (15 ROA 3684-3685).

Norma Penfield provided testimony on two separate days, March 19-20, 2007. Norma Penfield is Debra Panos' mother (15 ROA 3686). Ms. Penfield described the anguish she felt

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after Debra's death. She also explained how her grandchildren were placed in child haven and she was required to get a court order to release the children to her custody (15 ROA 3687). Apparently, the oldest son asked Ms. Penfield if he could have sleeping pills because he could not sleep (he was eight years old at the time) (15 ROA 3688). Ms. Penfield described how Chantelle wanted to die so she could go to heaven to be with her mother (15 ROA 3688).

Dina Richardson worked with Debra Panos at the police department in Tucson, Arizona (14 ROA 3291-3292). She became close friends with Debra. Ms. Richardson explained that James Chappell was a controlling individual who "pretty much ran the relationship" (14 ROA 3296). Ms. Richardson relayed a conversation wherein Debra stated that she would be assaulted by Mr. Chappell if she did not provide him money and the keys to the car, so that he could obtain drugs (14 ROA 3299). On a couple of occasions, Ms. Richardson heard Mr. Chappell in the background, on a phone conversation, telling Debra that he would "OJ Simpson her ass" (14 ROA 3302-3303).

Ms. Richardson was aware that Mr. Chappell had been arrested in a high drug activity area in Debra's car (14 ROA 3305). After the murder, Ms. Richardson stated the police department assisted her psychologically (14 ROA 3307). Additionally, Ms. Richardson described how the police department had a service for Debra where forty people. A portrait of Debra hangs in their briefing room (14 ROA 3307).

Michelle Mancha worked with Debra at GE Capital (13 ROA 3087). Michelle described an incident where Debra came to work after her nose was broken by Mr. Chappell (13 ROA 3090(where the cup had been thrown at her). Debra would confide in Michelle and Lisa Duran that items were missing out of her trailer and that the defendant was threatening and hitting her (13 ROA 3090). Things such as the television, microwave, stereo, and the sofa were being taken and sold (13 ROA 3090). Michelle described how James Chappell would come through the window because he did not have a key (13 ROA 3091). Michelle claimed that Mr. Chappell was not supposed to know that Debra had moved to Las Vegas, Nevada (13 ROA 3092). According

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to Michelle, Debra had told her this (13 ROA 3092). [1]

Michelle also was aware that in December of 1994, the defendant slapped Debra in the face in the parking lot of GE Capital (13 ROA 3092). Debra also described to Michelle an incident where the defendant sat on her and put a knife to her throat (13 ROA 3098). Michelle claimed that "we" offered to send Mr. Chappell back to Michigan but he refused (13 ROA 3099). According to Michelle, the defendant threatened to kill Debra shortly before the murder, in court (13 ROA 3103). When Michelle found out about Debra's death, she became very upset (13 ROA 3107). Michelle still has Debra's picture on her dresser (13 ROA 3108).

Lisa Duran (AKA Larsen), worked with Debra at GE Capital (13 ROA 3168). Ms. Duran described how Debra would attempt to cover evidence of her injuries inflicted by Mr. Chappell (13 ROA 3170). Debra would say "my kids need their father" (13 ROA 3170). In one phone call, Mr. Chappell asked Lisa Duran "what other nigga she was lying up with underneath" (13 ROA 3171). In another call, Ms. Duran stated that Mr. Chappell was upset because Debra was not accepting his phone calls (13 ROA 3171). Ms. Duran believed Debra was packing up her belongings so that she could leave the trailer. This fact directly contradicts Mike Pollard's testimony that Debra would not leave the trailer because she had invested too much (13 ROA 3172; 13 ROA 3129). Ms. Duran contacted police to conduct a welfare check on Debra's trailer. Ms. Duran's hunch was correct, Debra was found murdered inside (13 ROA 3173).

Ms. Duran explained that she went through therapy because of the guilt she felt associated with the murder (13 ROA 3177). Ms. Duran missed approximately seven or eight months of work and was prescribed medication (13 ROA 3178). Debra was involved in a relationship with another male named "JR" (13 ROA 3182). In fact, Ms. Duran testified that Debra was going to move in with JR (13 ROA 3182).

Clair McGuire worked with Debra at the Tucson city hall conducting data entry (13 ROA 3242). Debra worked multiple jobs in Tucson (13 ROA 3243). Clair observed Mr. Chappell push

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[1]This fact is in direct contradiction to all of the evidence which suggests that Debra Panos was the breadwinner of the family and continuously paid for Mr. Chappell's flights in order to be physically present with her.

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and trip Debra on multiple occasions (13 ROA 3243). Clair described the difficulties Debra was having with James because the police department did not want their employees associating with individuals involved in criminal activities (13 ROA 3244). Prior to the murder, Clair moved to Las Vegas and stayed in the trailer with Debra (13 ROA 3245). Clair noticed that belongings were missing because the defendant would take them to sell (13 ROA 3245). On one occasion, Clair heard Mr. Chappell trying to enter the trailer and called 911 (13 ROA 3246). After police arrived, a knife was located next to her bed (13 ROA 3247). In June of 1995, Clair summoned the police for Debra. Mr. Chappell had Debra pinned on the bed and all three children were home at the time (13 ROA 3247). Clair moved out of the trailer at the end of July in 1995 (13 ROA 3248). Clair admitted that it was common for Mr. Chappell to climb through the bedroom window (13 ROA 3250).

On August 18, 1998, Mr. Chappell was arrested with another individual for assault (13 ROA 3251). Police contacted the alleged victim who claimed that he had been assaulted. The alleged victim stated that Mr. Chappell had thrown a brick at him (13 ROA 3252). Mr. Chappell stated that the victim had tried to run the defendant's over and so he threw a brick at the car. Mr. Chappell also indicated that the alleged victim referred to them as "niggers" (13 ROA 3253). Mr. Chappell also stated that his co-defendant "Harold" threw a brick at the alleged victim and knocked him down (13 ROA 3253). Mr. Chappell was not convicted of a felony offense for this incident (13 ROA 3254).

The defense called several mitigation witnesses. Willie Chappell is the older brother of James (15 ROA 3690). When James was approximately two and a half years old, a sheriff's department vehicle hit and killed their mother (15 ROA 3690-3391). James' mother was a pedestrian (15 ROA 3691). Willie has two brothers and three sisters (15 ROA 3691). Mr. Chappell's father was not around the children during their childhood (15 ROA 3691). Therefore, when their mother died, the children went to stay with their grandmother (15 ROA 3691). The grandmother also resided in Lansing, Michigan (15 ROA 3691). Growing up, their grandmother was very abusive using broomsticks, bed boards, and extension cords, to discipline the children (15 ROA 3691).

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James' attended special education classes in school (15 ROA 3692). Not only was the environment not nurturing at home, the neighborhood was drug infested (15 ROA 3693). Willie learned that his mother had a serious drug problem (15 ROA 3694). Of the four children raised by the grandmother, all had serious substance and alcohol abuse problems (15 ROA 3695). Willie served twelve years in prison for felony convictions (stolen vehicle and armed robbery) (15 ROA 3693).

Fred Scott Dean grew up with James in Michigan (15 ROA 3696). Fred and James were in the same grade together (15 ROA 3697). Fred noted that James was in special education classes (15 ROA 3697). Fred knew that James had attended three different elementary schools in three separate years (15 ROA 3698). There was no real father figure in the home with the exception of an Uncle who was stabbed to death (15 ROA 3699). During junior high, Fred, James and other kids would consume alcohol and smoke marijuana (15 ROA 3699). Fred has a felony conviction for drug trafficking (15 ROA 3702). Fred noted that there were four drug houses in James' neighborhood (15 ROA 3703).

Benjamin Dean met James in elementary school. Benjamin and James lived right around the corner from each other (15 ROA 3706). Benjamin described the area as filled with abandoned houses, and the entire street ended up demolished (15 ROA 3706). The area in which James grew up was impoverished. Benjamin described James' residence as a place to hang out and party because his grandmother would spend nights playing bingo or at the horse track (15 ROA 3707).

Neither James Ford nor Ivory Morrell testified. However, Benjamin testified how James Ford lived in the same neighborhood (15 ROA 3708). Benjamin met Debra Panos at James Ford's house. According to Benjamin, James was approximately thirteen or fourteen when he began involvement with drugs (15 ROA 3708).

Mira King is the younger sister of James. Mira described their childhood as a household without affection (15 ROA 3710). Mira described her grandmother as being absent, often playing bingo or attending horse races (15 ROA 3710-3711). Mira explained that the area they grew up in was filled with empty and abandoned houses (15 ROA 3711). James was teased because he could not attend regular classes and was in special education (15 ROA 3712). Mira described her

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grandmother as a person who would refer to the kids as "stupid" or "idiots" (15 ROA 3712). James was specifically referred to as "stupid" (15 ROA 3712). Mira was placed in a girls home between the ages of fourteen and sixteen (15 ROA 3712). James was described as non-violent when he was growing up and loving to his son "JP" (15 ROA 3715). Mira was aware that her mother had been involved in drugs (15 ROA 3715). Sometimes, Aunt Sharon would watch the kids (15 ROA 3717). However, Aunt Sharon had a substance abuse problem with crack cocaine, marijuana, and has become an alcoholic (15 ROA 3717).

Charles Dean is the brother of Fred and Benjamin (15 ROA 3718). Charles also grew up in the same neighborhood. Charles indicated that the area was eventually condemned (15 ROA 3718). Charles told the jury that Keisha Axom was unable to attend the hearing because of complications with her pregnancy (15 ROA 3719). Keisha is James' cousin (15 ROA 3719).

The defense called three expert witnesses. Dr. Todd Grey is the chief medical examiner for the state of Utah (13 ROA 3224). Dr. Grey is board certified in forensic pathology (13 ROA3225). Dr. Grey was asked to consider whether there was any evidence to support the State's contention that Debra was sexually assaulted (13 ROA 3225). Dr. Grey noted that there was no physical evidence to support a sexual assault (13 ROA 3226). Dr. Grey noted no trauma to the vagina (13 ROA 3226). Dr. Grey also noted that Dr. Shelden Green had not found any evidence of sexual assault (13 ROA 3226). Dr. Grey was concerned that the knife markings were consistent with holes in the clothing compared to the wounds in the body (13 ROA 3226). Dr. Grey explained that the pants were worn in a "conventional fashion" and were not "twisted" and worn in a "normal position" (13 ROA 3226). Dr. Grey found no evidence of sexual assault (13 ROA 3227). Dr. Grey admitted that presence of sperm would be conclusive that Mr. Chappell had ejaculated (13 ROA3230).

Dr. William Danton practices clinical psychology at the University of Nevada, School of Medicine, in Reno (14 ROA 3317). Dr. Danton reviewed the psychological report of Dr. Edcoff. Additionally, Dr. Danton met with Mr. Chappell for two hours the evening prior to his testimony (14 ROA 3321). Dr. Danton noted that in domestic violence relationships the abuser usually controls the finances (14 ROA 3322). Whereas, here, Debra appeared to be the majority bread

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winner. Dr. Danton concluded that Debra may have several valid reasons for consenting to sexual intercourse with James right before the murder (14 ROA 3326). For instance, Dr. Danton concluded that Debra may have wanted to "appease" Mr. Chappell or be attempting to reconcile (14 ROA 3326). James had a significant fear of abandonment (14 ROA 3329). In the past, Debra would use sex to placate James (14 ROA 3320). Dr. Danton believed that Mr. Chappell may have blacked out during the killing but that additional testing was necessary to make an absolute conclusion (14 ROA 3371).

Dr. Lewis Etcoff is a licenced psychologist (14 ROA 3469). Dr. Etcoff was a witness taken out of order for the defense (14 ROA 3468). Ten years prior to the instant penalty phase, Dr. Etcoff evaluated Mr. Chappell (14 ROA 3475). The interview lasted approximately two hours (14 ROA 3476). Dr. Etcoff only interviewed Mr. Chappell, no other witnesses (14 ROA 3477). Dr. Etcoff also reviewed school records from Michigan (14 ROA 3478). Dr. Etcoff noted that James' father was never present in his life (14 ROA 3481). James' father had a substantial criminal record and substance related problems (14 ROA 34-81). When James was older, his father asked that he rob a bank, James declined (14 ROA 3482). James was in special education classes (14 ROA 3483). At sixteen years old, the school psychologist concluded that James was "emotionally handicapped" (14 ROA 3486). The school psychologist noted that James did not have coping skills to deal with everyday problems (14 ROA 3486). The school psychologist also noted that James appeared to be withdrawn and had low self image (14 ROA 3487). At that time, James' grade point average was 0.65 and he was ranked 584 out of 607 (14 ROA 3487). Mr. Chappell began using marijuana at age thirteen and was introduced to rock cocaine by eighteen (14 ROA 3488). Mr. Chappell became dependent on rock cocaine (14 ROA 3488). Mr. Chappell scored an overall IQ of 80 which puts him in the bottom ninth percentile (14 ROA 8491). His verbal IQ was seventy-seven, placing him in the bottom six percent (14 ROA 3490). Dr. Etcoff concluded that his math skills put him in the bottom one percent describing him as "learning disabled in math" (14 ROA 3491). James attempted to be truthful during the testing based upon the validity score built into the test (14 ROA 3499). The test results indicate that James felt "worthless, inadequate, guilt ridden, and sensitive to humiliation (14 ROA 3501).

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James was extremely dependent upon Debra (14 ROA 3501). Dr. Etcoff noted that James was extremely remorseful during the interview and was actually breaking down crying (14 ROA 3506). However, James had developed fantasies of other men sleeping with Debra (14 ROA 3504).

Lastly, the defense called Marabel Rosales who works as a mitigation investigator for the special public defenders office (16 ROA 3767). Marabel traveled to Lansing and interviewed Ivory Morrell and James Ford (16 ROA 3767). Both witnesses traveled to testify at trial but Ivory had commitments in Lansing and had to proceed back to Michigan. James had to return to Michigan because his employer claimed that he would be fired if he did not return (16 ROA 3767).

ARGUMENT

I. STANDARD OF REVIEW FOR INEFFECTIVE ASSISTANCE OF COUNSEL.

To state a claim of ineffective assistance of counsel that is sufficient to invalidate a judgment of conviction, petitioner must demonstrate that:

1. counsel's performance fell below an objective standard of reasonableness,
2. counsel's errors were so severe that they rendered the verdict unreliable.

Lozada v. State, 110 Nev. 349, 353, 871 P. 2d 944, 946 (1994). (Citing Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 205, (1984)). Once the defendant establishes that counsels performance was deficient, the defendant must next show that, but for counsels error the result of the trial would probably have been different. Strickland, 466 U.S. at. 694, 104 S. Ct. 2068; Davis v. State, 107 Nev. 600, 601,602, 817 P. 2d 1169, 1170 (1991). The defendant must also demonstrate errors were so egregious as to render the result of the trial unreliable or the proceeding fundamentally unfair. State v. Love, 109 Nev. 1136, 1145, 865 P.2d 322, 328 (1993), citing Lockhart v. Fretwell, 506 U. S. 364,113 S. Ct. 838 122 2d, 180 (1993); Strickland, 466 U. S. at 687 104 S. Ct. at 2064.

The United States Supreme Court in Strickland v. Washington ,466 U.S. 668, 104 S.Ct. 2052 (1984), established the standards for a court to determine when counsel's assistance is so ineffective that it violates the Sixth Amendment of the U.S. Constitution. Strickland laid out a two-pronged test to determine the merits of a defendant's claim of ineffective assistance of

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counsel.

First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. In Nevada, the Nevada Supreme Court has held "claims of ineffective assistance of counsel must be reviewed under the "reasonably effective assistance" standard articulated by the U.S. Supreme Court in Strickland v. Washington, requiring the petitioner to show that counsel's assistance was deficient and that the deficiency prejudiced the defense." Bennett v. State, 111 Nev. 1099, 1108,901 P.2d 676, 682 (Nev. 1995), and Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 Nev. 1996).

In meeting the prejudice requirement of ineffective assistance of counsel claim, Mr. Chappell must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Reasonable probability is probability sufficient to undermine confidence in the outcome. Kirksey v. State, 112 Nev. at 980. "Strategy or decisions regarding the conduct of defendant's case are virtually unchallengeable, absent extraordinary circumstances." Mazzan v. State, 105 Nev. 745,783 P.2d 430 Nev. 1989); Olausen v. State, 105 Nev. 110,771 P.2d 583 Nev. 1989).

The Nevada Supreme Court has held a defendant has a right to effective assistance of appellate counsel on direct appeal. Kirksey v. Nevada, 112 Nev. 980, 923 P.2d 1102 (1996).

The constitutional right to effective assistance of counsel extends to a direct appeal. Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). A claim of ineffective assistance of appellate counsel is reviewed under the "reasonably effective assistance" test set forth in Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S.Ct. 2052 (1984). Effective assistance of appellate counsel does not mean that appellate counsel must raise every non-frivolous issue. See Jones v. Barnes, 463 U.S. 745, 751-54, 77 L.Ed. 2d 987, 103 S. Ct. 3308

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(1983). An attorney's decision not to raise meritless issues on appeal is not ineffective assistance of counsel. Daniel v. Overton, 845 F. Supp. 1170, 1176 (E.D. Mich. 1994); Leaks v. United States, 841 F. Supp. 536, 541 (S.D.N.Y. 1994), aff'd, 47 F.3d 1157 (2d Cir.). To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal. Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132. In making this determination, a court must review the merits of the omitted claim. Heath, 941 F. 2d at 1132.

In the instant case, Mr. Chappell's proceedings were fundamentally unfair. Mr. Chappell received ineffective assistance of counsel. Based upon the following arguments:

II. MR. CHAPPELL RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE THIRD PENALTY PHASE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In the instant case, penalty phase counsel failed to properly investigate and prepare for the penalty phase. There are multiple instances identified by Mr. Chappell included in this section.

1. Failure to obtain a P.E.T. Scan
2. Failure to test Mr. Chappell for the effects of fetal alcohol syndrom and/or being born to a drug addicted mother
3. Failure to properly prepare the expert witnesses: Dr. Etcoff, Dr. Grey, and Dr. Danton
4. Failure to present mitigation witnesses to the jury
5. Failure to obtain an expert regarding pre-ejaculation fluids
6. Failure to present lay witnesses

Pretrial investigation is a critical area in any criminal case and the failure to accomplish the investigation has been held to constitute ineffective assistance of counsel. In Jackson v. Warden, 91 Nev. 430, 537 P.2d 473 (1975), the Nevada Supreme Court held,

> It is still recognized that a primary requirement is that counsel...conduct careful factual and legal investigation and inquiries with a view towards developing matters of defense in order that he make informed decisions on his clients behalf both at the pleadings stage...and at trial. Jackson, 92 Nev. at 433, 537 P.2d at 474.

Federal courts are in accord that pretrial investigation and preparation are key to effective assistance of counsel. See, U.S. v. Tucker, 716 F.2d 576 (1983). In U.S. v. Baynes, 687 F.2d 659 (1982), the federal court explained,

> Defense counsel, whether appointed or retained is obligated to inquire thoroughly into all potential exculpatory defenses in evidence, mere possibility that investigation might have produced nothing of consequences for the defense does

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not serve as justification for trial defense counsels failure to perform such investigations in the first place. The fact that defense counsel may have performed impressively at trial would not have excused failure to investigate claims that might have led to complete exoneration of the defendant.

Counsel's complete failure to properly investigate renders his performance ineffective.

[F]ailure to conduct a reasonable investigation constitutes deficient performance. The Third Circuit has held that "[i]neffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice when s/he [sic] has not yet obtained the facts on which such a decision could be made." See U.S. v. Gray, 878 F.2d 702, 711 (3d Cir.1989). A lawyer has a duty to "investigate what information ... potential eye-witnesses possess[ ], even if he later decide[s] not to put them on the stand." Id. at 712. See also Hoots v. Allsbrook, 785 F.2d 1214, 1220 (4th Cir.1986) ("Neglect even to interview available witnesses to a crime simply cannot be ascribed to trial strategy and tactics."); Birt v. Montgomery, 709 F.2d 690, 701 (7th Cir.1983) . . . ("Essential to effective representation . . . is the independent duty to investigate and prepare.").

In State of Nevada v. Love, 865 P.2d 322, 109 Nev. 1136, (1993), the Supreme Court considered the issue of ineffective assistance of counsel for failure of trial counsel to properly investigate and interview prospective witnesses.

In Love, the District Court reversed a murder conviction of Rickey Love based upon trial counsel's failure to call potential witnesses coupled with the failure to personally interview witnesses so as to make an intelligent tactical decision and making an alleged tactical decision on misrepresentations of other witnesses testimony. Love, 109 Nev. 1136, 1137.

"The question of whether a defendant has received ineffective assistance of counsel at trial in violation of the Sixth Amendment is a mixed question of law and fact and is thus subject to independent review." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, at 2070, 80 L.Ed.2d 674 (1984). The Nevada Supreme Court reviews claims of ineffective assistance of counsel under a reasonable effective assistance standard enunciated by the United States Supreme Court in Strickland and adopted by the Nevada Supreme Court in Warden v. Lyons, 100 Nev. 430, 683 P.2d 504, (1984); *see* Dawson v. State, 108 Nev. 112, 115, 825 P.2d 593, 595 (1992). Under this two-prong test, a defendant who challenges the adequacy of his or her counsel's representation must show (1) that counsel's performance was deficient and (2) that the defendant was prejudiced by this deficiency. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064.

Under Strickland, defense counsel has a duty to make reasonable investigations or to

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make a reasonable decision that makes particular investigations unnecessary. *Id. at* 691, 104 S.Ct. at 2066. (Quotations omitted). Deficient assistance requires a showing that trial counsel's representation of the defendant fell below an objective standard of reasonableness. *Id. at* 688, 104 S.Ct. at 2064. If the defendant establishes that counsel's performance was deficient, the defendant must next show that, but for counsel's errors, the result of the trial probably would have been different. *Id. at* 694, 104 S.Ct. at 2068.

"An error by trial counsel, even if professionally unreasonable, does not warrant setting aside a judgment of a criminal proceeding if the error had no effect on the judgment. Strickland, 466 U.S. at 691, 104 S.Ct. at 2066. Thus Strickland also requires that the defendant be prejudiced by the unreasonable actions of counsel before his or her conviction will be reversed. The defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id. at* 694, 104 S.Ct. at 2068. Additionally, the Strickland court indicated that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id. at* 696, 104 S.Ct. at 2069.

A. FAILURE TO PRODUCE TESTIMONY FROM JAMES FORD AND IVORY MORRELL

During the original post-conviction, counsel alleged that trial counsel had been ineffective for failure to produce several mitigation witnesses. Specifically, post-conviction counsel complained that James C. Ford and Ivory Morrell (friends of James Chappell) were not called to testify. At the conclusion of the post-conviction hearings, the district court granted the writ in part and denied the writ in part. The district court concluded that Mr. Chappell received ineffective assistance of penalty phase counsel for the failure to call mitigation witnesses. This decision was upheld on appeal from the first post-conviction. Thereafter, post-conviction counsel represents Mr. Chappell at the instant penalty phase. Interestingly enough, neither James C. Ford nor Ivory Morrell testified as to the mitigation evidence that they could have provided.

On March 19, 2007, penalty phase counsel advised the court that Mr. Morrell and Mr. Ford would not be able to testify (15 ROA 3669). Counsel explained that Mr. Morrell and Mr. Ford had been present since "Tuesday night of last week" (15 ROA 3669). On the Friday before,

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both witnesses were in a situation where they would lose employment (15 ROA 3669). In fact, Mr. Ford's district supervisor stated that he would be fired if he was not present at work on Monday (the day that counsel was making the representations (15 ROA 3669). Penalty phase counsel was concerned that the employment depression in Lansing, Michigan was so severe that it necessitated letting the witnesses proceed back to Michigan. Counsel stated, "it was our decision to allow them - - we had them here and we could have enforced the subpoena on them causing them to lose their work and causing difficulty with out client, and causing them to lose their work, and we made the decision to allow them to return to Michigan, so that they will not be testifying" (15 ROA 3669).

In essence, counsel weighed the decision to relieve the two mitigation witnesses of their obligation to testify based on employment hardship versus the defendant's opportunity to have his life spared at a penalty phase. Nothing could be more important in the penalty phase. Penalty phase counsel had argued to the district court that trial counsel from the first trial was ineffective for failure to call these two witnesses. Yet, the two witnesses were then released. The difficulty with the issue is compounded by a review of the third penalty phase. Interestingly enough, the defense called a few witnesses out of order, in the State's case in chief. Curiously, no attempts were made to put Mr. Ford and Mr. Morrell on the stand out of order. Most certainly, the district court would have accommodated the defense request, had defense counsel simply orally informed the court of the dilemma. Then, the witnesses would have undoubtedly provided the mitigation evidence which was so obviously necessary.

For instance, Dr. Etcoff's testimony was taken out of order. Yet, penalty phase counsel failed to make this request even though the district court and Nevada Supreme Court had determined first penalty phase counsel to be ineffective for failure to call these witnesses (amongst other mitigation that was not presented). In the original post conviction, counsel provided the following synopsis of James C. Ford.

> Chappell's best friend in Michigan. Chappell grew up with Mr. Ford and he was around Debra and Chappell during the first five years of our relationship. He also knew about Chappell's employment history and could have testified at both the trial and penalty phase (Supplemental Petition for Writ of Habeas Corpus, pp. 14).

Post conviction counsel explained, "Mr. Ivory Morrell [sic] was also a friend of Chappell

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and Debra in Michigan and stayed in contact with them in Arizona. He could have testified to Debra's behavior in the relationship with Chappell" (Supplemental Petition for Writ of Habeas Corpus, pp. 14). Attached for this Court's review as "Exhibit A" are the two affidavits of Ford and Morrell which were attached to the original post conviction petition. The affidavits of these two individuals are as important today as they were during the original petition. Penalty phase counsel knew that the Nevada Supreme Court recognized the significance of these two individuals potential testimony. Upon their affidavits, Mr. Chappell received a new penalty phase. It was clearly ineffective assistance of counsel for failure to present these witnesses. The same analyses that was provided by the Nevada Supreme Court and the district court almost a decade ago applies today. More importantly, penalty phase counsel was aware of the significant influence of the potential testimony of the two witnesses.

The prosecution was so concerned with the failure to present mitigation witnesses, that the prosecutor raised the issue to the trial court (16 ROA 3803). The prosecutor stated,

> I went back and reviewed the court's order which was the basis for the reversal of the penalty phase and the reason why we were in the proceeding, the decision by Judge Douglas, I believe, confirmed by the Supreme Court in the order of affirmance that the defense failed to call certain witnesses that would have made a difference in the outcome of the original case.
>
> > There were eight or nine witnesses that were detailed in the briefs and the decision. For the record, my notation on that would indicate that would be Shirley Serrelly, James Ford, Ivory Morrell, Chris Bardo, David Greene, Benjamin Dean, Claira Axom, Barbara Dean, and Ernestine Harvey. Of those nine names the defendant only called two of them, by my understanding. There were five of them that were not called, no affidavits were submitted, no letters were written in, no testimony was given in summary by third parties (16 ROA 3803-3804).

The prosecutor did note that Claira Axom's prior testimony was read into the court record (16 ROA 3803).

Next, a review of the entire file portrays an extremely deficient investigation of a time when Mr. Chappell lived in Arizona. During the penally phase, the State provided witnesses from Arizona who testified to very damning events by Mr. Chappell. No rebuttal was offered by the defense. Mr. Chappell respectfully requests that this Court grant an evidentiary hearing to ascertain what efforts and investigation were conducted in Arizona in order to assist Mr.

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Chappell at the penalty phase.

The Nevada Supreme Court in Doleman v. State, 112 Nev. 843 921 P.2d 278 (1996) concluded:

> We conclude that the failure of Doleman's trial counsel to reasonably investigate the potential testimony of certain witnesses at Doleman's penalty hearing constituted ineffective assistance of counsel. In this case, the court found that trial counsel's failure to call witnesses from an institution where the convicted individual had attended school, who would have testified as to the convicted individual's ability to function in structured environments and adhere to institutional rules, constituted a violation of the reasonable effective assistance standard.

Defense counsel's failure to investigate the facts can render a result "unreliable"Buffalo v. State, 111 Nev. 1139, 901 P.2d 647 (1995).

The defense called their mitigation investigator who attempted to tell the jury the potential testimony of Ford and Morrell. Unfortunately, the testimony of a mitigation investigator does not equate to the mitigation witnesses themselves.

B. FAILURE TO OBTAIN AN EXPERT

In the instant case, the sole aggravator found by the jury was that the murder was committed while Chappell was engaged in the commission of a sexual assault. On appeal from the penalty phase, appellate counsel argued that there was insufficient evidence to establish the sole aggravator beyond a reasonable doubt (Order of Affirmance, pp. 3). The Nevada Supreme Court explained,

> Our review of the record reveals sufficient evidence to establish the sexual assault aggravator beyond a reasonable doubt as determined by a rational trier of fact. See, Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980); See also, Origel–Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1989); Jackson v. Virginia, 443 U.S. 307, 319 (1979).

One of the factors considered by the Nevada Supreme Court was Chappell's assertion that he did not ejaculate into the victim during their sexual encounter, even when matching DNA was recovered from her vagina (Order of Affirmance, pp.3). In fact, this issue was vehemently argued to the jury by the prosecution. During his sworn testimony, Mr. Chappell admitted that he had vaginal sexual intercourse and oral sex with Debra Panos, before he killed her. Mr. Chappell testified that the sexual encounters were consensual but denied ejaculation. The State argued to the jury that this proved Mr. Chappell was a liar and had sexually assaulted the victim.

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Apparently, the Nevada Supreme Court used this fact to determine there was sufficient evidence to convict of sexual assault.

Without the sexual assault aggravator, Mr. Chappell is not eligible for a sentence of death. Ms. Panos was found stabbed to death fully clothed. The knife wounds went through her clothing and into her body. Ms. Panos was not naked and therefore this provides proof of a prior consensual sexual encounter. This fact also corroborates Mr. Chappell's testimony that after the consensual sexual encounter he located letters he perceived as proof that she was unfaithful and went into a blind rage.

Counsel should have provided expert testimony that pre-ejaculation fluid may contain sperm. It has long been recognized in the medical community, a women can become pregnant even when ejaculation does not occur (Dr. Roger Wharms, M.D., Mayo clinic).

During the testimony of Detective James Vaccaro, he was questioned whether the results of DNA of James Chappell was found in Debra's vaginal cavity of Debra. Detective Vaccaro concluded, "I do know that the results were that the DNA of James Chappell was found in the form of semen inside the vagina of Debra Panos". The detective was then asked, "the fact that its in the form of semen would indicate that he ejaculated into her body"? The detective indicated "yes" (14 ROA 3425).

Penalty phase counsel was ineffective for failing to provide expert testimony that sperm could be located in the vaginal cavity of the victim when the defendant sincerely believed he had not ejaculated. The simple fact which is provided to most high school students in health class, could have dispelled the belief that Mr. Chappell was lying and therefore sexually assaulted the victim. Mr. Chappell has specifically requested funding for an expert in this area. It was ineffective assistance of counsel for failure to obtain this expert testimony.

C. FAILURE TO OBTAIN A P.E.T. SCAN

In the instant case, Dr. Etcoff examined and tested Mr. Chappell. Mr. Chappell had an extremely low IQ. There was evidence that Mr. Chappell's mother may have been addicted to drugs and alcohol. A proper investigation should have been conducted to determine whether James was born to a mother who was ingesting narcotics and/or alcohol during her pregnancy.

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There is no indication in the voluminous file that counsel investigated the possibility of fetal alcohol syndrome. Additionally, Mr. Chappell's father was involved in controlled substances and criminal activities. Every one of Mr. Chappell's siblings were involved with controlled substances.

During closing argument, defense counsel explained, "his mother was addicted to drugs and alcohol and it's quite possible she was using either drugs and/or alcohol while she was pregnant (16 ROA 3788). Fetal Alcohol Spectrum Disorders are a group of disorders that can occur in a person who's mother drank alcohol during pregnancy. The effects can include physical problems and problems with behavior and learning. There was evidence that Mr. Chappell's mother may have been addicted to drugs and alcohol. A proper investigation should have been conducted to determine whether James was born to a mother who was ingesting narcotics and/or alcohol during her pregnancy. There is no indication in the voluminous file that counsel investigated the possibility of fetal alcohol syndrome.

The Nevada Supreme Court in Riley v. State, 110 Nev. 638, 650, 878 P.2d 272, 280 (1994) explained, "even though we declined to reverse, we recognized that a defendant may be prejudiced by counsel's failure to investigate overall mental capabilities when a pretrial psychological evaluation indicates that the defendant may have serious mental health problems".

Mr. Chappell had been sentenced to death by the first jury. Therefore, it was incumbent upon first post-conviction counsel (penalty phase trial counsel) to request funding for a P.E.T. scan and/or brain imaging of the defendant.

Mr. Chappell specifically requests funding to determine whether Mr. Chappell suffered from fetal alcohol syndrome and requests permission for brain imaging.

D. FAILURE TO PROPERLY PREPARE EXPERT WITNESSES PRIOR TO PENALTY PHASE

The defense called Dr. Etcoff as a mitigation witness. Dr. Etcoff had interviewed Mr. Chappell for two hours almost a decade before his second penalty phase testimony. On cross-examination, it became painfully obvious that Dr. Etcoff had not been properly prepared. It was obvious that the defense had failed to provide a mountain of relevant evidence to Dr. Etcoff. On cross-examination, Dr. Etcoff admitted he had relied upon Mr. Chappell's statements. In fact, Dr.

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Etcoff believed that the couple was splitting up which had occurred in the last few months prior to the victim's death (15 ROA 3550). Dr. Etcoff admitted that he did not know that the domestic violence had been going on for a lengthy period of time (15 ROA 3550). Dr. Etcoff believed that the problems in the relationship occurred shortly before the murder because Mr. Chappell told him so (15 ROA 3551). Dr. Etcoff admitted that he was unaware that the problems had been occurring for years (15 ROA 3551). In fact, Dr. Etcoff admitted that he was not provided evidence that the domestic violence was occurring on a weekly basis which resulted in injuries to Debra Panos (15 ROA 3551).

Dr. Etcoff admitted that this information would be important in formulating his opinion (15 ROA 3551). However, Dr. Etcoff was unaware of these facts. Dr. Etcoff admitted that he was unaware of the incident on June 1, where the defendant had pinned the victim down and placed a knife to her throat (15 ROA 3552). Dr. Etcoff admitted that he had not interviewed any of the witnesses associated with the years of domestic violence (15 ROA 3553). Dr. Etcoff admitted that the defense had not provided him any of this information prior to his testimony (15 ROA 3553).

More importantly, Dr. Etcoff admitted in the ten years since his evaluation that the defense had not provided any additional information (15 ROA 3554). Dr. Etcoff admitted that the information was relevant for a psychologist. Yet, Mr. Etcoff freely admitted that he was now relying on very limited data because of the failure of the defense to provide him with the information (15 ROA 3554). Dr. Etcoff admitted he was not aware that Mr. Chappell had allegedly threatened to kill Debra the day before (15 ROA 3555). Dr. Etcoff admitted that he was not provided information that Debra had been shaking curled up in the fetal position shortly before the murder (15 ROA 3556). Dr. Etcoff admitted on cross-examination that Mr. Chappell's story regarding consensual sex did not make sense (15 ROA 3556). Dr. Etcoff admitted that he believed the story didn't make sense now that he had an opportunity to be cross-examined regarding all the information he was unaware of (15 ROA 3556).

In fact, Dr. Etcoff was asked whether Mr. Chappell's story seemed "bogus" because there was semen found in Debra's vagina when Mr. Chappell denied ejaculation (15ROA 3557).

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Having concluded that Mr. Chappell's story was "bogus", Dr. Etcoff further concluded that the defense had not even provided him photos in the case (15 ROA 3557). At the conclusion of cross- examination, Dr. Etcoff explained that Mr. Chappell's statements that the fight occurred when he located the letters in Debra's car makes less sense (15 ROA 3558).

On redirect examination, defense counsel asked:

> Q: And you knew he had a long history of domestic violence with Debbie?
>
> A: I don't know if I knew. I don't believe I knew he had a long history of domestic violence and what it entailed, I don't believe I knew that stuff (15 ROA 3576).

In essence, Dr. Etcoff provided opinions to the jury on direct examination that were entirely refuted after cross examination. Dr. Etcoff apparently provided opinions that he withdrew based upon his lack of knowledge of the case. The excerpts from the penalty phase demonstrate that Dr. Etcoff was not provided relevant information to provide his opinion. Surely, in pre trial interviewing and/or preparation defense counsel would have provided Dr. Etcoff's with the long history of domestic violence. That fact was uncontradicted during the penalty phase. Numerous witnesses described years of domestic violence. Yet, the defenses expert was unaware of these facts.

During the direct examination of Dr. Etcoff, he was asked if it was common procedure to interview people associated with the defendant rather than just talking to the defendant (14 ROA 3477). Dr. Etcoff replied,

> You want to, as a psychologist, you want if someone's mother, or brother, or sister, or wife, or someone who knows them well is around and you really want to get an outside opinion or collateral opinion of what their functioning had been like. I do that all the time with people in civil cases. I wanna know what the spouse thinks has been the cause of the accident, so to speak. And undoubtedly then ask deputy public defender Brooks if anyone in the family was available or could they be brought to Las Vegas so I could interview them, but that wasn't possible. So the only person I was able to interview at the time was Mr. Chappell (14 ROA 3477).

