IN THE SUPREME COURT OF THE STATE OF NEVADA

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JAMES CHAPPELL, Appellant, vs. THE STATE OF NEVADA, Respondent.	S.C. CASE NO. 61967

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 OPENING BRIEF

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JURISDICTIONAL STATEMENT

Argument on the petition was held and Mr. Chappell's Petition for Writ of Habeas Corpus was denied on October 19, 2012 (21 ROA 4706). The Findings of Fact, Conclusions of Law and Order was filed on November 16, 2012 (20 ROA 4527). Mr. Chappell filed a timely notice of appeal on October 22, 2012 (20 ROA 4515). This Opening Brief follows.

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, this Court issued its opinion affirming the conviction (9 ROA 2273); Chappell v. State, 114 Nev. 1403, 972 P.2d 838 (1998). This 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, this 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 this 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 this 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. This Court also rejected other issues raised by Chappell on appeal. Id. This 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). This 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). A supplemental petition was filed on April 30, 2002 (10 ROA 2417). Among other issues, Chappell contended that his conviction was invalid 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 this Court (11 ROA 2757). On June 24, 2004, Chappell filed a notice of cross-appeal (11 ROA 2761). On April 7, 2006, this Court issued its Order of Affirmance in which it upheld the district court's decision (11 ROA 2783). Of relevance to this petition, is this 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)). This 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).

The second penalty phase began on March 12, 2007 (19 ROA 3932). 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 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. was filed on October 23, 2008. This 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, this Court filed its remittitur.

Chappell filed a timely Petition for Writ of Habeas Corpus on June 22, 2010. A supplemental brief was filed on February 15, 2012 (20 ROA 4562). The State's Response was filed on May 16, 2012 (20 ROA 4431). A Reply brief was filed on July 30, 2012 (20 ROA 4491). Argument on the petition was held and Mr. Chappell's Petition for Writ of Habeas Corpus was denied on October 19, 2012 (21 ROA 4706). The Findings of Fact, Conclusions of Law and Order was filed on November 16, 2012 (20 ROA 4527). Mr. Chappell filed a timely notice of appeal on October 22, 2012 (20 ROA 4515). This Opening Brief follows.

STATEMENT OF FACTS

The statement of facts are enunciated in Mr. Chappell's supplemental brief (20 ROA 4569-4582).

ARGUMENT

I. MR. CHAPPELL IS ENTITLED TO A REVERSAL OF THE DISTRICT COURT'S DENIAL OF THE POST-CONVICTION WRIT BASED UPON THE DISTRICT COURT'S REFUSAL TO GRANT AN EVIDENTIARY HEARING.

On February 15, 2012, Mr. Chappell filed a sixty-two page supplemental brief in support of defendant's writ of habeas corpus. Mr. Chappell specifically

requested the district court entertain an evidentiary hearing so that he could ineffective assistance.

On February 15, 2012, Mr. Chappell filed a motion for the authorization to obtain expert services and payment of fees at state expense (20 ROA pp. 4485).

In the motion, Mr. Chappell requested permission to retain an expert on the effects of fetal alcohol disorder. There was evidence that Mr. Chappell's mother may have been addicted to drugs and alcohol. Yet, there was no indication of the voluminous file that counsel investigated the possibility of fetal alcohol syndrome. Mr. Chappell also requested permission to obtain a full neurological examination of Mr. Chappell including but not limited to a PET Scan.

Additionally, Mr. Chappell filed a motion for the appointment of an investigator (20 ROA 4550).

At the conclusion of the briefing, a status check was held on August 29, 2012. At the August 29, 2012 hearing, Mr. Chappell and the State agreed that the district court should entertain oral argument on the briefs and the motions for the appointment of an investigator and experts (20 ROA 4415).

Oral argument was heard on October 19, 2012. During the argument, the district court indicated that she was "not persuaded" that there was ineffective assistance of counsel (20 ROA 4418). At the conclusion of the relatively brief oral

argument, the district court denied Mr. Chappell's request for the appointment of experts and an investigator. Mr. Chappell was denied the opportunity to present evidence at a meaningful evidentiary hearing. Mr. Chappell's writ was denied.

Mr. Chappell would respectfully request that this Court consider the denial of his reasonable requests to supplement the record proving ineffective assistance of counsel. Mr. Chappell's issues enunciated within this brief establish that he was entitled to his reasonable requests for experts/investigator and an evidentiary hearing.

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

II. 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.

This 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).

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

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III. 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), this 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."); 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), this 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.

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 represented 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, 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 this 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 (10 ROA 2417).

Post conviction counsel explained, "Mr. Ivory Morrell [sic] was also a friend of Chappell 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" (10 ROA 2431). The affidavits of these two individuals are as important today as they were during the original petition (11 ROA 2683). Penalty phase

counsel knew that this 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 this 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. Chappell at the penalty phase.

This 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 . This 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 this 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.

Apparently, this 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. 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.

This 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. 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). 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 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 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:

> 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 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 phase due to ineffective assistance of counsel.

IV. 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, this 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). 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 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 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 this 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, this 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.

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 this Court known the extent of the error, Mr. Chappell's penalty phase would have been reversed.

V. 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. On appeal, 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
2. "Don't let the defendant fool you"
3. Justice and Mercy arguments

This 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. This Court considered these arguments for plain error. Penalty phase counsel made numerous errors that taken as a whole must result in reversal.

VI. 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.

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). This 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).

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, this 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).

This 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 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 this 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.

VII. 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 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.

This 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), this 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.

VIII. 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).

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 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.

IX. THE DEATH PENALTY IS UNCONSTITUTIONAL[1]

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.

Nevada law requires that execution be inflicted by an injection of a lethal

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

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 unnecessary pain: Stephen Peter Morin: March 13, 1985 (Texas), Randy Woolls: August 20, 1986 (Texas), Raymond Landry: December 13, 1988 (Texas), Stephen McCoy: May 24, 1989 (Texas), Rickey Ray Rector: January 24, 1992 (Arkansas), Robyn Lee Parks: March 10, 1992 (Oklahoma), Billy Wayne White: April 23, 1992 (Texas), Justin Lee May: May 7, 1992 (Texas) John Wayne Gacy: May 19, 1994 (Illinois), and Tommie Smith: July 18, 1996

(Indiana).

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.

Mr. Chappell recognizes that this 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.

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 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.

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).

The failure to have a functioning clemency procedure makes Nevada's death penalty scheme unconstitutional, requiring the vacation of Mr. Chappell's sentence.

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. [2]

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.

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 State

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

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.

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 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)

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 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. 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 than a cold calculated judgement after premeditation and deliberation had occurred. 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.

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

In Dechant v. State, 10 P.3d 108, 116 Nev. 918 (2000), this Court reversed the murder conviction of Amy Dechant based upon the cumulative effect of the errors at trial. In Dechant, this 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.

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CONCLUSION

Based on the foregoing, Mr. Chappell respectfully requests this Court order reversal of his convictions.

DATED this 6th day of January, 2014.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using 14 point font of the Times New Roman style.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(7)(b). Pursuant to NRAP 32(7)(b)(i), this appellate brief complies because although excluding the parts of the brief exempted by NRAP 32(7)(b), it does not contain more than 37,000 words and 80 pages.

Finally, I hereby certify that I have read this amended appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 6th day of January, 2014.

Respectfully submitted by,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on January 6, 2014. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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