IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES CHAPPELL,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 61967

RESPONDENT'S ANSWERING BRIEF

Appeal From Denial of Second Petition for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County

CHRISTOPHER R. ORAM, ESQ.
Attorney at Law
Nevada Bar #004349
520 South Fourth Street, 2nd Fl.
Las Vegas, Nevada 89101
(702) 384-5563

Counsel for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

CATHERINE CORTEZ MASTO
Nevada Attorney General
Nevada Bar #003926
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

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Appeal from the Denial of Second Petition for Writ of Habeas Corpus (Post-Conviction) Eighth Judicial District Court, Clark County

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XII. WHETHER THERE IS CUMULATIVE ERROR TO WARRANT REVERSAL OF CHAPPELL'S CONVICTION.

STATEMENT OF THE CASE

On October 16, 1996, James Montell Chappell (hereinafter "Chappell") was found guilty 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 for stabbing to death his ex-girlfriend, Deborah Panos, in her own home. 7 AA 1751-52.[1] The

[1] While Chappell has cited to the ROA (Record on Appeal) in his brief, the State notes that Chappell has actually created an Appellant's Appendix (AA) without

penalty phase of Chappell's jury trial began on October 21, 1996, and on October 24, 1996, the jury found two mitigating circumstances – 1) murder committed while under influence of extreme mental or emotional disturbance; and 2) "other mitigating circumstances." 9 AA 2126; 2170-71. The jury found the following four aggravating circumstances – 1) Burglary; 2) Robbery; 3) Sexual Assault; 4) and Torture or Depravity of Mind. 9 AA 2127; 2168-69. The jury determined that the mitigating circumstances did not outweigh the aggravating circumstances, and therefore returned a verdict of DEATH on the First Degree Murder Charge. 9 AA 2167.

On December 30, 1996, Chappell was formally sentenced to serve a term of imprisonment of four (4) to ten (10) years for Burglary, plus two consecutive terms of six (6) to fifteen (15) years for Robbery With Use of a Deadly Weapon, with those counts to run CONSECUTIVELY to the sentence of DEATH for First-Degree Murder With the Use of a Deadly Weapon. 9 AA 2179; 2187-88. The Judgment of Conviction was filed on December 31, 1996. 9 AA 2190.

On January 17, 1997, Chappell filed a Notice of Appeal from the Judgment of Conviction. 9 AA 2200. On December 30, 1998, this Court affirmed Chappell's conviction and sentence of death. 9 AA 2273. While this Court concluded there was

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bates numbering and therefore cites to the numbers created for the ROA. However, because Chappell has filed an AA, the State will refer to it as such.

insufficient evidence to support the aggravating circumstance of torture, this Court also determined there was sufficient evidence to support the aggravating circumstances of Burglary, Robbery, and Sexual Assault. 9 AA 2276-81. However, because the remaining three aggravating circumstances clearly outweighed the two mitigating circumstances, this Court held Chappell's sentence of death to be proper. 9 AA 2276-81. The Remittitur issued on October 25, 1999. 10 AA 2338.

On October 19, 1999, Chappell filed his first Pro Per Petition for Writ of Habeas Corpus (Post-Conviction). 9 AA 2258. David Schieck, Esq. was appointed as post-conviction counsel and subsequently filed a Supplemental Petition on April 30, 2002. 10 AA 2357; 2417. The State filed its Response on June 19, 2002. 10 AA 2481. On September 13, 2002, the District Court held an evidentiary hearing on the petition where it heard testimony from Chappell's trial attorneys Howard Brooks, Esq., and Willard Ewing, Esq. 11 AA 2554. At the conclusion of the evidentiary hearing, the District Court requested supplemental briefing and affidavits from various individuals. 11 AA 2619-20. On June 3, 2004, the District Court entered the Findings of Fact, Conclusions of Law and Order which partially granted and partially denied Chappell's petition. 11 AA 2745. The District Court denied the petition as to all guilt phase issues finding that all claims of ineffective assistance of counsel at trial were harmless due to the overwhelming evidence of guilt and none of the claims prejudiced the outcome of the trial. 11 AA 2746. However, as to the

penalty phase, the District Court found trial counsel ineffective for failing to investigate and call mitigation witnesses to testify during Chappell's penalty hearing, and determined that the omitted testimony had a reasonable likelihood of impacting the jury's decision. 11 AA 2746. Accordingly, the District Court vacated Chappell's sentence of death and ordered a new penalty hearing. 11 AA 2748.

On June 18, 2004, the State filed a Notice of Appeal from the District Court's decision granting Chappell a new penalty hearing. 11 AA 2757. Chappell filed a Notice of Cross-Appeal from the District Court denying his petition as to all guilt phase issues. 11 AA 2761. On April 7, 2006, this Court affirmed the District Court's decision ordering a new penalty hearing and additionally struck two of the felony-aggravators (Burglary and Robbery) pursuant to McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004). 11 AA 2789; 2795-96. Importantly, this Court 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. 11 AA 2795. The Remittitur issued on May 2, 2006. 11 AA 2782.

Chappell's second penalty hearing began on March 12, 2007. 19 AA 4323. On March 21, 2007, the jury found the aggravating circumstance of murder committed during the perpetration of sexual assault. 15 AA 3737. The jury also found the following mitigating circumstances: Chappell suffered from substance abuse, had no father figure in his life, was raised in an abusive household, was the

victim of physical abuse as a child, was born to a drug/alcohol addicted mother, suffered from a learning disability, and was raised in a depressed housing area. 15 AA 3739-40. Despite the jury finding more mitigating circumstances at the second penalty hearing, the jury still determined the mitigating circumstances did not outweigh the aggravating circumstance and again sentenced Chappell to death. 15 AA 3738.

On May 10, 2007, Chappell was formally sentenced to DEATH for First Degree Murder With Use of a Deadly Weapon. 19 AA 4406-09. The Judgment of Conviction was filed the same day. 19 AA 4409.

On June 8, 2007, Chappell filed a Notice of Appeal from the Judgment of Conviction. 19 AA 4263. On October 20, 2009, this Court affirmed Chappell's conviction and sentence of death. 1 RA 1-31. The Remittitur issued on June 8, 2010. 1 RA 33.

On June 22, 2010, Chappell filed his Second Pro Per Petition for Writ of Habeas Corpus (Post-Conviction).[2] Christopher R. Oram, Esq. was appointed as post-conviction counsel and thereafter filed a Supplemental Petition on February 15, 2012. 20 AA 4562. The State filed its Response on May 16, 2012. 20 AA 4431; 4466. Chappell then filed a Reply on July 30, 2012. 20 AA 4491. Following oral

[2] Chappell's June 22, 2010, Pro Per Petition in not included in his Appellant's Appendix. However, as Chappell's Second Pro Per Petition is not relevant to this instant appeal, the State has not included it in the RA either.

argument on the matter, the District Court denied Chappell's second petition on October 19, 2012. 20 AA 4527-31. The Findings of Fact, Conclusions of Law and Order was filed on November 16, 2012. 20 AA 4527.

On October 22, 2012, Chappell filed a timely Notice of Appeal from the denial of his Second Post-Conviction Petition. 20 AA 4515. Chappell subsequently filed his Opening Brief on January 8, 2014, and the State responds as follows.