Dr. Etcoff was then asked by penalty phase counsel if he got an accurate evaluation from Mr. Chappell and Dr. Etcoff replied that it was "as accurate as you can get". The Court sustained the State's objection (14 ROA 3477).

Here, more than ten years after Dr. Etcoff had requested permission to speak to the

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defendant's family, penalty phase counsel never made family members available to Dr. Etcoff

The lack of pre trial preparation was evident and devastating to Mr. Chappell. By the conclusion of cross-examination, Dr. Etcoff admitted that Mr. Chappell's story regarding consensual sex made no sense and was in fact "bogus". Dr. Etcoff apparently admitted that Mr. Chappell's story that he did not ejaculate was also unfounded. This was at a direct result of the failure to properly prepare the witness with accurate information.

Dr. William Danton is a clinical psychology at the University of Nevada, Reno, school of Medicine (15 ROA 3317).

During Dr. Danton's direct examination, he explained different hypotheses for why Debra may have had sex with Mr. Chappell on the day of the murder. However, Dr. Danton stated "the only issue about that is if there were affairs with other men, that doesn't fit well with that hypothesis. Of course, the other hypothesis is forced. He forced her to have sex" (14 ROA 3327). Here, the defense expert provided approximately four possible reasons for a sexual encounter with Mr. Chappell on the day of the murder. Dr. Danton concluded that one scenario would be forced sexual activity, providing the jury with the conclusion that rape was a certain possibility.

Dr. Danton discussed domestic violence during his testimony. Unbelievably, Dr. Danton testified that he first met with Mr. Chappell (for two hours) the night before his testimony on March 15, 2007 (15 ROA 3321). Here, the jury is aware that the case had been pending for years. Dr. Etcoff testified that he had evaluated Mr. Chappell ten years prior to his testimony. However, the jury learns that one of three defense experts analyzed the defendant for the first time the night before his testimony. Again, this expert was not properly prepared to testify. Was the defense preparing to call Dr. Danton irregardless of his interview with the defendant? Did the defense not prepare prior to trial in an effort to present a domestic violence expert? Why is the expert analyzing the defendant for the first time in the middle of the penalty phase? This fact establishes lack of pretrial preparation.

During Dr. Danton's testimony, he surmised that Mr. Chappel may have blacked out during the actual murder. This testimony would corroborate Mr. Chappel's trial testimony wherein he claimed he did not remember the actual facts of the stabbing. However, a juror asked

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a question of Dr. Danton. The juror asked "first off, in your opinion do you think that Mr. Chappell blacked out? If you have enough information to answer the question". (14 ROA 3371). Dr. Danton stated that he would be more on the side that Mr. Chappell did in fact black out (14 ROA 3371). However, Dr. Danton then stated, "although I have to, in all honesty, I don't have enough data to conclusively say he blacked out. There is testing that could be done that might establish that, but I haven't done it" (14 ROA 3371). Additionally, Dr. Etcoff was extensively questioned as to whether he really believed if Mr. Chappell had blacked out. The State feverishly argued that Mr. Chappell was lying about his testimony that he had blacked out during the actual murder. During Dr. Danton's testimony, he was later confronted with Dr. Etcoff's opinion that Mr. Chappell had not blacked out. Again, Dr. Danton confirmed, "to my knowledge no tests were done that might specifically speak to that question" (14 ROA 3373). Here, the defense witnesses appear to be directly contradicting each other. Yet, the testing had not been conducted. More importantly, it is clear that defense counsel had not properly pretrialed the expert witnesses, otherwise counsel would have noticed that their witnesses were contradicting each other. Yet, defense counsel failed to confer with Dr. Danton and ensure that the testing was aware of was conducted. Further proof of the failure to properly prepare for the penalty phase.

The defense called Dr. Grey who testified that he had not seen the DNA report (13 ROA 3230). The following is an excerpt from cross-examination:

Q: So you didn't read the report that talks about the presence of sperm as well?
A: I did not see that.
Q: But that would be conclusive that there was ejaculation?
A: Yes (13 ROA 3230).

Again, penalty phase counsel failed to properly prepare their expert witnesses. If Dr. Grey had been given an opportunity to review the report and discuss the case with counsel in depth, he would have had knowledge of this fact. More importantly, this is more evidence that penalty phase counsel should have obtained an expert to establish that semen can be present without ejaculation.

The following expert demonstrate further evidence of the failure to properly prepare Dr. Grey occurred during cross examination:

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Q: And that is based on what the defendants's version of events were?
A: Again, the specifics of how that information was gathered I do not know
Q: So you didn't look at the actual photographs or look at the evidence that was seized fro the scene in order to come to your conclusion?
A: The only pictures I saw were the ones related to the victims position (13 ROA 3230).

Dr. Grey also admitted that he had not been informed by the defense that Debra had been threatened in court the day before (13 ROA 3231). Additionally, Dr. Grey stated that he was unaware that Debra was shaking and afraid in the fetal position shortly before the murder (13 ROA 3231). Dr. Grey admitted that these threats were not taken into account regarding the issue of sexual assault (13 ROA 3231). Dr. Grey was unaware that Mr. Chappell had testified that he had pinned Debra down and that there was a knife present (13 ROA 3232). Dr. Grey admitted that he had not read Mr. Chappell's testimony (13 ROA 3232).

There is a pattern of lack of preparation throughout the penalty phase where in experts do not appear to have the information necessary to provide accurate opinions. On cross-examination this lack of preparation was devastating to Mr. Chappell.

E. FAILURE TO PROPERLY PREPARE A LAY MITIGATION WITNESS

The defense called Benjamin Dean as a mitigation witness (15 ROA 3706). Mr. Dean attended school with Mr. Chappel (15 ROA 3706). Not only did Mr. Dean grow up with Mr. Chappell but he also knew Debra (15 ROA 3709). On direct examination, Mr. Dean was asked about the couple's relationship and he stated, "I didn't see any problems with them..." (15 ROA 3708). However, on cross-examination Mr. Dean was severely impeached with his prior affidavit. On cross-examination Mr. Dean was asked whether he believed Debra was controlling and manipulating. Mr. Dean responded indicating he had never said that (15 ROA 3709). On cross-examination Mr. Dean was asked whether Debra wanted to keep Mr. Chappell away from his old friends. Mr. Dean denied saying that (15 ROA 3709). Mr. Dean denied ever stating that Debra was verbally abusive to James. However, having denied making any of these statements the prosecution then showed Mr. Dean his signed affidavit from March of 2003 (15 ROA 3709). In the affidavit, Mr. Dean affirmed that Debra was controlling (15 ROA 3709). The affidavit described Debra as manipulative and that she did not like his old friends (15 ROA 3709). The affidavit stated that Debra was abusive (15 ROA 3709). Mr. Dean had no credible answer for

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why his previous affidavit described Debra in such a poor light yet he denied making any of those statements in front of the jury.

Obviously, penalty phase counsel did not properly pretrial Mr. Dean. The first portion of the pretrial should have been to review Mr. Dean's prior affidavit. Furthermore, based on the direct examination of Mr. Dean it appears penalty phase counsel may have been unaware of Mr. Dean's prior affidavit. This was a part of a larger pattern of the failure to prepare. This is conclusive evidence that counsel proceeded to trial on a day to day basis without properly preparing witnesses in an effort to spare Mr. Chappell's life.

Mr. Chappell is entitled to a new penalty due to ineffective assistance of counsel.

III. MR. CHAPPELL RECEIVED INEFFECTIVE ASSISTANCE OF PENALTY PHASE TRIAL COUNSEL AND APPELLATE COUNSEL FOR FAILURE TO OBJECT TO THE CUMULATIVE VICTIM IMPACT PANEL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

On March 15, 2007, defense counsel specifically objected to victim impact statements being provided by witnesses that are not family members. (14 ROA 3271-3273). In response, the district court permitted victim impact statements from people other than family members but specifically stated, "as I said yesterday, to the extent we get to something overly cumulative in this presentation, I'll cut it off" (14 ROA 3273). On appeal, appellate counsel argued that the district court erred by permitting the prosecution to introduce "excessive victim impact testimony" (Order of Affirmance pp. 18). Specifically, appellate counsel complained that non-family members provided extensive impact evidence and that the State had failed to include in the notice mandated by Supreme Court Rule 250(4)(f).

First, on appeal, the Nevada Supreme Court explained, "however, Chappell did not object on the grounds of insufficient notice and thus the second claim is reviewed for plain error effecting his substantial rights". See, Archanian v. State, 122 Nev. 1019, 1031, 145 P.3d 1008, 1017 (2006)(Order of Affirmance pp. 18-19). The failure to trial penalty phase counsel to object mandated a higher standard of review on appeal. Trial penalty phase counsel was therefore ineffective for failing to object.

Additionally, appellate counsel failed to inform the Supreme Court that the victim impact

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statements were overly cumulative. For instance, the State provided live testimony of a witness and then having questioning the witness, asked the witness to read a statement that had been prepared prior to testimony. The written statements appeared to explain the same victim impact that had already been testified to.

Mr. Mike Pollard previously testified at the first trial. His testimony was read to the jury in its entirety (13 ROA 3114). Over the defense objection, the State was then permitted to call Mr. Pollard to provide live testimony (15 ROA 3678). The State admitted, "your honor, earlier in the case we read some testimony. We were unable to locate Mr. Mike Pollard. Later that day he -- we got a call from him so he's available. We would like to call him for a few brief questions with regard to impact" (15 ROA 3678). Unfortunately, Mr. Pollard's live testimony mirrored his testimony that was read in terms of the victim impact. This was objected to by trial penalty counsel but not raised on appeal. This is proof that the district court permitted overly cumulative presentation of victim impact that was not even associated with the victims family.

In both Mr. Pollard's live testimony and his previously read testimony, he indicated that he worked at GE Capital (15 ROA 3679; 13 ROA 3115). In both testimonies he indicated he met Debra at work (15 ROA 3679, 13 ROA 3115). In both testimonies he indicated that he had become close friends with the victim (15 ROA 3679,13 ROA 3116). In both testimonies, Mr. Pollard discussed that Debra had been on his sofa shortly before the murder (15 ROA 3679, 13 ROA 3131). In his live testimony, Mr. Pollard indicated that he had felt saddened that Debra's children would grow up without a mother (15 ROA 3679). In his live testimony, he described Debra as "a very sweet person" who was very friendly (15 ROA 3679). In his live testimony, Mr. Pollard explained that he ended up quitting his job because he could not concentrate and that he had to move out of Nevada, based on the victim impact (15 ROA 3679). In his previously read testimony, he described Debra as a kind hearted person who was very friendly (13 ROA 3134). In his previously read testimony he described how Debra loved her children very much (13 ROA 3134). Mr. Pollard described Debra as kind hearted and happy go lucky (13 ROA 3134).

Moreover, cumulative impact testimony is present during the testimony of Carol Monson (15 ROA 3681). Ms. Monson was Debra's Aunt. Ms. Monson testified regarding victim impact

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for approximately ten pages. Thereafter, Ms. Monson was permitted to read letters from other witnesses including Christina Reese, Ms. Dorris Waskowski (15 ROA 3684). Having read the letters from Ms. Reese and Ms. Waskowski, the State had Ms. Monson read further updated letters from both of these witnesses (Reese and Waskowski). If that wasn't sufficiently cumulative, the State had Ms. Monson read her own letter that is almost four further pages of text (15 ROA 3681-3686). Here, Ms. Monson was permitted to provide live testimony explaining the impact Debra's death had upon her. Then, she was permitted to read two prior letters written by individuals who had been impacted by Debra's death. Then, Ms. Monson was asked to read updated letters from those two individuals. Then, Ms. Monson was asked to read a letter that she had prepared.

The district court claimed it would preclude cumulative victim impact statements. Here, the cumulative effect was overwhelming. This was not raised on appeal to the Nevada Supreme Court.

"A district court's decision to admit particular evidence during the penalty phase is within the sound discretion of the district court and will not be disturbed absent an abuse of that discretion" Johnson v. State, 122 Nev. 1344, 1353, 148 P.3d 767, 774 (2006) (quoting, McConnell v. State, 120 Nev. 1043, 1057, 102 P.3d 606, 616 (2004)(quotation marks omitted). In the instant case, the district court abused its discretion when it permitted this continuously cumulative victim impact. This was specifically objected to by counsel at the penalty phase. On appeal, appellate counsel complained that the district court had permitted an excessive amount of victim impact. The supreme Court disagreed. On appeal, the Nevada Supreme Court held that individuals outside the victims families can present victim impact. See, Wesley v. State, 112 Nev. 503, 519, 916 P.2d793, 804 (1996). However, the Court cannot permit people to provide live testimony and then have their testimony read into evidence and then provide live testimony which mirrors the previously read testimony, regarding victim impact. The court cannot permit individuals to provide live testimony regarding the impact and thereafter read lengthy statements mirroring the impact. Clearly, the district court permitted overly cumulative victim impact over Mr. Chappell's objection.

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It was ineffective assistance of trial counsel to fail to object to the notice requirement which was raised on direct appeal. It was ineffective assistance of appellate counsel from the second penalty phase for failure to inform the supreme court regarding the extent to the cumulative victim impact that was presented. Had the Supreme Court known the extent of the error, Mr. Chappell's penalty phase would have been reversed.

IV. PENALTY PHASE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO IMPROPER PROSECUTORIAL ARGUMENTS DURING THE PENALTY PHASE IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Specifically, in appellant's Opening Brief on appeal from the second penalty phase, appellate counsel complained of excessive prosecutorial misconduct. Attached as "Exhibit B" is pages 64-70 of appellants Opening Brief wherein the argument of excessive misconduct is raised. On appeal, appellate counsel noted that trial counsel did not object to this misconduct and therefore the court had to consider the matter for plain error. U.S. v. Olano, 507 U.S. 525, 731 (1993); U.S. v. Leon, v. Reyes, 177 F.3d 816, 821 (9th Cir. 1999). The following is a list of arguments raised by penalty phase appellate counsel which were not objected to at the penalty phase.

1. Misstating the role of mitigating circumstances (Appellants Opening Brief pp. 66)
2. "Don't let the defendant fool you" (Appellant's Opening Brief pp. 67)
3. Justice and Mercy arguments (Appellant's Opening Brief pp. 68)

The Supreme Court specifically noted that Mr. Chappell failed to object to the comparative worth, role of the mitigating circumstances, the mercy argument, and the argument that Chappell conned the jury (Order of Affirmance pp. 22-24). The Supreme Court considered these arguments for plain error. Penalty phase counsel made numerous errors that taken as a whole must result in reversal.

V. PENALTY PHASE COUNSEL AND PENALTY PHASE APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE SEVERAL INSTANCES OF IMPROPER PROSECUTORIAL ARGUMENT WHICH SHOULD HAVE BEEN RAISED SIMULTANEOUSLY IN MR. CHAPPELL'S APPEAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

During the cross-examination of Dr. Etcoff, testimony was elicited that Mr. Chappell had

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complained he had been arrested for a domestic violence incident in front of his children (15 ROA 3541-3542). The prosecutor questioned Dr. Etcoff stating:

> Q: Because it probably marked his otherwise sterling reputation he had with his children at that point to see the police for the tenth time taking their father off in handcuffs (15 ROA 3542).

Defense counsel objected and the court sustained the objection. This issue was not raised on appeal.

NRS 48.045(2) provides, Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

NRS 48.045 states, "[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. See, Taylor v. State, 109 Nev. 849, 853, 858 P.2d 843, 846 (1993). See also, Beck v. State, 105 Nev. 910, 784 P.2d 983 (1989). However, an exception to this general rule exists. Prior bad act evidence is admissible in order to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. See, NRS 48.045(2). It is within the trial court's sound discretion whether evidence of a prior bad act is admissible.... Cipriano v. State, 111 Nev. 534, 541, 894 P.2d 347, 352 (1995). See also, Crawford v. State, 107 Nev. 345, 348, 811 P.2d 67, 69 (1991).

In the instant case, there is no evidence that Mr. Chappell was arrested ten times in front of his children. However, undoubtedly the jury would have believed that the children were exposed to approximately ten arrests because the prosecutor posed the question in that manner. First, it is improper for a prosecutor to elude to facts outside of the record which deny the defendant a right to a fair hearing. Agard v. Portuondo, 117 F.3d 696, 711 (2nd Cir. 1997)(holding that alluding to facts that are not in evidence is prejudicial and not at all probative)(cert. granted on other grounds, 119 Sup. Ct. 1248 (1999). The Nevada Supreme Court has frequently condemned prosecutors from eluding to facts outside of the record. See, EG, Guy v. State, 108 Nev. 770, 780, 839 P.2d 578, 585 (1992)(cert. denied, 507 U.S. 109 (1993); Sandburn v. State,

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107 Nev. 399, 408-409, 812 P.2d 1279, 1286 (1999); Jimimez v. State, 106 Mev. 769, 772, 801 P.2d 1366, 1368 (1990); Collier v. State, 101 Nev. 473, 478, 705 P.2d 1126, 1129 (1985).

There was absolutely no proof that Mr. Chappell had been arrested ten times in front of his children. It was highly improper for the prosecutor to make such as assertion. The average juror has confidence that the obligations of the prosecutor will be faithfully observed. Consequently, improper suggestions, insinuations, and especially assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

This issue was not raised on appeal from the penalty phase. This question was highly improper. The statement violated NRS 48.045(b) and has been denounced by both state and federal courts. Had this issue been raised on appeal, the Nevada Supreme Court would have reversed Mr. Chappell's sentence of death.

Next, during closing argument, the prosecution described how Mr. Chappell "choose evil" (16 ROA 3778). The prosecution also stated that Mr. Chappell is "a despicable human being" (16 ROA 3779). This comments were neither objected to at the penalty phase nor raised on appeal. The attorneys were therefore ineffective. It is improper for prosecutors to ridicule or disparage the defendant. Indeed "the prosecutor's obligation to desist from the use of pejorative language and inflammatory rhetoric is as every bit as solemn as his obligation to attempt to bring the guilty to account" U.S. v. Rodriguez-Estrada, 877 F.2d 153, 159 (1st. Cir. 1989).

The Nevada Supreme Court has long recognized that a prosecutor has a duty not to ridicule or belittle the defendant. See. Earl v. State, 111 Nev. 1304, 904 P.2d 1029, 1033 (1995), Jones v. State, 113 Nev. 454, 937 P.2d 55, 62 (1997). In U.S. v. Weatherless, 734 F.2d 179, 181 (4th Cir. 1984), the Court stated that it was beneath the standard of a prosecutor to refer to the accused as a "sick man". (Cert denied, 469 U.S. 1088 (1984)). Court have held it improper for a prosecutor to characterize defendants as "evil men". See, People v. Hawkins, 410 N.E. 2d 309 (Illinois 1980). A prosecutor referring to the defendant as a maniac exceeded the bounds of propriety. People v. Terrell, 310 NE 2d 791, 795 (Illinois Ap. Ct. 1994). Improper for a prosecutor to refer to the defendant as "slime". Biondo v. State, 533 South 2d 910-911 (FALA

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1988). Reversing conviction where prosecutor referred to the defendant as "crud". Patterson v. State, 747 P.2d 535, 537-38 (Alaska, 1987). Condemning prosecutor's remarks referring to the defendant as a "rabid animal". Jones v. State, 113 Nev. 454, 468-69 937 P.2d at 62.

In the instant case, the comments made by the prosecutor taken as a whole must result in a reversal. Here, the prosecutor stated that the defendant had been arrested ten times in front of his children, which hurt his "sterling reputation". The defendant was referred to as a "despicable human being". The defendant "choose evil". These comments were not objected to during the penalty phase or on appeal from the penalty phase. If the Nevada Supreme Court had been aware that these comments had been made (and not isolated) the result of the appeal from the penalty phase would have resulted in reversal. Mr. Chappell received ineffective assistance of penalty phase trial counsel and appellate counsel.

VI. MR. CHAPPELL RECEIVED INEFFECTIVE ASSISTANCE OF PENALTY PHASE COUNSEL AND APPELLATE COUNSEL FOR FAILURE TO OBJECT TO IMPROPER IMPEACHMENT IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. Chappell called Fred Scott Dean as a mitigation witness. Mr. Dean was important to Chappell's mitigation because he had known Mr. Chappell throughout his life (15 ROA 3696-3697). Mr. Dean admitted that he had been convicted of federal drug trafficking and drug possession (State and Federal convictions) (15 ROA 3701). However, on cross-examination, the prosecutor elicited the following testimony from Mr. Dean:

Q: How long were you prison for?
A: Twelve years.
Q: That's a long time.
A: Yes sir.
Q: What kind of charges?
A: Like I said drug possession, and the other one was interstate drug trafficking.
Q: Were there other charges that were dismissed as part of your deal there?
A: There was no pretty much deal. That was just - - it was plead to the lesser charge versus the charge that I was charged with. Yes.
Q: So you plead to a lesser charge?
A: Yes.
Q: And the lesser charge was?
A: 12-30 - well, it was 20-30 the judge sentenced me to 12-30.
Q: And that was a drug charge?
A: Yes sir.
Q: What was the more serious charge that was reduced/
A: I was trying to think of how they titled it, possession of drugs over 65

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grams.
Q: Was this cocaine?
A: Yes sir.
Q: 65 grams is a lot of cocain.
A: Yes sir.
Q: So this was drug trafficking or this was trafficking quantity?
A: Yes sir.
Q: And the minimum sentence would have been a lot more severe if you hadn't done the deal?
A: When you say deal, what do you mean by that?
Q: Taking the lesser plea.
A: I would have been worse, yes sir (15 ROA 3702).

NRS 50.095 impeachment by evidence of conviction of a crime:

1. The purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is admissible but only if the crime was punishable by death or imprisonment for more than 1 year under the law under which the witness was convicted.

The Nevada Supreme Court and the federal courts have made it abundantly clear that impeachment with a felony conviction cannot go into the facts in details of the conviction. Here, Mr. Dean freely admitted that he had drug convictions. The prosecutor went into significant detail. This was highly improper.

For example, in Jacobs v. State, 91 Nev. 155, 532 P.2d 1034 (1975), the Nevada Supreme Court held that an inquiry into the credibility of a witness may be attacked by evidence that a witness has been convicted of a crime however it was error to allow questioning concerning the actual term that was imposed. Although a witness may be impeached with evidence of prior convictions, the details and circumstances of the prior crimes are not an appropriate subject of inquiry. Shults v. State, 96 Nev. 742, 616 P.2d 3 88 (1980).

The prosecutor elicited numerous answers which were in violation of the statute and case law. This statute mirrors the federal statutes on point. Neither counsel for Mr. Chappell at the penalty phase or on appeal objected. Mr. Chappell received ineffective assistance of counsel for failure to object to this issue. Pursuant to the prejudice standard enunciated in Strickland, the result of the appeal would have mandated reversal had this issue been properly raised.

VII. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN ALLOWING THE ADMISSION OF EVIDENCE OF SEVERAL BAD ACTS THUS VIOLATING APPELLANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS AND WARRANTING REVERSAL OF HIS PENALTY PHASE.

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During the State's case in chief, Ladonna Jackson was called as a witness. Ms. Jackson knew Mr. Chappell from the Vera Johnson Housing project (13 ROA 3198). Over defense counsel's object, Ms. Jackson was allowed to testify that Mr. Chappell made money "by stealing" (13 ROA 3203). Defense counsel objected and the court overruled the objection. The State is required to place the defendant on notice of evidence to be used at the penalty phase. There is no indication in the record that Mr. Chappell was on notice that Ms. Jackson would provide her opinion that Mr. Chappell was a thief. See, Nunnery v. State, 127 Nev. Adv. Op. 69(October 27, 2011).

NRS 48.045(2) provides, Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Once the court's ruled that evidence is probative of one of the permissible issues under NRS 48.045(2), the court must decide whether the probative value of the evidence is substantially outweighed by its prejudicial effect.

NRS 48.045 states, "[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. See, Taylor v. State, 109 Nev. 849, 853, 858 P.2d 843, 846 (1993). See also, Beck v. State, 105 Nev. 910, 784 P.2d 983 (1989). However, an exception to this general rule exists. Prior bad act evidence is admissible in order to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. See, NRS 48.045(2). It is within the trial court's sound discretion whether evidence of a prior bad act is admissible.... Cipriano v. State, 111 Nev. 534, 541, 894 P.2d 347, 352 (1995). See also, Crawford v. State, 107 Nev. 345, 348, 811 P.2d 67, 69 (1991).

"The duty placed upon the trial court to strike a balance between the prejudicial effect of such evidence on the one hand, and its probative value on the other is a grave one to be resolved by the exercise of judicial discretion.... Of course the discretion reposed in the trial judge is not unlimited, but an appellate court will respect the lower court's view unless it is manifestly

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wrong." Bonacci v. State, 96 Nev. 894, 620 P.2d 1244 (1980), citing, Brown v. State, 81 Nev. 397, 400, 404 P.2d 428 (1965).

In the instant case, Mr. Chappell should not have had to defend against unfounded allegations made during the penalty phase. It was ineffective assistance of appellate counsel for failure to raise this issue.

VIII. THE DEATH PENALTY IS UNCONSTITUTIONAL[2]

Mr. Chappell's state and federal constitutional rights to due process, equal protection, right to be free form cruel and unusual punishment, and right to a fair penalty hearing were violated because the death penalty is unconstitutional. U.S. Const. Amend. V, VI, VII, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

In support of this claim, Mr. Chappell alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

Nevada law requires that execution be inflicted by an injection of a lethal drug. NRS 176.355(1). Competent physicians cannot administer the lethal injection, because the ethical standards of the American Medical Association prohibit physicians from participating in an execution other than to certify that a death has occurred. American Medical Association, House of Delegates, Resolution 5 (1992); American Medical Association, Judicial Council, Current Opinion 2.06 (1980). Non-physician staff from the Department of Corrections will have the responsibility of locating veins and injecting needles which are connected to the lethal injection machine.

In recent executions in states employing lethal injection, prolonged and unnecessary pain has been suffered by the condemned individual by difficulty in inserting needles and by unexpected chemical reactions among the drugs or violent reactions to them by the condemned individual.

The following lethal injection executions, among others, have produced prolonged and

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[2]Mr. Chappell acknowledges that the Nevada Supreme Court has consistently denied this issue. However, Mr. Chappell presents this issue to preserve it for federal review.

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unnecessary pain:

Stephen Peter Morin: March 13, 1985 (Texas). Had to probe both arms and legs with needles for 45 minutes before they found the vein.

Randy Woolls: August 20, 1986 (Texas). A drug addict, Woolls had to help the executioner technicians find a good vein for the execution.

Raymond Landry: December 13, 1988 (Texas). Pronounced dead 40 minutes after being strapped to the execution gurney and 24 minutes after the drugs first started flowing into his arms. Two minutes into the killing, the syringe came out of Landry's vein, spraying the deadly chemicals across the room toward the witnesses. The execution team had to reinsert the catheter into the vein. The curtain was drawn for 14 minutes so witnesses could not see the intermission.

Stephen McCoy: May 24, 1989 (Texas). Had such a violent physical reaction to the drugs (heaving chest, gasping, choking, etc.) that one of the witnesses (male) fainted, crashing into and knocking over another witness. Houston attorney Karen Zellars, who represented McCoy and witnessed the execution, thought that the fainting would catalyze a chain reaction. The Texas Attorney General admitted the inmate "seemed to have a somewhat stronger reaction," adding "the drugs might have been administered in a heavier dose or more rapidly."

Rickey Ray Rector: January 24, 1992 (Arkansas). It took medical staff more than 50 minutes to find a suitable vein in Rector's arm. Witnesses were not permitted to view this scene, but reported hearing Rector's loud moans throughout the process. During the ordeal, Rector (who suffered serious brain damage from a lobotomy) tried to help the medical personnel find a vein. The administrator of the State's Department of Corrections medical programs said (paraphrased by a newspaper reporter) "the moans did come as a team of two medical people that had grown to five worked on both sides of his body to find a vein." The administrator said "that may have contributed to his occasional outburst."

Robyn Lee Parks: March 10, 1992 (Oklahoma). Parks had a violent reaction to the drugs used in the lethal injection. Two minutes after the drugs were administered, the muscles in his jaw, neck and abdomen began to react spasmodically for approximately 45 seconds. Parks continued to gasp and violently gag. Death came eleven minutes after the drugs were

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administered. Said Tulsa World reporter, Wayne Greene, "the death looked ugly and scary."

Billy Wayne White: April 23, 1992 (Texas). It took 47 minutes for authorities to find a suitable vein, and White eventually had to help.

Justin Lee May: May 7, 1992 (Texas). May had an unusually violent reaction to the lethal drugs. According to Robert Wernsman, a reporter for the Item (Huntsville), Mr. May "gasped, coughed and reared against his heavy leather restraints, coughing once again before his body froze . . . ." Associated Press reporter Michael Graczyk wrote, "He went into coughing spasms, groaned and gasped, lifted his head from the death chamber gurney and would have arched his back if he had not been bolted down. After he stopped breathing his eyes and mouth remained open."

John Wayne Gacy: May 19, 1994 (Illinois). After the execution began, one of the three lethal drugs clogged the tube leading to Gacy's arm, and therefore stopped flowing. Blinds, covering the windows through which witnesses observe the execution, were then drawn. The clogged tube was replaced with a new one, the blinds were opened, and the execution process resumed. Anesthesiologists blamed the problem on the inexperience of the prison officials who were conducting the execution, saying that proper procedures taught in "IV 101" would have prevented the error.

Emmitt Foster: May 3, 1995 (Missouri). Foster was not pronounced dead until 30 minutes after the executioners began the flow of the death chemicals into his arms. Seven minutes after the chemicals began to flow, the blinds were closed to prohibit witnesses from viewing the scene, and they were not reopened until three minutes after the death was pronounced. According to the coroner, who pronounced death, the problem was caused by the tightness of the leather straps that bound Foster to the gurney; it was so tight that the flow of chemical into his veins was restricted. It was several minutes after a prison worker finally loosened the strap that death was pronounced. The coroner entered the death chamber twenty minutes after the execution began, noticed the problem and told the officials to loosen the strap so that the execution could proceed.

Tommie Smith: July 18, 1996 (Indiana). Smith was not pronounced dead until an hour

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and 20 minutes after the execution team began to administer the lethal combination of intravenous drugs. Prison officials said the team could not find a vein in Smith's arm and had to insert an angio-catheter into his heart, a procedure that took 35 minutes. According to authorities, Smith remained conscious during that procedure.

The procedures utilized to conduct the executions described above are substantially similar to those utilized by the State of Nevada.

Because of inability of the State of Nevada to carry out Mr. Chappell's execution without the infliction of cruel and unusual punishment, the sentence must be vacated.

A. NEVADA'S DEATH PENALTY SCHEME DOES NOT NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY.

Under contemporary standards of decency, death is not an appropriate punishment for a substantial portion of convicted first-degree murderers. Woodson, 428 U.S. at 296. A capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty. Hollaway, 116 Nev. 732, 6P.3d at 996; Arave, 507 U.S. at 474; Zant, 462 U.S. at 877; McConnell, 121 Nev. At 30, 107 P.3d at 1289. Despite the Supreme Court's requirement for restrictive use of the death sentence, Nevada law permits broad imposition of the death penalty for virtually and all first-degree murderers. As a result, in 2001, Nevada had the second most persons on death row per capita in the nation. James S. Liebman, A Broken System: Error Rates in Capital Cases, 1973-1995 (2000); U.S. Dept. Of Justice, Bureau of Justice Statistics Bulletin, Capital Punishment 2001; U.S. Census Bureau, State population Estimates: April 2000 to July 2001, http://eire.census.gov/pspest/date/states/tables/ST-eest2002-01.php. Professor Liebman found that from 1973 through 1995, the national average of death sentences per 100,000 population, in states that have the death penalty, was 3.90. Liebman, at App. E-11.

The sates with the highest death rate for the death penalty for this period were as follows: Nevada – 10.91 death sentences per 100,000 population; Arizona - 7.82; Alabama - 7.75; Florida - 7.74; Oklahoma -7.06; Mississippi - 6.47; Wyoming -6.44; Georgia - 5.44; Texas - 4.55. Id. Nevada's death penalty rate was nearly three time the national average and nearly 40% higher than the next highest state for this 12 year period. Such a high death penalty rate in Nevada is due to the fact that neither the Nevada statues defining eligibility for the death penalty nor the case

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law interpreting these statues sufficiently narrows the class of persons eligible for the death penalty in this state.

Mr. Chappell recognizes that the Nevada Supreme Court has repeatedly affirmed the constitutionality of Nevada's death penalty scheme. See Leonard, 117 Nev. at 83, 17 P.3d at 416 and cases cited therein. Nonetheless, the Court has never explained the rationale for its decision on this point and has yet to articulate a reasoned and detailed response to this argument. This issue is presented here both so that this Court may consider the full merits of this argument and so that this issue may be fully preserved for review by the federal courts.

B. THE DEATH PENALTY IS CRUEL AND UNUSUAL PUNISHMENT.

Mr. Chappell's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, and a reliable sentence because the death penalty is cruel and unusual punishment and under the Eighth and Fourteenth Amendments. He recognizes that this Court has found the death penalty to be constitutional, but urges this Court to overrule its prior decisions and presents this issue to preserve it for federal review.

Under the federal constitution, the death penalty is cruel and unusual in all circumstances. *See* Gregg v. Georgia, 428 U.S. 153, 227 (Brennan, J., dissenting); id. at 231 (Marshall, J., dissenting); contra, id. at 188-195 (Opn. of Stewart, Powell and Stevens, JJ.); id. at 276 (White, J., concurring in judgment). since stare decisis is not consistently adhered to in capital cases, e.g., Payne v. Tennessee, 111 S.Ct. 2597 (1991), this court and the federal courts should reevaluate the constitutional validity of the death penalty.

The death penalty is also invalid under the Nevada Constitution, which prohibits the imposition of "cruel or unusual" punishments. Nev. Const. Art. 1 § 6. While the Nevada case law has ignored the difference in terminology, and had treated this provision as the equivalent of the federal constitutional prohibition against "cruel and unusual punishments, e.g. Bishop v. State, 95 Nev. 511, 517-518, 597 P.2d 273 (1979), it has been recognized that the language of the constitution affords greater protection than the federal charter: "under this provision, if the punishment is either cruel or unusual, it is prohibited. "Mickle v. Henrichs, 262 F. 687 (D. Nev. 1918). While the infliction of the death penalty may not have been considered "cruel" at the time

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of the adoption of the constitution in 1864, "the evolving standards of decency that make the progress of a maturing society. "Trop v. Dulles, 356 U.S. 86, 101 (1958) have led in the recognition even by the staunchest advocates of its permissibility in the abstract, that killing as a means of punishment is always cruel. *See* (Furman v. Georgia, 408 U.S. 238, 312 (White, J., concurring); *See* Walton v. Arizona, 110 S.Ct. 3047, 3066 (1990) (Scalia, J., concurring). Accordingly, under the disjunctive language of the Nevada Constitution, the death penalty cannot be upheld.

The death penalty is also unusual, both in the sense that is seldom imposed and in the sense that the particular cases in which it is imposed are not qualitatively distinguishable from those in which is it not. Further, the case law has so broadly defined the scope of the statutory aggravating circumstances that it is the rare case in which a sufficiently imaginative prosecutor could not allege an aggravating circumstance. In particular, the "random and motiveless" aggravating circumstance under NRS 200.033(9) has been interpreted to apply to "unnecessary" killings, e.g. Bennett v. State, 106 Nev. 135, 143, 787 P.2d 797 (1990), a category which includes virtually every homicide. Nor has the Court ever differentiated, in applying the felony murder aggravating factor, between homicides committed in the course of felonies and homicides in which a felony is merely incidental to the killing. CF. People v. Green, 27 Cal.3d 1, 61-62, 609 P.2d 468 (1980). Given these expansive views of the aggravating factors, they do not in fact narrow the class of murders for which the death penalty may be imposed, nor do they significantly restrict prosecutorial discretion in seeking the death penalty: in essence, the present situation is indistinguishable from the situation before the decision in Furman v. Georgia, 408 U.S. 238 (1972) when having the death penalty imposed was "cruel and unusual in the same way that being struck by lightning is cruel and unusual." Id. at 309 (Stewart, J., concurring). There is no other way to account for the fact that in a case such as Faessel v. State, 108 Nev. 413, 836 P.2d 609 (1992), the death penalty is not even sought and the defendant receives a second-degree murder sentence; in Mercado v. State, 100 Nev. 535, 688 P.2d 305 (1984), the perpetrator of an organized murder in prison receives a life sentence; and appellant, convicted of killing the woman he loved in a drug-induced frenzy, is found deserving of the ultimate penalty the state can

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exact.

The United States Supreme Court, unfortunately, has continued to confuse means with ends: while focusing exclusively upon the procedural mechanisms which are supposed to produce justice, it has neglected the question whether these procedures are in fact resulting in the death penalty being applied in a rational and even-handed manner, upon the most unredeemable offenders convicted of the most egregious offenses. The fact that this case was selected as one of the very few cases in which the death penalty should be imposed is a sufficient demonstration that these procedures do not work. Accordingly, this Court should recognize that the death penalty as currently constituted and applied results in the imposition of cruel or unusual punishment, and the sentence should therefore be vacated.