STATEMENT OF THE FACTS

In affirming Chappell's conviction and sentence of death on direct appeal from the Judgment of Conviction, this Court outlined the facts from trial as follows:

> On the morning of August 31, 1995, James Montell Chappell was mistakenly released from prison in Las Vegas where he had been serving time since June 1995 for domestic battery. Upon his release, Chappell went to the Ballerina Mobile Home Park in Las Vegas where his ex-girlfriend, Deborah Panos, lived with their three children. Chappell entered Panos' trailer by climbing through the widow. Panos was home alone, and she and Chappell engaged in sexual intercourse. Sometime later that morning, Chappell repeatedly stabbed Panos with a kitchen knife, killing her. Chappell then left the trailer park in Panos' car and drove to a nearby housing complex.
>
> The State filed an information on October 11, 1995, charging Chappell with one count of burglary, one count of robbery with the use of a deadly weapon, and one count of murder with the use of a deadly weapon. On November 8, 1995, the State filed a notice of intent to seek death penalty. The notice listed four aggravating circumstances: (1) the murder was committed during the commission of

or an attempt to commit robbery; (2) the murder was committed during the commission of or an attempt to commit any burglary and/or invasion of the home; (3) the murder was committing during the commission of or an attempt to commit any sexual assault; and (4) the murder involved torture or depravity of mind.

Prior to trial, Chappell offered to stipulate that he (1) entered Panos' trailer home through a window, (2) engaged in sexual intercourse with Panos, (3) caused Panos' death by stabbing her with a kitchen knife, and (4) was jealous of [Panos] giving and receiving attention from other men. The State accepted the stipulations, and the case proceeded to trial on October 7, 1996.

Chappell took the witness stand on his own behalf and testified that he considered the trailer to be his home and that he had entered through the trailer's window because he had lost his key and did not know that Panos was home. He testified that Panos greeted him as he entered the trailer and that they had consensual sexual intercourse. Chappell testified that he left with Panos to pick up their children from day care and discovered in the car a love letter addressed to Panos. Chappell, enraged, dragged Panos back into the trailer where he stabbed her to death. Chappell argued that his actions were the result of a jealous rage.

The jury convicted Chappell of all charges. Following a penalty hearing, the jury returned a sentence of death on the murder charge, finding two mitigating circumstances – murder committed while Chappell was under the influence of extreme mental or emotional disturbance and "any other mitigating circumstances," – and all four aggravating circumstances. The district court sentenced Chappell to a minimum of forty-eight months and a maximum of 120 months for burglary; a minimum of seventy-two months and a maximum of 180 months for robbery, plus an equal and consecutive sentence for the use of a deadly weapon; and death for the count of murder

> in the first degree with the use of a deadly weapon. The district court ordered all counts to run consecutively. Chappell timely appealed his conviction and sentence of death.

9 AA 2273-75.

At Chappell's second penalty hearing, initiated by the District Court reversing Chappell's first penalty hearing and this Court affirming that decision, the District Court heard testimony regarding the history of domestic violence between Chappell and Panos. Charmaine Smith and Clare McGuire both testified that Panos had told them of an incident where Chappell had straddled her, sat on her chest, and held a knife to her throat. 13 AA 3236-7; 3247-8. A police officer also testified to these facts and that he arrested Chappell for Battery Domestic Violence as it related to the incident that Charmaine and Clare described. 15 AA 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. 15 AA 3640-1; 13 AA 3237. Chappell himself fully admitted to this incident. 15 AA 3658-9. Likewise, Detective Weidner testified that he arrested Chappell for felonious assault in 1988, eight years before the sexual assault in this case. 13 AA 3251-52.[3]

[3]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 AA 217-26. In particular, testimony was adduced in the 1996 trial that Chappell had made threats against Panos, that she did not want to continue the relationship with Chappell, and that she was planning on moving away before he got

Lisa Larsen testified that she received a message from Chappell to tell Panos "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 AA 3171. Dina Freeman-Richardson twice overheard Chappell threaten Panos that he would "do an OJ Simpson on your ass." 14 AA 3302-3. Chappell himself admitted writing a letter to Panos threatening that "One day soon I'll be at that front door, and what in God's name will you do then." 15 AA 3668.

Two family members of Panos were called to give testimony: Panos' aunt, Carol Monson, and Panos' mother, Norma Penfield. 15 AA 3681-90. During Carol Monson's testimony, she read short letters from Panos' cousin Christina Reese, and another aunt, Doris Waskowski. 15 AA 3684-5. None of Panos' three children were called as witnesses, although they were discussed during Norma Penfield's testimony. See 15 AA 3681-90.

Chappell's prior testimony from the guilt phase of the 1996 trial was read into the record over Chappell's objection. 15 AA 3641-68. In objecting, Chappell's attorney acknowledged that prior sworn testimony is generally admissible, but

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out of jail. 4 AA 911-12, 915, 938-9. Additionally, Latrona Smith testified that Panos called and asked her to call back with some kind of excuse so that she could leave the house. 5 AA 1307-8. Any objections to this testimony at trial were overruled and on appeal this Court found no merit in Chappell's claim of error in admitting these hearsay statements or Chappell's prior acts of domestic violence. 9 AA 2282-3, 2289.

argued he wanted to preserve an issue regarding ineffective assistance of counsel in the 1996 trial for allowing Chappell to testify as he did. 15 AA 3632. In allowing the prior testimony, the District Court reasoned that ineffectiveness in allowing Chappell to testify had not been raised in the first post-conviction proceedings and would therefore be procedurally barred in any future petition. 15 AA 3632-3. Additionally, the guilt phase had been affirmed twice on appeal and therefore constituted law of the case. 15 AA 3632-3.

In mitigation, Chappell 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 Panos to death. 14 AA 3514-17. Dr. Todd Grey, a board certified Forensic Pathologist, testified that in reviewing Panos' autopsy report, he did not find any physical evidence that would support sexual assault during the course of the homicide. 13 AA 3223-26. Dr. William Danton testified that Chappell was "extremely dependent" on his relationship with Panos, that Chappell was diagnosed with borderline personality disorder and was therefore extremely sensitive to abandonment, and that Chappell used drugs as a coping mechanism. 14 AA 3324-5. Dr. Danton further testified that Panos "could use sex to calm [Chappell] down if [Chappell] was angry." 14 AA 3330.

Dr. Lewis Etcoff testified that he evaluated Chappell for at least half a day during which he had Chappell take a personality test. 14 AA 3476. Dr. Etcoff also

reviewed the police records, read the voluntary statement of Lisa Duran and letters from Panos, and reviewed Chappell's Lansing, Michigan school records and special-education records. 14 AA 3476. As a result of this preparation, Dr. Etcoff was able to produce a detailed forensic neuropsychological evaluation. 14 AA 3478. Dr. Etcoff testified that Chappell was forthcoming when they would talk about the instances of domestic violence with Panos, that Chappell's father was not around when Chappell was growing up, and that Chappell's mother died when he was two years old. 14 AA 3480-2. Dr. Etcoff further testified that Chappell's conditions in life had impaired his ability to exercise free will thereby making him less culpable. 14 AA 3514-17. In fact, Dr. Etcoff compared Chappell's constrained free will with that of others in the courtroom. 14 AA 3514-17.

In allocution to the jury, Chappell 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 AA 3769. The jury was instructed on the proper role of mitigating circumstances and that mercy could be properly considered. 15 AA 3747, 3753-5, 3758. In closing argument, the prosecutor compared the character of Chappell to that of Panos and her mother in how each dealt with negative circumstances in their lives. 16 AA 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 AA 3787. The prosecutor also

acknowledged the role of mercy in the sentencing determination, but argued that the demands of justice also needed to be balanced. 16 AA 3786-7. The defense summation repeatedly disparaged opposing counsel with accusations of hiding the ball and intentionally confusing or misleading the jury. 16 AA 3787-91.

While the defense proposed thirteen mitigating circumstances, 15 AA 3755, the jury found a total of seven: (1) Chappell suffered from substance abuse; (2) Chappell had no father figure in his life; (3) Chappell was raised in an abusive household; (4) Chappell was the victim of physical abuse as a child; (5) Chappell was born to a drug/alcohol addicted mother; (6) Chappell suffered from a learning disability; and (7) Chappell was raised in a depressed housing area. 15 AA 3739-40. After deliberation, the jury once again returned a verdict for the death penalty finding the existence of the sexual assault aggravator beyond a reasonable doubt and concluding that the mitigating circumstances did not outweigh the aggravating circumstance. 15 AA 3738-41.

ARGUMENT

I.

THE DISTRICT COURT PROPERLY DENIED CHAPPELL'S REQUEST FOR AN EVIDENTIARY HEARING ON HIS SECOND POST-CONVICTION PETITION.

A court's decision whether to hold an evidentiary hearing is reviewed for abuse of discretion and a court need not hold an evidentiary hearing in connection with claims belied by the record. Little v. Warden, 117 Nev. 845, 852, 34 P.3d 540,

544-45 (2001); Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994).

At a status check on August 29, 2012, the District Court decided it would first entertain oral argument on Chappell's Petition and then decide whether an evidentiary hearing was necessary. 20 AA 4415. On October 19, 2012, the District Court heard oral arguments on Chappell's petition and request for an evidentiary hearing. 20 AA 4415. At the conclusion of the hearing, the District Court denied Chappell's request for an evidentiary hearing finding the claims alleged in Chappell's petition could be resolved without expanding the record since his claims were either waived, procedurally barred, otherwise not cognizable, or only contained bare, conclusory allegations which were insufficient to warrant relief. 20 AA 4531.

On appeal, Chappell argues he is entitled to a reversal of his conviction because of this decision by the District Court. AOB at 7. Chappell argues he should have been granted an evidentiary hearing on his claims to determine whether counsel was ineffective, to determine the prejudicial impact of errors and omissions, and "to ascertain the truth in the case." AOB at 10. However, an evidentiary hearing was simply not necessary in this case. All of the facts pertinent to ruling on Chappell's

claims ineffective assistance of counsel were contained in the already-voluminous record before the court. There was simply no need to expand the record any further with trivial facts and testimony that had no bearing on Chappell's instant claims of error. Furthermore, and as discussed in more depth herein, all of Chappell's claims are completely without merit. Specifically, claims VIII, IX, and XI are procedurally barred, while claims IIA, IIC, V, and VII fail to afford Chappell any relief because they are pleaded in such a bare, conclusory manner which is insufficient to meet his burden in a post-conviction petition per Marshall, Little, and Hargrove. As such, the District Court properly denied Chappell's request for an evidentiary hearing and this instant claim of error must be denied.

II.
STANDARD OF REVIEW FOR CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

A claim of ineffective assistance of counsel presents a mixed question of law and fact which is subject to independent review upon appeal. Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). However, judicial review of a lawyer's representation is highly deferential. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004); Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065 (1984).

Nevada has adopted the standard outlined in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), for determinations regarding the effectiveness of

counsel. Under Strickland, in order to assert a claim for ineffective assistance of counsel, the defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying a two–pronged test. Strickland 466 U.S. at 686–87, 104 S.Ct. at 2063-64; State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). 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. Strickland, 466 U.S. at 687–88 and 694, 104 S.Ct. at 2065 and 2068. The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one. Strickland, 466 U.S. at 697, 104 S.Ct. at 2069. Deficient performance is representation that falls below an objective standard of reasonableness. Id. (citing Dawson v. State, 108 Nev. 112, 115, 825 P.2d 593, 595 (1992)).

"Surmounting Strickland's high bar is never . . . easy." Padilla v. Kentucky, 599 U.S. 356, 371, 130 S.Ct. 1473, 1485 (2010). 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, 120 Nev. at 1011, 103 P.3d at 32. 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).

In considering whether trial counsel was effective, the court must determine whether counsel made a "sufficient inquiry into the information . . . pertinent to his client's case." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996) (citing Strickland, 466 U.S. at 690–91, 104 S.Ct. at 2066). Once this decision is made, the court will consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Doleman, 112 Nev. at 846, 921 P.2d at 280 (citing Strickland, 466 U.S. at 690–91, 104 S.Ct. at 2066). Counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280 (citing Strickland, 466 U.S. at 691, 104 S.Ct. at 2066). The defendant has the burden of overcoming the presumption that trial counsel's actions were the product of sound trial strategy. Means, 120 Nev. at 1012, 103 P.3d at 33.

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). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. Counsel cannot be deemed ineffective for failing to

make futile objections, file futile motions, or for failing to make futile arguments. Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Furthermore, 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. Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id.

III.
SECOND PENALTY-PHASE COUNSEL WAS NOT INEFFECTIVE

In Ground II of Chappell's Supplemental Petition, he argued that penalty-phase counsel was ineffective on five grounds: 1) for failing to procure live testimony from mitigation witnesses James Ford and Ivri Morrell;[4] 2) for failing to obtain an expert; 3) for failing to obtain a P.E.T. scan; 4) for failing to properly prepare expert witnesses prior to penalty phase; and 5) for failing to properly prepare a lay mitigation witness. 20 AA 4584-97.

The District Court denied each of these claims finding there was no deficient performance such that the outcome of Chappell's second penalty hearing would have been different. 20 AA 4528. As Chappell raises all of these claims again on

[4]In his Supplemental Petition, Chappell referred to this witness as "Ivory Morrell," but submits an affidavit wherein she affirms using the name Ivri Marrell.

appeal, the State will address each in turn explaining the District Court's analysis in the respective section.

A. Failure To Produce Live Testimony From Two Mitigation Witnesses

In Ground II(A) of Chappell's supplemental petition, he argued counsel was ineffective for failing to produce live testimony of James Ford and Ivri Marrell. 20 AA 4584-97. The District Court held that even though live testimony of these witnesses was not presented, Chappell failed to demonstrate any prejudice because the jury heard a summary of their testimony and the substance of their testimony was presented through other witnesses. 20 AA 4529.

The District Court properly denied this claim. On March 19, 2007, during Chappell's second penalty hearing, unforeseen circumstances arose regarding mitigation witnesses Ford and Marrell's employment. 15 AA 3669. Counsel informed the court that they had seven witnesses in Las Vegas from Lansing, Michigan as a result of their extensive investigation, but that two of them—Ford and Marrell—were in a position where if they did not go back to Lansing immediately, they would lose their jobs. 15 AA 3669. 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. 15 AA 3669. Counsel was aware that the two witnesses were part of the reason the District Court ordered a new penalty hearing, and thus made the following record:

> "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."**

15 AA 3669 (emphasis added).

While an unforeseen circumstance prevented Ford and Marrell from testifying at the second penalty hearing, counsel obtained the substance of their testimony prior to the witnesses leaving and then admitted that testimony through other witnesses who did not need to return to Lansing. In the affidavits attached to Chappell's Supplemental Petition, Marrell states she would have testified that: (1) she was Chappell's good friend; (2) there was a lot of animosity towards Chappell's relationship with Panos because of Chappell's race; (3) Chappell was never abusive; (4) Panos was jealous and abusive; and (5) Chappell was never violent or angry. 20 AA 4626-28. Ford's affidavit relays the same information; in fact, the phrases Ford uses in his affidavit are often verbatim repetitions of the phrases Marrell uses in her affidavit. See 20 AA 4632-34. Ford even states that "We were all of the same general opinions and belief about what had transpired." 20 AA 4632. Counsel provided all of this information through various witnesses as outlined below.