C. EXECUTIVE CLEMENCY IS UNAVAILABLE.

Mr. Chappell's death sentence is invalid because Nevada has no real mechanism to provide for clemency in capital cases. Nevada law provides that prisoners sentenced to death may apply for clemency to the State Board of Pardons Commissioners. See NRS 213.010. Executive clemency is an essential safeguard in a state's decision to deprive an individual of life, as indicated by the fact that ever of the 38 states that has the death penalty also has clemency procedures. Ohio Adult parole Authority v. Woodward, 523 U.S. 272, 282 n. 4 (1998) (Stevens, J., concurring in part, dissenting in part). Having established clemency as a safeguard, these states must also ensure that their clemency proceedings comport with due process. Evitts v. Lucey, 469 U.S. 387, 401 (1985). Nevada's clemency statutes, NRS 213.005-213.100, do not ensure that death penalty inmates receive procedural due process. See Mathews v. Eldrige, 424 U.S. 319, 335 (1976). As a practical matter, Nevada does not grant clemency to death penalty inmates. Since 1973, well over 100 people have been sentenced to death in Nevada. Bureau of Justice Statistics Report, Capital Punishment 2006 (December 2007 NCJ 220219).

Mr. Chappell is informed and believes and on that basis alleges that since the reinstatement of the death penalty, only a single death sentence in Nevada has been commuted and in that case, it was commuted only because the defendant was mentally retarded and the U.S. Supreme Court found that the mentally retarded could no longer be executed. It cannot have been

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the legislature's intent to create clemency proceedings in which the Board merely rubber-stamps capital sentences. The fact that Nevada's clemency procedure is not exercised on behalf of death-sentenced inmates means, in practical effect, that is does not exist. The failure to have a functioning clemency procedure makes Nevada's death penalty scheme unconstitutional, requiring the vacation of Mr. Chappell's sentence.

IX. MR. CHAPPELL'S DEATH SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, AND A RELIABLE SENTENCE, BECAUSE THE NEVADA CAPITAL PUNISHMENT SYSTEM OPERATES IN AN ARBITRARY AND CAPRICIOUS MANNER. U.S. CONST. AMENDS. V, VI, VIII AND XIV; NEV. CONST. ART. I SECS. 3, 6 AND 8; ART IV, SEC. 21.[3]

In support of this claim, Mr. Chappell alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power and an evidentiary hearing:

1. Mr. Chappell hereby incorporates each and every allegation contained in this petition as if fully set forth herein.

2. The Nevada capital sentencing process permits the imposition of the death penalty for any first degree murder that is accompanied by an aggravating circumstance. NRS 200.020(4)(a). The statutory aggravating circumstances are so numerous and so vague that they arguable exist in every first-degree murder case. *See* NRS 200.033. Nevada permits the imposition of the death penalty for all first-degree murders that are "at random and without apparent motive." NRS 200.033(9). Nevada statutes also appear to permit the death penalty for murders involving virtually every conceivable kind of motive: robbery, sexual assault, arson, burglary, kidnapping, to receive money, torture, to prevent lawful arrest, and escape. *See* NRS 200.033. The scope of the Nevada death penalty statute is thus clear: The death penalty is an option for all first degree murders that involve a motive, and death is also an option if the first degree murder involves no motive at all.

3. The death penalty is accordingly permitted in Nevada for all first-degree murders,

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[3] Mr. Chappell acknowledges that the Nevada Supreme Court has consistently denied this issue. However, Mr. Chappell presents this issue to preserve it for federal review.

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and first-degree murder, in turn, are not restricted in Nevada within traditional bounds. As the result of unconstitutional form jury instructions defining reasonable doubt, express malice and premeditation and deliberation, first degree murder convictions occur in the absence of proof beyond a reasonable doubt, in the absence of any rational showing of premeditation and deliberation, and as a result of the presumption of malice aforethought. Consequently, a death sentence is permissible under Nevada law in every case where the prosecution can present evidence, not even beyond a reasonable doubt, that an accused committed an intentional killing.

4. As a result of plea bargaining practices, and imposition of sentences by juries, sentences less than death have been imposed for offenses that are more aggravated than the one for which Mr. Chappell stands convicted; and in situations where the amount of mitigating evidence was less than the mitigation evidence that existed here. The untrammeled power of the sentencer under Nevada law to declines to impose the death penalty, even when no mitigating evidence exists at all, or when the aggravating factors far outweigh the mitigating evidence, means that the imposition of the death penalty is necessarily arbitrary and capricious.

5. Nevada law fails to provide sentencing bodies with any rational method for separating those few cases that warrant the imposition of the ultimate punishment form the many that do not. The narrowing function required by the Eighth Amendment is accordingly non-existent under Nevada's sentencing scheme, and the process is contaminated even further by Nevada Supreme Court decisions permitting the prosecution to present unreliable and prejudicial evidence during sentencing regarding uncharged criminal activities of the accused. Consideration of such evidence necessarily diverts the sentencer's attention from he statutory aggravating circumstances, whose appropriate application is already virtually impossible to discern. The irrationality of the Nevada capital punishment system is illustrated by State of Nevada v. Jonathan Daniels, Eighth Judicial District Court Case No.C126201. Under the undisputed facts of that case, Mr. Daniels entered a convenience store on January 20, 1995, with the intent to rob the store. Mr. Daniels then held the store clerk at gunpoint for several seconds while the clerk begged for his life; Mr. Daniels then shot the clerk in the head at point blank range, killing him. A moment later, Mr. Daniels shot the other clerk. Mr. Daniels and two

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friends then left the premises calmly after first filling up their car with gas. Despite these egregious facts, and despite Mr. Daniels' lengthy criminal record, he was sentenced to life in prison for these acts.

6. There is not rational basis on which to conclude that Mr. Daniels deserves to live whereas Mr. Chappell deserves to die. These facts serve to illustrate how the Nevada capital punishment system is inherently arbitrary and capricious. Other Clark County cases demonstrate this same point: In State v. Brumfield, Case No. C145043, the District Attorney accepted a plea for sentence of less than death for a double homicide; and in another double homicide case involving a total of 12 aggravating factors resulted in sentences of less than death for two defendants. State v. Duckworth and Martin, Case No. C108501. Other Nevada cases as aggravated as the one for which Mr. Chappell was sentenced to death have also resulted in lesser sentences. See Ewish v. State, 110 Nev. 221, 223-25, 871 P.2d 306 (1994); Callier v. Warden, 111 Nev. 976, 979-82, 901 P.2d 619 (1995); Stringer v. State, 108 Nev. 413, 415-17 836 P.2d 609 (1992).

7. Because the Nevada capital punishment system provides no rational method for distinguishing between who lives and who dies, such determinations are made on the basis of illegitimate considerations. In Nevada capital punishment is imposed disproportionately on racial minorities: Nevada's death row population is approximately 50% minority even though Nevada's general minority population is less than 20%. All of the people on Nevada's death row are indigent and have had to defend with the meager resources afforded to indigent defendants and their counsel. As this case illustrates, the lack of resources afforded to indigent defendants and their counsel. As this case illustrates, the lack of resources provided to capital defendants virtually ensures that compelling mitigating evidence will not be presented to, or considered by, the sentencing body. Nevada sentencers are accordingly unable to, and do not, provide the individualized, reliable sentencing determination that the constitution requires.

8. These systemic problems are not unique to Nevada. The American Bar Association has recently called for a moratorium on capital punishment unless and until each jurisdiction attempting to impose such punishment "implements policies and procedures that are

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consistent with . . . . longstanding American Bar Association policies intended to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed . . . . " as the ABA has observed in a report accompanying its resolution, "administration of the death penalty, from being fair and consistent, is instead a haphazard maze of unfair practices with no internal consistency" (ABA Report). The ABA concludes that this morass has resulted from the lack of competent counsel in capital cases, the lack of a fair and adequate appellate review process, and the pervasive effects of race. Like wise, the states of Illinois and Nebraska have recently enacted or called for a moratorium on imposition of the death penalty.

9. The United Nations High Commissioner for Human Rights has recently studied the American capital punishment process, and has concluded that "guarantees and safeguards, as well as specific restrictions on Capital Punishment, are not being respected. Lack of adequate counsel and legal representation for many capital defendants is disturbing." The High Commissioner has further concluded that "race, ethnic origin and economic status appear to be key determinants of who will, and who will not, receive a sentence of death." The report also described in detail the special problems created by the politicization of the death penalty, the lack of an independent and impartial state judiciary, and the racially biased system of selecting juries. The report concludes:

> The high level of support for the death penalty, even if studies have shown that it is not as deep as is claimed, cannot justify the lack of respect for the restrictions and safeguards surrounding its use. In many countries, mob killings an lynching enjoy public support as a way to deal with violent crime and are often portrayed as "popular justice." Yet they are not acceptable in civilized society.

10. The Nevada capital punishment system suffers from all of the problems identified in the ABA and United Nations reports - the under funding of defense counsel, the lack of a fair and adequate appellate review process and the pervasive effects of race. The problems with Nevada's process, moreover, are exacerbated by open-ended definitions of both first degree murder and the accompanying aggravating circumstances, which permits the imposition of a death sentence for virtually every intentional killing. This arbitrary, capricious and irrational

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scheme violates the constitution and is prejudicial *per se.*

X. **MR. CHAPPELL'S CONVICTION AND DEATH SENTENCE ARE INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, TRIAL BEFORE AN IMPARTIAL JURY AND A RELIABLE SENTENCE BECAUSE THE PROCEEDINGS AGAINST HIM VIOLATED INTERNATIONAL LAW. U.S. CONST. AMENDS. V, VI VIII AND XIV; NEV. CONST. ART. I SECS. 3, 6 AND 8; ART IV, SEC. 21.** [4]

In support of this claim, Mr. Chappell alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power and an evidentiary hearing:

1. Both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights recognize the right to life. Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, Art. 3 (1948) [hereinafter "UDHR"]; International Covenant on Civil and Political Rights, adopted December 19, 1966, Art. 6, 999 U.N.T.S. 171 (entered into force March 23, 1976) [hereinafter "ICCPR"}. The ICCPR provides that "[n]o one shall be arbitrarily deprived of his life." ICCPR, Art. 6. Other applicable articles include, but are not limited to ICCPR, Art. 9 ("[n]o one shall be subjected to arbitrary arrest"), ICCPR, Art. 14 (right to review of conviction and sentence by a higher tribunal "according to the law"), ICCPR, Art. 18 ("right to freedom of thought"), UDHR, Art. 18 (right "freedom of thought"), UDHR, Art. 19 (right to "freedom of opinion and expression"), UDHR, Art. 5 and ICCPR, Art. & (prohibition against cruel, inhuman or degrading treatment or punishment); *See also* The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted December 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987). In support of such claims, Mr. Chappell reasserts each and every claim and supporting fact contained in this petition as if fully set forth herein.

2. The United States Government and the State of Nevada are required to abide by norms of international law. The Paquet Habana, 20 S.Ct. 290 (1900)("international law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdictions"). The Supremacy Clause of the United States Constitution specifically requires the

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[4] Mr. Chappell acknowledges that the Nevada Supreme Court has consistently denied this issue. However, Mr. Chappell presents this issue to preserve it for federal review.

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State of Nevada to honor the United States' treaty obligations. U.S. Constitution, Art. VI.

3. Nevada is bound by the ICCPR because the United States has signed and ratified the treaty. In addition, under Article 4 of the ICCPR no country is allowed to derogate from Article 6. Nevada is bound by the UDCR because the document is a fundamental part of Customary International Law. Therefore, Nevada has an obligation not to take life arbitrarily.

4. A recent United Nations report on human rights in the United States lists some specific ways in which the American legal system operates to take life arbitrarily. Report of the Special Rapportuer on Extrajudicial, Summary or Arbitrary Executions, E/CN.4/1998/681 (Add. 3)(1998) [hereinafter "Report of Special Rapportuer"]. United Nations Special Rapportuer Bacre Waly Ndiaye found "[m]any factors other than the crime itself, appear to influence the imposition of the death sentence [in the United States]." Class, race and economic status, both of the victim and the defendant are key elements. Id., at 62. Other elements Mr. Ndiaye found to unjustly affect decisions regarding whether the convicted person should live or die include:

a. the qualifications of the capital defendant's lawyer;

b. the exclusion of people who are opposed to the death penalty from juries;

c. varying degrees of information and guidance given to the jury, including the importance of mitigating factors;

d. prosecutors given the discretion whether or not to seek the death penalty;

e. the fact that some judges must run for re-election.

5. The reasons why Mr. Chappell's conviction and sentence are arbitrary and, therefore, violate International Law are described throughout this petition; Mr. Chappell incorporates each and every and supporting facts as if fully set forth herein. However, to assist the court, Mr. Chappell provides the following examples of how his conviction and sentence are arbitrary in nature (they specifically correspond to the arbitrary factors listed above from the Report of Special Rapportuer):

a. People who were opposed to the death penalty were excluded from Mr. Chappell's jury;

b. A single aggravating action (sexual assault) was allowed to be used against

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Mr. Chappell in multiple ways in order to justify the imposition of the death penalty, while mitigating factors were not fully considered;

c. The prosecutor had discretion in whether or not to seek the death penalty;

d. The judge presiding over Mr. Chappell's trial was elected;

e. The Nevada Supreme Court which reviewed the case is elected;

f. Finally, an additional factor not listed in the Report of the Special Rapporteur but clearly an indication of the arbitrary nature of the imposition of the death sentence in Nevada, members of the judiciary admit that they do not read briefs regarding the death penalty cases before them.

6. These violations of international law were prejudicial *per se*. In the alternative, the State cannot show beyond a reasonable doubt that these violations did not affect Mr. Chappell's conviction and sentence and thus relief is required.

XI. CHAPPELL'S CONVICTION AND SENTENCE ARE INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEE OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS, EFFECTIVE ASSISTANCE OF COUNSEL AND RELIABLE SENTENCE BECAUSE THE JURY INSTRUCTIONS GIVEN AT TRIAL WERE FAULTY AND WERE NOT THE SUBJECT OF CONTEMPORANEOUS OBJECTION BY TRIAL COUNSEL, NOT RAISED ON DIRECT APPEAL BY APPELLATE COUNSEL, NOT RAISED BY PENALTY PHASE APPELLATE COUNSEL, AND NOT RE-RAISED BY PENALTY PHASE COUNSEL.

In the instant case, Mr. Chappell is entitled to a reversal of his conviction based upon an unconstitutional instruction being used to convict Mr. Chappell of first degree murder.

The jury instruction given defining premeditation and deliberation was constitutionally infirm and denied Mr. Chappell due process and equal protection under the United States and Nevada Constitutions. The instruction failed to provide the jury with any rational or meaningful guidance as to the concept of premeditation and deliberation and thereby eliminated any rational distinction between first and second degree murder. The instruction given does not require any premeditation at all and thus violates the constitutional guarantee of due process of law because it is so bereft of meaning as to the definition of two elements of the statutory offense of first degree murder as to allow virtually unlimited prosecutorial discretion in charging decisions.

The United States Court of Appeals for the Ninth Circuit considered an identical issue in

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Chambers v. E.K. McDaniel, 549 F.3d 1191, (9th Cir. 2008). In Chambers, the Court held that the defendant's federal constitutional right to due process was violated because the instruction given to convict him of first degree murder was missing an essential element and that the error was not harmless. 549 F.3d 1191, 1193. In Chambers, the defendant argued that the Nevada State Court's rejection of his due process argument regarding the jury instruction on premeditation "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" Id. at 1199.

In Chambers, the Ninth Circuit explained,

> In Polk v. Sandoval, 503 F.3d 903, 911 (9th Cir. 2007), we held that the same jury instruction on premeditation at issue here was constitutionally defective, and the Nevada court's failure to correct the error was contrary to clearly established federal law, as determined by the Supreme Court. Id. (Internal quotation marks omitted)

The federal court of appeals for the Ninth Circuit held that their decision in Polk was binding. Id. In Chambers, the Court conducted an identical analysis "as they did in Polk" as to whether the ailing instruction so infected the entire trial that the resulting conviction violated due process. The Court considered the instruction and compared it to the trial record. Id. See Estelle v. McGuire, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

In the instant case, an instruction lacking an essential element of first degree murder was used to convict Mr. Chappell.

The Byford instruction states,

> Murder of the first degree is murder which is perpetrated by means of any kind of willful, deliberate, and premeditated killing. All three elements willfulness, deliberation, and premeditation must be proven beyond a reasonable doubt before an accused can be convicted of first degree murder.
>
> Willfulness is the intent to kill. There need be not appreciable space of time between the formation of the intent to kill and the act of the killing.
>
> Deliberation is the process of determining upon a course of action to kill as a result of though, including weighing the reasons for and against the action and considering the consequences of the actions.
>
> A deliberate determination may be arrived at in a short period of time. But in all cases the determination must not be formed in passion, or if formed in passion, it must be carried out after there has been time for the passion to subside and deliberation to occur. A mere unconsidered and rash impulse is not deliberate, even though it includes the intent to kill.
>
> Premeditation is a design, a determination to kill, distinctly formed in the mind by the time of the killing.
>
> Premeditation need not be for a day, an hour, or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from

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the evidence that the act constituted the killing has been preceded by and has been the result of premeditation, no matter how rapidly the act follows the premeditation, it is premeditated.

The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into tan intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.

The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder in the first degree.

At trial, Mr. Chappell was given the following instruction:

Premeditation is a design, a determination to kill, formed in the mind of the killer at any moment before or at the time of killing.

Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. If the jury believes from the evidence that the act constituting the killing was preceded by and is the result of premeditation , no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder (Instruction 22).

In Chambers, the Court explained, "[E[ven though a constitutional error occurred, Chambers is not entitled to relief unless he can show that "the error had substantial and injurious effect or influence in determining the jury's verdict." Id. at 1200. (See also Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993). If there is grave doubt as to whether the error has such an effect the petitioner is entitled to the writ. Coleman v. Calderon, 210 F.3d 1047, 1051 (9th Cir. 2000).

In Chambers the Court concluded,

> Chambers' federal constitutional due process right was violated by the instructions given by the trial court at his murder trial, as they permitted the jury to convict him of first-degree murder without finding separately all three elements of that crime: willfulness, deliberation, and premeditation. The error was not harmless. The Nevada Supreme Court's decision denying Chambers' petition for an extraordinary writ and rejecting his due process claim was contrary to clearly established federal law. 549 F.3d 1191 (9th Cir. 2008).

In the instant case, the Kazalyn 116 Nev. 215, 994 P.2d 700 (2000) instruction given during Mr. Chappell's trial may well have caused a jury to return a verdict of first degree murder when a verdict less than first degree murder was probable. Hence, had the correct jury instruction been provided, a reasonable juror could have found that Mr. Chappell was acting rashly, rather

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than a cold calculated judgement after premeditation and deliberation had occurred. Since Mr. Chappell was provided with an incorrect instruction that failed to establish all elements of first degree murder, Mr. Chappell is entitled to a new trial.

In the instant case, Mr. Chappell's conviction must be reversed. Mr. Chappell is similarly situated to Mr. Polk and to Mr. Chambers. Any contention that the State could make that the error was harmless beyond a reasonable doubt is meritless. Therefore, the fact that all three elements of first degree murder were not enunciated to the jury in the form of an instruction mandates that Mr. Chappell should receive a new trial. Trial counsel was ineffective for failing to object to the giving of the Kazalyn instruction, direct appeal counsel was ineffective for failing to raise this issue on direct appeal, penalty phase counsel should have re-raised this issue before the district court prior to Mr. Chappell's third penalty phase, and counsel on appeal from the penalty phase was ineffective for failing to raise this issue.

This issue was raised on appeal and denied by the Nevada Supreme Court. However, Mr. Chappell re-raises this issue for purposes of preservation.

XII. MR. CHAPPELL RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BASED UPON CUMULATIVE ERROR.

In Dechant v. State, 10 P.3d 108, 116 Nev. 918 (2000), the Nevada Supreme Court reversed the murder conviction of Amy Dechant based upon the cumulative effect of the errors at trial. In Dechant, the Nevada Supreme Court provided, "[W]e have stated that if the cumulative effect of errors committed at trial denies the appellant his right to a fair trial, this Court will reverse the conviction. Id. at 113 citing Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). The Court explained that there are certain factors in deciding whether error is harmless or prejudicial including whether 1) the issue of guilt or innocence is close, 2) the quantity and character of the area and 3) the gravity of the crime charged. Id.

Based on the foregoing, Mr. Chappell would respectfully request that this Court reverse his conviction based upon cumulative errors of trial and appellate counsel.

XIII. MR. CHAPPELL IS ENTITLED TO AN EVIDENTIARY HEARING

A petitioner is entitled to an evidentiary hearing where the petitioner raises a colorable

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claim of ineffective assistance. Smith v. McCormick, 914 F.2d 1153, 1170 (9th Cir.1990); Hendricks v. Vasquez, 974 F.2d 1099, 1103, 1109-10 (9th Cir.1992). See also Morris v. California, 966 F.2d 448, 454 (9th Cir.1991) (remand for evidentiary hearing required where allegations in petitioner's affidavit raise inference of deficient performance); Harich v. Wainwright, 813 F.2d 1082, 1090 (11th Cir.1987) ("[W]here a petitioner raises a colorable claim of ineffective assistance, and where there has not been a state or federal hearing on this claim, we must remand to the district court for an evidentiary hearing."); Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986) (without the aid of an evidentiary hearing, the court cannot conclude whether attorneys properly investigated a case or whether their decisions concerning evidence were made for tactical reasons).

In the instant case, an evidentiary hearing is necessary to question counsel. Mr. Chappell's counsel fell below a standard of reasonableness. More importantly, based on the failures of counsel, Mr. Chappell was severely prejudiced, pursuant to Strickland v.Washington, 466 U. S. 668, 104 S. Ct. 205, (1984).

Under the facts presented here, an evidentiary hearing is mandated to determine whether the performance of counsel were effective, to determine the prejudicial impact of the errors and omissions noted in the petition, and to ascertain the truth in this case.

CONCLUSION

Based on the foregoing, Mr. Chappell would respectfully request that this Court grant this writ.

DATED this 15th day of February, 2012.

Respectfully submitted by:

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EXHIBIT A

EXHIBIT A

EXPR
DAVID M. SCHIECK, ESQ.
Nevada Bar No. 0824
302 E. Carson #600
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ATTORNEY FOR CHAPPELL

FILED

MAR 10 2 59 PM '03

Shirley B. Parraguirre
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

JAMES MONTELL CHAPPELL, Petitioner, vs. THE STATE OF NEVADA, Respondent.	CASE NO. C 131341 DEPT. NO. XI DATE: N/A TIME: N/A

AFFIDAVITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)

See attached.

DATED: March 10, 2003.

RESPECTFULLY SUBMITTED:

DAVID M. SCHIECK, ESQ.

RECEIPT OF COPY

RECEIPT of a copy of the foregoing document is hereby acknowledged.

DATED: Mar. 10, 03

DISTRICT ATTORNEY'S OFFICE

200 S. THIRD STREET
LAS VEGAS NV 89155

Attorney At Law
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AFFIDAVIT

STATE OF MICHIGAN)
) ss:
COUNTY OF EATON)

IVRI MARRELL, being first duly sworn, deposes and says:

I live in Lansing, Michigan and was friends with JAMES CHAPPELL ("JAMES") while were attending high school and after high school. I would say that along with myself, James Ford and Benjamin Dean were JAMES' best friends in Lansing. I was not interviewed prior to the trial and penalty hearing. When I was interviewed by Mr. Schieck in November, 2002, I was present along with James Ford and Benjamin. Much of what we discussed was a collective recollection of JAMES and his relationship with Deborah. We all were of the same general opinions and believes about what had transpired.

I was aware that JAMES worked at a number of places in Lansing, including Cheddar's Restaurant. JAMES was a good friend and kept me out of trouble on a number of occasions.

I also knew Deborah Panos through her relationship with JAMES. There was a great deal of animosity from Deborah's family toward JAMES because he was black. After their first baby was born the problems got even worse because her parents kicked her out of the house and wanted nothing to do with JAMES or the baby. They lived with Carla, JAMES' sister for a while and then Deborah moved back in with her parents. JAMES would have to sneak over to the house to even see Deborah or the baby.

I used to double date with JAMES and Deborah and have

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personal knowledge of what their relationship was like before her parents forced her to move to Tucson and she convinced JAMES to come with her. Their relationship was never physically abusive and they appeared to be very much in love despite the objections and actions of her parents.

Deborah was very controlling and jealous of JAMES and wouldn't let him go out with the guys and would often verbally abuse him. I observed JAMES around his kids and he was crazy about them and never mistreated them and seeme to be a very good and caring father.

I was not aware of what happened after JAMES went to Tucson the first time because we did not talk very often, but I knew he was unhappy and told him that he should come back to Lansing where all of his friends and family were located. JAMES did come back from Tucson for a short period of time and lived with me for part of the time he was back in Lansing.

JAMES did not chase after Deborah after she went to Tucson, the opposite is true. She was always calling him and asking him to come back to Tucson and she sent him the ticket to go back to Tucson, which was against the advice that everyone gave to him.

I feel that there were a number of important things that I could have told the jury about JAMES and his relationship with Deborah. I have been told that at the trial a lot of things were said about JAMES that were not accurate and that I could have testified about. For instance, JAMES was never violent to my knowledge, especially toward Deborah and the children. He

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put up with a lot from her and her family and never resorted to violence to my knowledge. If he became addicted to crack cocaine in Tucson or Las Vegas that may have changed him, but the JAMES I knew would never have been able to do the things that he is accused of doing.

I have always lived in Lansing and could have been easily located had anyone made an effort to find me or any of the other friends of JAMES that knew the true story about the relationship between JAMES and Deborah. If contacted I would have been more than willing to travel to Las Vegas to testify on behalf of JAMES at either the trial or the penalty hearing.

FURTHER, Affiant sayeth naught.

Ivri T. Marrell
IVRI MARRELL

SUBSCRIBED AND SWORN to before me
this 3 day of ~~November~~ March, ~~2002~~ 2003.

NOTARY PUBLIC
NANNETTE V. McGILL
Notary Public, Eaton County, MI
ACTING Ingham CO.
My Commission Expires 04/01/2003

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AFFIDAVIT

STATE OF MICHIGAN)
) ss:
COUNTY OF EATON)

BENJAMIN DEAN, being first duly sworn, deposes and says:

I live in Lansing, Michigan and was friends with James Chappell while were attending high school and after high school. I would say that along with myself, Ivri Marrell and James Ford were James' best friends in Lansing. When I was interviewed by Mr. Schieck in November, 2002, I was present along with Ivri and James Ford. Much of what we discussed was a collective recollection of James and his relationship with Deborah. We all were of the same general opinions and beliefs about what had transpired.

After James came back from Tucson he told me about all the problems that he had to endure. He felt that it was his obligation to take care of Deborah and the kids and that another guy would not want to take care of her. He would do all the chores around their apartment such as cooking and cleaning and would take care of the children while Deborah worked. Despite this, Deborah was very controlling and demanding of him, often making racial comments to him. Her mother was very prejudiced and would call James a nigger.

I believe that when Deborah got to Tucson she made new friends that influenced her against James.

I have been told some of the negative testimony from the trial about James, and this is not the James that I knew for many years in Lansing. He was not violent, and was like a big

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clown and was always real playful. He was the life of a party and would always make people laugh.

Deborah was his first real girlfriend and she changed him and his spirit. She was very manipulative of him, especially after the first child and did not like for him to be around his old friends. She came from a wealthy white family and James came from the poorer black section of Lansing. She seemed to hold this over his head and resented his true friends.

When he came back from Tucson, everything was fine until Deborah started calling him and asking him to come back to Tucson. Finally she sent him a ticket and went without telling any of his friends because we would have all advised him not to go back to Tucson. It was my opinion that she wanted to keep James away from his friends in order to control him and that is why she sent him the ticket

Deborah was very controlling and jealous of James and wouldn't let him go out with the guys and would often verbally abuse him.

I observed James around his kids and he was crazy about them and never mistreated them and seemed to be a very good and caring father.

My mother is Barbara Dean and she always was able to reach me with a phone call. When James' previous attorney and investigator came to Lansing they talked with me for a short period of time and had me show them around the neighborhood, but never asked me any questions about the relationship between James and Deborah or about his character. I would have been

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more than happy to come to Las Vegas to testify on behalf of James at the trial or penalty hearing. From what I understand the jury was given a very distorted picture of James. His friends, such as myself could have told a more complete and detailed story about James.

FURTHER, Affiant sayeth naught.

BENJAMIN DEAN

SUBSCRIBED AND SWORN to before me

this 4th day of ~~November, 2002.~~ March 2003

Tslhai DeSta
NOTARY PUBLIC

TSLHAI DESTA
Notary Public, Ingham Co., MI
My Comm. Expires July 29, 2006

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AFFIDAVIT

STATE OF MICHIGAN)
) ss:
COUNTY OF EATON)

JAMES FORD, being first duly sworn, deposes and says:

I live in Lansing, Michigan and was friends with JAMES CHAPPELL ("JAMES") while we were attending high school and after high school. I would say that along with myself, Ivri Marrell and Benjamin Dean were JAMES' best friends in Lansing. I was not interviewed prior to the trial and penalty hearing. When I was interviewed by Mr. Schieck in November, 2002 I was present along with Ivri and Benjamin. Much of what we discussed was a collective recollection of JAMES and his relationship with Deborah. We all were of the same general opinions and beliefs about what had transpired.

I knew Deborah Panos through her relationship with JAMES. There was a great deal of animosity from Deborah's family toward JAMES because he was black. After their first baby was born the problems got even worse because her parents kicked her out of the house and wanted nothing to do with JAMES or the baby. They lived with Carla, JAMES' sister for a while and then Deborah moved back in with her parents. JAMES would have to sneak over to the house to even see Deborah or the baby.

Deborah was very controlling and jealous of JAMES and wouldn't let him go out with the guys and would often verbally abuse him.

I observed JAMES around his kids and he was crazy about them and never mistreated them and seeme to be a very good and

David M. Schieck
Attorney At Law
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caring father.

I was not aware of what happened after JAMES went to Tucson the first time because we did not talk very often, but I knew he was unhappy and I told him that he should come back to Lansing where all of his friends and family were located. JAMES did come back from Tucson for a short period of time and lived with Ivri for part of the time he was back in Lansing.

JAMES did not chase after Deborah after she went to Tucson, the opposite is true. She was always calling him and asking him to come back to Tucson and she sent him the ticket to go back to Tucson, which was against the advice that everyone gave to him.

I feel that there were a number of important things that I could have told the jury about JAMES and his relationship with Deborah. I have been told that at the trial a lot of things were said about JAMES that were not accurate and that I could have testified about. For instance, JAMES was never violent to my knowledge, especially toward Deborah and the children. He put up with a lot from her and her family and never resorted to violence to my knowledge. If he became addicted to crack cocaine in Tucson or Las Vegas that may have changed him, but the JAMES I knew would never have been able to do the things that he is accused of doing.

I have always lived in Lansing and could have been easily located had anyone made an effort to find me or any of the other friends of JAMES that knew the true story about the relationship between JAMES and Deborah. If contacted I would

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have been more than willing to travel to Las Vegas to testify on behalf of JAMES at either the trial or the penalty hearing.

It is shocking to me that JAMES received the death penalty because the person I knew was not a bad person. It is a terrible thing that Deborah was killed by JAMES, but it is also terrible that JAMES was sentenced to death by a jury that did not know the truth about him and the relationship with Deborah.

FURTHER, Affiant sayeth naught.

James Ford
JAMES FORD

SUBSCRIBED AND SWORN to before me
this 6th day of ~~November~~ March, ~~2002~~ 2003.

NOTARY PUBLIC

NANNETTE V. McGILL
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EXHIBIT B

EXHIBIT B

& Lee L. Rev. 379 (2006).

The misconduct which occurred here was pervasive and constituted the theme of the prosecutor's closing argument. As a matter of plain error, this Court should reverse Chappell's judgment based upon the extreme prejudice to the jury's deliberations caused by this patently improper argument.

K. The State Committed Extensive Prosecutorial Misconduct

The State violated Chappell's state and federal constitutional rights a fair and reliable sentencing hearing, due process and right to be free from cruel and unusual punishment by committing prosecutorial misconduct throughout the closing arguments. U.S. Const. Amends. VI, VIII, XIV. Nev. Const. Art. I Secs. 3, 6, 8.

In addition to the comparative worth arguments that are set forth above, the prosecutors committed additional misconduct which warrants reversal of Chappell's conviction. It is well established that misconduct by a prosecuting attorney during closing arguments may be grounds for reversal. See Berger v. U.S., 295 U.S. 78 91935). The prosecuting attorneys represent a sovereign whose obligation is to govern impartially and whose interest in a particular case is not necessarily to win, but to do justice. Berger, 295 U.S. at 88. The prosecuting attorney may "prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Id. A prosecutor should not use arguments to inflame the passions or prejudices of the jury. Viereck v. U.S., 318 U.S. 236, 247-48 (1943). Although trial counsel did not object to this misconduct, this Court may consider this issue as a matter of plain error. U.S. v. Olano, 507 U.S. 725, 731 (1993); U.S. v. Leon-Reyes, 177 F.3d 816, 821 (9th Cir. 1999).

Comment on Chappell's Right To Remain Silent

The State introduced Chappell's prior testimony, including a cross-examination by the State that constituted commentary on Chappell's right to remain silent.:

Q You've had a substantial period of time to think about today, haven't you?

A Yes, sir.

Q You've known for quite awhile, haven't you, that at some point you would take the witness stand and give the jury your version of what happened?

A Yes, sir.

Q Once you had made that decision, whenever it was, you've given a lot of attention to what you would tell the jury?

A I didn't make up anything, sir.

Q I didn't say you made up anything, Mr. Chappell. Have you thought a lot about what you would tell the jury?

A No.

Q Have you thought a lot about how you would act on the witness stand?

A No, sir.

XV ROA 3654. Chappell's counsel argued that this was a comment on his right to remain silent but the district court rejected the argument after noting that the claim was found to be without merit in post-conviction proceedings. XV ROA 3632-33. The district court's reliance upon these ruling was misplaced as the post-conviction rulings do not support this conclusion. In its post-conviction ruling, the district court concluded that issues concerning the guilt phase of the trial were without merit because of overwhelming evidence of guilt. XI ROA 2746. The court did not rule on the merits of this issue. On appeal from the district court's order granting in part and denying in part Chappell's post-conviction petition, this Court noted "that overwhelming evidence supported Chappell's conviction and that any errors in . . . the prosecutor's remarks were harmless beyond a reasonable doubt, whether Chappell's trial counsel objected to them or not." XI ROA 2790.

The use for impeachment purposes of a defendant's silence at the time of arrest and after receiving Miranda warnings violates the Due Process Clause of the Fourteenth Amendment. Doyle v. Ohio, 426 U.S. 610 (1976). Likewise, this Court has found that the State may not comment on a defendant's silence, even if no Miranda warnings are given. Coleman v. State, 111 Nev. 657, 662-63, 895 P.2d 653, 657 (1995). The prosecutor here committed misconduct by introducing testimony which violated Chappell's constitutional rights.

Misstating Role of Mitigating Circumstances

The prosecutor committed misconduct by misstating the role of mitigating circumstances, commenting on matters th at were not in evidence, and improperly minmizing the mitigating evidence that was presented:

> People aren't perfect. Systems aren't perfect. But it's time, ladies and gentlemen, for the blame to stop and for there to be accountability. Yes, the defendant had difficulties in his early life. But they're not uncommon things. A lot of people grow up humbly. A lot of people grow up without a mother or a father or some other parent. There's grandparents raising kids all over the place these days.
>
> One commentator once said, pain is inevitable, but suffering is optional. We come back to the individuals we got in this case. In light of all these circumstances, yes, pain is inevitable. Everybody is going to have pain. Everybody is going to have difficulty. But how do we address that. Do we go around blaming everybody else and doing whatever we selfishly want to do, or do we rise above it. Because it's possible to become a better person, as a consequence of pain, not just get through it. Everybody knows that. We know that.

XVI ROA 3781.

> It's probably a certain prejudice that we all sort of internalize to some degree the idea that a murder between two people who knew each other isn't that bad. It's not as bad or scary as a stranger murder. Because if a stranger had climbed through Debbie Panos' window, raped her, had beat her up, stabbed her to death and then stole her car, there wouldn't by (sic) a whole lot of commentary about marijuana houses on the street he grew up on. There wouldn't be a whole lot of commentary about, well, maybe she liked him, or maybe she wanted him back. Wouldn't we discussing that at all. We'd be discussing the violence of the act of that day. And that's what this case it about.

XVI ROA 3797.

> Now certainly the fact that he had this troubled up-bringing and he was in an environment that apparently a lot of people were doing drugs than (sic), would make his life more difficult. But it doesn't mean that he didn't have chance, after chance, after chance to address the very drug problems that the defense now asks you to give him some credit for.
>
> It doesn't erase what he did. It's just part of his background. And most of us have a background that is less than ideal. Most of us have had parents or were raised be (sic) people who didn't do a perfect job. But it doesn't diminish what we do as adults. It doesn't take away his actions.

XVI ROA 3799.

These arguments constituted misconduct. See Berger, 295 U.S. at 88 (describing the role of prosecutors as unique because they are "representative not of an ordinary party to a controversy, but a sovereignty whose obligation to govern impartially is as compelling as its

obligation to govern at all" and a prosecutor is a "servant of the law" meaning prosecutors must "refrain from improper methods calculated to produce wrongful conviction"); U.S. v. Agurs, 427 U.S. 97, 110-11 (1976) (directing prosecutors to serve the "overriding interest" of justice before consideration of its secondary interest – vigorous prosecution); Caldwell, 472 U.S. at 328-41 (holding that the Eighth Amendment protects defendants from prosecutorial arguments that misinform juries on their roles in sentencing phase of capital trials); Darden v. Wainwright, 477 U.S. 168, 168 (1986) (noting protections given to defendants by the Due Process Clause's fair trial standards).