Fred Dean, who grew up with Chappell, Ford, and Marrell in Michigan as part of the same group of friends, testified about the long relationship between Chappell and Panos. 15 AA 3669. Fred Dean explained how he grew up with Chappell, how

Chappell started dating Panos in high school while Chappell lived in Lansing, and that he never observed any problems between Chappell and Panos. 15 AA 3696-00. Benjamin Dean and Charles Dean, brothers of Fred Dean, testified that they were childhood friends with Chappell and they all grew up in a rough neighborhood. 15 AA 3706-9, 3718-9. Benjamin Dean testified to Chappell's relationship with Panos by explaining that Panos and Chappell began dating while in high school, that he did not observe problems in their relationship, and that Chappell was never angry or violent, but rather frequently made people laugh. 15 AA 3706-9. Chappell's brother and sister testified to the hard conditions they survived while growing up; specifically, that they grew up in their grandmother's house in a bad neighborhood where drugs were prevalent, how they never had a father figure, that their mother died in a car accident in 1973, that Chappell internalized most of his anger, but that regardless of his childhood condition Chappell was a loving father to his children. 15 AA 3690-5, 3710-5.

The jury also heard testimony from Marabel Rosales, a Mitigation Investigator, who testified as to why Ford and Marrell did not testify. 16 AA 3767. Rosales explained that both Ford and Marrell wanted to testify and were "very upset and disappointed" that they were unable to. 16 AA 3767. Rosales then provided a summary of what Ford and Marrell would have testified to; specifically, how the two grew up with Chappell in the same neighborhood, how both of them knew

Panos, how there was a lot of sneaking around in the relationship because there was great animosity from Panos' parents because Chappell was Black, how Chappell 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 AA 3767-78.

Accordingly, even though Ford and Marrell may not have personally testified at the second penalty hearing, their absence was immaterial because the substance of their testimony was still heard and considered by the jury. There simply was no error in counsel choosing to proceed in this way; rather, this was a strategic decision made by counsel in order to alleviate the burden of impending job loss on two of Chappell's friends.

Notably, the crux of Chappell's argument on appeal with respect to this claim of error centers on a severely-restricted interpretation of the District Court's Order for a new penalty hearing in this case. Chappell contends that because the Court ordered a new penalty hearing based on counsel's failure to call mitigation witnesses at the second penalty hearing, two of whom happened to be Ford and Marrell, Chappell asserts that second penalty-phase counsel therefore "must" be ineffective for failing to produce live testimony from both Ford and Marrell.[5] AOB at 14-16. However, Chappell's ambitious argument fails because the order for a new penalty

[5] Chappell at times refers to a "third penalty phase," however there was no third penalty phase in this case.

hearing was not as limited as Chappell contends. In vacating the first penalty hearing, the District Court found there were "several witnesses" that were available to provide testimony in mitigation, and that the "outcome of the penalty hearing was prejudiced by counsel's failure to produce and present the *numerous* witnesses that could have described Chappell and the dynamics of his relationship with [Panos] and their children." 11 AA 2746 (emphasis added). Then in affirming that decision, this Court found that 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 counsel should have better focused on the "long relationship" for the penalty phase. 11 AA 2785.

Despite Chappell's assertions, the basis for mandating a new penalty hearing was not ordered solely because Ford and Marrell did not testify. Instead, a new penalty hearing was ordered because counsel failed to present testimony through any number of available witnesses about Chappell's relationship with Panos and their children. While counsel at the second penalty hearing could have presented information regarding Chappell and Panos' relationship through Ford and Marrell, it was not a prerequisite to counsel's effectiveness as Chappell seems to claim. Indeed, when considering all of the testimony presented through the numerous witnesses at the second penalty hearing, Chappell cannot show that counsel's

representation 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, the substance of their testimony would be admitted through other available witnesses. All of the information that Chappell insists was "crucial" was relayed at the second penalty hearing by the other witnesses who were "all of the same general opinions and belief" about Chappell. This was a reasonable strategic decision by counsel which does not make counsel deficient in any way. See Doleman, 112 Nev. at 848, 921 P.2d at 280 (reasonable strategic decisions on the part of counsel virtually unchallengeable).

Moreover, even if this Court determines counsel should have forced Ford and Marrell to testify despite their impending job loss, Chappell fails to demonstrate any prejudice as a result. At the conclusion of the second penalty hearing, the jury found seven (7) mitigating circumstances based on the mitigation witnesses' testimony, which was significantly more mitigating circumstances as compared to the first penalty hearing where the jury only found two (2) mitigating circumstances. While the jury ultimately returned another verdict of death based on the heinous nature of Chappell's crime, this determination does not undermine counsel's effectiveness at the second penalty hearing. As Chappell fails to provide this Court with any convincing theory as to why these witnesses' live testimony would have changed the

outcome in any way, Chappell's claim of ineffectiveness in this regard fails and this claim must be denied.

B. Failure to Obtain Expert to Testify that Pre-Ejaculation Fluid May Contain Sperm.

In Ground II(B) of his supplemental petition, Chappell argued that second penalty hearing counsel was ineffective for failing to call an expert witness to testify that pre-ejaculation fluid may contain sperm, which would allegedly demonstrate that Chappell was not lying about not ejaculating inside Panos' body. 20 AA 4589-90. The District Court held counsel was not ineffective for failing to retain an expert in pre-ejaculation fluid in order to explain Chappell's semen in Panos because, despite Chappell's claim that he withdrew prior to ejaculation, counsel already called three expert witnesses to rebut the sexual assault aggravator by showing the intercourse was consensual and therefore a fourth expert would not have changed the outcome in light of all the other evidence bearing on the issue of consent. 20 AA 4529.

The District Court properly denied this claim because Chappell fails to show that counsel's failure to call a fourth expert to testify as Chappell asserts fell below an objective standard of reasonableness. Notably, "the 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).

At the second penalty hearing, Dr. Grey testified there was no physical evidence to support a finding that sexual assault occurred. 13 AA 3223-6. Dr. Danton testified that Panos could use sex to calm Chappell down when he was angry. 14 AA 3330. Dr. Etcoff testified that Chappell was forthcoming when discussing Panos, and that the conditions in Chappell's life impaired his ability to make free will choices. 14 AA 3480-2; 14 AA 3514-17. Defense counsel called these three experts to, in part, rebut the sexual assault aggravator and counsel's strategic decision to call these witnesses in lieu of another does not indicate deficient performance.

Moreover, Chappell fails to meet the second prong of Strickland because he has not identified an expert witness who was available to testify and how that witness's testimony would have changed the outcome of his case. See Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (holding that 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). Chappell's failure to demonstrate any prejudice with respect to this claim is further compounded by the overwhelming evidence that Chappell committed sexual assault against Panos. Chappell argues that because the Nevada Supreme Court "used this fact [that Chappell is a liar] to determine there was sufficient evidence to convict of sexual assault," counsel was ineffective for failing to bolster Chappell's statement that he did not ejaculate inside Panos. AOB at 20. This, however, is belied by the record.

The fact that Chappell lied about sexually assaulting Panos was only one (1) of five (5) specific evidentiary components that this Court focused on in affirming the sexual assault aggravator. Specifically, this 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 Panos 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)).

1 RA 3-4.

Accordingly, Chappell 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. Therefore, this claim is without merit and must be denied.

Lastly, to the extent Chappell 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), this 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, Chappell's claims regarding the sexual assault aggravator were raised and rejected on appeal. 1 RA 3-4. Therefore, because this Court previously addressed and dismissed Chappell's claim regarding sufficiency of evidence of the sexual assault aggravator, 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.

In Ground II(C) of his supplemental petition, Chappell claimed second penalty hearing 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 Chappell. 20 AA 4590-91. The District Court rejected this claim finding that counsel did investigate Chappell's mental capabilities and presented experts who testified that Chappell had Borderline Personality Disorder and an IQ of 80, which is in the low/average range. 20 AA 4529. Furthermore, as the jury determined

Chappell was born to a drug and alcohol-addicted mother, Chappell could not demonstrate that obtaining a P.E.T. scan, even if the scan revealed Chappell had Fetal Alcohol Syndrome, would have led to a more favorable outcome. 20 AA 4529.

The District Court properly determined this claim was without merit because Chappell cannot show that counsel's performance fell below an objective standard of reasonableness. Counsel did investigate Chappell's overall mental capabilities and presented such evidence to the jury at Chappell's second penalty hearing: Dr. Danton testified that Chappell had borderline personality disorder, 14 AA 3324-5, while Dr. Etcoff testified that he administered an intelligence IQ test and an academic achievement test and that Chappell had an IQ of 80, in the low/average range. 14 AA 3476, 3491. The jury was well aware of Chappell's mental capabilities, and there was ample testimony about Chappell's difficult childhood growing up and about his rough, drug-filled neighborhood.

Chappell also fails to explain exactly what a P.E.T. scan would have revealed and how that would have changed the outcome of his case per Molina. Chappell does not claim that he suffers from brain damage, nor does he claim that a P.E.T. scan would possibly result in a findings that Chappell's brain activity is deficient. Chappell has not even attempted to allege how obtaining a P.E.T. scan would have rendered a more favorable outcome at his penalty hearing which is insufficient to meet his burden in a post-conviction petition. See Molina, 120 Nev. at 192, 87 P.3d

at 538. Indeed, in order for Chappell 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. Chappell utterly fails to do so.

Moreover, even assuming, *arguendo*, that a P.E.T. scan would have revealed Chappell had Fetal Alcohol Syndrome, and even if this was presented to the jury, it would not have affected the outcome of Chappell's second penalty hearing. In determining what mitigating circumstances were present in this case, the jury found, *inter alia*, that Chappell suffered from substance abuse, that Chappell was born to a drug, alcohol addicted mother, and that Chappell suffered from a learning disability. 16 AA 3822-3. As the jury did find Chappell was born to a drug, alcohol addicted mother, there is nothing that obtaining a P.E.T. scan and/or brain imaging (even if it revealed that Chappell had Fetal Alcohol Syndrome, which the State does not concede) would have done to affect the outcome of his penalty hearing. Therefore, Chappell fails to meet his burden under Strickland and this claim must be denied.

D. Claims II(D) and II(E): Failure to Properly Prepare Expert and Lay Witnesses.

Lastly, in his supplemental petition Chappell claimed second penalty hearing counsel was ineffective for failing to properly prepare witnesses Dr. Etcoff, Dr. Danton, Dr. Grey, and Benjamin Dean for the penalty hearing. 20 AA 4591-96. The District Court rejected this argument and made three findings with regard to this

claim: first, Chappell's argument of prejudice was belied by the record as counsel called nine (9) witnesses whose testimony resulted in the jury finding seven (7) mitigating circumstances; second, simply because the State was able to effectively cross-examine Chappell's witnesses did not demonstrate counsel was ineffective; and third, Chappell failed 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. 20 AA 4529.

On appeal, Chappell claims counsel did not prepare Dr. Etcoff, Dr. Danton, Dr. Grey, and Benjamin Dean for cross-examination because they were unaware of certain facts raised by the State, because Dr. Danton provided testimony even though he only met with Chappell the night prior to the testimony, and because the State impeached Dean with a prior inconsistent statement. AOB at 23-32. However, it appears Chappell is only challenging counsel's alleged "lack of preparation" because his witnesses did not testify as Chappell wanted them to. To this extent, the State notes it would have been unethical for counsel to "coach" the witness on how to testify. See United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S.Ct. 2039, 2046 n.19 (1984) (to be effective, the constitution "does not require that counsel do what is impossible or unethical").

It appears Chappell's claim of error centers on the fact that the State was able to effectively cross-examine Chappell's expert witnesses and impeach Dean with his

prior inconsistent statement about Panos. However, simply because the State was prepared for penalty hearing and conducted an effective cross-examination does not demonstrate that defense counsel was ineffective in any way. As the District Court aptly noted, Chappell cannot demonstrate that counsel's representation amounted to incompetence under prevailing professional norms given that nine (9) witnesses testified in mitigation on Chappell's behalf including three (3) experts. Defense counsel thoroughly questioned these witnesses on direct examination and elicited facts from their testimony which counsel deemed crucial to the case, including: there was no physical evidence of sexual assault; Panos used sex to calm Chappell down; Chappell's life conditions made him less able to control his actions; Chappell grew up in a rough neighborhood; and Panos and Chappell started dating when the two were very young. See supra. From this testimony, the jury found that Chappell had proven the existence of seven mitigating factors.

Accordingly, Chappell has failed to support his claim of ineffectiveness with specific factual allegations which is insufficient to warrant Chappell relief. See Hargrove, 100 Nev. at 503, 686 P.2d at 225 (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). Furthermore, Chappell 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, Chappell has not even alleged how preparing these witnesses more would have affected the outcome of his second penalty hearing in some way. As Chappell cannot meet either prong of Strickland by a preponderance of the evidence, this claim must be denied.

IV.
SECOND PENALTY-PHASE COUNSEL AND APPELLATE COUNSEL WERE NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE "VICTIM IMPACT PANEL."

In Ground III of his supplemental petition, Chappell claimed that second penalty phase 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. 20 AA 45973. Furthermore, Chappell claimed that second appellate counsel was ineffective for failing to argue that the victim impact statements were overly cumulative. 20 AA 4598. The District Court denied these claims finding that counsel's failure to object to the lack of notice, along with appellate counsel's failure to argue cumulative testimony, was not prejudicial under either a plain or harmless error analysis. 20 AA 4542.

On appeal, Chappell again claims second penalty phase counsel was ineffective for failing to object to victim impact statements on the grounds of insufficient notice. AOB at 32. Yet, Chappell notably fails to indicate how the result

of his appeal would have been any different had counsel objected during the second penalty phase or had this Court analyzed the claim under a harmless-error rather than plain-error standard of review. Nonetheless, the record in this case clearly indicates that Chappell's instant claim is without merit because he cannot demonstrate any prejudice pursuant to the second prong of Strickland.