Defendants have a constitutional right to the presentation and consideration by the jury of any facts that may mitigate the jury's finding that death is the appropriate punishment. Lockett v. Ohio, 438 U.S. 586, 604 (1978). A Caldwell violation is established if the prosecutor argues in such a manner as to "foreclose the jury's consideration of . . . mitigating evidence" because the jurors are misled on their duty to consider this evidence. Depew v. Anderson, 311 F.3d 742, 749 (6th Cir. 2002); Buchanan v. Angelone, 522 U.S. 269, 277 (1998) (holding that a prosecutor's argument that undercut the defendant's mitigation case so significantly, and at times inaccurately, foreclosed the jury's consideration of mitigating evidence, thereby altering the jury's role assigned to it in violation of the Eighth Amendment). In addition to the Eighth Amendment Caldwell violation, the arguments here also violated Chappell's Fifth and Fourteenth Amendment rights. See Antwine v. Delo, 54 F.3d 1357, 1371 (8th Cir. 1995); Darden, 477 U.S. at 181.

"Don't Let The Defendant Fool You" Arguments

Additional misconduct was committed as the prosecutors argued that the jurors would be conned by Chappell, and they would be taking the easy way out, if they imposed a sentence less than death

> Don't be coned. (sic) It's interesting, Dr. Etcoff in the beginning of his testimony said, you know, the defendant, he's just not sophisticated enough to lie. I would know that. Then we heard on cross-examination all of these things the defendant flat out liked to him about, that the doctor didn't know. And here's a Ph.D. person who just got totally coned (sic) by the defendant, and he coned (sic) the system, and he coned (sic) the system, and he coned (sic) Mr. Duffy, sat across from him for two hours saying he really wanted to

do something about that drug problem enough that Duffy let him go, and he went straight out over to kill Debbie.

He would like to see you coned (sic) in this case, ladies and gentlemen. Don't be coned. (sic) Don't sell it short. Please, don't go for the lesser things because it's easier. Do the right thing, even though it's the harder thing, and that would be an imposition of the death penalty. Because ladies and gentlemen, the evidence in this case indicates this is the appropriate penalty in this case. It is the only appropriate penalty in this case.

XVI ROA 3786-87.

And it wasn't just Dr. Duffy that got snowed by the defendant. Dr. Etcoff was snowed just as well. . . .

XVI ROA 3801.

Arguments that Chappell "conned" others constituted misconduct. See Cristy v. Horn, 28 F.Supp.2d 307, 318-19 (W.D. Pa. 1998) (holding that an argument that labeled the defendant as "the Great Manipulator," to whom prison was just a "revolving door," only served to inflame the jurors). See also U.S. v. Gonzalez, 488 F.2d 833, 836 (2d Cir. 1973) (condemning remarks such as "you have to be born yesterday" to believe appellant's defense, and the defense is "an insult to your intelligence,"); U.S. v. Drummond, 481 F.2d 62, 64 (2d Cir. 1973) (condemning remarks such as the defendant's "testimony is so riddled with lies it insults the intelligence of 14 intelligent people sitting on the jury"). Inflammatory arguments of this type misdirect the focus of jurors away from the facts and the law. Miller v. Lockhart, 65 F.3d 676, 684 (8th Cir. 1995); Tucker v. Zant, 724 F.2d 882, 889 (11th Cir. 1984) (Due Process Clause does not tolerate misleading arguments). This argument was also improper and prejudicial because it was directed at the jurors and put them in the untenable position of "them" against Chappell. People v. Payne, 187 A.D.2d 245, 248 (N.Y. App. Div. 1993) (improper to suggest that defendant was trying to "sucker us," because the "message was that although the defendant has rights, those rights must be carefully measured because it is 'us' against him.").

Justice and Mercy Arguments

The prosecutor committed misconduct in arguing that the jury should not consider mercy:

But you can make some corrections now. We can't bring Debbie back, but we can see that justice is done. We're going to talk about justice in a few minutes.

XVI ROA 3780.

So the question for you as jurors is not really do you have it in yourselves, or are you a merciful person because as jurors you are serving a different role in this case. You don't just owe James Chappell the consideration of mercy, you owe the victims and the State of Nevada a just sentence as well. It's probably tempting in this case to give life without, that seems like a realistic sentence. You probably would feel like you are not giving him any breaks at all with a life without sentence.

But you need to ask yourself, is that truly justice fo what he did over the years. What punishment reflects what he did to Debbie Panos, not just that day, but over time. What punishment reflects how he degraded her by calling her bitch and slut. What punishment compensates for breaking her nose. She had to go to work with that object on her nose after it was broken and tell her friends what happened. He humiliated her. What punishment compensates her for holding a knife to her in her own home so he could get information because he thought she was gone too long that day.

This from the person who spent his days taking her money and going and getting high for the day. What punishment accounts for all of that. What punishment is justified for taking the life of a 26-year-old young woman, a mother of three. Or how about what punishment accounts for Norma Penfield's loss the (sic) day. She lost her daughter. James Chappell brutally murdered her only child that day. What compensates her.

Has that changed for her over ten years. Does she still bear that loss, that burden ten years later. I mean, really the reality is it was easy for him after he got arrested on September 1st, '95. It was all done for him at that point. He didn't have to deal with the aftermath of the devastation he caused. He didn't have to look two little boys in the face and tell then (sic) their mother wasn't coming back. He didn't have to listen to an eight-year-old boy ask for sleeping pills. he didn't have to listen to any of that. He didn't have to listen to a four-year-old girl talk about -- asking her grandmother to sing like mom did. he didn't have to see any of his children's faces when they wanted their mother over the years when the missed her. He didn't have to arrange, at all, for Debbie Panos; (sic) body to be transported to Michigan. He was spared all of that. Those pieces were picked up by Norma Penfield.

He got to sit and worry about himself and formulate the best spin on events, the best version. And that's all he has ever done his whole life. He got to tell the doctors about his problems and his troubled childhood. It's so typical of how he spent his whole life.

He sells those children's coats and shoes, and Debbie works three jobs so they can buy more. He beat Debbie in Tucson and she decides to move to Las Vegas so they can get a fresh start. He treats Debbie badly, and she tells her own mother, well, his grandmother wasn't nice to him, she threw him out. But the problem is what he did on that day, on August 31st, is so treacherous and so selfish and so evil there's truly no fixing what he did.

XVI ROA 3802.

We've all said and you all know at this point that the punishment should fit the crime. And when you consider the decade of torment that he inflicted on this woman, the loss that he imposed on three young children, the loss that he imposed on her mother, and his attitude after the fact, there's only one

punishment and that's the death penalty.

XVI ROA 3802.

It was misconduct for the prosecutor to argue that mercy for Chappell was not an appropriate consideration. Presnell v. Zant, 959 F.2d 1524, 1529-31 (11th Cir. 1992); Peterkin v. Horn, 176 F.Supp.2d 342, 372-73 (E.D. Pa. 2001); Lesko v. Lehman, 925 F.2d 1527, 1545-46 (3d Cir. 1991) (holding unconstitutional an argument that urged jurors to settle the score between the defendant and the victims). This Court has also condemned arguments of this type. Thomas v. State, 83 P.3d 818, 826 (Nev. 2004) (finding a prosecutor's argument was improper because it informed jurors that the "defendant is deserving of the same sympathy and compassion and mercy that he extended to [the victims]."). It was also misconduct to argue that the only manner to achieve justice for Panos and her family was to impose a sentence of death against Chappell. These arguments acted to inflame the emotions and passions of the jury. Young, 470 U.S. at 9 n.7 (citing ABA Standards of Criminal Justice 4-7.8); see also ABA Standards for Criminal Justice 3-5.8 ("The prosecutor should not make arguments calculated to appeal to the prejudices of the jury); Floyd, 118 Nev. at 173, 42 P.3d at 261 ("any inclination to inject personal beliefs into arguments or to inflame the passions of the jury must be avoided. Such arguments clearly exceed the boundaries of proper prosecutorial conduct."). The prosecutor's comments here did nothing to aid the jury in determining whether the death penalty was an appropriate sentence under NRS 200.035, but instead urged the jurors to return a sentence of death as vindication, which was based upon the inflamed passions of the jury.

Based upon each of these incidents of misconduct, as well as the cumulative impact of the misconduct, Chappell's sentence of death should be reversed.

L. The District Court Failed To Instruct The Jury That The State Was Required To Establish Beyond On Beyond a Reasonable Doubt That Mitigating Circumstances Did Not Outweigh Aggravating Circumstances

Chappell's death sentence is invalid under the reliability guarantees of the Eighth Amendment, the federal due process clause, under Blakely v. Washington, 542 U.S. 296 (2004), and under the Nevada constitution because the jury was not instructed that it was

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Attorney for Defendant
JAMES CHAPPELL

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA, Plaintiff, vs. JAMES CHAPPELL, Defendant.	CASE NO. C131341 DEPT. NO. XXV

RECEIPT OF COPY

RECEIPT OF COPY of the above and foregoing **SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT 'S WRIT OF HABEAS CORPUS (POST-CONVICTION)** is hereby acknowledge this 13 day of February, 2012.

CLARK COUNTY DISTRICT ATTORNEY

200 Lewis Avenue
Las Vegas, Nevada 89155

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Attorney for Defendant
JAMES CHAPPELL

FILED

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA, Plaintiff, vs. JAMES CHAPPELL, Defendant.	CASE NO. C131341 DEPT. NO. XXV

MOTION FOR AUTHORIZATION TO OBTAIN EXPERT SERVICES AND FOR PAYMENT OF FEES INCURRED HEREIN.

COMES NOW, Defendant, JAMES CHAPPELL, by and through his attorney, CHRISTOPHER R. ORAM, ESQ., hereby requests this Honorable Court to issue an order appointing an expert for Mr. Chappell. Defendant also requests on Order authorizing payment in excess of the statutory maximum three hundred dollars ($300.00), not to exceed three thousand dollars ($3,000.00) per expert unless prior Court approval is granted.

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Docket 61967 Document 2013-34681

This motion is made and based pleadings and papers on file herein, the affidavit of counsel attached hereto, as well as any oral arguments of counsel adduced at the time of hearing.

DATED this 14th day of February, 2012.

Respectfully submitted

CHRISTOPHER R. ORAM, ESQ.
Nevada Bar #004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada, 89101

Attorney for Defendant
JAMES CHAPPELL

NOTICE OF MOTION

YOU, AND EACH OF YOU, will please take notice that the undersigned will bring the foregoing **MOTION FOR AUTHORIZATION TO OBTAIN EXPERT SERVICES AND FOR PAYMENT OF FEES INCURRED HEREIN** on for hearing on the 28 day of February, 2012, at the Clark County Courthouse, 200 Lewis Avenue in District Court, Department XXV at the hour of 9 .m. or as soon thereafter as counsel may be heard.

Respectfully submitted

CHRISTOPHER R. ORAM, ESQ.
Nevada Bar # 004349
520 S. Fourth Street, 2nd Floor
Las Vegas, NV 89101

Attorney for Defendant
JAMES CHAPPELL

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POINTS AND AUTHORITIES

Nevada Revised Statute 7.135 states:

> Reimbursement for expenses; employment of investigative, expert or other services:The attorney appointed by a magistrate or district court to represent a defendant is entitled, in addition to the fee provided by N.R.S. 7.125 for his services to be reimbursed for expenses reasonably incurred by him in representing the defendant and may employ, subject to the prior approval of the magistrate or the district court in an ex parte application, such investigative, expert or other services as may be necessary for an adequate defense. Compensation to any person furnishing such investigative, expert or other services must not exceed $300.00, exclusive of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is:
>
> 1. Certified by the trial judge of the court, or by the magistrate if the services were rendered in connection with a case disposed of entirely before him, as necessary to provide fair compensation of services of an unusual character or duration: and
>
> 2. Approved by the presiding judge of the judicial district in which the attorney was appointed . . .

In the instant case, Mr. Chappell is currently in his post-conviction proceedings on charges of murder. In light of the seriousness of the capital conviction of Mr. Chappell, and the tasks that need to be completed in order to properly raise issues on behalf of Mr. Chappell, I believe it is necessary that experts be permitted to act in the capacity for Mr. Chappell through his post-conviction proceedings.

First, an expert is needed is perform a P.E.T. scan. In the instant case, the defense presented evidence in mitigation regarding the defendant's environment. However, the defense never had the defendant's brain properly analyzed. It was incumbent upon the defense to have the defendant properly analyzed.

A Positron Emission Tomography Scan (PET Scan) is a nuclear medicine imaging technique which produces a three dimensional picture of the functional process in the body. PET Neuroimaging is based on an assumption that areas of high radioactivity are associated with brain activity. What is actually measured indirectly is the flow of blood to different parts of the brain, which is generally believed to be correlated, and has been measured using the tracer oxygen. It can also assist in examining links between specific psychological processes or disorders in brain activity ("A Close look into the Brain," Julich Research Center, 29 April 2009.)

In the instant case, the defense should have investigated in an effort to determine whether Mr.

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Chappell suffered from internal difficulties within the brain. A review of the file fails to reveal that counsel attempted to obtain an analysis of Mr. Chappell's brain. Mr. Chappell is currently requesting funding to conduct this testing.

A second expert is needed to perform a full neurological exam on Mr. Chappell in order to determine any additional issues that may be raised on his behalf. Over ten years had passed since Mr. Chappell had been tested prior to his third penalty phase.

Additionally, a third expert is needed to determine the possible effects of Fetal Alcohol Spectrum Disorder on Mr. Chappell. Fetal Alcohol Spectrum Disorders are a group of disorders that can occur in a person who's mother drank alcohol during pregnancy. The effects can include physical problems and problems with behavior and learning. . There was evidence that Mr. Chappell's mother may have been addicted to drugs and alcohol. A proper investigation should have been conducted to determine whether James was born to a mother who was ingesting narcotics and/or alcohol during her pregnancy. There is no indication in the voluminous file that counsel investigated the possibility of fetal alcohol syndrome.

WHEREFORE, for the foregoing reasons, Mr. Chappell requests this court to authorize an order granting the services of experts to perform a P.E.T. Scan, a neurological exam, and testing for Fetal Alcohol Syndrome. Additionally, for this Court to allow payment for his/her fees in excess of the statutory maximum three hundred dollars ($300.00), not to exceed three thousand dollars ($3,000.00) per expert unless prior Court approval is granted.

DATED this 14th day of February, 2012.

Respectfully submitted:

CHRISTOPHER R. ORAM, ESQ.
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520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101

Attorney for Defendant
JAMES CHAPPELL

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AFFIDAVIT OF CHRISTOPHER R. ORAM, ESQ.
IN SUPPORT OF MOTION FOR AUTHORIZATION TO OBTAIN EXPERT SERVICES AND FOR PAYMENT OF FEES INCURRED HEREIN

STATE OF NEVADA)
)ss:
COUNTY OF CLARK)

CHRISTOPHER R. ORAM, ESQ., having been duly sworn, deposes and says:

1. Your Affiant is an attorney duly licensed to practice law in the State of Nevada.

2. James Chappell by and through his attorney, CHRISTOPHER R. ORAM, ESQ., hereby requests this Honorable Court to issue an order appointing an expert for Mr. Chappell Defendant also requests on Order authorizing payment in excess of the statutory maximum three hundred dollars ($300.00), not to exceed three thousand dollars ($3,000.00) per expert unless prior Court approval is granted.

3. In the instant case, Mr. Chappell is currently in his post-conviction proceedings on charges of murder. In light of the seriousness of the capital conviction of Mr. Chappell, and the tasks that need to be completed in order to properly raise issues on behalf of Mr. Chappell, I believe it is necessary that experts be permitted to act in the capacity for Mr. Chappell through his post-conviction proceedings.

4. Mr. Chappell requests this court to authorize an order granting the services of an expert to perform a P.E.T. Scan, a neurological exam, and testing for Fetal Alcohol Syndrome. Additionally, for this Court to allow payment for his/her fees in excess of the statutory maximum three hundred dollars ($300.00), not to exceed three thousand dollars ($3,000.00) per expert unless prior Court approval is granted.

5. That this motion is being made in good faith and not for purposes of delay.

6. Further your affiant sayeth naught.

DATED this 14th day of February, 2012.

CHRISTOPHER R. ORAM, ESQ.

SUBSCRIBED AND SWORN to before me this 14th day of February, 2012.

NOTARY PUBLIC in and for said County and State

JESSIE LEE VARGAS
Notary Public-State of Nevada
APPT. NO. 09-9721-1
My Appt. Expires February 16, 2013

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Attorney for Defendant
JAMES CHAPPELL

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA, Plaintiff, vs. JAMES CHAPPELL, Defendant.	CASE NO. C131341 DEPT. NO. XXV

RECEIPT OF COPY

The above **MOTION FOR AUTHORIZATION TO OBTAIN EXPERT SERVICES AND FOR PAYMENT OF FEES INCURRED HEREIN** is hereby acknowledged this 15 day of February, 2012.

Clark County District Attorney

By _____
200 Lewis Avenue
Las Vegas, Nevada 89155

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Attorney for Defendant
JAMES CHAPPELL

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA, Plaintiff, vs. JAMES CHAPPELL, Defendant.	CASE NO. C131341 DEPT. NO. XXV

REPLY TO STATE'S RESPONSE TO SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT'S WRIT OF HABEAS CORPUS.

COMES NOW, Defendant, JAMES CHAPPELL, by and through his counsel of record, CHRISTOPHER R. ORAM, ESQ., hereby submits his Reply to the State's Response to the supplemental brief in support of Defendant's Writ of Habeas Corpus (Post-Conviction).

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This Supplement is made and based upon the pleadings and papers on file herein, the Points and Authorities attached hereto, and any oral arguments adduced at the time of hearing this matter.

DATED this 30th day of July, 2012.

Respectfully submitted:

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Attorney for Petitioner
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STATEMENT OF THE CASE

The Statement of the Case stands as enunciated in Mr. Chappell's Supplemental Brief. This Reply was originally due on July 26, 2012. However, it should be noted that Chief Deputy District Attorney Steve Owens gave the undersigned until Monday, July 30, 2012, to file this Reply. [1]

STATEMENT OF THE FACTS

The Statement of the Facts stands as enunciated in Mr. Chappell's Supplemental Brief.

ARGUMENT

I. STANDARD OF REVIEW FOR INEFFECTIVE ASSISTANCE OF COUNSEL.

This argument stands as enunciated in Mr. Chappell's Supplemental Brief.

II. MR. CHAPPELL RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE THIRD PENALTY PHASE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In the instant case, penalty phase counsel failed to properly investigate and prepare for the penalty phase. There are multiple instances identified by Mr. Chappell included in this section.

1. Failure to obtain a P.E.T. Scan
2. Failure to test Mr. Chappell for the effects of fetal alcohol syndrom and/or being born to a drug addicted mother
3. Failure to properly prepare the expert witnesses: Dr. Etcoff, Dr. Grey, and Dr. Danton
4. Failure to present mitigation witnesses to the jury
5. Failure to obtain an expert regarding pre-ejaculation fluids
6. Failure to present lay witnesses

Pretrial investigation is a critical area in any criminal case and the failure to accomplish the investigation has been held to constitute ineffective assistance of counsel. In Jackson v.

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[1] The State argues that Mr. Chappell is procedurally barred from raising claims (State's Response pp. 7-10). However, the State does not specify which of Mr. Chappell's arguments they believe to be procedurally barred. Within the body of the State's Response, the State does not identify any individual arguments they believe to be time barred. In fact, with the exception of argument eight (State's Response VIII, pp. 29), the State does not claim that any individual argument is time barred. Mr. Chappell would respectfully request that the Court order the State to response specifically to any arguments they believe are time barred so that Mr. Chappell may be given an opportunity to properly respond. However, perhaps argument eight is the only issue the State believes is time barred. In that event, Mr. Chappell has adequately responded.

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Warden, 91 Nev. 430, 537 P.2d 473 (1975), the Nevada Supreme Court held,

> It is still recognized that a primary requirement is that counsel...conduct careful factual and legal investigation and inquiries with a view towards developing matters of defense in order that he make informed decisions on his clients behalf both at the pleadings stage...and at trial. Jackson, 92 Nev. at 433, 537 P.2d at 474.

Federal courts are in accord that pretrial investigation and preparation are key to effective assistance of counsel. See, U.S. v. Tucker, 716 F.2d 576 (1983). In U.S. v. Baynes, 687 F.2d 659 (1982), the federal court explained,

> Defense counsel, whether appointed or retained is obligated to inquire thoroughly into all potential exculpatory defenses in evidence, mere possibility that investigation might have produced nothing of consequences for the defense does not serve as justification for trial defense counsels failure to perform such investigations in the first place. The fact that defense counsel may have performed impressively at trial would not have excused failure to investigate claims that might have led to complete exoneration of the defendant.
>
> Counsel's complete failure to properly investigate renders his performance ineffective.
>
> [F]ailure to conduct a reasonable investigation constitutes deficient performance. The Third Circuit has held that "[i]neffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice when s/he [sic] has not yet obtained the facts on which such a decision could be made." See U.S. v. Gray, 878 F.2d 702, 711 (3d Cir.1989). A lawyer has a duty to "investigate what information ... potential eye-witnesses possess[ ], even if he later decide[s] not to put them on the stand." Id. at 712. See also Hoots v. Allsbrook, 785 F.2d 1214, 1220 (4th Cir.1986) ("Neglect even to interview available witnesses to a crime simply cannot be ascribed to trial strategy and tactics."); Birt v. Montgomery, 709 F.2d 690, 701 (7th Cir.1983) . . . ("Essential to effective representation . . . is the independent duty to investigate and prepare.").

A. FAILURE TO PRODUCE TESTIMONY FROM JAMES FORD AND IVORY (IVRI) MORRELL

During the original post-conviction, counsel alleged that trial counsel had been ineffective for failure to produce several mitigation witnesses. Specifically, post-conviction counsel complained that James C. Ford and Ivory Morrell (friends of James Chappell) were not called to testify. At the conclusion of the post-conviction hearings, the district court granted the writ in part and denied the writ in part. The district court concluded that Mr. Chappell received ineffective assistance of penalty phase counsel for the failure to call mitigation witnesses. This decision was upheld on appeal from the first post-conviction. Thereafter, post-conviction counsel represented Mr. Chappell at the second penalty phase. Interestingly enough, neither James C.

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Ford nor Ivory Morrell testified during the second penalty phase.

In the State's Response, the State claims counsel was not ineffective for failing to present these two mitigation witnesses and investigating potential witnesses while the defendant lived in Arizona (State's Response pp. 1). First, the State argues defense counsel presented ample evidence of Mr. Chappell's relationship with his wife and upbringing to be deemed effective. The State simply enunciates facts adduced at the second penalty phase and contends this satisfies counsel's responsibilities in presenting mitigating evidence. However, the State made a similar argument in an effort to oppose Mr. Chappell's original post-conviction proceedings. During the original post-conviction proceedings, the State argued original trial counsel was effective and presented ample mitigation evidence. However, post-conviction counsel argued there were numerous potential mitigation witnesses that were not presented to the jury. In essence, the State makes the identical argument in opposition to the instant petition as they did in the original petition.

However, the State's position before this Court is directly contradicted by the concerns of the prosecutor during the second penalty hearing. Here, Mr. Chappell claims his attorney's were ineffective for failing to call the very mitigation witnesses that the Nevada Supreme Court deemed ineffective assistance of counsel. During the second penalty phase the prosecution was so concerned with the failure to present mitigation witnesses the prosecution actually made a record of this significant concern.

The prosecutor stated,

> I went back and reviewed the court's order which was the basis for the reversal of the penalty phase and the reason why we were in the proceeding, the decision by Judge Douglas, I believe, confirmed by the Supreme Court in the order of affirmance that the defense failed to call certain witnesses that would have made a difference in the outcome of the original case.
>
> There were eight or nine witnesses that were detailed in the briefs and the decision. For the record, my notation on that would indicate that would be Shirley Serrelly, James Ford, Ivory Morrell, Chris Bardo, David Greene, Benjamin Dean, Claira Axom, Barbara Dean, and Ernestine Harvey. Of those nine names the defendant only called two of them, by my understanding. There were five of them that were not called, no affidavits were submitted, no letters were written in, no testimony was given in summary by third parties (16 ROA 3803-3804).

During the second penalty phase, the prosecution was obviously concerned regarding the

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failure of defense counsel to present numerous mitigation witnesses. Yet, the State now argues that defense counsel provided effective assistance of counsel. The State's position is in direct contradiction to the prosecutor's position during the second penalty phase.

Next, the State argues defense counsel introduced Marabel Rosales, a mitigation investigator, to summarize the potential testimony of the mitigation witnesses. Apparently, the State believes that the failure to call available live witnesses to the stand can be substituted for the unemotional testimony of an investigator who would summarize the mitigation witnesses potential testimony. First, this fails to consider the fact that witnesses in the penalty phase provide emotion for the jury to consider during their deliberation process. The jury was facing a life or death decision. For the State to argue that an emotionless investigator equals the passionate pleas for life, is meritless. Jurors are not computers. The death penalty is undoubtedly the most emotional decision a jury ever decides in the United States. This is why the prosecutor voiced such concern to the district court during the second penalty phase.

The State argues that defense counsel's failure to present the mitigation witnesses were reasonable strategic decisions (State's Response pp. 14). In Doleman v. State, 112 Nev. 843, 848, 941 P.2d 278, 280 (1996), the Nevada Supreme Court held that reasonable strategic decisions on the part of defense counsel are virtually unchallengeable. The State contends that the failure to call available mitigation witnesses is a strategic choice which is unchallengeable. Again, the State's argument is belied by logic. According to defense counsel, the decision was made to relieve the witnesses of their duties pursuant to a subpoena because of concerns that the witnesses may have difficulty with their employment status. Therefore, defense counsel chose to permit the witnesses to leave rather than present them to the jury in an effort to spare Mr. Chappell's life. Notably, defense counsel called a few witnesses out of order, in the State's case in chief. However, no attempts were made to put on these mitigation witnesses out of order. Had defense counsel requested that the mitigation witnesses be called out of order, this issue would not be ripe for review. Defense counsel's concern for the employment status of these extremely important mitigation witnesses pales in comparison to the necessity to save Mr. Chappell's life. Defense counsel had a duty to Mr. Chappell not the employment concerns of these witnesses.

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The State claims that Mr. Chappell failed to produce any convincing theory as to why these witnesses live testimony would change the outcome of the proceedings (State's Response pp. 15). On appeal from post-conviction, the Nevada Supreme Court determined that Mr. Chappell should receive a new penalty phase based in part on the failure to call available mitigation witnesses. Here, defense counsel (who had been post-conviction counsel) made the same identical mistake that cause reversal. Therefore, Mr. Chappell has provided overwhelming evidence that the Nevada Supreme Court would find a new penalty phase mandated given the repeat of these errors. The State's contention that Mr. Chappell has not provided a convincing theory of why the live witnesses testimony would have changed the outcome is belied by the law of the case. Why did Mr. Chappell receive a new penalty phase for the failure to call the mitigation witnesses and thereafter defense counsel again failed to present the mitigation witnesses. The error is identical. Mr. Chappell is entitled to a new penalty phase.

Is it important to remember that Mr. Ford was Chappell's best friend in Michigan. Ivory Morrell had been close friends with Mr. Chappell and Debra in Michigan and had stayed in contact with them in Arizona. This leads to Mr. Chappell's next contention.

Counsel was ineffective for properly investigating the defendant's past and his relationship with Debra while living in Arizona. In the supplemental petition, Mr. Chappell raises this contention. Mr. Chappell filed a motion for authorization to obtain an investigator and for payment of fees simultaneously with his supplemental petition. Mr. Chappell requested resources for an investigator to assist in these endeavors. The State has opposed the motion. Ironically, in the State's Response, the State claims "a defendant who alleges a failure to investigate must demonstrate how a better investigation would have benefitted his case and changed the outcome of the proceedings" Molina v. State, 120 Nev. 185, 87 P.3d 533 (2004) (State's Response pp.15).

Citing United States v. Porter, 924 F.2d 395, 397 (1st Cir. 1991), the State argues that Mr. Chappell should have alleged with specificity what the investigation would have revealed and how it would have changed the outcome of the trial (State's Response pp. 15). The State concludes that Mr. Chappell has made bear allegations which do not warrant relief (State's Response pp. 15) (citing, Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Here, upon

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information and belief, there was limited investigation into Mr. Chappell's relationship, while living in Arizona. Mr. Chappell desires an evidentiary hearing to question counsel as to what efforts were made to investigate the relationship and background of the couple in Arizona. Mr. Chappell specifically requested that the Court provide an investigator to assist in the investigation of Arizona. The State opposed the motion and now claims that Mr. Chappell is making bare allegations without specific information. It is true that Mr. Chappell has been unable to investigate this matter because he has not been authorized to send an investigator to begin the appropriate task. It is grossly unfair for the State to preclude Mr. Chappell the funds to investigate and then claim he has failed to present any specifics regarding an investigation that the State has thwarted. The State's argument proves that Mr. Chappell should be entitled to an evidentiary hearing and reasonable funding for an investigation.

The Nevada Supreme Court in Doleman v. State, 112 Nev. 843 921 P.2d 278 (1996) concluded:

> We conclude that the failure of Doleman's trial counsel to reasonably investigate the potential testimony of certain witnesses at Doleman's penalty hearing constituted ineffective assistance of counsel. In this case, the court found that trial counsel's failure to call witnesses from an institution where the convicted individual had attended school, who would have testified as to the convicted individual's ability to function in structured environments and adhere to institutional rules, constituted a violation of the reasonable effective assistance standard.

Defense counsel's failure to investigate the facts can render a result "unreliable"Buffalo v. State, 111 Nev. 1139, 901 P.2d 647 (1995).

In the instant case, the defense failed to properly present mitigation witnesses and investigate in violation of the fifth, sixth, eighth and fourteenth amendments to the United States Constitution.

B. FAILURE TO OBTAIN AN EXPERT

The sole aggravator found by the jury was that the murder was committed during the commission of a sexual assault. Nevada law requires that at least one aggravating circumstance be proved beyond a reasonable doubt in order for a defendant to be death eligible. Without the sexual assault aggravator, Mr. Chappell could not be sentenced to death. Mr. Chappell was not

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charged with sexual assault. Interestingly enough, if the State reasonably believed that Mr. Chappell had committed sexual assault, it is curious why they chose not to charge him with such a serious crime. Instead, Mr. Chappell was given notice that the State intended to seek the death penalty against him based on a single aggravating circumstance, sexual assault.

Dr. Sheldon Green performed the autopsy on Ms. Panos. A sexual assault kit was taken by the crime scene analyst with negative results (15 ROA 3673). Ms. Panos was fully clothed when she was discovered. This couple had a long and turbulent relationship. The couple lived in Michigan, Arizona and Nevada. Each time, Ms. Panos assisted Mr. Chappell in relocating. Often, the couple would have fights and split up. However, reconciliation was always inevitable. Some witnesses testified that Ms. Panos was attempting to flee the grip of Mr. Chappell. However, a careful review of the record provides a somewhat different story. Each time witnesses claimed that Ms. Panos was fleeing, Ms. Panos then enabled Mr. Chappell to come and reconcile the relationship. Originally, the couple lived in Michigan. However, Ms. Panos' parents moved to Tucson, Arizona. Eventually, Ms. Panos made arrangements to assist Mr. Chappell in reuniting and living together in Arizona (13 ROA 3054). Ms. Panos and Mr. Chappell continued to have children together. In fact, Mr. Chappell left Arizona for a period of time and Debra begged him to return to Arizona (15 ROA 3644). During the lengthy relationship, there were numerous alleged incidents of domestic violence. Yet, each and every time Ms. Panos continued to reconcile the relationship.

In the State's response, the State continuously ignores the dynamic of this lengthy relationship. The State would have this Court believe that Ms. Panos was trying to flee Mr. Chappell and begin a new life. However, the facts of the relationship dictate otherwise. It appears that there was a cyclical aspect to the relationship. Unfortunately, in relationships of domestic violence it is not uncommon to find reconciliation even after acts of domestic violence.

These facts are necessary to establish, in part, that no sexual assault occurred. The Nevada Supreme Court found evidence of sexual assault based on five factors. The most important factor, was the conclusion that Mr. Chappell had lied to the police when he claimed consensual sexual contact with Debra, but denied ejaculation. The State and the supreme court

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then concluded that Mr. Chappell must have lied because semen matching his DNA was recovered. (Order of Affirmance, 10/20/ 2009, pp. 3-4). A brief analysis of these factors is necessary to establish the necessity for an expert. First, the State has continuously argued that Ms. Panos was curled up in a fetal position and highly fearful when she found out that Mr. Chappell had been released from jail. However, the facts clearly show that Ms. Panos then left the safety of her friends home and went directly back to her apartment where she surely would have known that Mr. Chappell would go. It makes no sense that a person so highly fearful of Mr. Chappell would leave the safety and comfort of a friends home to proceed back to a place of great danger. It makes much more sense that the pattern of the relationship was continuing. Ms. Panos would again consider reconciliation (no matter how unwise) with Mr. Chappell.

Next, the State would contend that Ms. Panos had told Mr. Chappell the relationship was over. Perhaps, this is true. However, that assertion was made by this couple ad nauseam. The relationship was constantly over and reconciliation constantly occurred. It is much more consistent that the pattern was continuing at the time that Ms. Panos left the security of a safe house and proceeded back to the trailer where she knew that Mr. Chappell would proceed. The State contends that Ms. Panos was in the process of moving so that Mr. Chappell could not find her. This also before. At one point, when the relationship was over, Mr. Chappell moved back to Michigan and Ms. Panos begged him to return. While working at the police department in Arizona, Ms. Panos was a victim of domestic violence. Ms. Panos quit her job and proceeded to Las Vegas wherein she again assisted Mr. Chappell to reconcile and continue their lengthy relationship in Las Vegas.

Therefore, the factors relied upon by the State all seem to be easily countered. However, the most devastating fact in proving sexual assault was proof that Mr. Chappell had lied. In fact, the Nevada Supreme Court dedicated the fact that semen was located even though Mr. Chappell had denied ejaculation, as a significant factor in proving sexual assault. At trial and in the second penalty phase, counsel stood idly by and let this ridiculous fact stand as proven. This fact is contradicted by every health teacher in high school. Taken to it's logical conclusion, one can believe that a women cannot get pregnant unless a male ejaculates. Every teenager in the United

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States is strongly advised to avoid this type of scientific misconception. Unfortunately, both the State, the defense and the Nevada Supreme Court have accepted this archaic belief as true. Even though science is in direct contradiction to this fact. Mr. Chappell admitted a sexual encounter with Ms. Panos shortly before the murder. Hence, Mr. Chappell could have been telling the truth that a sexual encounter occurred, he did not ejaculate, and semen was found.

Dr. Roger Harms, M.D., drafted an article, "Birth Control: Can Pre-ejaculation Fluid Cause Pregnancy?". In the beginning of the article, Dr. Harms first word is "yes". Dr. Harms concludes, "pre-ejaculation fluid may contain sperm, which means that a women can get pregnant even when ejaculation doesn't occur within the vagina". Countless studies have come to the same obvious conclusion. Actually, it is bizarre that this argument and establishment of this well known fact is necessary. However, the State seems to blatantly ignore science.

If Mr. Chappell had informed authorities that he had not had a sexual encounter with Ms. Panos, clearly the Court could determine that he was lying.

The very fact that this assertion is not obvious is proof of ineffective assistance of counsel for failing to present an expert on this issue. In the State's response, they claim that there was overwhelming evidence of sexual assault. The State also proceeds to outline how Dr. Gray testified that there was no physical evidence that would support a finding of sexual assault (State's Response pp. 16) (13 ROA 3223-6). The State admits that Dr. Danton testified that Ms. Panos would use sex to calm Mr. Chappell down, when he was angry (State's Response pp. 16) (14 ROA 3330).

The State concludes that counsel made a strategic choice to call certain witnesses (State's Response pp. 16). What strategic reason would defense counsel have for not calling a witness to contradict this miconception. However, what appeared to be obvious, is being used against Mr. Chappell as evidence that he committed sexual assault.

Next, the State argues that Mr. Chappell fails to demonstrate how an expert witness would have benefitted his case (State's Response pp. 17) (citing, Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S.Ct. 2052 (1984) and State v. Molina, 120 Nev. at 192, 87 P.3d at 538). Here, Mr. Chappell can clearly show how the expert would have benefitted his case. If

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Mr. Chappell's attorneys had called an expert to establish that an individual can have sexual intercourse, not ejaculate, and leave semen, than the State would not have been able to conclude that Mr. Chappell was lying. Mr. Chappell respectfully demands funding for an expert so that the record properly reflects that Mr. Chappell's statement to the police is not just possible, but probable. Mr. Chappell has a right to present an expert to correct the record. If Mr. Chappell's attorneys had presented this testimony, the State would not be able to continue to assert that he had lied to the police even though the State's assertion is belied by science. Without this aggravating circumstance, Mr. Chappell is not death eligible.

In essence, Mr. Chappell's testimony and statement to the police is much more consistent with reality than the arguments made by the State. Mr. Chappell had consensual sex with his wife. Ms. Panos dressed herself. Unfortunately, Mr. Chappell went into a rage, having found a letter he believed to be a love letter, and stabbed his wife to death. All parties appear to agree that Mr. Chappell stabbed his wife to death. However, sexual assault was not a part of this case.

Defense counsel's performance for failure to obtain an expert to prove the obvious was deficient. But for the deficiency, the result of the penalty phase would have been different because the aggravating circumstance could not be proven beyond a reasonable doubt. See, Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Mr. Chappell received ineffective assistance of counsel in violation of the sixth and fourteenth amendments to the United States Constitution.

C. FAILURE TO OBTAIN A P.E.T. SCAN

In the instant case, Mr. Chappell had an extremely low IQ. It appears that Mr. Chappell's mother may have been addicted to drugs and alcohol. A proper investigation should have included whether Mr. Chappell was born while his mother was ingesting narcotics and/or alcohol during her pregnancy. It does not appear from the record that fetal alcohol syndrome was investigated. During closing argument, defense counsel argued Mr. Chappell's mother was addicted to drugs and alcohol and was quite possibly using drugs and/or alcohol while she was pregnant (16 ROA 3788). In Haberstroh v. Nevada, 119 Nev. 173, 69 P.2d 676 (2003), the Nevada Supreme Court reversed Mr. Haberstroh's sentence of death for a new penalty phase. In

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the decision, the Nevada Supreme Court noted that mitigation evidence which had not been offered at the first sentencing hearing, should be offered at a new hearing which included "evidence that he suffers from partial fetal alcohol syndrome, mild neuropsychological impairment, a low average IQ, personality disorder, and that he grew up with alcoholic parents and suffered physical and emotional abuse" 69 P.3d at 683. The Court's decision in Haberstroh is important because it recognizes the substantial impact of fetal alcohol syndrome at sentencing and provides support for an argument that the failure to develop such evidence would be prejudicial.

In the instant case, Mr. Chappell is similarly situated to Mr. Haberstroh. Counsel utterly failed to present evidence of fetal alcohol syndrome or even investigate the possibility that the syndrome existed in this case. Counsel should have been aware of this potential mitigation based on counsel's argument that Chappell's mother was possibly using alcohol and/or drugs at the time of pregnancy. Additionally, all of Mr. Chappell's siblings were involved with controlled substances. In direct contradiction to the Nevada Supreme Court's concerns in Haberstroh, the State concludes in their response,

> Considering that the jury found that the defendant was born to a drug, alcohol addicted mother, defendant fails to demonstrate that obtaining a PET scan and/or brain imaging even if these tests would have revealed that the defendant did have fetal alcohol syndrome would have led to a more favorable outcome at his penalty hearing. Thus, defendant fails to meet his burden under Strickland and this claim must fail (State's Response pp. 19).

The State's entire conclusion disregards the reasoning and discussion by the Nevada Supreme Court in Haberstroh.

In the matter of the personal restraint of James Leroy Brett, 142 Wn.2d 868, 16 P.3d 601 (Washington, 2001), the Washington Supreme Court reversed the first degree murder conviction and death sentence based upon ineffective assistance of counsel. The Washington Supreme Court held that trial counsel was ineffective based on 1) trial counsel knew or should have known that petitioner had significant medical and mental conditions; 2) substantial medical and psychiatric opinion was available; 3) counsel failed to conduct a reasonable investigation into the medical and mental conditions; and 4) the reference hearings expert legal testimony established that

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counsel, by failing to take any meaningful steps to develop petitioner's defense deprived petitioner of effective assistance of counsel. Id. In Brett, the Washington Supreme Court explained,

> We agree with the Ninth Circuit's approach in Caro, which is consistent with Strickland, and find it analogous to the present case. Here, defense counsel did almost nothing. The only expert sought by counsel to evaluate Brett's fetal alcohol effect was a psychologist wholly unqualified to render a medical diagnosis of Brett. Dr. Stanulis informed defense counsel of this fact immediately. However, neither Dane nor Foster moved for the appointment of a qualified expert. 16 P.3d 601, 608. (Citing, Caro v. Calderon, 165 F.3d 1223 (9th Cir.), Cert denied, 527 U.S. 1049, 119 Sup. Ct. 2414, 144 L. Ed. 2d. 811 (1999).

Mr. Chappell was denied effective assistance of counsel when counsel knew or should have known of the possibility/probability that fetal alcohol syndrome existed yet did nothing to establish this fact. In Caro, the Ninth Circuit stated,

> Counsel have an obligation to conduct an investigation which will allow a determination of what sort of experts to consult. Once that determination has been made, counsel must present those experts with information relevant to the conclusion of that expert. Caro, 165 F.3d at 1226 (HN 6). See also, Bloom v. Calderon, 132 F.3d 1267, 1277 (9th Cir. 1997), Cert. denied, 523 U.S. 1135, 140 L. Ed. 2d 1104, 118 Sup. Ct. 1856 (1998).

It was incumbent upon Mr. Chappell's counsel to request funding for brain imaging and/or a PET scan. It was incumbent upon Mr. Chappell's counsel to investigate the possibility of fetal alcohol syndrome. Mr. Chappell received ineffective assistance of counsel and specifically requests funding to analyze Mr. Chappell for the presence of fetal alcohol syndrome and requests permission for brain imaging.

D. FAILURE TO PROPERLY PREPARE EXPERT WITNESSES PRIOR TO PENALTY PHASE

For the purposes of this Reply, subsections "D" and "E" have been joined together.

E. FAILURE TO PROPERLY PREPARE A LAY MITIGATION WITNESS

For the purposes of this Reply, subsections "D" and "E" have been joined together.

In Mr. Chappell's supplemental brief, he provides analysis for each of the experts that were unprepared to testify based upon ineffective assistance of counsel. Additionally, Mr. Chappell outlined the failure to properly prepare Mr. Benjamin Dean, a lay mitigation witness.

In the State's response, they provide limited analysis regarding each of the witnesses that

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Mr. Chappell complained about. In sum, the State argues,

> Moreover, defendant fails to show a reasonable probability that the result of his penalty hearing would have been any different had the above witnesses testified differently. In fact, defendant fails to allege what exactly would have been different about the witnesses testimony if there had been more preparation. Defendant cannot meet either prong of Strickland by a preponderance of the evidence (State's Response pp. 20).

As was previously noted in subsection B, the defense failed to present expert testimony to rebut the presumption that semen cannot be present unless ejaculation occurs. Dr. Luis Etcoff was reduced to testifying that Mr. Chappell's story was "bogus". During cross-examination, Dr. Etcoff admitted that Mr. Chappell's story regarding consensual sex made no sense. Dr. Etcoff admitted that Mr. Chappell's story that he did not ejaculate, was unfounded based upon the location of semen. A review of Dr. Etcoff's testimony reveals that he had limited knowledge of the facts of the case. Obviously, if the defense had an expert to establish that semen could be present without ejaculation, Dr. Etcoff would not have been admitting that Mr. Chappell's story was "bogus". Everyone seemed to accept that semen could not be present unless the defendant ejaculated.

Dr. Grey also testified that he had not seen the DNA report. On cross-examination, Dr. Grey admitted he had not seen the report which discussed the presence of sperm. On cross-examination the following question and answer occurred:

Q: But that would be conclusive that there was ejaculation?
A: Yes (13 ROA 3230).

Dr. Grey had not been properly prepared for cross-examination. The defense had failed to present expert testimony establishing the obvious. Dr. Grey even admitted that the presence of sperm is conclusive proof of ejaculation. It appears consistently throughout the trial that everyone had forgotten basic health.

On cross-examination, Dr. William Danton concluded that one scenario could feasibly be sexual assault. Dr. Danton admitted that he had only met Mr. Chappell for two hours on the night before his testimony (March 15, 2007) (15 ROA 3321). Mr. Danton admitted that he had limited knowledge of the facts of the case. Mr. Danton admitted that he did not have enough data and testing had not been conducted to determine whether Mr. Chappell had blacked out. These are

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but a few examples of the failure to properly prepare the experts.

More importantly, the cross-examination of the experts further compounded the misplaced idea that semen must equate to ejaculation. Hence, Mr. Chappell must have lied when he said he had consensual sex without ejaculation. Here, had the defense properly prepared their experts and hired an expert regarding the presence of semen without ejaculation, the result of the penalty hearing would have been different because sexual assault would not have been found.

Mr. Benjamin Dean was contradicted extensively with his own affidavit. An evidentiary hearing should be held to determine whether defense counsel presented the affidavit to Mr. Dean prior to testimony. It is of concern that Mr. Dean did not appear to testify consistently with his affidavit. In Jackson v. Warden, 91 Nev. 430, 537 P.2d 473 (1975), the Nevada Supreme Court held,

> It is still recognized that a primary requirement is that counsel...conduct careful factual and legal investigation and inquiries with a view towards developing matters of defense in order that he make informed decisions on his clients behalf both at the pleadings stage...and the trial. Jackson, 92 Nev. at 433, 537 P.2d at 474.

In the instant case, counsel's performance fell below a standard of reasonableness. Had counsel properly prepared for the penalty phase, the result would have been different. Mr. Chappell has met both standards enunciated in Strickland, 466 U.S. 668, 104 Sup. Ct. 2052 (1984), as outlined above.

F. MR. CHAPPELL'S PRO PER WRIT

The State addressed Mr. Chappell's pro per claim regarding the failure to object to two PSI reports. Mr. Chappell's pro per claims have all been adopted by counsel. Mr. Chappell objects to counsel's failure to object to the PSI reports. The issue stands as submitted.

III. MR. CHAPPELL RECEIVED INEFFECTIVE ASSISTANCE OF PENALTY PHASE TRIAL COUNSEL AND APPELLATE COUNSEL FOR FAILURE TO OBJECT TO THE CUMULATIVE VICTIM IMPACT PANEL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This argument stands as enunciated in Mr. Chappell's Supplemental Brief.

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IV. PENALTY PHASE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO IMPROPER PROSECUTORIAL ARGUMENTS DURING THE PENALTY PHASE IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This arguments stands as enunciated in Mr. Chappell's Supplemental Brief.

V. PENALTY PHASE COUNSEL AND PENALTY PHASE APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE SEVERAL INSTANCES OF IMPROPER PROSECUTORIAL ARGUMENT WHICH SHOULD HAVE BEEN RAISED SIMULTANEOUSLY IN MR. CHAPPELL'S APPEAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

During the cross-examination of Dr. Etcoff, testimony was elicited that Mr. Chappell had complained he had been arrested for a domestic violence incident in front of his children (15 ROA 3541-3542). The prosecutor questioned Dr. Etcoff stating:

> Q: Because it probably marked his otherwise sterling reputation he had with his children at that point to see the police for the tenth time taking their father off in handcuffs (15 ROA 3542).

Defense counsel objected and the court sustained the objection. This issue was not raised on appeal.

In the instant case, there was no evidence that Mr. Chappell was arrested ten times in front of this children. However, undoubtedly the jury would have believed the prosecutor. Interestingly enough, the State argues in response that "further, defendant argues that there is no evidence in the record that he was arrested ten times. This is false" (State's Response pp. 25). Unfortunately, the State has chosen to take Mr. Chappell's complaint out of context. Mr. Chappell specifically complained that there was no evidence that his children had observed him arrested on ten occasions. On page forty of the supplemental brief, Mr. Chappell made it abundantly clear stating, "in the instant case there is no evidence that Mr. Chappell was arrested ten times in front of this children". The State simply responded by establishing that Mr. Chappell may have been arrested numerous times, failing to address Mr. Chappell's specific complaint that there was no evidence his children had seen him arrested on ten occasions. It is obviously disturbing to an average juror to believe that Mr. Chappell's children would have consistently observed him arrested, based upon his criminal activities. The State recognizes that the assertion

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was blatantly false and outrageous prosecutorial misconduct. Hence, the State fails to address the issue in it's entirety, choosing to explain some irrelevant fact in order to substantiate the misconduct.

Next, the State argues that the arguments of counsel are not evidence, citing to Randolph v. State, 117 Nev. 970, 984, 36 P.3d 424, 433 (2001). First, the prosecutor's question is not the argument of counsel. Next, the prosecutor does not have carte blanche permission to make any unfounded and outrageous assertion and simply conclude that the arguments of counsel are not evidence. At this rate, the State would argue that the prosecutor could announce that the defendant must be guilty because he refused to testify. Would the State simply respond by stating that the arguments of counsel are not evidence? Surely, the State could find some defense for their prosecutor's misconduct. Here, the very fact that the State will not respond to the outrageous statement proves acknowledgment of the misconduct.

First, it is improper for a prosecutor to elude to facts outside of the record which deny the defendant a right to a fair hearing. Agard v. Portuondo, 117 F.3d 696, 711 (2nd Cir. 1997)(holding that alluding to facts that are not in evidence is prejudicial and not at all probative)(cert. granted on other grounds, 119 Sup. Ct. 1248 (1999). The Nevada Supreme Court has frequently condemned prosecutors from eluding to facts outside of the record. See, EG, Guy v. State, 108 Nev. 770, 780, 839 P.2d 578, 585 (1992)(cert. denied, 507 U.S. 109 (1993); Sandburn v. State, 107 Nev. 399, 408-409, 812 P.2d 1279, 1286 (1999); Jimimez v. State, 106 Mev. 769, 772, 801 P.2d 1366, 1368 (1990); Collier v. State, 101 Nev. 473, 478, 705 P.2d 1126, 1129 (1985).

It appears that the State concedes misconduct by failing to address the issue. Mr. Chappell was not arrested ten times in front of his children. The Statement was false. The statement was designed to deny Mr. Chappell a right to a fair hearing. There is no room for a prosecutors sarcasm wherein a gross exaggeration of such highly prejudicial information is presented to the jury. The statement also violated NRS 48.045(2) because it presented facts in such a way as to imply that evidence of other crimes, wrongs or acts were present in Mr. Chappell's history. A reasonable juror would conclude that the prosecutor was wholely accurate in the statement. The issue should have been raised on direct appeal and undoubtedly the Nevada Supreme Court

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would have reversed based on this error combined with the cumulative errors that occurred in the second penalty phase.

Thereafter, during closing argument, the prosecutor described how Mr. Chappell "chose evil" (16 ROA 3778). The prosecutor also described Mr. Chappell as a "despicable human being" (16 ROA 3779). Neither comments were objected to at the penalty phase nor raised on appeal.

The Nevada Supreme Court has long recognized that a prosecutor has a duty not to ridicule or belittle the defendant. See. Earl v. State, 111 Nev. 1304, 904 P.2d 1029, 1033 (1995), Jones v. State, 113 Nev. 454, 937 P.2d 55, 62 (1997). In U.S. v. Weatherless, 734 F.2d 179, 181 (4th Cir. 1984), the Court stated that it was beneath the standard of a prosecutor to refer to the accused as a "sick man". (Cert denied, 469 U.S. 1088 (1984)). Court have held it improper for a prosecutor to characterize defendants as "evil men". See, People v. Hawkins, 410 N.E. 2d 309 (Illinois 1980). A prosecutor referring to the defendant as a maniac exceeded the bounds of propriety. People v. Terrell, 310 NE 2d 791, 795 (Illinois Ap. Ct. 1994). Improper for a prosecutor to refer to the defendant as "slime". Biondo v. State, 533 South 2d 910-911 (FALA 1988). Reversing conviction where prosecutor referred to the defendant as "crud". Patterson v. State, 747 P.2d 535, 537-38 (Alaska, 1987). Condemning prosecutor's remarks referring to the defendant as a "rabid animal". Jones v. State, 113 Nev. 454, 468-69 937 P.2d at 62.

In the State's response, the State concludes that referring to Mr. Chappell as a "despicable human being" was warranted an not improper (State's Response pp. 27). Mr. Chappell disagrees. Mr. Chappell received ineffective assistance of penalty phase and appellate counsel for failure to raise these issues on direct appeal in violation of the sixth, eighth and fourteenth amendments to the United States Constitution.

VI. MR. CHAPPELL RECEIVED INEFFECTIVE ASSISTANCE OF PENALTY PHASE COUNSEL AND APPELLATE COUNSEL FOR FAILURE TO OBJECT TO IMPROPER IMPEACHMENT IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. Chappell called Fred Scott Dean as a mitigation witness. Mr. Dean was important to Chappell's mitigation because he had known Mr. Chappell throughout his life (15 ROA 3696-

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3697). Mr. Dean admitted that he had been convicted of federal drug trafficking and drug possession (State and Federal convictions) (15 ROA 3701). However, on cross-examination, the prosecutor elicited the following testimony from Mr. Dean:

Q: How long were you prison for?
A: Twelve years.
Q: That's a long time.
A: Yes sir.
Q: What kind of charges?
A: Like I said drug possession, and the other one was interstate drug trafficking.
Q: Were there other charges that were dismissed as part of your deal there?
A: There was no pretty much deal. That was just - - it was plead to the lesser charge versus the charge that I was charged with. Yes.
Q: So you plead to a lesser charge?
A: Yes.
Q: And the lesser charge was?
A: 12-30 - well, it was 20-30 the judge sentenced me to 12-30.
Q: And that was a drug charge?
A: Yes sir.
Q: What was the more serious charge that was reduced/
A: I was trying to think of how they titled it, possession of drugs over 65 grams.
Q: Was this cocaine?
A: Yes sir.
Q: 65 grams is a lot of cocain.
A: Yes sir.
Q: So this was drug trafficking or this was trafficking quantity?
A: Yes sir.
Q: And the minimum sentence would have been a lot more severe if you hadn't done the deal?
A: When you say deal, what do you mean by that?
Q: Taking the lesser plea.
A: I would have been worse, yes sir (15 ROA 3702).

NRS 50.095 impeachment by evidence of conviction of a crime:

1. The purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is admissible but only if the crime was punishable by death or imprisonment for more than 1 year under the law under which the witness was convicted.

In the State's response, they concede that the prosecutor's questioning of Mr. Dean was improper (State's Response pp. 28). However, the State argues that the error does not warrant reversal. Again, the State appears to contend that no matter how many improper arguments the prosecutor makes, none of it constitutes reversal. Apparently, the prosecutor has cart blanche rights to trample on the constitution of the United States. At some point, blatant errors must be punished. Prosecutors by nature enforce punishment upon others. Yet, here the State seems to

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feel that they have an absolute right to commit misconduct and then simply argue that their misconduct would not change the result of the proceedings. The State simply ignores a long line of federal cases that have consistently frowned upon prosecutor's committing gross acts of misconduct. Noticeably absent is any effort to explain how the prosecutor could have provided such an improper line of questioning. Simply permitting this type of misconduct encourages prosecutors within this State to continue this behavior even when a human being is facing life or death.

Without any ramification, the rules of evidence and the constitution begin to erode away. Usually, the State can explain the actions of the prosecutor or perhaps claim a simple mistake. Whereas in the instant case, the State simply informs this Court that the prosecutor shouldn't have presented misconduct, but the Court will do nothing about it. It was a violation of Mr. Chappell's constitutional rights and rendered the proceedings unfair. Mr. Chappell received ineffective assistance of counsel in violation of the sixth and fourteenth amendments to the United States Constitution for failure to address these issues at the second penalty phase or on appeal. Mr. Chappell is entitled to a new penalty phase based upon this error. Additionally, this Court should consider this admitted error along with the numerous errors which occurred in this case as cumulative error and reverse Mr. Chappell's sentence of death.

VII. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN ALLOWING THE ADMISSION OF EVIDENCE OF SEVERAL BAD ACTS THUS VIOLATING APPELLANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS AND WARRANTING REVERSAL OF HIS PENALTY PHASE.

During the State's case in chief, Ladonna Jackson was called as a witness. Ms. Jackson knew Mr. Chappell from the Vera Johnson Housing project (13 ROA 3198). Over defense counsel's object, Ms. Jackson was allowed to testify that Mr. Chappell made money "by stealing" (13 ROA 3203). Defense counsel objected and the court overruled the objection. The State is required to place the defendant on notice of evidence to be used at the penalty phase. There is no indication in the record that Mr. Chappell was on notice that Ms. Jackson would provide her opinion that Mr. Chappell was a thief. See, Nunnery v. State, 127 Nev. Adv. Op. 69(October 27, 2011).

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In the State's Response, they fail to address the merits of Mr. Chappell's argument. Instead, the State chooses to claim that the issue should have been raised on direct appeal and is therefore barred pursuant to NRS 34.810 (1)(b)(2) (State's Response pp. 29). Mr. Chappell specifically complained that his appellate counsel was ineffective for failing to raise the issue on appeal (Supplemental Brief pp. 45). Mr. Chappell had a right to effective assistance of appellate counsel on direct appeal. Apparently, the State believes that Mr. Chappell did not have a right to effective assistance of counsel on direct appeal which is in violation of clearly established federal case law. The State refuses to address the issue proving the meritorious assertions listed in Mr. Chappell's supplement. Based on the State's failure to address the merits, Mr. Chappell is entitled to a reversal of his sentence of death.

VIII. THE DEATH PENALTY IS UNCONSTITUTIONAL

This argument stands as enunciated in Mr. Chappell's Supplemental Brief.

IX. MR. CHAPPELL'S DEATH SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, AND A RELIABLE SENTENCE, BECAUSE THE NEVADA CAPITAL PUNISHMENT SYSTEM OPERATES IN AN ARBITRARY AND CAPRICIOUS MANNER. U.S. CONST. AMENDS. V, VI, VIII AND XIV; NEV. CONST. ART. I SECS. 3, 6 AND 8; ART IV, SEC. 21.

This argument stands as enunciated in Mr. Chappell's Supplemental Brief.

X. MR. CHAPPELL'S CONVICTION AND DEATH SENTENCE ARE INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, TRIAL BEFORE AN IMPARTIAL JURY AND A RELIABLE SENTENCE BECAUSE THE PROCEEDINGS AGAINST HIM VIOLATED INTERNATIONAL LAW. U.S. CONST. AMENDS. V, VI VIII AND XIV; NEV. CONST. ART. I SECS. 3, 6 AND 8; ART IV, SEC. 21.

This argument stands as enunciated in Mr. Chappell's Supplemental Brief.

XI. CHAPPELL'S CONVICTION AND SENTENCE ARE INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEE OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS, EFFECTIVE ASSISTANCE OF COUNSEL AND RELIABLE SENTENCE BECAUSE THE JURY INSTRUCTIONS GIVEN AT TRIAL WERE FAULTY AND WERE NOT THE SUBJECT OF CONTEMPORANEOUS OBJECTION BY TRIAL COUNSEL, NOT RAISED ON DIRECT APPEAL BY APPELLATE COUNSEL, NOT RAISED BY PENALTY PHASE APPELLATE COUNSEL, AND NOT RE-RAISED BY PENALTY PHASE COUNSEL.

This argument stands as enunciated in Mr. Chappell's Supplemental Brief.

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

XII. MR. CHAPPELL RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BASED UPON CUMULATIVE ERROR.

This argument stands as enunciated in Mr. Chappell's Supplemental Brief.

XIII. MR. CHAPPELL IS ENTITLED TO AN EVIDENTIARY HEARING.

This argument stands as enunciated in Mr. Chappell's Supplemental Brief.

CONCLUSION

Based on the foregoing, Mr. Chappell would respectfully request that this Court grant this writ.

DATED this 30th day of July, 2012.

Respectfully submitted by:

CHRISTOPHER R. ORAM, ESQ.
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(702) 384-5563

Attorney for Petitioner
JAMES CHAPPELL

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(702) 384-5563

Attorney for Defendant
JAMES CHAPPELL

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA, Plaintiff, vs. JAMES CHAPPELL, Defendant.	CASE NO. C131341 DEPT. NO. XXV

RECEIPT OF COPY

RECEIPT OF COPY of the above and foregoing **REPLY TO THE STATE'S RESPONSE TO THE SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT 'S WRIT OF HABEAS CORPUS (POST-CONVICTION)** is hereby acknowledge this 30 day of July, 2012.

CLARK COUNTY DISTRICT ATTORNEY

200 Lewis Avenue
Las Vegas, Nevada 89155

CHRISTOPHER R. ORAM, LTD.
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CLERK OF THE COURT

NOTC
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Attorney for Defendant
JAMES CHAPPELL

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA, Plaintiff, vs. JAMES CHAPPELL, Defendant.	CASE NO. C131341 DEPT. NO. V

NOTICE OF APPEAL

NOTICE is hereby given that Defendant, JAMES CHAPPELL, hereby appeals to the Supreme Court of the State of Nevada from the denial of his Petition for Writ of Habeas Corpus (Post-Conviction), which was denied by the Honorable Judge Carolyn Ellsworth on October 19, 2012. The order not having been entered yet.

DATED this 22 day of October, 2012.

By _____
CHRISTOPHER R. ORAM
Nevada Bar #004349
520 South Fourth Street.,
Las Vegas, Nevada 89101

Attorney for Defendant
JAMES CHAPPELL

CHRISTOPHER R. ORAM, LTD.
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LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

CERTIFICATE OF MAILING

I hereby certify that I am an employee of CHRISTOPHER R ORAM and that on the 22 day of October 2012, I did deposit in the United States Post Office, at Las Vegas, Nevada, in a sealed envelope with postage fully pre-paid thereon, a true and correct copy of the above and foregoing **NOTICE OF APPEAL**, addressed to:

Supreme Court Clerk
Supreme Court Building
201 S. Carson Street
Carson City, Nevada 89701

Steve Wolfson
District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101

Catherine Cortez Masto
Attorney General
100 North Carson Street
Carson City, Nevada 89701

An employee of Christopher R. Oram Esq.

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

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10/22/2012 03:32:42 PM

CLERK OF THE COURT

CASA
CHRISTOPHER R. ORAM, ESQ.
Nevada State Bar #004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563

Attorney for Defendant
JAMES CHAPPELL

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA, Plaintiff, vs. JAMES CHAPPELL, Defendant.	CASE NO. C131341 DEPT. NO. V

CASE APPEAL STATEMENT

1.	Appellant	:	JAMES CHAPPELL
2.	Judge	:	Hon. Carolyn Ellsworth
3.	Parties in District Court	:	State of Nevada v. James Chappell
4.	Parties in Appeal	:	James Chappell v. State of Nevada
5.	Counsel on Appeal	:	Christopher R. Oram, Esq. 520 S. Fourth Street, 2nd Floor Las Vegas, Nevada 89101 (702) 384-5563 Steve Wolfson District Attorney 200 Lewis Avenue Las Vegas, NV 89155 Catherine Cortez Masto Attorney General 100 North Carson Street Carson City, Nevada 89701

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

6. Appellant was represented by court appointed counsel in the district court.

7. Appellant is currently represented by court appointed counsel on appeal.

8. Appellant has not been granted leave to proceed in form pauperis as of this date.

9. On October 19, 2012, the Honorable Judge Carolyn Ellsworth denied Mr. Chappell's Petition for Writ of Habeas Corpus (Post-Conviction). The order not having been entered as of this date.

DATED this 22 day of October, 2012.

Respectfully submitted by:

CHRISTOPHER R. ORAM, ESQ.
Nevada Bar No. 004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563

Attorney for Defendant
JAMES CHAPPELL

CHRISTOPHER R. ORAM, LTD.
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TEL. 702.384-5563 | FAX. 702.974-0623

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of CHRISTOPHER R. ORAM, ESQ., and that on the 22 day October, 2012, I did deposit in the United States Postal Service office at Las Vegas, Nevada, in a sealed envelope with postage fully pre-paid thereon, a true and correct copy of the above foregoing **CASE APPEAL STATEMENT**, addressed to:

Supreme Court Clerk
Supreme Court Building
201 S. Carson Street
Carson City, Nevada 89701

Steve Wolfson
District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101

Catherine Cortez Masto
Attorney General
100 North Carson Street
Carson City, Nevada 89701

An employee of Christopher R. Oram, Esq.

CHRISTOPHER R. ORAM, LTD.
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LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Oct 30 2012 09:48 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

INDICATE FULL CAPTION:

JAMES CHAPPELL
Appellant

vs.

THE STATE OF NEVADA
Respondent

No. 61967

DOCKETING STATEMENT
CRIMINAL APPEALS
(Including appeals from pretrial and post-conviction rulings and other requests for post-conviction relief)

GENERAL INFORMATION

1. Judicial District Eighth County Clark
Judge Carolyn Ellsworth District Ct Case No. C131341

2. If the defendant was given a sentence,
(a) what is the sentence?
See attached Page

(b) has the sentence been stayed pending appeal?
No.

(c) was defendant admitted to bail pending appeal?
No.

3. Was counsel in the district court appointed ☑ or retained ☐?

4. **Attorney filing this docketing statement:**

Attorney Christopher R. Oram Esq. Telephone (702)598-1471
Firm: Christopher R. Oram LTD.
Address:

Client(s) James Chappell

5. Is appellate counsel appointed ☑ or retained ☐?

Docket 61967 Document 2012-34186

If this is a joint statement by multiple appellants, add the names and addresses of other counsel on an additional sheet accompanied by a certification that they concur in the filing of this statement.

6. **Attorney(s) representing respondent(s):**

Attorney Steve Wolfson Telephone (702) 671-2500
Firm: District Attorney
Address: 200 Lewis Avenue
Las Vegas, Nevada 89101

Client(s) State of Nevada

Attorney Catherine Cortez-Masto Telephone
Firm: Attorney General
Address: 100 North Carson Street
Carson City, Nevada 89701-4717

Client(s) State of Nevada

(List additional counsel on separate sheet if necessary)

7. **Nature of disposition below:**

- ☐ Judgment after bench trial
- ☐ Judgment after jury verdict
- ☐ Judgment upon guilty plea
- ☐ Grant of pretrial motion to dismiss
- ☐ Parole/Probation revocation
- ☐ Motion for new trial
  - ☐ grant ☐ denial
- ☐ Motion to withdraw guilty plea
  - ☐ grant ☐ denial
- ☐ Grant of pretrial habeas
- ☐ Grant of motion to suppress evidence
- ☑ Post-conviction habeas (NRS ch. 34)
  - ☐ grant ☑ denial
- ☐ Other disposition (specify)

8. **Does this appeal raise issues concerning any of the following:**

☑ death sentence
☐ life sentence
☐ juvenile offender
☐ pretrial proceedings

9. **Expedited appeals:** The court may decide to expedite the appellate process in this matter. Are you in favor of proceeding in such manner?

Yes ☐ No ☑

10. **Pending and prior proceedings in this court.** List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal (e.g, separate appeals by co-defendants, appeal after post-conviction proceedings):
None that Counsel is aware

11. **Pending and prior proceedings in other courts.** List the case name, number and court of all pending and prior proceedings in other courts that are related to this appeal (e.g., habeas corpus proceedings in state or federal court, bifurcated proceedings against co-defendants):
None that counsel is aware.

12. **Nature of action.** Briefly describe the nature of the action and the result below:
On October 19, 2012, the Honorable Judge Carolyn Ellsworth denied Mr. Chappell's Petition for Writ of Habeas Corpus. The Order not having been entered as of this date.

13. **Issues on appeal.** State concisely the principal issue(s) in this appeal:

Mr. Chappell reserves the right to address issues as they may arise.

14. **Constitutional issues.** If the State is not a party and if this appeal challenges the constitutionality of a statute or municipal ordinance, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

N/A ☑ Yes ☐ No ☐

If not, explain

15. **Issues of first-impression or of public interest.** Does this appeal present a substantial legal issue of first-impression in this jurisdiction or one affecting an important public interest?

First-impression: Yes ☐ No ☑

Public interest: Yes ☐ No ☑

16. **Length of trial.** If this action proceeded to trial or evidentiary hearing in the district court, how many days did the trial or evidentiary hearing last?

17 days

17. **Oral argument.** Would you object to submission of this appeal for disposition without oral argument?

Yes ☑ No ☐

TIMELINESS OF NOTICE OF APPEAL

18. Date district court announced decision, sentence or order appealed from 10/22/2012

19. Date of entry of written judgment or order appeal from not entered as of this date.

(a) If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

20. If this appeal is from an order granting or denying a petition for a writ of habeas corpus, indicate the date written notice of entry of judgment or order was served by the district court

(a) Was service by delivery ☐ or by mail ☐.

21. If the time for filing the notice of appeal was tolled by a post judgment motion,

(a) Specify the type of motion, and the date of filing of the motion:

Arrest judgment _____ Date filed _____
New trial _____ Date filed _____
(newly discovered evidence)
New trial _____ Date filed _____
(other grounds)

(b) Date of entry of written order resolving motion _____

22. Date notice of appeal filed 10/22/2012

23. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(b), NRS 34.560, NRS 34.575, NRS 177.015(2), or other

SUBSTANTIVE APPEALABILITY

24. Specify statute, rule or other authority that grants this court jurisdiction to review from:

NRS 177.015(1)(b) _____
NRS 177.015(1)(c) _____
NRS 177.015(2) _____
NRS 177.015(3) _____
NRS 177.055 _____
NRS 34.560 _____
NRS 34.575(1) _____
NRS 34.575(2) _____
Other (specify) NRAP 4(b)

VERIFICATION

I certify that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief.

James Chappell
Name of appellant

October 29, 2012
Date

Christopher R. Oram Esq.
Name of counsel of record

Signature of counsel of record

CERTIFICATE OF SERVICE

I hearby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 29th day of Oct 2012. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ-MASTO
Nevada Attorney General

STEVE OWENS
Chief Deputy District Attorney

CHRISTOPHER R. ORAM, ESQ.

BY:

/s/ Jessie Vargas
An Employee of Christopher R. Oram, Esq.

REGISTER OF ACTIONS
CASE NO. 95C131341

The State of Nevada vs James M Chappell

Case Type:	Felony/Gross Misdemeanor
Date Filed:	10/10/1995
Location:	Department 5
Conversion Case Number:	C131341
Defendant's Scope ID #:	1212860
Lower Court Case Number:	95F08114

PARTY INFORMATION

Defendant	Chappell, James M	Lead Attorneys Christopher R. Oram *Retained* 7023845563(W)
Plaintiff	State of Nevada	Steven B Wolfson 702-671-2700(W)

CHARGE INFORMATION

Charges: Chappell, James M	Statute	Level	Date
1. BURGLARY.	205.060	Felony	01/01/1900
2. ROBBERY WITH A DEADLY WEAPON	200.380*165	Felony	01/01/1900
3. MURDER WITH A DEADLY WEAPON	200.010*165	Felony	01/01/1900
3. DEGREES OF MURDER	200.030	Felony	01/01/1900

EVENTS & ORDERS OF THE COURT

12/30/1996 **Sentencing** (9:00 AM) ()

SENTENCING Court Clerk: TINA HURD Reporter/Recorder: PATSY SMITH Heard By: A. William Maupin

Minutes

12/30/1996 9:00 AM

- Elaine Lowrey of the Division of Parole & Probation present. DEFT. CHAPPELL ADJUDGED GUILTY OF COUNT I - BURGLARY (F), COUNT II - ROBBERY WITH USE OF A DEADLY WEAPON (F) AND COUNT III - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON (F). Statements in mitigation of sentencing. COURT ORDERED, in addition to the $25.00 Administrative Assessment Fee, deft. is SENTENCED to a MAXIMUM term of ONE HUNDRED TWENTY (120) MONTHS with a MINIMUM parole eligibility of FORTY EIGHT (48) MONTHS in the Nevada Department of Prisons for Count I, and is SENTENCED to a MAXIMUM term of ONE HUNDRED EIGHTY (180) MONTHS with a MINIMUM parole eligibility of SEVENTY TWO (72) MONTHS in the Nevada Department of Prisons plus an EQUAL AND CONSECUTIVE MAXIMUM term of ONE HUNDRED EIGHTY (180) MONTHS with a MINIMUM parole eligibility of SEVENTY TWO (72) MONTHS in the Nevada Department of Prisons for the use of a deadly weapon for Count II, to be served CONSECUTIVELY to Count I and deft. is SENTENCED to DEATH for Count III, to be served CONSECUTIVELY to Counts I and II. Deft. to receive 192 DAYS Credit for Time Served and is to PAY STATUTORY RESTITUTION. BOND EXONERATED, if any. Stay of execution signed in open court. NDP

Return to Register of Actions

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11/16/2012 11:09:30 AM

CLERK OF THE COURT

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JAMES CHAPPELL,
#1212860

Defendant.

CASE NO: 95C131341
DEPT NO: V

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

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

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

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

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

ORDER

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

DATED this _____ day of November, 2012.

DISTRICT JUDGE

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

BY
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352

CERTIFICATE OF FACSIMILE TRANSMISSION

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

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

Ellen Davis

Employee for the District Attorney's Office

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OFFICE OF THE DISTRICT ATTORNEY
CRIMINAL APPEALS UNIT

STEVEN B. WOLFSON
District Attorney

CHRISTOPHER J. LALLI
Assistant District Attorney

TERESA M. LOWRY
Assistant District Attorney

MARY-ANNE MILLER
County Counsel

STEVEN S. OWENS
Chief Deputy

JONATHAN VANBOSKERCK
Chief Deputy

FACSIMILE TRANSMISSION

Fax No. (702) 382-5815

Telephone No. (702) 671-2750

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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OFFICE OF THE DISTRICT ATTORNEY
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Fax No. (702) 382-5815

Telephone No. (702) 671-2750

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,

COPY

Electronically Filed
11/20/2012 08:16:26 AM

CLERK OF THE COURT

NEO

DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES M. CHAPPELL,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: 95C131341
Dept No: V

NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PLEASE TAKE NOTICE that on November 16, 2012, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on November 20, 2012.

STEVEN D. GRIERSON, CLERK OF THE COURT

By: Heather Ungermann
Heather Ungermann, Deputy Clerk

CERTIFICATE OF MAILING

I hereby certify that on this 20 day of November 2012, I placed a copy of this Notice of Entry of Decision and Order in:

The bin(s) located in the Office of the District Court Clerk of:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division

☑ The United States mail addressed as follows:

James Chappell # 52338
P.O. Box 1989
Ely, NV 89301

Christopher R. Oram, Esq.
520 S. Fourth St., 2nd Floor
Las Vegas, NV 89101

Heather Ungermann
Heather Ungermann, Deputy Clerk

Electronically Filed
11/16/2012 11:09:30 AM

CLERK OF THE COURT

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JAMES CHAPPELL,
#1212860

Defendant.