On appeal following his second penalty hearing, Chappell argued the District Court erred in permitting the prosecution to introduce "excessive victim impact testimony;" specifically, because the victim impact testimony was not included in the State's notice pursuant to SCR 250(4)(f). 1 RA 18. In rejecting this claim, this Court held 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." 1 RA 20. Accordingly, as this Court has already determined Chappell suffered no prejudice from the alleged lack of notice, Chappell cannot meet the second prong of Strickland by claiming counsel was ineffective for failing to object on the same grounds. Notably, "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." See Strickland, 466 U.S. at 697, 104 S.Ct. at 2069. As such, Chappell's claim regarding trial counsel's failure to object to insufficient notice must fail.

Chappell also claims that second appellate counsel was ineffective for failing to "inform the Supreme Court that the victim impact statements were overly cumulative." AOB at 33. To succeed on a claim of ineffective assistance of appellate counsel, Chappell must satisfy the following two-prong test set forth by Strickland: 1) that appellate counsel's conduct fell below an objective reasonable standard, and 2) the omitted issue had a reasonable probability of success. Strickland, 466 U.S. at 687-688, 104 S.Ct. at 2064. 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).

On appeal from Chappell's second penalty hearing, counsel claimed that the District Court erred by permitting the prosecution to introduce "excessive victim impact testimony." 1 RA 18. Nevertheless, this 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." 1 RA 20. Accordingly, the State submits that second appellate counsel did raise this issue on appeal and therefore Chappell's instant claim 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).

However, to the extent that claiming the victim impact evidence was "excessive" is somehow different from Chappell's previous claim that the evidence was "cumulative," the State submits that appellate counsel made a reasonable calculation in failing to raise these as independent claims. See Jones v. Barnes, 463 U.S. 745, 751-752; 103 S.Ct. 3308, 3313 (1983) (this Court recognizing the "importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most, on a few key issues."); see also 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. Therefore, Chappell fails to prove either deficiency or prejudice with respect to this claim to meet either prong of Strickland. As such, this claim must be denied.

V.
SECOND PENALTY HEARING COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE ALLEGED IMPROPER PROSECUTORIAL ARGUMENT.

In Ground IV of his supplemental petition, Chappell claimed that second penalty hearing counsel was ineffective for failing to object to 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. 20 AA 4600. After making this bare assertion of error, Chappell then made

the conclusory statement that these errors "taken as a whole must result in reversal." 20 AA 4600. The District Court rejected this claim finding that second penalty phase counsel's failure to object to these comments, which were later raised on appeal following Chappell's second penalty hearing and subsequent conviction of death, did not result in prejudice as the Nevada Supreme Court considered each instance and found none constituted error. 20 AA 4542. Therefore, the Court concluded that any objection by second penalty phase counsel would have been overruled and would not have resulted in a different outcome on appeal regardless of whether analyzed under either a plain or harmless error standard. 20 ROA 4542.

Chappell raises this claim again on appeal notably making the same bare allegation that counsel should have objected to these statements by the prosecutor. AOB at 38. Again, this is not sufficient to afford Chappell relief. See Hargrove, 100 Nev. at 503, 686 P.2d at 225. Moreover, when to object, even if there is a legal basis for an objection, is a strategic decision solely for counsel to determine. See Dawson, 108 Nev. at 117, 825 P.2d at 596 (holding that 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. Given the strong

deference to strategic decisions made by counsel, Chappell has not shown that counsel was deficient in any way with respect to these instances of alleged prosecutorial misconduct.

Furthermore, to the extent that Chappell's argument can be construed as alleging he was prejudiced because counsel's failure to object led this Court to address these issues under a plain-error standard of review, that 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). This Court may, however, notice errors that are plain from the record. NRS 178.602. In Chappell's case, this Court chose to thoroughly examine Chappell's claims of prosecutorial misconduct and found no error, plain or otherwise.[6] See 1 RA 23-25. Accordingly, Chappell has not been prejudiced in any way by counsel's failure to

[6]Addressing Chappell's claim that the prosecutor misstated the role of mitigating circumstances, this 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, and accordingly found no error. Addressing Chappell's claim that the prosecutor committed misconduct when he warned the jury not to be "conned" by Chappell, this 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, this Court reviewed the merits of the claim and concluded that: (1) This claim was belied by the record; and (2) The comment was proper. 1 RA 23-25.

object, and therefore his claim of ineffectiveness on this issue is without merit and must be denied.

VI.
SECOND PENALTY-PHASE COUNSEL AND APPELLATE COUNSEL WERE NOT INEFFECTIVE FOR FAILING TO CHALLENGE SEVERAL OTHER INSTANCES OF ALLEGED PROSECUTORIAL MISCONDUCT.

In Ground IV of his supplemental petition, Chappell claimed second appellate counsel was ineffective for failing to raise on appeal on allegedly improper statement by the prosecution where the prosecution stated Chappell had a "sterling reputation" and suggested that he had been arrested ten times. 20 AA 4600-06. Chappell also claims that both second penalty phase counsel and appellate counsel were ineffective for failing to object and failing to raise on appeal two other allegedly prejudicial comments made by the prosecutor during closing arguments that Chappell "chose evil" when he murdered Panos and that he is "a despicable human being." 20 AA 4600-06. Chappell argued that if appellate counsel had raised these issues, this Court would have reversed his convictions. 20 AA 4600-06. The District Court rejected both of these claims. As to the first comment, the Court found an objection was made and sustained therefore resulting in no reversible prejudice on appeal; and as to the other two comments, the Court found those constituted a fair comment on the evidence and therefore any objection would not have been sustained and would not have affected the outcome of Chappell's case in any way. 20 AA 4542.

These claims were properly rejected as without merit. As to the first comment, Chappell 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. AOB 40-41. During the State's cross-examination of Dr. Etcoff, the prosecutor extensively questioned him about Chappell's tendency to blame others for his actions: for example, blaming Panos 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 Panos and hit her; and blaming the police for his other arrests. 15 AA 3518-55. Additionally, the State admitted Exhibit 129, which was 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. 18 AA 4099.

This was the context in which this first offending comment arose. Then, after Dr. Etcoff opined that he could understand why Chappell 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?" 15 AA 3542. After this comment, Chappell objected and the District Court sustained the objection. 15

AA 3542. As Chappell's objection was sustained and the witness did not answer the question, no improper testimony was ever admitted into evidence and therefore Chappell cannot demonstrated prejudice as a result. See Valdez v. State, 124 Nev. 1172, 1193-94, 196 P.3d 465, 479 (2008) (No prejudice resulting from prosecutorial misconduct where objection sustained). Notably, while Chappell argues that there was no evidence in the record that he was arrested ten times, this is simply incorrect. See 18 AA 4099 (Exhibit 129). Furthermore, the arguments of counsel are not evidence and the jury was instructed in this regard as well. See 15 AA 3758 (Instruction No. 17); see also Randolph v. State, 117 Nev. 970, 984, 36 P.3d 424, 433 (2001). Thus, there was no prejudice to Chappell and because the objection was sustained, no error for this Court to correct on appeal. 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, Chappell claims that trial and appellate counsel were ineffective for failing to object to or raise claims of error regarding two comments by prosecutors

[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. See Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

during closing arguments—that Chappell "chose evil" when he murdered Panos and that he is "a despicable human being." AOB 41. While discussing Dr. Etcoff's testimony during his closing, the prosecutor noted the lengthy cross examination wherein he challenged Dr. Etcoff's expert opinion that Chappell had "less than free will" at the moment he killed Panos and was somehow compelled or constrained to kill her because of psychological processes. See 15 AA 3522-40. The prosecutor challenged this concept by asking Etcoff if this theory would not excuse all criminality and asking whether, in his expert opinion, Dr. Etcoff thought that some criminals "may choose evil." 15 AA 3524. Dr. 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. 15 AA 3524. After further examination, Dr. Etcoff eventually admitted that the choice Chappell made to kill Panos was "evil." 15 AA 3570. Accordingly, during closing argument, the State made the argument that Chappell indeed "chose evil." 16 AA 3778. The State was fairly commenting on the evidence and specifically on the concession that it obtained from Chappell's own expert. There was simply nothing for counsel to object to, and therefore no error to correct on appeal. Neither second penalty phase counsel nor second appellate counsel[8] can be deemed ineffective in this regard.