CASE NO: 95C131341
DEPT NO: V

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

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

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

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

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

ORDER

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

DATED this _____ day of November, 2012.

DISTRICT JUDGE

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

BY _____
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352

CERTIFICATE OF FACSIMILE TRANSMISSION

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

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

Ellen Davis

Employee for the District Attorney's Office

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OFFICE OF THE DISTRICT ATTORNEY
CRIMINAL APPEALS UNIT

STEVEN B. WOLFSON
District Attorney

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Assistant District Attorney

TERESA M. LOWRY
Assistant District Attorney

MARY-ANNE MILLER
County Counsel

STEVEN S. OWENS
Chief Deputy

JONATHAN VANBOSKERCK
Chief Deputy

FACSIMILE TRANSMISSION

Fax No. (702) 382-5815

Telephone No. (702) 671-2750

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

FROM: Steven S. Owens

SUBJECT: James Chappell, 95C131341, Findings

DATE: November 14, 2012

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*** TX REPORT ***
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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,

0001
CHRISTOPHER R. ORAM, ESQ.
Nevada State Bar #004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563

Attorney for Defendant
JAMES CHAPPELL

FILED

FEB 15 2 48 PM '12

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA, Plaintiff, vs. JAMES CHAPPELL, Defendant.	CASE NO. C131341 DEPT. NO. XXV

MOTION FOR AUTHORIZATION TO OBTAIN AN INVESTIGATOR AND FOR PAYMENT OF FEES INCURRED HEREIN.

COMES NOW, Defendant, JAMES CHAPPELL, by and through his attorney, CHRISTOPHER R. ORAM, ESQ., hereby requests this Honorable Court to issue an order appointing an investigator for Mr. Chappell. Defendant also requests on Order authorizing payment in excess of the statutory maximum three hundred dollars ($300.00), not to exceed two thousand five hundred dollars ($2,500.00) per expert unless prior Court approval is granted.

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CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

This motion is made and based pleadings and papers on file herein, the affidavit of counsel attached hereto, as well as any oral arguments of counsel adduced at the time of hearing.

DATED this 13th day of February, 2012.

Respectfully submitted

CHRISTOPHER R. ORAM, ESQ.
Nevada Bar #004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada, 89101

Attorney for Petitioner
JAMES CHAPPELL

NOTICE OF MOTION

YOU, AND EACH OF YOU, will please take notice that the undersigned will bring the foregoing **MOTION FOR AUTHORIZATION TO OBTAIN AN INVESTIGATOR AND FOR PAYMENT OF FEES INCURRED HEREIN** on for hearing on the 28 day of February, 2012, at the Clark County Courthouse, 200 Lewis Avenue in District Court, Department XXV at the hour of 9 .m. or as soon thereafter as counsel may be heard.

Respectfully submitted

CHRISTOPHER R. ORAM, ESQ.
Nevada Bar # 004349
520 S. Fourth Street, 2nd Floor
Las Vegas, NV 89101

Attorney for Petitioner
JAMES CHAPPELL

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX 702.974-0623

POINTS AND AUTHORITIES

Nevada Revised Statute 7.135 states:

> Reimbursement for expenses; employment of investigative, expert or other services: The attorney appointed by a magistrate or district court to represent a defendant is entitled, in addition to the fee provided by N.R.S. 7.125 for his services to be reimbursed for expenses reasonably incurred by him in representing the defendant and may employ, subject to the prior approval of the magistrate or the district court in an ex parte application, such investigative, expert or other services as may be necessary for an adequate defense. Compensation to any person furnishing such investigative, expert or other services must not exceed $300.00, exclusive of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is:
>
> 1. Certified by the trial judge of the court, or by the magistrate if the services were rendered in connection with a case disposed of entirely before him, as necessary to provide fair compensation of services of an unusual character or duration: and
>
> 2. Approved by the presiding judge of the judicial district in which the attorney was appointed . . .

In the instant case, Mr. Chappell is currently in his post-conviction proceedings regarding his sentence of death. In light of the seriousness of Mr. Chappell's conviction and his sentence of death, I believe it is necessary that an investigator be permitted to act in the capacity for Mr. Chappell through his post-conviction proceedings.

The above mentioned investigator will incur fees associated with his/her services, thus it is necessary that this Court permit payment of his/her fees incurred herein. Moreover, Mr. Chappell is financially unable to obtain an investigator on his own behalf.

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CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX 702.974-0623

WHEREFORE, for the foregoing reasons, Mr. Chappell requests this court to authorize an order granting the services of an investigator. Additionally, for this Court to allow payment for his/her fees in excess of the statutory maximum three hundred dollars ($300.00), not to exceed two thousand five hundred Dollars ($2,500.00) per expert unless prior Court approval is granted.

DATED this 13th day of February, 2012.

Respectfully submitted:

CHRISTOPHER R. ORAM, ESQ.
Nevada State Bar #004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101

Attorney for Petitioner
JAMES CHAPPELL

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

AFFIDAVIT OF CHRISTOPHER R. ORAM, ESQ.
IN SUPPORT OF MOTION FOR AUTHORIZATION TO OBTAIN AN INVESTIGATOR AND FOR PAYMENT OF FEES INCURRED HEREIN.

STATE OF NEVADA)
)ss:
COUNTY OF CLARK)

CHRISTOPHER R. ORAM, ESQ., having been duly sworn, deposes and says:

1. Your Affiant is an attorney duly licensed to practice law in the State of Nevada.

2. JAMES CHAPPELL, by and through his attorney, CHRISTOPHER R. ORAM, ESQ., hereby requests this Honorable Court to issue an order appointing an investigator for Mr. Chappell. Defendant also requests on Order authorizing payment in excess of the statutory maximum three hundred dollars ($300.00), not to exceed two thousand five hundred dollars ($2,500.00) per expert unless prior Court approval is granted

3. In the instant case, Mr. Chappell is currently in his post-conviction proceedings regarding his sentence of death. In light of the seriousness of Mr. Chappell's conviction and his sentence of death, I believe it is necessary that an investigator be permitted to act in the capacity for Mr. Chappell through his post-conviction proceedings.

4. The above mentioned investigator will incur fees associated with his/her services, thus it is necessary that this Court permit payment of his/her fees incurred herein. Moreover, Mr. Chappell is financially unable to obtain an investigator on his own behalf.

5. Therefore, it is essential that Mr. Chappell be permitted an investigator.

6. That this motion is being made in good faith and not for purposes of delay.

7. Further your affiant sayeth naught.

DATED this 23rd day of February, 2012.

CHRISTOPHER R. ORAM, ESQ.

SUBSCRIBED AND SWORN to before me this 23rd day of February, 2012.

NOTARY PUBLIC in and for said County and State

JESSIE LEE VARGAS
Notary Public-State of Nevada
APPT. NO. 09-9721-1
My App. Expires February 18, 2013

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
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Attorney for Defendant
JAMES CHAPPELL

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA, Plaintiff, vs. JAMES CHAPPELL, Defendant.	CASE NO. C131341 DEPT. NO. XXV

RECEIPT OF COPY

The above **MOTION FOR AUTHORIZATION TO OBTAIN AN INVESTIGATOR AND FOR PAYMENT OF FEES INCURRED HEREIN** is hereby acknowledged this 15 day of February, 2012.

Clark County District Attorney

By _____
200 Lewis Avenue
Las Vegas, Nevada 89155

CHRISTOPHER R. ORAM, LTD.
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RTRAN

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. JAMES MONTELL CHAPPELL, Defendant.	CASE NO. C131341 DEPT. NO. V

BEFORE THE HONORABLE CAROLYN ELLSWORTH, DISTRICT COURT JUDGE

WEDNESDAY, AUGUST 29, 2012

RECORDER'S TRANSCRIPT RE:
STATUS CHECK

APPEARANCES:

For the Plaintiff: STEVEN S. OWENS
Chief Deputy District Attorney

For the Defendant: CHRISTOPHER R. ORAM, ESQ.

RECORDED BY: LARA CORCORAN, COURT RECORDER

Docket 61967 Document 2013-34681

LAS VEGAS, NEVADA, WEDNESDAY, AUGUST 29, 2012, 9:09 A.M.

* * * * *

THE COURT: Top of 1, Case Number C131341, State of Nevada versus James Montell Chappell. Good morning.

MR. ORAM: Good morning, Your Honor.

THE COURT: All right. This is on for status check it says.

MR. ORAM: Your Honor, I believe – we received notice from Judge Bell that she had to recuse herself from this case.

THE COURT: Oh, right.

MR. ORAM: And there's been full briefing completed. And so I guess what needs to happen is – it's such a – it's such a lengthy case and so voluminous I would think the Court would need quite a bit of time to review the matter. And so I think both sides would just ask that a argument date be set at a time convenient to the Court.

THE COURT: Okay. So by your hand motions you were showing me – so how long do you think it's going to take me to read this?

MR. ORAM: What would you say, Mr. Owens?

MR. OWENS: There's been two penalty hearings in this capital case. This is a post-conviction – first post-conviction petition from the new penalty hearing, the new sentence of death. It's the second insofar as some of the guilt-phase issues are concerned. So there's a lengthy procedural history involved.

THE COURT: Was there a hearing?

MR. OWENS: Depends on how fast of a reader you are, I guess. But it may –

THE COURT: Was there an evidentiary hearing?

MR. ORAM: No, Your Honor.

THE COURT: No.

MR. ORAM: We've just finished briefing. And so I had a couple motions where I was requesting an expert and an investigator, which the Court at the time said that they would entertain at the time of argument so that we could, you know, perhaps argue everything at one time. But, again, I think it is quite lengthy.

MR. OWENS: I agree. The next step is to set it for argument when the Court is ready to entertain argument and then we can decide whether an evidentiary hearing is needed and we can decide the motions at the same time and move forward from there.

THE COURT: How about 30 days? How's my calendar look? We're just coming into the criminal cycle again and I've got quite a few trials set.

THE CLERK: Thirty – let me look. So it's like October – is it going to just be on a regular calendar day?

THE COURT: Yeah.

THE CLERK: I would say maybe October 1st.

THE COURT: October 1st.

MR. ORAM: Would we put –

THE COURT: Would you need the defendant to be here for this?

MR. ORAM: Your Honor, I'd –

MR. OWENS: Not for argument, no.

MR. ORAM: Not for argument, no. But we would put this on a later time rather than the 8:30 calendar, because I imagine you – this one would probably take probably an hour at least to argue the matter?

THE COURT: Well, we can try because we'll need to get a courtroom.

MR. ORAM: Yes, Your Honor.

THE CLERK: What time?

THE COURT: Let's put in on – we could put it on a Friday. Friday morning on my civil calendars because those don't usually go – the longest they usually go is an hour.

THE CLERK: All right. Let's put it on October 12th at 10.

MR. ORAM: Yes, Your Honor.

MR. OWENS: That should work.

THE COURT: Thank you.

MR. ORAM: Thank you very much, Your Honor.

PROCEEDING CONCLUDED AT 9:13 A.M.

* * * * * * * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-video recording of this proceeding in the above-entitled case.

Lara Corcoran

LARA CORCORAN
Court Recorder/Transcriber

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TRAN

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA

Plaintiff

vs.

JAMES MONTELL CHAPPELL

Defendant

CASE NO. C131341

DEPT. NO. V

BEFORE THE HONORABLE CAROLYN ELLSWORTH, DISTRICT COURT JUDGE

MONDAY, OCTOBER 19, 2012

RECORDER'S TRANSCRIPT RE:
EVIDENTIARY HEARING: ARGUMENT

APPEARANCES:

For the Plaintiff: STEVEN S. OWENS
Chief Deputy District Attorney

For the Defendant: CHRISTOPHER R. ORAM, ESQ.

RECORDED BY: LARA CORCORAN, COURT RECORDER

LAS VEGAS, NEVADA, FRIDAY, OCTOBER 19, 2012, 9:58 A.M.

* * * * *

MR. ORAM: – Your Honor.

THE COURT: You're not expecting them to have transported him, right?

MR. ORAM: No, I am not, Your Honor. And I believe we can proceed on argument without him.

THE COURT: Okay. All right. So, case number C131341, State of Nevada versus James Montell – is it Chapel [phonetic] or Shapell [phonetic]?

MR. ORAM: It's Chapell [Chapel], Your Honor.

THE COURT: Chapell. All right. And do you have any particular order you want me to hear, because there are the other – there's the petition for writ of habeas corpus argument, but there are all these other motions that are also on?

MR. ORAM: Your Honor, perhaps I could just sort of address the case as a whole at first and then get some guidance maybe from the Court or hear the State's argument. I could probably just sort of address all of the arguments because, in essence, what I'm going to be asking the Court to do is hold an evidentiary hearing, and before that evidentiary hearing give me an opportunity to have an investigator, at least one expert, and conduct a PET scan. And so that would be what – the end conclusion of what I'm asking for.

THE COURT: Right. So just let me tell you so you can kind of tailor your arguments, I suppose, that I read everything, that I'm not persuaded that there was ineffective assistance or that your other assignments of error, you know, like attacking the constitutionality, et cetera, of the – or of the death penalty scheme in Nevada, or that it's cruel and unusual punishment, those things, I'm not persuaded

by any of those arguments.

Moreover, I don't see that an evidentiary hearing – and normally I grant them, as you know; we've had many, but I don't see in this case that an evidentiary hearing is going to add anything to what I already have before me. I don't think an evidentiary hearing is warranted in this particular case and so I would be inclined to deny the petition as well as all the motions.

So, go ahead.

MR. ORAM: Your Honor, if I could also say one housekeeping matter. Mr. Hover, as you know he is in your court, he is also for one – for another case next door –

THE COURT: Right.

MR. ORAM: – apparently there's a high-profile case – O. J. Simpson is next door – so that case was not called. At some point I may need to go over to just assist Mr. Hover, although it sounds like this particular argument may be relatively short, and it's a busy court next door.

Your Honor, I would – again, I recognize that the Court will have read everything. I don't have much to add, although I would be able to argue it this morning. I'm prepared to argue for an hour, if need be, because I – but I would be regurgitating every single thing that is in these.

Now, I recognize, as the Court said, in my supplemental brief from page 45 on, these are standard death-penalty arguments I would make in every single case of mine, and they are always denied. We do it for federal preservation of the issues.

Your Honor, I would – I would ask that an evidentiary hearing be held so that I may flush out the arguments that I have done.

THE COURT: Tell me what you would think you would expect to happen in an evidentiary hearing. What evidence do you think would come out in an evidentiary hearing that would change or add to what we have already?

MR. ORAM: I would just sort of summarize it this way, Your Honor. I would want to know why defense counsel had not at least met with their – or, excuse me, with their experts – now, I can't tell you whether they did or they didn't – and prepared them in a better fashion, that being Dr. Etcoff, Dr. Danton and Dr. Grey, so that they had a good – had knowledge of the case, knowledge of the facts, so that they weren't so blind-sided. It seemed to me when I was reading their testimony that they testified on direct examination for the defense to one thing, but by the time the skilled prosecutor, Mr. Owens, Christopher Owens, was done with them it seemed that they were almost State witnesses because they didn't seem to know about domestic violence; they didn't know about the facts of the case.

THE COURT: All right. So assuming that that's the case, that once they were presented with the facts of the case their opinions were not favorable to the defense, so how would them having all of that ahead of time changed that? In other words, they would have, right, had they, as you say then had all this ahead of time – now, let me digress a little bit.

Are you – you're talking about the second – we're focusing here on the second penalty hearing; right?

MR. ORAM: That's correct.

THE COURT: Because they'd testified in the first hearing many years earlier; correct?

MR. ORAM: Some of them did. I'm not sure that Dr. Grey did, Your Honor, and so that I can't – as I'm standing here I cannot accurately answer whether

they absolutely testified in the first one. I know Dr. Etcoff did because Dr. Etcoff was examined and said that he had met with the defendant for two hours in preparation for the first penalty phase.

THE COURT: So the experts, anyway, took the stand and they testified based upon their knowledge of the facts, and then on cross-examination when additional facts were given to them, then their opinions apparently were changed; right?

MR. ORAM: Correct. Yes.

THE COURT: Okay. So, had they had all those facts ahead of time their testimony would've been the same. So, how is the failure then – alleged failure to prepare them ahead, how did that prejudice the defendant?

MR. ORAM: Well, I think, on two levels, two factors there. First of all it was surprising when you hear the doctors testify I didn't know this was a case really about domestic violence. If I could summarize the case, which I won't do because the Court's gone through it, but if the Court was going to summarize for, let's say, a group of students what the case was about and what the facts of the case were about, I'm sure one of the things the Court would say is that this is a case about a history of domestic violence that then resulted in death. And it was surprising to see experts say I didn't really know that, that fact.

That would seem to me to be something that you would sit down with your expert in the first few minutes of talking to your expert and say exactly what I just did, this is a case of a woman who was killed as a result of her significant other being in a rage and this rage had been continuing on for a long period of time. It was sort of that – almost a battered-woman syndrome that you see here. There's battery. She then wants to reconcile. She reconciles and all the friends, family

members are always sort of appalled by her reconciliation, why are you going back to this man. So it seems odd to me that there is experts saying I really didn't know that, or -- that was odd.

Another one that seems odd about the case to me is that you only have the sexual assault as being the only aggravator left in the particular case, and when I look at the Nevada Supreme Court's decision they say one of the five factors that essentially gives a jury the opportunity to say sexual assault occurred, one of those factors is that we have Mr. Chappell lying because Mr. Chappell said he had consensual sex but he did not ejaculate and there is semen found. Therefore, the detective says that must prove that he's lying, and the State says it.

There's no objection from the defense, and as I've pointed out it seems like – if I had been defense counsel in that case, I think a reasonable attorney had been looking at that situation would have called – you don't even need to call experts, just start with the high schools. Call a health teacher in here and say can a woman get pregnant without the man ejaculating, and the answer is going to be yes every single time.

And so I don't know how that became a factor to prove sexual assault, and that was one that I thought should be dispelled.

What I also thought was interesting is when, for example – Court's indulgence. Dr. Etcoff, when he was given that scenario – in other words he did not recognize that, he didn't know the facts well enough so that when Mr. Owens questioned him, or it may have been the other prosecutor questioned him on cross-examination and said, well, what if we – what if I told you that the defendant admitted to having sex but denied ejaculation, yet we can prove that semen is there, does that – what does that prove, and he actually said that proved the defendant's

story was bogus. And, to me, that had to just level the defendant. If the jury had to sit there and think, well, the defendant's just lying through his teeth, he must have sexually assaulted the woman.

And, so to me it seemed like, boy, you need to dispel that immediately, and that would be one of the biggest things that I would think in an opening argument you'd want to say is just because semen is located doesn't mean the defendant lied. The defendant – I don't understand why a defendant would admit to stabbing his wife to death, admit to having sex with her shortly before that occurred, within an hour or two, but want to lie about ejaculation. That doesn't make much sense. If you think you're gonna cover up a sexual assault but you won't admit murder, then wouldn't you say I never had sex with that woman, don't know what you're talking about and then you find semen, then you know, okay, he's lying.

So I don't understand why that occurred and why the experts were not prepared to meet that challenge and why there were no experts on the side of the defense to answer those questions. It seems like you could dispel that quite easily. It almost seems like a myth occurred in the courtroom.

That was very troubling to me and I don't really know why the Supreme Court actually put that as a factor, because, unless I'm missing something, I think – I think it's a myth, and I think that anybody who has teenage kids would never advise their teenage kids of this fact, that you can't – a woman couldn't get pregnant unless there's ejaculation. It doesn't make sense to me.

And so that was one of the factors, to answer the Court's question, that I would argue necessitates a evidentiary hearing to find out why the lack of preparation. Does that answer the court's question at least as to my argument on that? It does.

THE COURT: Okay.

MR. ORAM: Your Honor, I'm not sure, because it's so lengthy and because I sort of heard the Court's – what I perceive to be the Court's ruling. And another thing I want to make sure that I'm not doing is if the Court's mind is made up I'm not here to waste the Court's time if I cannot dissuade you from that decision I recognize that and I know that you have read everything and that obviously then we would appeal it. So I'm not sure if you want to hear argument or if you're saying, Mr. Oram –

THE COURT: Well, I would like Mr. Owens to address this whole issue of the ejaculation argument. It seemed a bit like a red herring to me, but tell me about that.

MR. OWENS: Certainly. And Mr. Oram says he'd like to put defense counsel on the stand and ask them why they didn't prepare their experts more on this ejaculation concept, as well as on perhaps other issues, and that apparently one of them didn't know it was a domestic violence issue. I know two of them talked at length about the pattern of domestic violence and reconciliation between these two

But specifically on the ejaculation that's really not what this case was about, whether he ejaculated in her or not. He admitted that they had sexual intercourse; that was not in dispute. What was in dispute was whether it was consensual or not, and so the presence of semen really became a non-issue because in his testimony he said that they had sexual intercourse. He just said that he withdrew prior to ejaculation. Yeah, well so what? The Nevada Supreme Court, yeah, they listed that as one of the factors that they looked at, but there was a number of factors for the Supreme Court to look at to affirm the sexual assault aggravator as well as the jury to look at to find that aggravator in the first place.

There's so much other weighty evidence that this issue about ejaculation simply would not have changed the fact that Chappell threatened his girlfriend that he's going to do an O.J. Simpson on her ass. I mean, that alone –

THE COURT: Wasn't there testimony from one of the experts, defense experts where he conceded that she could have – in fact that was – wasn't that his opinion, that she could have in fact had sex with him just to – out of fear and that would still be a sexual assault, out of – if she was trying to placate him to try and keep him from harming her –

MR. OWENS: Absolutely.

THE COURT: -- that would still be sexual assault.

MR. OWENS: Absolutely.

THE COURT: And didn't the Supreme Court consider that?

MR. OWENS: Absolutely. Their doctors testified that they were really looking for physical evidence under the medical definition of sexual assault, vaginal bruising or tearing or something, and they found no evidence of sexual assault, but on cross-examination they admitted that medical science doesn't tell them about the consensual nature of the activity. Absent some medical findings medicine doesn't say whether or not he had a knife to her throat at the time that he did this, whether she was threatened and felt I need to avoid getting beat, I need to agree and give in to this. That's really a jury decision that the medical science is simply not going to help us on.

So the jury heard about all these threats. They heard about the victim curling up in a fetal position when she heard the defendant was getting out of jail again. They heard and knew that he came in through the window. They knew that there was this phone call about the – her children and her calling – or asking the

woman to call back so that she could have an excuse or reason to get out of there. There's an awful lot of facts and threats that she would – that he would seriously hurt her if she was with another man, and she had been with another man while he was in jail.

And that is all the facts that point out whether or not this was consensual, and it's not going to be proven dispositively by any kind of expert or medical science, it's going to be the totality of all the facts and circumstances which haven't changed, which the jury was free to consider to find that this aggravator had been found beyond a reasonable doubt. In fact, two different juries have found that – existence of that aggravator beyond a reasonable doubt now. There's overwhelming evidence.

And so, yeah, I would say to now go out and get an expert to testify to what defense counsel admits every high school student is taught, well, that's common knowledge that there could be pre-ejaculate. That's not going to really bear on – or change the outcome of the case. It's not going to bear on the issue of consent here, and so for that reason I don't – I don't think we need to have an expert or an evidentiary hearing. It just is not a significant fact.

And I already mentioned the domestic violence, failure to prepare the experts. One of them specifically was called to testify about domestic violence and the nature of this specific relationship over time. We're looking in hindsight at how a skilled prosecutor was able to cross-examine a witness. You can't anticipate in advance every single way in which a witness might potentially get tripped up, and so it's very speculative to say that if they'd been better prepared they might've been able to respond more appropriately to the cross-examination, but the reality is is that seldom do people say the exact same thing the exact same way every time and

there are always little ways in which a prosecutor can cross-examine someone to find inaccuracies in their testimony or to question the weak parts of their opinion that they are advancing to the jury.

That's simply not going to change and it's not something we can fault the attorneys for in hindsight just because the prosecutor might have had some headway. I don't remember anything on the DV issue, but maybe there was a little bit of headway on the ejaculation issue and getting some sort of admission from their expert, but, like I said, it really wasn't relevant to the issue of consent.

I don't really see their experts having fundamentally changed their opinion as a result of the cross-examination. Any little inroads that the prosecutor was able to get did not undermine their opinion of the jury that this was consensual 'cause there was no evidence that this was forced, that the pattern of the relationship was such that it was consistent that she would continually make up each time with the defendant, and that fundamental opinion did not change for any of the three experts despite any effect of cross-examination.

So, none of that would have made a difference in the case; therefore, I think it should all be denied.

THE COURT: All right. Oh, and as far as the PET scans and the neurological, again, I mean I don't think there was any showing as to what that would've changed since there was plenty of evidence that he was – his, you know, mother used alcohol when she was pregnant with him, that he had a learning disability, that his IQ was in the low to moderate range, you know, all of those things. And, of course, the jury found those mitigating factors; they just didn't feel that they outweighed the aggravators.

So, I just don't see it and I don't – in this case I don't see that an

evidentiary hearing is going to change that. So I'll deny that. And the State will prepare the findings of fact, conclusions of law for my review, also to present them to the defense for them to look over, and, as well, will you prepare the orders denying the motions, too.

MR. OWENS: I will, and I'll do an order for the transcript from today so I can have that to aid me in doing the findings.

MR. ORAM: Thank you very much, Your Honor.

THE COURT: Thank you.

Oh, let me just say that my – the reasons for denying the petition for writ of habeas corpus are the reasons and arguments that are set forth in the State's opposition.

MR. OWENS: Okay. Thank you.

MR. ORAM: Thank you, Your Honor.

PROCEEDING CONCLUDED AT 10:17 A.M.

* * * * * * * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings with the sound recording in the above-entitled case.

Beverly Sigurnik

BEVERLY SIGURNIK
Court Recorder/Transcriber

IN THE SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK

JAMES MONTELL CHAPPELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 61967
District Court Case No. C131341

RECEIPT FOR DOCUMENTS

TO: Christopher R. Oram
Clark County District Attorney/Steven S. Owens, Chief Deputy District Attorney
Steven D. Grierson, Eighth District Court Clerk

You are hereby notified that the Clerk of the Supreme Court has received and/or filed the following:

10/24/2012 Appeal Filing fee waived. Criminal.

10/24/2012 Filed Notice of Appeal. Appeal docketed in the Supreme Court this day. (Docketing statement mailed to counsel for appellant.)

Appellant(s) shall file a docketing statement with the Clerk of the Supreme Court within 20 days of the date of this notice. See NRAP 14. A copy of the docketing statement is enclosed or you may access the form online at **nevadajudiciary.us**. Click on the Supreme Court tab and search for **Docketing Statement**. A PDF version is accessible that can be completed, copied, and submitted to this Court for filing.

DATE: October 24, 2012

Tracie Lindeman, Clerk of Court
ai

O/b due: 2/21/13

transcript: 10/19/12 @ 10AM Argument
Carolyn Ellsworth - DCS

EIGHTH JUDICIAL DISTRICT COURT CLERK'S OFFICE

NOTICE OF DEFICIENCY

ON APPEAL TO NEVADA SUPREME COURT

CHRISTOPHER R. ORAM, ESQ.
520 S. 4TH ST., #370
LAS VEGAS, NV 89101

DATE: October 23, 2012
CASE: C131341

RE CASE: STATE OF NEVADA vs. JAMES M. CHAPPELL

NOTICE OF APPEAL FILED: October 22, 2012

YOUR APPEAL HAS BEEN SENT TO THE SUPREME COURT.

PLEASE NOTE: DOCUMENTS **NOT** TRANSMITTED HAVE BEEN MARKED:

☐ Case Appeal Statement
- NRAP 3 (a)(1), Form 2

☒ Order

☒ Notice of Entry of Order

NEVADA RULES OF APPELLATE PROCEDURE 3 (a) (3) states:

> "The district court clerk must file appellant's notice of appeal despite perceived deficiencies in the notice, including the failure to pay the district court or Supreme Court filing fee. **The district court clerk shall apprise appellant of the deficiencies in writing**, and shall transmit the notice of appeal to the Supreme Court in accordance with subdivision (e) of this Rule with a notation to the clerk of the Supreme Court setting forth the deficiencies. Despite any deficiencies in the notice of appeal, the clerk of the Supreme Court shall docket the appeal in accordance with Rule 12."

Please refer to Rule 3 for an explanation of any possible deficiencies.

RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JAMES MONTELL CHAPPELL,
#1212860

Defendant.

CASE NO: 95-C131341

DEPT NO: XXV

STATE'S RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AND DEFENDANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT'S WRIT OF HABEAS CORPUS

DATE OF HEARING: 5/24/12
TIME OF HEARING: 9:00 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through STEVEN S. OWENS, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Petition For Writ Of Habeas Corpus (Post-Conviction) and Defendant's Supplemental Brief In Support Of Defendant's Writ Of Habeas Corpus.

This response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

///

///

DATED this 16th day of May, 2012.

Respectfully submitted,

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

BY
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352

POINTS AND AUTHORITIES

STATEMENT OF THE CASE[1]

On December 31, 1996, James Chappell ("Defendant") was convicted, pursuant to a jury verdict, of Burglary, Robbery With Use of a Deadly Weapon, and First-Degree Murder With the Use of a Deadly Weapon. Defendant was sentenced to serve a term of four (4) to ten (10) years in prison for Burglary and two consecutive terms of six (6) to fifteen (15) years for Robbery With the use of a Deadly Weapon. A jury sentenced Defendant to death for First-Degree Murder With the Use of a Deadly Weapon. On appeal, the Nevada Supreme Court affirmed Defendant's convictions and sentence of death. Chappell v. State, 114 Nev. 1403, 972 P.2d 838 (1998).

On October 19, 1999, Defendant filed his first pro per post-conviction petition for writ of habeas corpus. David Schieck, Esq. was appointed as post-conviction counsel and Defendant filed a supplement to his petition on April 30, 2002. The District Court partially granted and partially denied the petition, vacated Defendant's sentence of death, and ordered a new penalty hearing. The District Court found merit in Defendant's claim that trial counsel was ineffective for failing to investigate and call mitigation witnesses to testify

[1] The Statement of the Case is partially adapted from the Nevada Supreme Court's Order of Affirmance filed on October 20, 2009, Docket No. 49478, and partially adopted from the Nevada Supreme Court's Order of Affirmance filed on April 7, 2006, Docket No. 43493.

during Defendant's penalty hearing, and that the omitted testimony had a reasonable likelihood of impacting the jury's decision. The District Court otherwise upheld Defendant's conviction and denied his claims relating to the guilt phase of his trial. The Nevada Supreme Court affirmed the District Court's decision. Chappell v. State, Docket No. 43493 (Order of Affirmance, April 7, 2006).

On May 10, 2007, following Defendant's second penalty hearing, a jury again sentenced Defendant to death. On appeal, the Nevada Supreme Court affirmed Defendant's sentence of death. Chappell v. State, Docket No. 49478 (Order of Affirmance, October 20, 2009).

On June 22, 2012, Defendant filed his second pro per post-conviction petition for writ of habeas corpus. Christopher R. Oram, Esq. was appointed as post-conviction counsel and Defendant filed a supplemental brief in support of his petition on February 15, 2012. The State responds to Defendant's petition and supplemental brief as follows.

STATEMENT OF FACTS

In 1996, Defendant was originally convicted of Burglary, Robbery, and Murder and was sentenced to death for sexually assaulting and then stabbing to death his ex-girlfriend, Deborah Panos, in her own home. 9 Record On Appeal ("ROA") 2190-5. The conviction and sentence were both affirmed on direct appeal. 9 ROA 2273-89. Although the Nevada Supreme Court struck the torture and depravity of mind aggravator on appeal, sufficient evidence was found in support of all the remaining aggravators including sexual assault. 9 ROA 2279-80.

In the subsequent post-conviction proceedings, Defendant raised several claims of ineffective assistance of counsel. 10 ROA 2447-8. Following an evidentiary hearing, the District Court held that all claims of attorney error at trial were harmless due to the overwhelming evidence of guilt and thus none of the claims prejudiced the outcome of the trial. 11 ROA 2745-9. However, a new penalty hearing was ordered due to attorney error for not calling certain mitigation witnesses. Id.

On appeal and cross-appeal from the district court's judgment, the Nevada Supreme

Court affirmed the District Court's decision. 11 ROA 2783-2797. In so doing, the Court struck two of the felony-aggravators pursuant to McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004), but specifically held that the sexual assault aggravator was unaffected and remained viable if the State elected to seek the death penalty again at the new penalty hearing. Id.

Testimony at the new penalty hearing began on March 15, 2007, and included testimony describing a history of domestic violence between Defendant and the victim, Deborah Panos. Charmaine Smith and Clare McGuire both testified that Deborah had told them of an incident where Chappell had straddled her, sat on her chest, and held a knife to her throat. 13 ROA 3236-7, 3247-8. A police officer also testified to these facts and that he arrested Defendant for Battery Domestic Violence. 15 ROA 3640-1. The described incident occurred in June of 1995—three months before the sexual assault in this case—and served as the basis for a probation violation report as well as an order for in-patient drug treatment. Id.; 13 ROA 3237. Defendant himself fully admitted to this incident. 15 ROA 3658-9. Likewise, Detective Weidner testified that he arrested Defendant for felonious assault in 1988, eight years before the sexual assault in this case. 13 ROA 3251-52.[2]

Lisa Larsen testified that she received a message from Defendant to tell Deborah "that when he got out, that she wasn't going to have any kind of life or anything . . . she wouldn't have any friends." 13 ROA 3171. Dina Freeman-Richardson twice overheard Defendant threaten Deborah that he would "do an OJ Simpson on your ass." 14 ROA 3302-3. Defendant himself admitted writing a letter to Deborah threatening that "One day soon I'll be at that front door, and what in God's name will you do then." 15 ROA 3668.

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[2]Most of this testimony involving prior bad acts and hearsay had been admitted at the original 1996 trial pursuant to the State's motion to admit prior bad acts. 1 ROA 217-26. In particular, testimony was adduced in the 1996 trial that Defendant had made threats against Deborah Panos, that she did not want to continue the relationship with Defendant and was planning on moving away before he got out of jail. 4 ROA 911-12, 915, 938-9. Additionally, Latrona Smith testified that Deborah Panos called and asked her to call back with some kind of excuse so that she could leave the house. 5 ROA 1307-8. Any objections to this testimony at trial were overruled and on appeal the Nevada Supreme Court found no merit in Defendant's claim of error in admitting these hearsay statements or Chappell's prior acts of domestic violence. 9 ROA 2282-3, 2289.

Although the victim came from a large, close-knit family, 15 ROA 3685, only two family members were called to give testimony: the victim's aunt, Carol Monson, and the victim's mother, Norma Penfield. 15 ROA 3681-90. During her testimony, Carol Monson read short letters from the victim's cousin Christina Reese, and another aunt, Doris Waskowski. 15 ROA 3684-5. None of the victim's three children were called as witnesses, although they were discussed during Norma Penfield's testimony. 15 ROA 3681-90.

Defendant's prior testimony from the guilt phase of the 1996 trial was read in to the record over Defendant's objection. 15 ROA 3641-68. In objecting, Defendant's trial attorney acknowledged that prior sworn testimony is generally admissible, but wanted to preserve an issue regarding ineffective assistance of counsel in the 1996 trial for allowing Defendant to testify as he did. 15 ROA 3632. In allowing the prior testimony, the district court reasoned that ineffectiveness in allowing Defendant to testify had not been raised in the first post-conviction proceedings and would therefore be procedurally barred in any future petition. 15 ROA 3632-3. Also, the guilt phase had been affirmed twice on appeal. Id.

In mitigation, Defendant presented evidence of his character and terrible childhood in an attempt to convince the jury that he lacked the ability to exercise free will when he stabbed Deborah to death. 14 ROA 3514-17. Dr. Todd Grey, a board certified Forensic Pathologist, testified that in reviewing Deborah's autopsy report, he did not find any physical evidence that would support sexual assault during the course of the homicide. 13 ROA 3223-6. Dr. William Danton testified that Defendant was "extremely dependent" on his relationship with Deborah, that Defendant was diagnosed with borderline personality disorder and was therefore extremely sensitive to abandonment, and that Defendant used drugs as a coping mechanism. 14 ROA 3324-5. Dr. Danton further testified that Deborah "could use sex to calm [Defendant] down if [Defendant] was angry." 14 ROA 3330.

Dr. Lewis Etcoff testified that he evaluated Defendant for at least half a day, Defendant filled out a personality test for Dr. Etcoff, and Dr. Etcoff reviewed police records, voluntary statements, and Defendant's Lansing, Michigan school records and special-education records. 14 ROA 3476. As a result of this preparation, Dr. Etcoff was able to

produce a detailed forensic neuropsychological evaluation. 14 ROA 3478. Dr. Etcoff testified that Defendant was forthcoming when they would talk about the instances of domestic violence with Deborah, that Defendant's father was not around when Defendant was growing up, and that Defendant's mother died when he was two years old. 14 ROA 3480-2. Dr. Etcoff further testified that Defendant's conditions in life had impaired his ability to exercise free will, thereby making him less culpable and compared Defendant's constrained free will with that of others in the courtroom. 14 ROA 3514-17.

In allocution to the jury, Defendant claimed he spoke honestly, insisted that his childhood experiences contributed to his poor choices, and promised to work better and improve himself so he could help others. 16 ROA 3769.

The jury was instructed on the proper role of mitigating circumstances and that mercy could be properly considered. 15 ROA 3747, 3753-5, 3758. In closing argument, the prosecutor compared the character of Defendant and that of the victim and her mother in how each dealt with negative circumstances in their lives. 16 ROA 3778-87. The prosecutor urged the jury not to select a verdict just because it was "easier," but to "do the right thing" even though it may be "harder." 16 ROA 3787. The prosecutor also acknowledged the role of mercy in the sentencing determination, but argued that the demands of justice also be balanced. 16 ROA 3786-7. The defense summation repeatedly disparaged opposing counsel with accusations of hiding the ball and intentionally confusing or misleading the jury. 16 ROA 3787-91.

Although the defense had proposed thirteen mitigating circumstances, 15 ROA 3755, in a special verdict form the jury only found seven: (1) Defendant suffered from substance abuse; (2) Defendant had no father figure in his life; (3) Defendant was raised in an abusive household; (4) Defendant was the victim of physical abuse as a child; (5) Defendant was born to a drug/alcohol addicted mother; (6) Defendant suffered from a learning disability; and (7) Defendant was raised in a depressed housing area. 15 ROA 3739-40. After deliberation, the jury once again returned a verdict for the death penalty having found the existence of the sexual assault aggravator beyond a reasonable doubt and that the mitigating

circumstances did not outweigh the aggravating circumstance. 15 ROA 3738-41.

ARGUMENT

I. ANY CLAIMS REGARDING INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, FIRST PENALTY HEARING COUNSEL AND FIRST APPELLATE COUNSEL ARE PROCEDURALLY BARRED.

Defendant's June 22, 2010 pro per petition includes the following grounds: Ground one – ineffective assistance of counsel at trial and at the first penalty hearing (1996 trial and penalty hearing), and Ground two – ineffective assistance of counsel on direct appeal from the first trial concerning the guilt phase of the trial (December 30, 1998 – Nevada Supreme Court's published decision affirming Defendant's conviction). Defendant's Petition For Writ Of Habeas Corpus, 6-22-10, p. 9-10. These claims, in addition to any other claims in Defendant's supplement that appear to address ineffective assistance of Defendant's trial counsel, first penalty hearing counsel, and first appellate counsel are all procedurally barred. NRS 34.726(1) states that unless good cause is shown for the delay, a petition that challenges the validity of a judgment or sentence filed more than one year after entry of the Judgment of Conviction, or if appeal has been taken more than one year after the Supreme Court issues its Remittitur, is time-barred. Good cause for the delay exists if the petitioner demonstrates to the satisfaction of the court that the delay was not his fault and the dismissal of the petition as untimely would unduly prejudice him. Id. The one-year time bar is strictly construed. Gonzales v. State, 118 Nev. 590, 593, 590 P.3d 901, 902 (2002).

Defendant's petition does not fall within this statutory time limitation. The Nevada Supreme Court published its decision affirming Defendant's 1996 Judgment of Conviction and sentence of death on December 30, 1998. Defendant now attempts to attack his 1996 Judgment of Conviction, and his direct appeal from his conviction and first penalty hearing in his pro per petition filed on June 22, 2012, over thirteen (13) years after the Nevada Supreme Court issued published its decision. This is clearly outside of the strictly imposed one year time bar. In addition, Defendant's instant claim of ineffective assistance of counsel at his first penalty hearing is moot because the District Court ordered a re-hearing of the penalty phase when the District Court granted in part Defendant's first petition for writ of

habeas corpus. Defendant fails to demonstrate good cause or prejudice for this excessive delay, and a petition addressing these claims was already heard and decided by this Court and the Nevada Supreme Court, thus his claims are successive.

A second or successive petition may be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits. NRS 34.810(2). A defendant must also demonstrate good cause and actual prejudice to overcome the successive petition bar. Id. Defendant does not allege new or different grounds for relief, and prior determination of his first petition was on the merits and was granted in part and denied in part by this Court, and this Court's decision was later affirmed by the Nevada Supreme Court (Docket No. 43493). Defendant has also failed to demonstrate good cause to overcome the successive petition bar.

Application of procedural bars is mandatory. The Nevada Supreme Court has specifically held that the District Court has a duty to consider whether the procedural bars apply to a post-conviction petition and not arbitrarily disregard them. In State v. Dist. Ct. (Riker), 121 Nev. 225, 112 P.3d 1070 (2005), the Nevada Supreme Court stated:

> Given the untimely and successive nature of [defendant's] petition, the district court had a duty imposed by law to consider whether any or all of [defendant's] claims were barred under NRS 34.726, NRS 34.810, NRS 34.800, or by the law of the case . . . [and] the court's failure to make this determination here constituted an arbitrary and unreasonable exercise of discretion.

121 Nev. at 234 (emphasis added); see also State v. Haberstroh, 119 Nev. 173, 180-81, 69 P.3d 676, 681-82 (2003) (holding that parties cannot stipulate to waive, ignore or disregard the mandatory procedural default rules nor can they empower a court to disregard them).

Additionally, the State hereby pleads laches in the instant case. Nevada Revised Statutes 34.800 creates a rebuttable presumption of prejudice to the State if a defendant allows more than five years to elapse between the filing of the Judgment of Conviction, or a decision on direct appeal from a Judgment of Conviction, and the filing of a post-conviction petition. The statute requires that the State plead laches in its motion to dismiss the petition.

Since well over five (5) years have elapsed between the filing of the Nevada Supreme Court's decision on direct appeal (December 1998) and the filing of Defendant's claims in

the instant June 22, 2010 petition, NRS 34.800 directly applies in this case. Nevada Revised Statutes 34.800 was enacted to protect the State from having to find and call long lost witnesses whose once vivid recollections have faded and re-gather evidence that in many cases has been lost or destroyed because of the lengthy passage of time. Thus, the State would suffer extreme prejudice if it were now required to bring this case to trial, as memories fade and witnesses disappear. There is a rebuttable presumption of prejudice for this very reason and the doctrine of laches must be applied in the instant matter. Therefore, this Court must summarily dismiss the claims in Defendant's instant petition regarding his jury trial, his first penalty hearing, and his direct appeal of that trial, pursuant to NRS 34.800, as Defendant's delay in filing the instant petition has prejudiced the State.

Defendant's penalty re-hearing does not excuse non-compliance with the mandatory procedural bars anymore than those petitioners that claim their good cause was the pursuit of federal habeas relief. See Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989). Defendant's pursuit of a second penalty hearing cannot be considered an "impediment" sufficient to prevent Defendant from initiating habeas proceeding regarding all his convictions and sentences that were indisputably final.

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

Defendant's 1996 Judgment of Conviction was vacated only insofar as the death

sentence was concerned and the convictions have remained valid and final. The Nevada Supreme Court specifically stated the following in affirming Defendant's second death penalty sentence:

> This court previously affirmed Chappell's murder conviction, Chappell v. State, 114 Nev. 1403, 972 P.2d 838 (1998), and the United States Supreme Court denied certiorari, 528 U.S. 853 (1999). The relief granted to Chappell during post-conviction proceedings was expressly limited to the penalty phase. Chappell v. State, Docket No. 43493 (Order of Affirmance, April 7, 2006). Thus, the jury's determination of Chappell's guilt was final when certiorari was denied by the United States Supreme Court on October 4, 1999.

Chappell v. State, Docket No. 49478 (Order of Affirmance, October 20, 2009) p. 28. Thus, any claims Defendant attempts to raise regarding his valid and final conviction are procedurally barred and should be summarily dismissed.

II. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL DURING HIS 2007 SECOND PENALTY HEARING.

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

The Court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 103 P.3d 35 (2004). Counsel's performance is measured by an objective standard of reasonableness, which takes into consideration prevailing professional norms and the totality of the circumstances. Strickland, 466 U.S. at 688, 104 S.Ct. at 2065. "The question is whether an attorney's representation amounted to

incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." Harrington v. Richter, 131 S.Ct. 770, 788 (2011). Therefore, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). Further, the court should "second guess reasoned choices between trial tactics, nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711. "Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." Harrington, 131 S.Ct. at 791.

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999), citing Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The State will address Defendant's grounds of ineffectiveness in turn:

A. Failure To Produce Live Testimony From Two Mitigation Witnesses And Failure To Investigate Time Defendant Lived In Arizona.

Defendant argues that his second penalty hearing counsel was ineffective for failing to produce live testimony from James Ford and Ivri Marrell.[3] Defendant's Supplemental Brief, 2-15-12, p. 25-28. The crux of Defendant's argument is that because the District

[3]In his petition, Defendant calls his witness "Ivory Morrell," but submits an affidavit wherein she affirms using the name Ivri Marrell.

Court ordered a re-hearing of the 1996 penalty phase based on prior counsel's ineffectiveness in failing to call mitigation witnesses, two of which witnesses were Ford and Marrell, instant counsel was ineffective for failing to produce live testimony from these two witnesses.[4] Id.

In the District Court's order vacating the result of the first penalty hearing, the Court held that the "outcome of the penalty hearing was prejudiced by the failure to produce and present the numerous witnesses that could have described Chappell and the dynamics of his relationship with the victim and their children." Findings of Fact, Conclusions of Law, and Order, 6-3-04, p. 2. In affirming this decision, the Nevada Supreme Court noted in its Order of Affirmance that trial counsel (first penalty hearing counsel) acknowledged during the evidentiary hearing that he had a list of several potential witnesses "who could have testified favorably about his character and his long relationship with the victim," and that trial counsel should have better focused on the "long relationship" for the penalty phase. Chappell v. State, Docket No. 43493 (Order of Affirmance, April 7, 2006) p. 3. Accordingly, in the second penalty phase, counsel presented ample testimony that Defendant's and Deborah's relationship began when Defendant was in high school, and that while living in Lansing there were no problems between the couple. The jury heard a summary of what Ford and Marrell were going to testify to and this summary included how Ford and Marrell did not know Defendant to be violent and how Defendant loved his son. There was ample testimony from other witnesses that Defendant loved his children, was a loving father, and was not violent. The jury was aware that Defendant grew up around drugs in a bad neighborhood with no father figure, and a mother that died when he was two years old.

On March 19, 2007, defense counsel informed the Court that they had seven witnesses in Las Vegas from Lansing, Michigan as a result of their extensive investigation,

[4] Defendant at times refers to a "third penalty phase." Defendant's Supplemental Brief, p. 23, 26. There was no third penalty phase.

but that two of them—Ford and Marrell—were in a position where if they did not go back to Lansing, they would lose their jobs. 15 ROA 3669. Defense counsel stated that they made the decision to allow Ford and Marrell to return to Lansing and that counsel would introduce the information the two would offer through other witnesses. Id. Ford and Marrell grew up with Defendant in Michigan, and were all part of the same group of friends that also included Fred Dean who did testify at the penalty hearing. Id. Additionally, Defendant's sister, Mira Chappell, and Defendant's brother, Rick Chappell, testified and were also able to relate Defendant's family background. Id. Defense counsel was aware that the two witnesses were part of the basis for the District Court ordering a re-hearing of Defendant's penalty phase, and stated the following:

> I don't want the record to appear that I'm building an ineffective assistance in this record by not calling those two witnesses. We are confident that our other witnesses will provide the necessary testimony that Mr. Marrell and Mr. Ford talked about on post-conviction.

Id. Marabel Rosales, a mitigation Investigator, testified at Defendant's hearing and informed the jury as to why Ford and Marrell did not testify, that both individuals wanted to testify and that both individuals were "very upset and disappointed" that they were unable to testify. 16 ROA 3767. Rosales further provided a summary as to what Ford and Marrell would have testified to had they been able, mainly how the two grew up with Defendant in the same neighborhood, how both of them knew Deborah, how there was a lot of sneaking around in the relationship because there was great animosity from Deborah's parents because Defendant was Black, how Defendant loved his son, and how Ford and Marrell could not believe that the person they grew up with in Lansing was the same person on trial. 16 ROA 3767-78.

Fred Dean testified that he grew up with Defendant, that Defendant started dating Deborah in high school while Defendant lived in Lansing, and that Dean never observed any problems between Defendant and Deborah. 15 ROA 3696-00. Benjamin Dean and Charles Dean, brothers of Fred Dean, both testified that they were childhood friends with Defendant and they all grew up in a rough neighborhood. 15 ROA 3706-9, 3718-9. Benjamin Dean testified that Deborah and Defendant began dating when Defendant was in high school, that

he did not observe problems in their relationship, and that Defendant was never angry or violent, rather Defendant made people laugh. 15 ROA 3706-9. Additionally, Defendant's brother and sister testified that they grew up in their grandmother's house in a bad neighborhood where drugs were prevalent; they never had a father figure; their mother died in a car accident in 1973; that Defendant internalized most of his anger; and that Defendant was a loving father to his children. 15 ROA 3690-5, 3710-5.

In the affidavits that Defendant appends to his supplemental petition, Marrell states that she would have testified that: (1) She was Defendant's good friend; (2) There was a lot of animosity towards Defendant's relationship with the victim because of Defendant's race; (3) Defendant was never abusive; (4) The murdered victim was jealous and abusive; and (5) Defendant was never violent or angry. Defendant's Supplemental Brief, at Ex. A. Ford makes the same statements—in fact Ford's words are often verbatim repetitions of the phrases used in Marrell's affidavit. Ford further states that "We were all of the same general opinions and belief." See Id.

This last statement is particularly relevant and helpfully demonstrates why Defendant has failed to show by a preponderance of the evidence that counsel's representation at the second penalty hearing fell below an objective standard of reasonableness. Counsel made a clear record that even though Ford and Marrell were unable to stay in Las Vegas to testify, their testimony would be admitted by other means and other witnesses would testify as to basically the same thing Ford and Marrell would. Counsel then did exactly that. All of the information that Defendant now insists the jury did not have was related by the other witnesses who shared "all of the same general opinions and belief." Additionally, Marabel Rosales related Marrell's and Ford's cumulative testimony to the jury in their absence. This was reasonable strategy and there was no deficiency in the representation. See Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280 (1996) (reasonable strategic decisions on the part of counsel virtually unchallengeable).

Also, Defendant cannot show prejudice as the jury found many of the mitigating factors that Marrell, Ford, and the other mitigating witnesses testified to—it just did not

conclude that this evidence outweighed the aggravating circumstance. Defendant fails to produce any convincing theory as to why these witnesses' live testimony would have changed the outcome. Therefore, Defendant fails to show that counsel was ineffective in producing a summary of Ford's and Marrell's testimony and for failing to produce their live testimony and this claim must fail.

Next, Defendant claims that counsel was ineffective for failing to investigate Defendant's past in Arizona. Defendant's Supplemental Brief, 2-15-12, p. 27-28. Defendant also claims in his pro per petition that counsel was ineffective for failing to investigate court personnel who could have allegedly testified that Defendant did not have the opportunity to threaten Deborah during court proceedings. Defendant's Petition For Writ Of Habeas Corpus, 6-22-10, p. 10. A defendant who alleges a failure to investigate must demonstrate how a better investigation would have benefited his case and changed the outcome of the proceedings. Molina v. State, 120 Nev. 185, 87 P.3d 533 (2004). Such a defendant must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial. United States v. Porter, 924 F.2d 395, 397 (1st Cir. 1991). Furthermore, it is well established that a claim of ineffective assistance of counsel alleging a failure to properly investigate will fail where the evidence or testimony sought does not exonerate or exculpate the defendant. Ford v. State, 105 Nev. 850, 784 P.2d 951 (1989). A defendant's mere dissatisfaction with the outcome of his case is insufficient to establish that counsel was ineffective. Id. at 853, 784 P.2d at 953.

Here, Defendant has not demonstrated how counsel could have better investigated his past in Arizona, or how a more adequate investigation into Defendant's past in Arizona would have achieved a better result at his penalty hearing. Defendant does not specify what a better investigation would have revealed, or whether the evidence sought was exculpatory. Defendant fails to establish the identity of any witnesses in Arizona that could have provided mitigating testimony on his behalf or in rebuttal against the State's witnesses from Arizona, and further fails to establish that any such testimony would have exonerated Defendant. Similarly, Defendant fails to establish the identity of any alleged court personnel witnesses

that could have provided testimony that would have exonerated him. Thus, Defendant fails to demonstrate how counsel's conduct fell below an objective standard of reasonableness, and further fails to show that he was prejudiced by any alleged error. Defendant's bare allegations do not warrant relief and this claim should be denied. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

B. Failure To Obtain Expert To Testify That Pre-Ejaculation Fluid May Contain Sperm.

Defendant claims that counsel was ineffective for failing to rebut the State's contention that because semen was present inside the victim's body, Defendant ejaculated into her body and Defendant was therefore lying when he testified that he had consensual sexual intercourse with the victim but denied ejaculation. Defendant's Supplemental Brief, 2-15-12, p. 28-9; Defendant's Petition For Writ Of Habeas Corpus, 6-22-10, p. 10. Defendant claims that counsel should have called an expert witness to testify that pre-ejaculation fluid may contain sperm, and therefore somehow demonstrate that Defendant was not lying about not ejaculating inside the victim's body. Id.

Defendant fails to show that counsel's conduct in not calling an alleged expert to testify as Defendant purports fell below an objective standard of reasonableness. "[T]he day-to-day conduct of the defense rests with the attorney. He, not the client, has the immediate-and ultimate-responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002). Dr. Grey testified at the penalty hearing that there was no physical evidence that would support a finding that sexual assault occurred. 13 ROA 3223-6. Dr. Danton testified that Deborah could use sex to calm Defendant down when Defendant was angry. 14 ROA 3330. Dr. Etcoff testified that Defendant was forthcoming when discussing Deborah, and that the conditions in Defendant's life impaired his ability to make free will choices. 14 ROA 3480-2, 3514-17. Defense counsel called these witnesses, in part, to rebut the sexual assault aggravator, and counsel's strategic decision to call certain witnesses and not others does not give rise to ineffective assistance.

Moreover, Defendant fails to demonstrate what expert witnesses were available and how they would have benefited his case, and therefore he cannot meet the second prong of Strickland. See Molina, 120 Nev. at 192, 87 P.3d at 538. Defendant further fails to show that he was prejudiced by any alleged error in failing to call a witness to testify regarding pre-ejaculation fluid because of the overwhelming evidence presented that Defendant committed sexual assault against Deborah. Defendant argues that because the Nevada Supreme Court "used this fact [that Defendant is a liar] to determine there was sufficient evidence to convict of sexual assault," counsel was ineffective for failing to bolster Defendant's statement that he did not ejaculate inside Deborah. Defendant's Supplemental Brief, 2-15-12, p. 29. This claim is belied by the record, and the fact that Defendant lied was only one (1) of five (5) specific evidentiary components that the Nevada Supreme Court focused on in affirming the sexual assault aggravator. Specifically, the Nevada Supreme Court held:

> Our review of the record reveals sufficient evidence to establish the sexual assault aggravator beyond a reasonable doubt as determined by a rational trier of fact. (Citations omitted).
>
> In particular, we note evidence presented at the penalty hearing showing that: (1) the victim, Deborah Panos, was curled up in the fetal position, fearful, and crying when she found out that Chappell was at large; (2) Panos had told Chappell that their relationship was over; (3) Panos was in the process of moving where Chappell could not find her; (4) Panos was beaten approximately 15 to 30 minutes prior to being stabbed to death; and (5) despite Chappell's assertions that he did not ejaculate into Panos during their sexual encounter, semen matching his DNA was recovered from her vagina.
>
> Although Chappell claims that the sexual encounter was consensual, we conclude that the jury could reasonably infer from the evidence presented "that either Hall, 91 Nev. at 315-16, 535 P.2d at 798-99 (holding that where the Court decides an issue on the merits, the Court's ruling is law of the case, and the issue will not be revisited). would not have consented to sexual intercourse under these circumstances or was mentally or emotionally incapable of resisting Chappell's advances, and that Chappell therefore committed sexual assault." Quoting Chappell v. State, 114 Nev. 1403, 1409, 972 P.2d 838, 842 (1998).

Chappell v. State, Docket No. 49478 (Order of Affirmance, October 20, 2009) p. 3-4. Defendant wholly fails to show that there is a reasonable probability that but for counsel's alleged error in failing to call this alleged expert, the result of his penalty hearing would have been any different.

Insomuch as Defendant attempts to re-litigate the sexual assault aggravator found by the jury beyond a reasonable doubt, this argument is barred by the law of the case doctrine. In Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975), the Nevada Supreme Court held that where the Court decides an issue on the merits, the Court's ruling is law of the case, and the issue will not be revisited. The Court further stated that "the law of first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same." Id. at 315, 535 P.2d at 798. As demonstrated above, Defendant's claims regarding the sexual assault aggravator were raised and rejected on appeal. Chappell v. State, Docket No. 49478 (Order of Affirmance, October 20, 2009) p. 3-4. Therefore, because the Nevada Supreme Court previously addressed and dismissed these claims, the Court's ruling is the law of the case and further consideration of the issue is precluded.

C. Failure To Obtain P.E.T. Scan.

Defendant next claims that counsel was ineffective for failing to investigate the possibility of Fetal Alcohol Syndrome and for failing to obtain a "P.E.T. scan and/or brain imaging" of the Defendant. Defendant's Supplemental Brief, 2-15-12, p. 29-30. Defendant fails to explain what a P.E.T. scan is or what this scan would have revealed. Defendant does not claim that he suffers from brain damage or that a P.E.T. scan would possibly result in any findings that Defendant's brain activity is deficient. Thus, Defendant has not met his initial burden because he has not even attempted to allege how obtaining a P.E.T. scan would have rendered a more favorable outcome. Molina, 120 Nev. at 192, 87 P.3d at 538. In order for Defendant to demonstrate a reasonable probability that, but for counsel's failure to obtain a P.E.T. scan, the result would have been different, it must be clear from the "record what it was about the defense case that a more adequate investigation would have uncovered." Id. Defendant utterly fails to meet this burden. Also, "[w]here counsel and the client in a criminal case clearly understand the evidence and the permutations of proof and outcome, counsel is not required to unnecessarily exhaust all available public or private resources." Id. at 192, 87 P.3d at 538.

Additionally, Defendant fails to demonstrate that counsel's conduct fell below an

objective standard of reasonableness. Counsel did investigate Defendant's overall mental capabilities. At Defendant's hearing, Dr. Danton testified that Defendant had borderline personality disorder, 14 ROA 3324-5, and Dr. Etcoff testified that he administered an intelligence IQ test and an academic achievement test and that Defendant had an IQ of 80, in the low/average range. 14 ROA 3476, 3491. The jury was well aware of Defendant's mental capabilities, and there was ample testimony about Defendant's difficult childhood growing up and about his rough, drug-filled neighborhood.

Even assuming that this Court somehow finds Defendant's counsel deficient for failing to conduct a P.E.T. scan and/or brain imaging, Defendant's claim must still fail because he cannot meet the second prong of Strickland. Even if Defendant was found to have Fetal Alcohol Syndrome, and even if this would have been presented to the jury, Defendant fails to demonstrate that this alleged fact could have possibly led to a more favorable outcome during his penalty hearing. The jury found the following mitigating circumstances: Defendant suffered from substance abuse; Defendant was born to a drug, alcohol addicted mother; and Defendant suffered from a learning disability. 16 ROA 3822-3 (emphasis added). Considering that the jury found that Defendant was born to a drug, alcohol addicted mother, Defendant fails to demonstrate that obtaining a P.E.T. scan and/or brain imaging, even if these tests would have revealed that Defendant did have Fetal Alcohol Syndrome, would have led to a more favorable outcome at his penalty hearing. Thus, Defendant fails to meet his burden under Strickland and this claim must fail.

D. Failure To Properly Prepare Expert And Lay Witnesses.

Defendant claims that counsel was ineffective for failing to properly prepare witnesses for the penalty hearing, including Dr. Etcoff, Dr. Danton, Dr. Grey, and Benjamin Dean. Defendant's Supplemental Brief, 2-15-12, p. 30-6. Defendant claims that Dr. Etcoff, Dr. Grey, and Benjamin Dean were not properly prepared for cross-examination because they were unaware of certain facts raised by the State and because the State impeached Dean with a prior inconsistent statement. Id. Defendant also claims that counsel was ineffective because Dr. Danton provided testimony even though he only met with Defendant the night

prior to the testimony. Id.

Simply because the State was able to effectively cross examine Defendant's experts and impeach Dean with his prior inconsistent statement about Deborah does not demonstrate that defense counsel was in any way ineffective. Defendant cannot demonstrate that counsel's representation amounted to incompetence under prevailing professional norms. Nine (9) witnesses testified in mitigation and on behalf of Defendant, including three (3) experts. Defense counsel thoroughly questioned these witnesses on direct examination and elicited facts from their testimony counsel deemed crucial to the case, including that: there was no physical evidence of sexual assault; Deborah used sex to calm Defendant down; Defendant's life conditions made him less able to control his actions; Defendant grew up in a rough neighborhood; and Deborah and Defendant started dating when the two were very young. From this testimony, the jury found that Defendant had proven the existence of seven mitigating factors. Defendant has failed to support his claim that counsel failed to prepare these witnesses with specific factual allegations, and simply because the State was prepared to cross examine the witnesses does not support Defendant's allegation. In Hargrove v. State, 100 Nev. 498, 686 P.2d 222, the Nevada Supreme Court held that claims asserted in a petition for post-conviction relief must be supported with specific factual allegations which, if true, would entitle the petitioner to relief. "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. Defendant's bare allegations are belied by defense counsel's thorough examination of the mitigation witnesses, and his claims should be dismissed.

Moreover, Defendant fails to show a reasonable probability that the result of his penalty hearing would have been any different had the above witnesses testified differently. In fact, Defendant fails to allege what exactly would have been different about the witnesses' testimony if there had been more preparation. Defendant cannot meet either prong of Strickland by a preponderance of the evidence.

E. Failure To Object To The Admission Of Two PSI Reports.

In his pro per petition, Defendant claims that second penalty phase counsel was

ineffective for failing to object to the admission of two Pre-Sentence Investigation Reports—a 1995 report related to a gross misdemeanor charge and a 1996 report prepared for Defendant's first trial that contained a statement from Deborah's mother that "[t]he SOB does not deserve to live." Defendant's Petition For Writ Of Habeas Corpus, 6-22-10, p. 10.

First, counsel had no valid reason to object to the admission of the Pre-Sentence Investigation ("PSI") reports and was competent in not making frivolous objections. The Nevada Supreme Court thoroughly addressed the admission of the PSI reports—including confidentiality issues, evidence of prior arrests issues, issues with other statements in the PSI specifically including the statement made by Deborah's mother, and Defendant's written statement attached to one of the PSI reports—and the Court concluded that Defendant failed to demonstrate how the admission of the PSI reports affected his substantial rights. Chappell v. State, Docket No. 49478 (Order of Affirmance, October 20, 2009) p. 12-8. Therefore, even had counsel objected to the PSI on these grounds, the objections would not have been sustained. Counsel cannot be deemed ineffective for not making futile objections. Ennis v. State, 122 Nev. 694, 137 P.3d 1095, 1103 (2006). As such, trial counsel was not ineffective for failing to object.

For the same reasons, Defendant fails to demonstrate that even had counsel objected, the result of his trial or appeal would have been any different given that such an argument would be barred.[5] Hall, 91 Nev. at 315-16, 535 P.2d at 798-99 (holding that where the Court decides an issue on the merits, the Court's ruling is law of the case, and the issue will not be revisited).

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[5]In affirming Defendant's sentence, the Nevada Supreme Court held:

> Chappell claims he was prejudiced by the admission of a statement of Panos' mother in the 1996 PSI that "[t]he SOB does not deserve to live." Chappell argues that the statement was inadmissible but does not explain how this statement affected his substantial rights. This statement was not brought to the jury's attention, and it is clear from the context that this statement was a mother's expression of grief and not the government's sentencing recommendation.

Chappell v. State, Docket No. 49478 at 16 (Order of Affirmance, October 20, 2009)

III. SECOND PENALTY HEARING COUNSEL AND SECOND APPELLATE COUNSEL WERE NOT INEFFECTIVE FOR FAILING TO OBJECT TO "VICTIM IMPACT PANEL."

Defendant claims that his second penalty hearing counsel was ineffective for failing to object to victim impact statements on the grounds of insufficient notice, and that this failure to object prejudiced him because it mandated a stricter standard of review on appeal. Defendant's Supplemental Brief, 2-15-12, p. 36-9, Defendant's Petition For Writ Of Habeas Corpus, 6-22-10, p. 10. Notably, Defendant does not address how the result of his appeal would have been any different had counsel objected and had the Supreme Court then analyzed the claim under harmless- rather than plain-error review. The Nevada Supreme Court specifically stated that "even if the State provided inadequate notice of the challenged witnesses respecting their victim impact testimony, Chappell fails to demonstrate that he was prejudiced." Chappell v. State, Docket No. 49478 (Order of Affirmance, October 20, 2009) p. 20. Defendant cannot meet the second prong of Strickland, and his claim regarding trial counsel's failure to object to insufficient notice must fail. See Strickland, 466 U.S. at 697 ("In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.")

Defendant further claims that second appellate counsel was ineffective for failing to "inform the Supreme Court that the victim impact statements were overly cumulative." Id. p. 36-37. To succeed on a claim of ineffective assistance of appellate counsel, the defendant must satisfy the two-prong test set forth by Strickland; that 1) Appellate counsel's conduct fell below an objective reasonable standard, and 2) The omitted issue had a reasonable probability of success. 466 U.S. at 687-688, 694. There is a strong presumption that appellate counsel's performance fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990), citing Strickland, 466 U.S. at 689, 104 S.Ct. at 2065.

Here, appellate counsel raised the issue that the District Court erred by permitting the prosecution to introduce "excessive victim impact testimony." Chappell v. State, Docket

No. 49478 (Order of Affirmance, October 20, 2009) p. 18. The Nevada Supreme Court disagreed: "Because only two family members testified as to victim impact at the hearing, the testimony . . . did not result in the presentation of excessive victim impact evidence." Id. At 20. Insomuch as Defendant raises this same issue, it is barred by the law of the case. See Hall, 91 Nev. at 315-16, 535 P.2d at 798-99 (holding that where the Court decides an issue on the merits, the Court's ruling is law of the case, and the issue will not be revisited). Insomuch as a claim of error that the victim impact evidence is "excessive" is at all different from a claim that it is "cumulative," the State submits that appellate counsel made a reasonable calculation in failing to distinguish them and raise them as independent claims. See Jones, 463 U.S. at 751-52 (noting that appellate counsel is most effective when she "winnow[s] out weaker arguments on appeal and focus[es] on . . . a few key issues."); Rhyne, 118 Nev. 1, 38 P.3d 163. Of course, even if appellate counsel had raised this as an independent claim, the result would have been the same because the substantive merits of the claim are identical. Defendant has failed to prove deficiency or prejudice on this claim and it should therefore be dismissed.

IV. SECOND PENALTY HEARING COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE ALLEGED IMPROPER PROSECUTORIAL ARGUMENT.

Defendant claims that second penalty hearing counsel was ineffective for failing to object to various three allegedly improper instances of prosecutorial argument: (1) Misstating the role of mitigating circumstances; (2) Warning the jury not to be "conned" by Chappell's protestations that he lacked free will; and (3) The jury should do justice and not show Chappell mercy. Defendant's Supplemental Brief, 2-15-12, p. 39-42; Defendant's Petition For Writ Of Habeas Corpus, 6-22-10, p. 11. Defendant makes a conclusory statement that trial counsel was ineffective for failing to object to these arguments and that because counsel failed to object, the Nevada Supreme Court was constrained to review these claims for plain error on appeal. Defendant claims that he was thereby prejudiced somehow.

First, Defendant's bare allegation that trial counsel should have objected to these arguments is not sufficient to allow this Court to grant relief. See Hargrove, 100 Nev. 498,

686 P.2d 222. Moreover, when to object, even if there is a legal basis for an objection, is a strategic decision and is for counsel to determine. See Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992) ("Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable."). Once counsel is appointed, the day-to-day conduct of the defense rests with the attorney, and it is the attorney, not the client, who has the immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop. Rhyne, 118 Nev. 1, 8, 38 P.3d 163, 167. Defendant cannot show that his counsel was deficient.

Second, to the extent that Defendant claims he was prejudiced because trial counsel's failure to object led the Nevada Supreme Court to address these issues under a plain-error standard of review, the claim also fails. Normally, when a defendant fails to object at trial the issue will not be reviewed on appeal. See Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001) (providing that the failure to object at trial precludes appellate review but for plain error). The Supreme Court may, however, notice errors that are plain from the record. NRS 178.602. In Chappell's case, the Supreme Court chose to thoroughly examine Chappell's claims of prosecutorial misconduct and found no error, plain or otherwise.[6] See Chappell v. State, Docket No. 49478 at 23-25 (Order of Affirmance, October 20, 2009). Accordingly, Chappell has not been prejudiced and cannot therefore establish that his counsel was ineffective on this issue.

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[6]Addressing Chappell's claim that the prosecutor misstated the role of mitigating circumstances, the Supreme Court reviewed the merits of the claim and concluded that: (1) the State is entitled to rebut evidence relating to a defendant's character, upbringing, and mental condition; and (2) the jury was properly instructed on the role of mitigating circumstances. Accordingly, it found no error. Addressing Chappell's claim that the prosecutor committed misconduct when he warned the jury not to be "conned" by Chappell, the Supreme Court reviewed the merits of the claim and concluded that: (1) The State's argument was based on the evidence presented; and (2) The comment was not inflammatory. Addressing Chappell's claim that the State committed misconduct when it argued the jury should not show mercy to Chappell, the Supreme Court reviewed the merits of the claim and concluded that: (1) This claim was belied by the record; and (2) The comment was proper. Chappell v. State, Docket No. 49478 at 23-25 (Order of Affirmance, October 20, 2009).

V. SECOND PENALTY PHASE COUNSEL AND SECOND APPELLATE COUNSEL WERE NOT INEFFECTIVE FOR FAILING TO CHALLENGE SEVERAL OTHER INSTANCES OF ALLEGED PROSECUTORIAL MISCONDUCT.

Defendant claims that his appellate counsel was ineffective for failing to raise a claim challenging several allegedly prejudicial comments made by the prosecutor. Defendant claims that if appellate counsel had raised these issues, the Nevada Supreme Court would have reversed his convictions. Defendant errs.

First, Defendant claims that appellate counsel was ineffective for failing to raise a claim that the State committed reversible error when the prosecutor remarked sarcastically that Chappell had a "sterling reputation" and suggested that he had been arrested ten times. During the State's cross-examination of Dr. Etcoff, the prosecutor extensively questioned him about Chappell's tendency to blame others for his actions: blaming the victim for making him so angry and jealous and thereby "making him" kill her; blaming the police for arresting him in front of his kids after the June 1, 1995 incident where he straddled Deborah and hit her; and blaming the police for his other arrests. 15 ROA 3518-55. Additionally, the court admitted State's Exhibit 129, a collection of reports that reflect Chappell's arrests for various crimes over a period of a few years, including several instances of Burglary, Possession of Burglary Tools, Petit Larceny, Vehicle Offense, and Domestic-Violence related incidents. See 18 ROA Ex. 129.

This was the context in which this first offending comment arose. After Etcoff opined that he could understand why Defendant would blame the police for arresting him in front of his children, the prosecutor stated, "Because it probably marked his otherwise sterling reputation he had with his children at that point to see the police for the tenth time taking their father in handcuffs?" Admittedly, this sarcasm is not necessary or germane to the proceeding. In fact, the court felt similarly and sustained Defendant's objection to it. Thus there is no enduring prejudice from this errant comment. Further, Defendant argues that there is no evidence in the record that he was arrested ten times. This is false. See 18 ROA Ex. 129. Further, the arguments of counsel are not evidence, see Randolph v. State,

117 Nev. 970, 984, 36 P.3d 424, 433 (2001), and the court sustained Defendant's objection to this comment. Thus, there was no prejudice to the Defendant and, because the objection was sustained, no error for the Supreme Court to correct. Accordingly, appellate counsel acted reasonably in not raising this issue on appeal.[7] See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) ("An attorney's decision not to raise meritless issues on appeal is not ineffective assistance of counsel.").