[8]Indeed, this Court noted that:

As to the second comment, during closing argument the prosecutor discussed the history between Chappell and Panos—the long history 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 AA 3775-81. In this context, the prosecutor stated that Chappell is a despicable human being. 16 AA 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 prosecutor's statement in this case was not inflammatory and certainly did not amount to misconduct. Instead, it was a permissible conclusion drawn from the evidence adduced at the penalty hearing. 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). However even if the statement

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> 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.

1 RA 30.

did amount to misconduct, the outcome of the penalty hearing would not have been different had counsel objected given the overwhelming evidence that Chappell was death-penalty eligible. Indeed, two different juries over the course of almost 11 years years have sentenced Chappell to death. 9 AA 2167; 15 AA 3738. 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). Accordingly, this claim is without merit and must be denied.

VII.
SECOND PENALTY-PHASE COUNSEL AND APPELLATE COUNSEL WERE NOT INEFFECTIVE FOR FAILING TO OBJECT TO ALLEGED IMPROPER IMPEACHMENT.

In Ground VI of his supplemental petition, Chappell claimed that penalty-hearing counsel and appellate counsel were ineffective for failing to object to the State's impeachment of Fred Dean where the State elicited that Dean served 12 years in prison on a drug possession charge and that Dean received a deal by pleading to that lesser charge and obtaining a dismissal of a trafficking charge. 20 AA 4603-04. The District Court denied this claim finding that Chappell failed to demonstrate that the outcome of his penalty hearing would have been different had the impeachment details not been elicited. 20 AA 4542. The District Court held that any prejudice from counsel's failure to object to the prosecutor's impeachment of Dean was

minimal at best considering Dean was a convicted felon and the jury still found the seven mitigating circumstances. 20 AA 4542.

On appeal, Chappell argues the impeachment was improper because it went into the details of Dean's felony conviction and that he received ineffective assistance of counsel when counsel failed to object and appellate counsel failed to raise this as a claim of error on appeal. AOB at 44-45. Notably, the State's inquiry into the details of Dean's plea could be construed as improper as this Court has limited inquiry into witnesses' prior felonies; specifically, 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). However, the extent of Chappell's "argument" on this issue consists of a blanket assignment of error followed by a conclusory demand for reversal. This is wholly insufficient to meet his burden on appeal as Chappell must make specific allegations of deficiency and prejudice. Hargrove, 100 Nev. at 503, 686 P.2d at 225. As such, this claim should be summarily dismissed by this Court.

Nevertheless, to the extent this Court does consider Chappell's bare, conclusory claim, his contention that counsel was ineffective for failing to object to the State's impeachment is without merit. Deciding when to object, even if there is a legal basis for an objection, is a strategic decision for counsel to determine that is virtually unchallengeable on review absent extraordinary circumstances. See

Doleman, 112 Nev. at 848, 921 P.2d at 280. Here, Chappell has not even attempted to overcome the presumption that counsel's decision not to object was a reasonable strategic decision which is entitled to deference by this Court.

Furthermore, even if counsel was deficient for failing to object, Chappell fails to articulate any prejudice he suffered as a result and therefore this claim should be dismissed on 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."). In this case, the State's impeachment of Dean allowed the jury to know that in addition to being convicted of felony Drug Possession, Dean also received a plea deal and had a greater charge dismissed. However, as Dean was not the defendant at trial but simply one of many mitigation witnesses for the defense, it is unclear how an objection to the State's impeachment of Dean would have affected the jury's verdict in any way. The lack of prejudice is especially true in light of the fact that, despite knowing Dean received a plea deal in his felony drug possession case, the jury nonetheless thought Dean was credible and found seven mitigating circumstances. 15 AA 3737-40. It is Chappell's burden to show how the proposed objection would have resulted in a more favorable result at his penalty hearing, and he has failed to do so in this case.

As to second appellate counsel's alleged deficiency in failing to raise this issue on appeal, Chappell again fails to articulate any cogent argument besides making the blanket statement that "pursuant to the prejudice standard enunciated in Strickland, the result of the appeal would have mandated reversal." AOB 45. Again, this is completely insufficient to meet his burden on appeal to warrant him relief for this claim. See Hargrove, 100 Nev. at 503, 686 P.2d at 225. Moreover, even if counsel had raised this issue on appeal, the claim would have been subject to a plain error analysis[9] and there is nothing to suggest that Chappell could have shown the error affected his substantial rights by causing actual prejudice or a miscarriage of justice for this Court to grant relief. As Chappell has not demonstrated he suffered any prejudice as a result of the State's impeachment, it would have been futile for counsel to raise this issue on appeal and counsel cannot be deemed ineffective for failing to make futile arguments. See Ennis, 122 Nev. at 706, 137 P.3d at 1103. Similarly, even if counsel had appealed this meritless issue, Chappell fails to show that this Court would have reversed his conviction due to this alleged error given the

[9] Generally, failure to object to alleged prosecutorial misconduct precludes appellate review unless the error is plain error. Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). Under plain error review, reversal is not warranted unless the defendant demonstrates that the error affected his or her substantial rights by causing actual prejudice or a miscarriage of justice. Id. In determining prejudice, this Court considers whether a comment had: 1) a prejudicial impact on the verdict when considered in the context of the trial as a whole or 2) seriously affects the integrity or public reputation of the judicial proceedings. Rose v. State, 123 Nev. 194, 208-209, 163 P.3d 408, 418 (1997).

overwhelming evidence that a sentence of death was appropriate in this case. See 1 RA 30. Accordingly, this claim is without merit and must be denied.

VIII.
CHAPPELL'S CLAIM OF DISTRICT COURT ERROR IN ALLOWING THE ADMISSION OF EVIDENCE OF SEVERAL BAD ACTS IS NOT COGNIZABLE IN THIS APPEAL.

In Ground VII of his supplemental petition, Chappell claimed the District Court erred by allowing the "prior bad act" testimony of witness LaDonna Jackson. 20 AA 4604. The District Court summarily dismissed this claim noting that Chappell should have raised this claim on direct appeal from his Judgment of Conviction, and indeed as Chappell *did* raise this claim on direct appeal, found this claim was barred both procedurally and by the doctrine of law of the case. 20 AA 4530.

The District Court properly dismissed this claim. As an initial matter, this claim is barred by the doctrine of the law of the case because it has already been decided and denied by this Court. 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. Hall, 91 Nev. at 315-16, 535 P.2d at 798-99. "[T]he 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. Chappell raised this issue on direct appeal from his Judgment of Conviction, which rejected by this Court in 1998 on appeal from Chappell's jury trial. See 9 AA 2275-76 (holding that the District Court's decision to admit evidence of Chappell's prior bad acts without a Petrocelli hearing was harmless error).

Therefore, because this Court previously addressed and dismissed this claim, the Court's ruling is the law of the case and further consideration of the issue is precluded.

Furthermore, this claim must be dismissed because claims of district court error are only appropriate on direct appeal, not in a post-conviction habeas petition. See Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)); see also NRS 34.810(1)(b)(2). As Chappell does not even attempt to articulate good cause or prejudice to explain his procedural default; see State v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark,121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005) (explaining that the application of procedural bars is mandatory), Chappell's attempt to re-raise this claim in a post-conviction proceeding is wholly improper and must be summarily dismissed.

IX.
THE DEATH PENALTY IS CONSTITUTIONAL

In Ground VIII of his supplemental petition, Chappell claimed the death penalty was unconstitutional and therefore his conviction should be vacated. 20 AA 4606-13. The District Court summarily dismissed this claim noting that Chappell should have raised this claim on direct appeal, but did not, and therefore the claim was procedurally barred from review. 20 AA 4530.

While Chappell acknowledges in his instant appeal that this Court has repeatedly affirmed the constitutionality of Nevada's death penalty scheme, Chappell nonetheless raises various challenges to the constitutionality of the death penalty and Nevada's capital punishment scheme. AOB at 47. While the State notes that claims regarding the constitutionality of the death penalty were appropriate for direct appeal and are therefore barred pursuant to NRS 34.810(1)(b)(2), the State out of an abundance of caution will briefly respond to each issue.

A. Nevada's Capital Sentencing Scheme Sufficiently Narrows the Class of Person Eligible for the Death Penalty.

Chappell argues that Nevada's death penalty scheme does not narrow the class of persons eligible for the death penalty, insisting that Nevada law permits broad imposition of the death penalty for virtually all First-Degree Murders. AOB 49. However, this 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).

Additionally, this Court has found that the statutory scheme to be properly narrow on numerous occasions. See 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). This Court's past decisions regarding the constitutionality of the Nevada scheme apply to this instant case and this Court should again find that 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.

Despite Chappell's assertions to the contrary, this Court has found 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.

As the death penalty in Nevada clearly does not amount to cruel and unusual punishment, Chappell's claim is without merit and must be denied.

C. Nevada's Clemency Scheme Is Constitutional.

Next, Chappell claims that his sentence must be vacated because Nevada's death penalty scheme is unconstitutional for failing to have a "functioning clemency procedure." AOB 52. However, the statutory procedures for administering a grant of clemency does 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).

Furthermore, Nevada's clemency scheme was upheld in Colwell, 112 Nev. at 812, 919 P.2d at 406-7. As this 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. Chappell's argument essentially claims that Nevada's clemency laws and procedures must not be working because they are rarely exercised on behalf of defendants. However, Chappell argument lacks a logical step: Chappell merely points to *an* effect of the death penalty in Nevada, along with Chappell's assumed cause for that effect, but utterly ignores the lack of causal connection. Accordingly, Chappell's claim fails and must be denied.

X.
CHAPPELL'S CLAIM THAT HIS CONVICTION AND DEATH SENTENCE ARE INVALID BECAUSE THE PROCEEDINGS ALLEGEDLY VIOLATE INTERNATIONAL LAW IS NOT COGNIZABLE IN THIS APPEAL.

In Ground X of his supplemental petition, Chappell claimed that his conviction and death sentences were invalid because the proceedings against him violated international law. 20 AA 4617-19. Just like the above claim regarding the constitutionality of Nevada's death penalty scheme, the District Court summarily

dismissed this claim noting that Chappell should have raised this claim on direct appeal. 20 AA 4530.

Chappell raises this claim again on appeal, apparently disregarding the fact that this Court has consistently 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). Chappell cites the International Covenant on Civil and Political Rights in support of his claim. Notably, in Servin, 117 Nev. at 785-786, 32 P.3d at 1286, this Court quoted 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, as this Court has upheld the death penalty in the face of international laws which defendants frequently cite, Chappell's claim fails to afford him relief.

XI.
CHAPPELL'S CLAIM REGARDING THE JURY INSTRUCTION ADMITTED AT TRIAL, WHICH DEFINED PREMEDITATION AND DELIBERATION, IS PROCEDURALLY BARRED.

In Ground XI of his supplemental petition, Chappell claimed that "the jury instruction given defining premeditation and deliberation was constitutionally infirm." 20 AA 4619. Again, the District Court summarily dismissed this claim noting that Chappell should have raised this claim on direct appeal. 20 AA 4530.

Chappell raises this claim again on appeal notwithstanding the fact that Chappell's guilt phase claim of error is subject to various procedural bars. Chappell filed his petition more than thirteen years after this court issued the Remittitur from his direct appeal. Thus, Chappell's petition is untimely filed. See NRS 34.726(1). Moreover, Chappell's petition as it relates to his guilt phase is successive. See NRS 34.810(1)(b)(2). Chappell's petition was procedurally barred absent a demonstration of good cause and prejudice. See NRS 34.726(1); NRS 34.810(1)(b). As this Court has addressed this issue in his previous appeals, 1 RA 27-28, it is also barred by the doctrine of the law of the case. Hall, 91 Nev. at 315-16, 535 P.2d at 798-99.

Finally, as the State did in its May 16, 2012, response to Chappell's supplemental petition, the State again pleads laches. Therefore, Chappell is required to overcome the presumption of prejudice to the State. See NRS 34.800(2). Yet, Chappell again fails to articulate good cause to excuse his procedural defaults. Accordingly, this claim must be summarily dismissed by this Court. State v. Eighth

Judicial Dist. Court ex rel. Cnty. of Clark, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005) (explaining that the application of procedural bars is mandatory).

XII.
THERE IS NO CUMULATIVE ERROR TO WARRANT REVERSAL OF CHAPPELL'S CONVICTION AND SENTENCE OF DEATH

In Ground XII of his supplemental petition, Chappell claimed that his conviction should be reversed based on the cumulative errors of counsel. 20 AA 4622. The District Court denied this claim stating that the cumulative prejudice of any alleged errors at Chappell's second penalty hearing were insufficient to have altered the outcome of the case. 20 AA 4530.

Chappell again argues that the above series of alleged errors, when taken together, amount to reversible error. AOB at 59. Under the doctrine of cumulative error, "although individual errors may be harmless, the cumulative effect of multiple errors may deprive a defendant of the constitutional right to a fair trial." Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994) abrogated on other grounds by Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001). Evidence against the defendant must therefore be "substantial enough to convict him in an otherwise fair trial" and it must be said "that the verdict would have been the same in the absence of the error." Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1156 (1988).

As argued throughout, Chappell has failed to establish any error that would entitle him to relief. Accordingly, there is no cumulative error worthy of

reversal. Notably, a defendant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975) (citing Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974). However, even assuming this Court determines any errors did occur, such errors were harmless given the overwhelming evidence of Chappell's guilt in this case.

CONCLUSION

Based on the foregoing, the State respectfully requests that Chappell's appeal be DENIED.

Dated this 8th day of April, 2014.

Respectfully submitted,

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

BY */s/ Steven S. Owens*
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF COMPLIANCE

1. **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 Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7)(B)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 13,748 words and does not exceed 80 pages.
3. **Finally, I hereby certify** that I have read this 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. 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 8th day of April, 2014.

Respectfully submitted

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

BY */s/ Steven S. Owens*
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on April 8, 2014. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ MASTO
Nevada Attorney General

CHRISTOPHER R. ORAM, ESQ.
Counsel for Appellant

STEVEN S. OWENS
Chief Deputy District Attorney

/s/ E. Davis
Employee, Clark County
District Attorney's Office

SSO/Alyssa Staudinger/ed