Second, Defendant claims that trial and appellate counsel were ineffective for failing to object to or raise claims of error on appeal relating to two comments by prosecutors during closing arguments—that Defendant "chose evil" when he murdered the victim and that he is "a despicable human being." While discussing Etcoff's testimony during his closing, the prosecutor noted the lengthy cross examination wherein he challenged Etcoff's expert opinion that Chappell had "less than free will" at the moment he killed Deborah and was somehow compelled or constrained to kill her because of psychological processes. See 15 ROA 3522-40. The prosecutor challenged this concept, asking Etcoff if this theory would not excuse all criminality and querying whether, in his expert opinion, Etcoff thought that some criminals "may choose evil." 15 ROA 3524. Etcoff agreed, stating that "some may choose evil," but continuing that, based on his two-hour examination of Chappell ten years ago, it was his opinion that Chappell was not one who chose evil. Id. After further examination, Etcoff eventually admitted that the choice Chappell made to kill Deborah was "evil." 15 ROA 3570. Accordingly, during closing argument, the State made the argument that Chappell indeed "chose evil." 16 ROA 3778. The State was fairly commenting on the evidence and specifically on the concession that it obtained from Chappell's own expert. There was, therefore, nothing for trial counsel to object to and thus no deficiency at trial. There was no error to correct, and thus no deficiency on the part of appellate counsel for

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[7]To the extent that Chappell raises this issue as an erroneous admission of evidence of prior bad acts, this comment was not evidence, Randolph, 117 Nev. at 984, 36 P.3d at 433, and it would therefore be impossible for appellate counsel to have been ineffective for failing to make this meritless contention on appeal, Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

failing to raise it on appeal.[8]

During closing argument, the prosecutor discussed the history between Chappell and Deborah—the long trail of physical and verbal abuse, his threats to "do an O.J. on her ass," and how he would steal his young children's possessions and presents they received and resell them for his own needs. 16 ROA 3775-81. In this context, the prosecutor stated that Chappell is a despicable human being. 16 ROA 3778. While a prosecutor has a duty not to inject his personal beliefs into an argument, Earl v. State, 111 Nev. 1304, 1311, 904 P.2d 1029, 1033 (1995), "a prosecutor's principal objective in penalty phase argument is to convince the jury that the convicted defendant is deserving of the punishment sought," Jones v. State, 113 Nev. 454, 468, 937 P.2d 55, 64 (1997). The State submits that the prosecutor's statement in this case was not inflammatory and not misconduct—it was a permissible conclusion drawn from the evidence adduced. See Browning v. State, 124 Nev. 517, 534, 188 P.3d 60, 72 (2008) (concluding that prosecutor's comments at closing argument referring to defendant and his actions as evil did not constitute misconduct). Even if it were misconduct, the outcome of the penalty hearing would not have been different had trial counsel objected given the overwhelming evidence that Defendant is death eligible. Likewise, appellate counsel was not deficient for failing to raise the issue on appeal. See Riley v. State, 107 Nev. 205, 213, 808 P.2d 551, 556 (1991) (stating that "even aggravated prosecutorial remarks will not justify reversal" where substantial evidence supports the conviction).

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[8]Indeed, the Nevada Supreme Court noted that:

> Chappell's mitigating evidence highlighting his troubled upbringing and his drug addiction and expert testimony suggesting that he did not have the same level of "free will" as the average person was weakened by rebuttal evidence demonstrating that Chappell had a history of blaming others for his problems and his behavior. And in fact, while Chappell admitted to killing Panos, he continued to blame her, at least in part, for her murder at his hands.

Chappell v. State, Docket No. 49478 at 30 (Order of Affirmance, October 20, 2009).

VI. SECOND PENALTY HEARING COUNSEL AND SECOND APPELLATE COUNSEL WERE NOT INEFFECTIVE FOR FAILING TO RAISE ALLEGED IMPROPER IMPEACHMENT.

Defendant argues that penalty phase counsel and appellate counsel were ineffective for failing to object to the State's impeachment of Fred Dean. Defendant's Supplemental Brief, 2-15-12, p. 42-3. On cross examination, the State elicited from Dean that he served 12 years in prison on a drug possession charge and that he received a deal by pleading to that lesser charge and obtaining a dismissal of a trafficking charge. Defendant claims that this impeachment was improper and he received ineffective assistance of counsel when trial counsel failed to object and appellate counsel failed to raise a claim of error on appeal.

Defendant is correct that the Nevada Supreme Court has limited inquiry into witnesses' prior felonies, specifically concluding that "it was error to allow the question concerning the [prison] term that was imposed." Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975). Therefore, the State's inquiry into the details of Dean's plea was arguably improper. Defendant's analysis of this issue, however, ends there, with a conclusory demand for "reversal." Defendant must, however, make specific allegations of deficiency and prejudice. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Again, he fails to carry his burden and this claim must also fail.

Defendant's trial counsel was not deficient for failing to object to this arguably improper impeachment. When to object, even if there is a legal basis for an objection, is a strategic decision and is for counsel to determine. See Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280 (1996). Even if counsel were deficient, Defendant fails to articulate prejudice and the claim can and should be dismissed simply by analyzing the prejudice prong alone. See Strickland, 466 U.S. at 697 ("In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies."). Dean was not the defendant at this trial, he was a mitigation witness. Therefore, it is unclear what an objection would have accomplished and Defendant does not articulate how it would have affected the jury's verdict to know not just that Dean was convicted of felony Drug Possession but that he also

received a plea deal and had a greater charge dismissed. The jury found seven of the relevant mitigating circumstances and nevertheless found that they did not outweigh the aggravator and sentenced Chappell to death. It is Defendant's burden to allege how he was prejudiced and he fails to do so. For the same reasons, he cannot show that appellate counsel was deficient for failing to raise this meritless claim or that—even if it had—that the Supreme Court would have reversed on this issue relating to a collateral witness given the overwhelming evidence that a sentence of death was appropriate in this case. See Chappell v. State, Docket No. 49478 at 30 (Order of Affirmance, October 20, 2009). Therefore this claim should be dismissed.

VII. DEFENDANT'S DIRECT APPEAL CLAIM OF DISTRICT COURT ERROR IS PROCEDURALLY BARRED.

Defendant claims that the district court erred by allowing the "prior bad act" testimony of witness LaDonna Jackson. This claim of error was appropriate for direct appeal and thus it is barred pursuant to NRS 34.810(1)(b)(2). Defendant fails to articulate good cause or prejudice to explain his procedural default and this claim must therefore be dismissed. State v. Dist. Ct. (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005) (explaining that the application of procedural bars is mandatory).

VIII. THE DEATH PENALTY IS CONSTITUTIONAL.

Defendant asserts various challenges to the constitutionality of the death penalty and Nevada's capital punishment scheme. Defendant's Supplemental Brief, 2-15-12, p. 45-58. In his supplement, Defendant acknowledges that the Nevada Supreme Court has consistently denied the issues he now attempts to raise. In addition, these claims as they relate to the constitutionality of the death penalty were appropriate for direct appeal and are therefore barred pursuant to NRS 34.810(1)(b)(2). Defendant does not articulate good cause to excuse the default and these claims should be summarily dismissed. Riker, 121 Nev. at 231, 112 P.3d at 1074. Nevertheless, the State will briefly respond to each issue.

A. Nevada's Capital Sentencing Scheme Sufficiently Narrows The Class Of Person Eligible For The Death Penalty.

Defendant argues that Nevada's death penalty scheme does not narrow the class of persons eligible for the death penalty. Defendant's Supplemental Brief, 2-15-12, p. 48-9. Defendant asserts that Nevada law permits broad imposition of the death penalty for virtually all First-Degree Murders. Id.

The Nevada Supreme Court has repeatedly concluded that Nevada's death penalty scheme sufficiently narrows the class of people eligible for the death penalty. See Thomas v. State, 122 Nev. at 1361, 1373, 148 P.3d 727, 735-36 (2006); Weber v. State, 121 Nev. 554, 585, 119 P.3d 107, 128 (2005); Leonard v. State, 117 Nev. 53, 82-83, 17 P.3d 397, 415-16 (2001); Middleton v. State, 114 Nev. 1089, 1116-17, 968 P.2d 296, 314-15 (1998).

The Nevada scheme has been held to properly serve its constitutional narrowing function on numerous occasions. See Zant v. Stephens, 462 U.S. 862, 877, 103 S.Ct. 2733, 2742 (1983); Servin v. State, 117 Nev. 775, 785-786, 32 P.3d 1277, 1285 (2001); Gallego v. State, 117 Nev. 348, 370-371, 23 P.3d 227, 242 (2001); see also Evans, 117 Nev. 609, 637, 28 P.3d 498, 517-518 (2001); Deutscher v. State, 95 Nev. 669, 676, 601 P.2d 407, 412 (1979). In the instant case, this Court's past decisions regarding the constitutionality of the Nevada scheme apply. Nevada's capital sentencing scheme sufficiently narrows the class of persons eligible.

B. The Death Penalty Does Not Violate The Prohibition Against Cruel And Unusual Punishment.

Defendant asserts that the death penalty is cruel and unusual punishment. Defendant's Supplemental Brief, 2-15-12, p. 49-51. The Nevada Supreme Court has held that the death penalty does not violate the prohibition against cruel and unusual punishment found in either the United States Constitution or the Nevada Constitution. See Bishop v. State, 95 Nev. 511, 517-18, 597 P.2d 273, 276-77 (1979).

The United States Supreme Court upheld the death penalty in Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909 (1976). Additionally, the Nevada death penalty scheme has been repeatedly held to be constitutional and not cruel and/or unusual punishment under either the

Nevada or United States constitutions. See, e.g., Colwell v. State, 112 Nev. 807, 814-15, 919 P.2d 403, 408 (1996). This Court explained in Colwell:

> Finally, Colwell's counsel claims that the death penalty is cruel and unusual punishment in all circumstances in violation of the Eighth Amendment and the Nevada Constitution. Colwell's counsel concedes that the United States Supreme Court and this court have repeatedly upheld the general constitutionality of the death penalty under the Eighth Amendment. See, e.g., *Bishop*, 95 Nev. at 517-18, 597 P.2d at 276-77. Colwell's counsel merely desires to preserve his argument should this court change its mind. We are not so inclined. We note that this court has also held that the death penalty is not unconstitutional under the Nevada Constitution. *Id.* Accordingly, we conclude that Colwell's counsel's claim on this issue lacks merit.

Id. at 814-815, 919 P.2d at 408. The death penalty is constitutional. Defendant's claim must fail.

C. Nevada's Clemency Scheme Is Constitutional.

Defendant next claims that his sentence must be vacated because Nevada's death penalty scheme is unconstitutional for failing to have a "functioning clemency procedure." Defendant's Supplemental Brief, 2-15-12, p. 51-2.

The statutory procedures for administering a grant of clemency do not implicate a constitutionally protected interest. See Niergarth v. State, 105 Nev. 26, 28, 768 P.2d 882, 883 (1989); see generally Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 280-81 (1998) (noting that clemency is a matter of grace). The U.S. Supreme Court has made it clear that there is no constitutional right to a clemency hearing. See Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 464, 101 S.Ct. 2460 (1981) ("Unlike probation, pardon and commutation decisions have not traditionally been the business of the courts; as such, they are rarely, if ever, appropriate subjects for judicial review.... [A]n inmate has no 'constitutional or inherent right' to commutation of his sentence."); see also Joubert v. Nebraska Bd. of Pardons, 87 F.3d 966, 968 (8th Cir.1996) ("It is well-established that prisoners have no constitutional or fundamental right to clemency."), cert. denied, 518 U.S. 1035, 117 S.Ct. 1 (1996).

Nevada's clemency scheme was upheld in Colwell. 112 Nev. at 812, 919 P.2d at 406-7. As the Nevada Supreme Court stated: "NRS 213.085 does not completely deny the opportunity for 'clemency,' as Colwell's counsel contends, but rather modifies and limits the

power of commutation. Accordingly, Colwell's counsel's claim lacks merit." Id.

Furthermore, Defendant's argument lacks a logical step. Defendant's argument in essence is that Nevada's clemency laws and procedures must not be working because they are rarely exercised on behalf of defendants. Defendant has cited an effect, and has assumed a specific cause, but has failed to show a causal connection. Defendant's claim must fail.

D. Defendant's Sentence Is Not Invalid And Nevada's Capital Punishment System Does Not Operate In An Arbitrary And Capricious Manner.

Defendant's claim that his sentence is invalid because Nevada's Capital Punishment system operates in an arbitrary and capricious manner is a mixture of the above arguments. Defendant's Supplemental Brief, 4-15-12, p. 52-56. As detailed above, Nevada's capital punishment system has been held to be constitutional. See, e.g., Colwell, 112 Nev. at 814-15, 919 P.2d at 408. Inasmuch as Defendant compares his sentence with the sentence of other individuals, the fact that *different* juries determined *different* sentences after hearing *different* evidence about *different* murders does not make the system arbitrary and capricious. Defendant's claim must fail.

Additionally, when considering Defendant's claim that his jury arbitrarily decided that he should be given a death sentence it should be noted that the Nevada Supreme Court concluded the following in affirming the jury's decision to impose the death penalty:

> The evidence shows that Chappell had beaten Panos and stolen from her and their children to support his drug habit for almost a decade before he was incarcerated. Immediately after being released from custody, he went to Panos' home, beat her, sexually assaulted her, and stabbed her thirteen times. Chappell's mitigating evidence highlighting his troubled upbringing and his drug addiction and expert testimony suggesting that he did not have the same level of "free will" as the average person was weakened by rebuttal evidence demonstrating that Chappell had a history of blaming others for his problems and his behavior. And in fact, while Chappell admitted to killing Panos, he continued to blame her, at least in part, for her murder at his hands. Chappell also had a lengthy criminal history that included repeated acts of domestic violence, and evidence adduced during the penalty hearing demonstrated that he had a general disregard for the well-being of others. Based on these considerations, we conclude that the jury's decision to impose the death penalty was not excessive.

Chappell v. State, Docket No. 49478 at 30 (Order of Affirmance, October 20, 2009). The jury did not arbitrarily decide that Defendant should be given a death sentence, his sentence

is not excessive, and his claims must fail.

E. The Nevada Supreme Court Has Upheld The Death Penalty In The Face Of International Laws.

Defendant also claims that his conviction and death sentences are invalid because the proceedings against him violated international law. Defendant's Supplemental Brief, 2-15-12, p. 56-58.

The Nevada Supreme Court has rejected challenges to the constitutionality of the death penalty based on international law. Servin v. State, 117 Nev. 775, 787-88, 32 P.3d 1277, 1285-86 (2001); see also Roper v. Simmons, 543 U.S. 551, 575 (2005). Defendant cites the International Covenant on Civil and Political Rights. In Servin, 117 Nev. at 785-786, 32 P.3d at 1286, the Nevada Supreme Court quotes a portion of the United States' reservation from that covenant:

> That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.

Quoting 138 Cong.Rec. 8070 (1992); see also S.Exec.Rep. No. 23, 102d Cong., 2d Sess. 21-22 (1992)). Thus, the Nevada Supreme Court has upheld the death penalty in the face of international laws defendants frequently cite, and this claim also fails.

IX. DEFENDANT'S CLAIM REGARDING HIS JURY INSTRUCTION DEFINING PREMEDITATION AND DELIBERATION IS PROCEDURALLY BARRED.

Defendant claims that "the jury instruction given defining premeditation and deliberation was constitutionally infirm." Defendant's Supplemental Brief, 2-15-12, p. 58. Defendant's guilt phase claim of error is subject to various procedural bars. Defendant filed his petition more than thirteen years after this court issued the Remittitur from his direct appeal. Thus, Defendant's petition is untimely filed. See NRS 34.726(1). Moreover, Defendant's petition as it relates to his guilt phase is successive. See NRS 34.810(1)(b)(2). Defendant's petition was procedurally barred absent a demonstration of good cause and prejudice. See NRS 34.726(1); NRS 34.810(1)(b). As the Nevada Supreme Court has

addressed this issue in his previous appeals, see Chappell v. State, Docket No. 49478 at 27-28 (Order of Affirmance, October 20, 2009), it is the law of this case. Hall, 91 Nev. at 315-16, 535 P.2d at 798-99. Finally, because the State has specifically pleaded laches, Defendant is required to overcome the presumption of prejudice to the State. See NRS 34.800(2). Defendant again fails to articulate good cause to excuse his procedural defaults. This claim must be dismissed. State v. Dist. Ct. (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005) (explaining that the application of procedural bars is mandatory).

X. THERE WAS NO CUMULATIVE ERROR.

Defendant argues that the above series of alleged errors, when taken together, amount to reversible error. Defendant cites no authority for the proposition that instances of ineffective assistance of counsel are amenable to cumulative-error analysis and the Nevada Supreme Court has never issued such a holding. But cf. Harris by and through Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995) (concluding that prejudice may result from cumulative effect of multiple counsel deficiencies). The State submits that such an analysis is not appropriate when determining whether trial or appellate counsel was ineffective. Nevertheless, to the extent that this court entertains an independent cumulative error claim, Defendant has failed to make out a valid claim for any one of the issues he has raised and therefore there is no "error" to cumulate. See U.S. v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors.").

XI. DEFENDANT'S CLAIMS CAN BE RESOLVED WITHOUT EXPANDING THE RECORD.

If a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). NRS 34.770 provides the manner in which the district court decides a post conviction proceeding:

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent unless

an evidentiary hearing is held.
2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.

Here, Defendant has failed to prove that he is entitled to an evidentiary hearing and therefore an evidentiary hearing should not be granted. Mann, 118 Nev. at 356, 46 P.3d at 1231; Pellegrini v. State, 117 Nev. 860, 883, 34 P.3d 519, 534 (2001). All of Defendant's claims can be resolved without expanding the record, especially considering Defendant's claims have been either waived, are procedurally barred, see supra §§ I, II.E, VII, VIII, IX, or are otherwise not cognizable as bare or conclusory allegations, see supra §§ II.A, II.C, IV, VI. Additionally, Defendant fails to make out a colorable claim of ineffective assistance of counsel; thus, it is not necessary to expand the record in order to resolve Defendant's claims and Defendant's request for an evidentiary hearing should be denied.

With regard to Defendant's ineffective assistance of counsel claims, the United States Supreme Court recently explained that an evidentiary hearing is not required simply because counsel's actions are challenged as being an unreasonable strategic decision. Harrington v. Richter, 131 S.Ct. 770, 788 (2011). Although courts may not indulge post hoc rationalization for counsel's decision making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id., citing Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527 (2003). There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id., citing Yarborough v. Gentry, 540 U.S. 1, 124 S.Ct. 1 (2003). Strickland calls for an inquiry in the ***objective*** reasonableness of counsel's performance, not counsel's ***subjective*** state of mind. 466 U.S. at 688, 104 S.Ct. 2052.

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CONCLUSION

Based on the foregoing, the State respectfully requests that this Court DENY Defendant's Petition For Writ Of Habeas Corpus (Post-Conviction), and his supplement to his Petition for Writ Of Habeas Corpus.

DATED this 16th day of May, 2012.

Respectfully submitted,

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

BY
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing, was made this 16th day of May, 2012, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JAMES MONTELL CHAPPELL,
#1212860

Defendant.

CASE NO: 95-C131341

DEPT NO: XXV

STATE'S OPPOSITION TO MOTION FOR AUTHORIZATION TO OBTAIN EXPERT SERVICES AND PAYMENT OF FEES

DATE OF HEARING: 5/24/12
TIME OF HEARING: 9:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through STEVEN S. OWENS, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion for Authorization to Obtain Expert Service and for Payment of Fees.

This opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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DATED this 16th day of May, 2012.

Respectfully submitted,

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

BY
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On December 31, 1996, James Montell Chappell ("Defendant") was convicted, pursuant to a jury verdict, of Burglary, Robbery With Use of a Deadly Weapon and First-Degree Murder With the Use of a Deadly Weapon. Defendant was sentenced to serve a term of four (4) to ten (10) years in prison for Burglary and two consecutive terms of six (6) to fifteen (15) years for Robbery With the Use of a Deadly Weapon. A jury sentenced Defendant to death for First-Degree Murder With the Use of a Deadly Weapon. On appeal, the Nevada Supreme Court affirmed Defendant's convictions and sentence of death. Chappell v. State, 114 Nev. 1403, 972 P.2d 838 (1998).

On October 19, 1999, Defendant filed his first pro per post-conviction petition for writ of habeas corpus. David Schieck, Esq. was appointed as post-conviction counsel and Defendant filed a supplement to his petition on April 30, 2002. The District Court partially granted and partially denied the petition, vacated Defendant's sentence of death, and ordered a new penalty hearing. The District Court found merit in Defendant's claim that trial counsel was ineffective for failing to investigate and call mitigation witnesses to testify during Defendant's penalty hearing, and that the omitted testimony had a reasonable likelihood of impacting the jury's decision. The District Court otherwise upheld Defendant's conviction and denied his claims relating to the guilt phase of his trial. The

Nevada Supreme Court affirmed the District Court's decision. Chappell v. State, Docket No. 43493 (Order of Affirmance, April 7, 2006).

On May 10, 2007, following Defendant's second penalty hearing, a jury again sentenced Defendant to death. On appeal, the Nevada Supreme Court affirmed Defendant's sentence of death. Chappell v. State, Docket No. 49478 (Order of Affirmance, October 20, 2009).

On June 22, 2012, Defendant filed his second pro per post-conviction petition for writ of habeas corpus. Christopher R. Oram, Esq. was appointed as post-conviction counsel and Defendant filed a supplemental brief in support of his petition on February 15, 2012. On the same date he filed a Motion for Authorization to Obtain Expert Service and for Payment of Fees. The State's Opposition is as follows:

ARGUMENT

Defendant's motion requests this Court authorize funds so that he may procure the services of three kinds of experts. Under Nevada post-conviction law there is no right to discovery until after the writ has been granted and a date set for an evidentiary hearing. NRS 34.780. Likewise, only if an evidentiary hearing is required may the parties seek to expand the record. NRS 34.790. Defendant's motion for expert services payment is therefore premature. Additionally, for the reasons discussed below, the grounds Defendant asserts in support of his motion are unsupported by "any specific factual allegations that would, if true, have entitled him" to relief, Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984), and therefore any evidentiary hearing on these claims is unwarranted. If an evidentiary hearing is unwarranted, Defendant cannot pursue discovery. NRS 34.780.

First, Defendant requests this Court to grant him extra funds to obtain a P.E.T. scan and explains that a P.E.T. scan will yield a 3-dimensional image of his brain. What Defendant fails to explain is what that will accomplish. Defendant does not claim that he suffers from brain damage or that a P.E.T. scan would possibly result in any findings that Defendant's brain activity is deficient. Thus, Defendant has not met his initial burden because he has not even attempted to allege how obtaining a P.E.T. scan would have

rendered a more favorable outcome. Molina, 120 Nev. at 192, 87 P.3d at 538. In order for Defendant to demonstrate a reasonable probability that, but for counsel's failure to obtain a P.E.T. scan, the result would have been different, it must be clear from the "record what it was about the defense case that a more adequate investigation would have uncovered." Id. It is Defendant's burden to make specific allegations in this regard. Defendant utterly fails to meet this burden, and his request for funds to undergo this procedure should be denied.

Second, Defendant states that excess funds should be available to him so that he may obtain another "full neurological exam." Defendant fails to explain what a neurological exam is: it could imply that he is requesting some physiological testing of his brain anatomy apart from the P.E.T. imaging test or it could refer to psychological testing.[1] Defendant states that "[o]ver ten years have passed since Mr. Chappell had been tested prior to his third penalty phase." There has been no third penalty phase. To the extent that this ground for granting his motion requests funds for more psychological testing, Defendant has been thoroughly examined by Drs. William Danton and Lewis Etcoff. 14 ROA 3317-3504. Defendant seems to imply that this Court must authorize funds for a new exam because the prior exams occurred over ten years ago. However, Defendant's theory of the defense was that he lacked free will at the time he stabbed Deborah Panos to death. Defendant does not explain how yet another examination more than 17 years later would reveal anything that would undermine faith in the outcome of the second penalty hearing. Accordingly, this ground for payment should be dismissed.

Third, Defendant claims that this Court should authorize payment of an expert "to determine the possible effects of Fetal Alcohol Spectrum Disorder" on Defendant. Defendant claims that a "proper investigation" would have revealed that Defendant was born

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[1]This helpfully illustrates why this court should deny all of Defendant's vague motions for discovery and for expert funds. Defendant generally wants this Court to award him funds "in order to determine any additional issues that may be raised on his behalf." Defendant's Motion for Authorization to Obtain Expert Services and for Payment of Fees Incurred Herein at 4. The State submits that this is a clear invitation to join Defendant on a "fishing expedition." This Court should decline that invitation. See Ward v. Whitley, 21 F.3d 1355, 1367 (5th Cir. 1994).

to a drug/alcohol addicted mother. Apparently, a proper investigation was conducted as the jury found as a mitigating circumstance that Defendant was indeed "born to a drug/alcohol addicted mother." 15 ROA 3740. No further investigation is necessary. Considering this, even if a brain imaging would have revealed that Defendant did have Fetal Alcohol Syndrome,[2] Defendant cannot demonstrate that the result of his trial would have led to a more favorable outcome at his penalty hearing. As a result, an evidentiary hearing on this claim is unnecessary, Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002), and post-conviction discovery is not available, NRS 34.780.

Expenditure of public monies must be made in compliance with Nevada law and not for a "fishing" expedition or to needlessly investigate claims that would not have made a difference in the case.

CONCLUSION

For the foregoing reasons, Defendant's motion should be DENIED.

DATED this 16th day of May, 2012.

Respectfully submitted,

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

BY
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352

[2]In any event, it is highly unlikely that any expert could provide a definitive diagnosis of Fetal Alcohol Syndrome even if this Court did authorize the great expense that would be required for 3D brain imaging and diagnostic experts. According to the National Task Force on Fetal Alcohol Syndrome and Fetal Alcohol Effect in conjunction with the National Center on Birth Defects and Developmental Disabilities, there are no specific or uniformly accepted diagnostic criteria available for determining whether a person has Fetal Alcohol Syndrome. Centers for Disease Control and Prevention, Nat'l Center on Birth Defects and Developmental Disabilities, Fetal Alcohol Syndrome: Guidelines for Referral and Diagnosis, (July 2004), (available at http://www.cdc.gov), p. 2-3. Additionally, "diagnostic criteria are not sufficiently specific [enough] to ensure diagnostic accuracy, consistency, or reliability." Id. at 2. Further, these Guidelines not only state that "it is easy for a clinician to misdiagnose" fetal alcohol syndrome, but that there currently exist no diagnostic criteria to distinguish fetal alcohol syndrome from other alcohol-related conditions. Id. at 3.

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing, was made this 16th day of May, 2012, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

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Eileen Davis

Employee for the District Attorney's Office

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(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JAMES MONTELL CHAPPELL,
#1212860

Defendant.

CASE NO: 95-C131341

DEPT NO: DEPT. XXV

STATE'S OPPOSITION TO MOTION FOR AUTHORIZATION TO OBTAIN SEXUAL ASSAULT EXPERT AND PAYMENT OF FEES, AND OPPOSITION TO MOTION FOR INVESTIGATOR AND PAYMENT OF FEES

DATE OF HEARING: 5/24/12
TIME OF HEARING: 9:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through STEVEN S. OWENS, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion for Sexual Assault Expert and for Payment of Fees and Opposition to Defendant's Motion for Investigator and for Payment of Fees.

This opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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DATED this 16th day of May, 2012.

Respectfully submitted,

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

BY
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On December 31, 1996, James Montell Chappell ("Defendant") was convicted, pursuant to a jury verdict, of Burglary, Robbery With Use of a Deadly Weapon, and First-Degree Murder With the Use of a Deadly Weapon. Defendant was sentenced to serve a term of four (4) to ten (10) years in prison for Burglary and two consecutive terms of six (6) to fifteen (15) years for Robbery With the Use of a Deadly Weapon. A jury sentenced Defendant to death for First-Degree Murder With the Use of a Deadly Weapon. On appeal, the Nevada Supreme Court affirmed Defendant's convictions and sentence of death. Chappell v. State, 114 Nev. 1403, 972 P.2d 838 (1998).

On October 19, 1999, Defendant filed his first pro per post-conviction petition for writ of habeas corpus. David Schieck, Esq. was appointed as post-conviction counsel and Defendant filed a supplement to his petition on April 30, 2002. The District Court partially granted and partially denied the petition, vacated Defendant's sentence of death, and ordered a new penalty hearing. The District Court found merit in Defendant's claim that trial counsel was ineffective for failing to investigate and call mitigation witnesses to testify during Defendant's penalty hearing, and that the omitted testimony had a reasonable likelihood of impacting the jury's decision. The District Court otherwise upheld Defendant's conviction and denied his claims relating to the guilt phase of his trial. The

Nevada Supreme Court affirmed the District Court's decision. Chappell v. State, Docket No. 43493 (Order of Affirmance, April 7, 2006).

On May 10, 2007, following Defendant's second penalty hearing, a jury again sentenced Defendant to death. On appeal, the Nevada Supreme Court affirmed Defendant's sentence of death. Chappell v. State, Docket No. 49478 (Order of Affirmance, October 20, 2009).

On June 22, 2012, Defendant filed his second pro per post-conviction petition for writ of habeas corpus. Christopher R. Oram, Esq. was appointed as post-conviction counsel and Defendant filed a supplemental brief in support of his petition on February 15, 2012. On the same date he filed a Motion for Sexual Assault Expert and for Payment of Fees and a Motion for Investigator and for Payment of Fees. The State's Opposition to these motions has been consolidated and is as follows:

ARGUMENT

In support of Defendant's motion for a sexual assault expert, his argument, in its entirety, is that "In light of the seriousness of Mr. Chappell's conviction and sentence of death, I believe it is necessary that a sexual assault expert" be available.

In support of Defendant's motion for an Investigator, his argument, in its entirety, is that "In light of the seriousness of Mr. Chappell's conviction and sentence of death, I believe it is necessary that an investigator" be available.

Defendant fails to make any specific allegation as to what these experts and Investigators will uncover that could possible change the outcome of his case. Accordingly, Defendant's bare and conclusory motions should be denied. See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984); see also Caldwell v. Mississippi, 472 U.S. 320, 323, (1985) (deciding that defendant's general statements claiming necessity of an expert witness are insufficient to warrant the appointment of expert).

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CONCLUSION

For the foregoing reasons, Defendant's motion should be DENIED.

DATED this 16th day of May, 2012.

Respectfully submitted,

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

BY
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing, was made this 16th day of May, 2012, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

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200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JAMES MONTELL CHAPPELL,
#1212860

Defendant.

CASE NO: 95-C131341

DEPT NO: XXV

STATE'S OPPOSITION TO MOTION FOR LEAVE TO CONDUCT DISCOVERY

DATE OF HEARING: 5/24/12
TIME OF HEARING: 9:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through STEVEN S. OWENS, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion for Leave to Conduct Discovery.

This opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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DATED this 16th day of May, 2012.

Respectfully submitted,

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

BY _____
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On December 31, 1996, James Chappell ("Defendant") was convicted, pursuant to a jury verdict, of Burglary, Robbery With Use of a Deadly Weapon, and First-Degree Murder With the Use of a Deadly Weapon. Defendant was sentenced to serve a term of four (4) to ten (10) years in prison for Burglary and two consecutive terms of six (6) to fifteen (15) years for Robbery With the Use of a Deadly Weapon. A jury sentenced Defendant to death for First-Degree Murder With the Use of a Deadly Weapon. On appeal, the Nevada Supreme Court affirmed Defendant's convictions and sentence of death. Chappell v. State, 114 Nev. 1403, 972 P.2d 838 (1998).

On October 19, 1999, Defendant filed his first pro per post-conviction petition for writ of habeas corpus. David Schieck, Esq. was appointed as post-conviction counsel and Defendant filed a supplement to his petition on April 30, 2002. The District Court partially granted and partially denied the petition, vacated Defendant's sentence of death, and ordered a new penalty hearing. The District Court found merit in Defendant's claim that trial counsel was ineffective for failing to investigate and call mitigation witnesses to testify during Defendant's penalty hearing, and that the omitted testimony had a reasonable likelihood of impacting the jury's decision. The District Court otherwise upheld Defendant's conviction and denied his claims relating to the guilt phase of his trial. The

Nevada Supreme Court affirmed the District Court's decision. Chappell v. State, Docket No. 43493 (Order of Affirmance, April 7, 2006).

On May 10, 2007, following Defendant's second penalty hearing, a jury again sentenced Defendant to death. On appeal, the Nevada Supreme Court affirmed Defendant's sentence of death. Chappell v. State, Docket No. 49478 (Order of Affirmance, October 20, 2009).

On June 22, 2012, Defendant filed his second pro per post-conviction petition for writ of habeas corpus. Christopher R. Oram, Esq. was appointed as post-conviction counsel and Defendant filed a supplemental brief in support of his petition on February 15, 2012. On the same date he filed a Motion for Leave to Conduct Discovery. The State's Opposition is as follows:

ARGUMENT

Defendant's motion makes a non-specific request for "the discovery file." Defendant's motion is not authorized by Nevada law and the request should be denied for the following reasons.

First, the writ has not been granted. NRS 34.780 specifically provides that, "**After** the writ has been granted and a date set for the hearing, a party may invoke any method of discovery available under the Nevada Rules of Civil Procedure . . ." NRS 34.780(2) (emphasis added). NRS 34.780 applies to post-conviction criminal proceedings. NRS 34.780(1). The essential procedures with regard to a petition for writ of habeas corpus are as follows: A person who is convicted of a crime and under sentence of death or imprisonment who claims that the conviction or sentence is in violation of the United States Constitution may file a post-conviction petition for writ of habeas corpus to obtain relief from the conviction or sentence. NRS 34.724. The district judge, after receiving and verifying the properly filed petition, NRS 34.735, NRS 34.730, shall then order a response to be filed by the district attorney or Attorney General, or take other action that the judge or justice deems appropriate. NRS 34.745. The district judge may appoint counsel and allow supplemental pleadings to be filed. NRS 34.750. The district judge shall then, upon review of all filed

documents, determine whether an evidentiary hearing is required. If the district judge determines that an evidentiary hearing is not required, then the petition shall be dismissed without a hearing. If the district judge determines that an evidentiary hearing is required, then the petition shall be granted and a date set for hearing. NRS 34.770. Only after the writ has been granted and a date set for hearing may a party invoke discovery available under the Nevada Rules of Civil procedure to the extent good cause is shown. NRS 34.780. Therefore, Defendant's motion is premature and should be dismissed.

Second, Defendant is not entitled to an evidentiary hearing. As articulated more completely in the Response to Defendant's petition and supplement, see State's Response at 34-35, Defendant's claims of ineffective assistance of trial and appellate counsel at his second penalty hearing are wholly without merit. Even accepting as true the factual allegations of ineffective assistance, Defendant is not entitled to relief on any of his claims that relate to the second penalty hearing. See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Defendant's claims relating to the guilt and first penalty phase are—as also detailed in the State's Response—procedurally barred and Defendant fails to articulate good cause sufficient to overcome the default. See State v. District Court (Riker), 121 Nev. 255, 112 P.3d 1070 (2005) (holding that when claim is procedurally barred, evidentiary hearing cannot be set until petitioner meets burden of demonstrating good cause and prejudice to overcome procedural bars); Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001) (same). Because an evidentiary hearing on his claims is not required, a motion for discovery is moot.

Third, Defendant's nonspecific request for a "discovery file" would not pass muster under the federal standards that Defendant cites in his motion even if they applied to this case. Defendant contends that this Court should look to Rule 6(a) of the Rules Governing Section 2254, which allows discovery in federal habeas petitions for good cause shown. However, much like Defendant imprecisely cites to the Nevada Statute regarding discovery, Defendant similarly leaves out an important underpinning of the Federal Statute. While it is true that the actual Federal Statute makes no reference to a petition being granted and an

evidentiary hearing set before discovery procedures may be invoked, the case law behind the statute makes clear that the same intentions are present.

Federal courts have made clear that applicability of discovery procedures are not a matter of ordinary course for habeas petitioners. Bracy v. Gramley, 520 U.S. 899, 904, 117 S.Ct. 1793, 1796 (1997). However, because there are certain instances where discovery may be appropriate in habeas proceedings certain rules have been invoked to regulate discovery procedures in federal proceedings. Id. In particular, Rule 6(a) of the Rules Governing Section 2254. Under this rule, which Defendant cites in his motion, it has been an accepted procedure in the federal courts for a prisoner to first outline factual allegations in a petition before a district court would be able to determine the propriety of discovery. Calderon v. U.S. Dist. Ct. for the Northern Dist. of California, 98 F.3d 1102, 1106 (9th Cir. 1996). Only "in appropriate circumstances, a district court, confronted by a petition for habeas corpus which establishes a prima facie case for relief, may use or authorize the use of suitable discovery procedures." Harris v. Nelson, 394 U.S. 286, 290, (1969) (establishing basis for Rule 6(a)); see also Mayberry v. Petsock, 821 F.2d 179, 185 (3d Cir. 1987) ("Unless the petition itself passes scrutiny, there would be no basis to require the state to respond to discovery requests.").

Consistent with these limiting principles, requests for discovery must be specific—courts do not allow prisoners to use federal discovery for fishing expeditions to investigate mere speculation. Calderon at 1106. See Ward v. Whitley, 21 F.3d 1355, 1367 (5th Cir. 1994) ("federal habeas court must allow discovery and an evidentiary hearing only where a factual dispute, if resolved in the petitioner's favor, would entitle him to relief . . . Conclusory allegations are not enough to warrant discovery under Rule 6; the petitioner must set forth specific allegations of fact. Rule 6 . . . does not authorize fishing expeditions."). By making an ambiguous and nonspecific request for a "discovery file," Defendant requests this Court to allow him to pursue just such a fishing expedition. Defendant had discovery at trial and an opportunity to pursue discovery after his first post-conviction petition for a writ of habeas corpus was granted. NRS 34.780(2). This request should not be granted.

CONCLUSION

For the foregoing reasons, Defendant's motion should be DENIED.

DATED this 16th day of May, 2012.

Respectfully submitted,

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

BY
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352

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Eileen Davis

Employee for the District Attorney's Office

SSO/Ryan MacDonald/ed

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

JAMES CHAPPELL,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

S.C. CASE NO. 61967

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APPEAL FROM DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AND SENTENCE OF DEATH
EIGHTH JUDICIAL DISTRICT COURT
THE HONORABLE JUDGE CAROLYN ELLSWORTH, PRESIDING

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APPELLANT'S APPENDIX TO THE OPENING BRIEF
VOLUME XX

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Docket 61967 Document 2013-34681

IN THE SUPREME COURT OF NEVADA

JAMES CHAPPELL, Appellant, vs. THE STATE OF NEVADA Respondent.	CASE NO. 61967

APPENDIX

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on this 18th day of November, 2013. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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