IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

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

APPELLANT'S REPLY BRIEF

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JURISDICTIONAL STATEMENT

The Jurisdictional Statement stands as enunciated in the Opening Brief.

STATEMENT OF THE CASE

The Statement of the Case stands as enunciated in the Opening Brief.

STATEMENT OF FACTS

The Statement of the Facts stands as enunciated in the Opening Brief.

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 establish 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 in 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 (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 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.

This argument stands as enunciated in the Opening Brief.

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.

ARGUMENT SUMMARY

The State continuously argues that Mr. Chappell was unable to identify expert opinions that would have changed the outcome of his case. The State argues that Mr. Chappell failed to reveal what further investigation would have assisted him in an outcome other than a sentence of death. Mr. Chappell was specifically precluded from investigating his claims as he was denied funding for the claims. More importantly, the district court refused to entertain an evidentiary hearing.

The failure of the district court to permit funding and/or an evidentiary hearing precluded Mr. Chappell from meaningful post-conviction proceedings. The district court's decisions seriously damaged Mr. Chappell's abilities to

establish his claims of ineffective assistance of counsel.

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."); Birt v. Montgomery, 709 F.2d 690, 701 (7th Cir.1983) . . . ("Essential to effective representation . . . is the independent duty to investigate and prepare.").

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

During the original post-conviction, counsel alleged that trial counsel had been ineffective for failure to produce several mitigation witnesses. Specifically, post-conviction counsel complained that James C. Ford and Ivory Morrell (friends of James Chappell) were not called to testify. At the conclusion of the post-

conviction hearings, the district court granted the writ in part and denied the writ in part. The district court concluded that Mr. Chappell received ineffective assistance of penalty phase counsel for the failure to call mitigation witnesses. This decision was upheld on appeal from the first post-conviction. Thereafter, post-conviction counsel represented Mr. Chappell at the second penalty phase. Interestingly enough, neither James C. Ford nor Ivory Morrell testified during the second penalty phase.

In the State's Answering Brief, the State claims counsel was not ineffective for failing to present these two mitigation witnesses and investigating potential witnesses while the defendant lived in Arizona (State's Answering Brief pp. 19-25). First, the State argues defense counsel presented ample evidence of Mr. Chappell's relationship with his wife and upbringing. The State simply enunciates facts adduced at the second penalty phase and contends this satisfies counsel's responsibilities in presenting mitigating evidence. However, the State made a similar argument in an effort to oppose Mr. Chappell's original post-conviction proceedings. During the original post-conviction proceedings, the State argued trial counsel was effective and presented sufficient mitigation evidence.

However, post-conviction counsel argued there were numerous potential mitigation witnesses that were not presented to the jury. In essence, the State

makes the identical argument in opposition to this appeal as they did in the previous appeal.

However, the State's position before this Court is directly contradicted by the concerns of the prosecutor during the second penalty hearing. During the second penalty phase the prosecution was so concerned with the failure to present mitigation witnesses the prosecution actually made a record of this significant concern.

The prosecutor stated,

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

During the second penalty phase, the prosecution was obviously concerned regarding the failure of defense counsel to present numerous mitigation witnesses.

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

Next, the State argues defense counsel introduced Marabel Rosales, a mitigation investigator, to summarize the potential testimony of the mitigation witnesses (State's Answering Brief pp. 25). Apparently, the State believes that the failure to call available live witnesses to the stand can be substituted for the unemotional testimony of an investigator who summarized the mitigation witnesses potential testimony. First, this fails to consider the fact that witnesses in the penalty phase provide emotion for the jury to consider during the deliberation process. This was a life or death decision. For the State to argue that an emotionless investigator equals the passionate pleas for life, is meritless. Jurors are not computers. The death penalty is undoubtedly the most emotional decision a jury ever decides. This is why the prosecutor voiced such concern to the district court during the second penalty phase.

The State argues that defense counsel's failure to present the mitigation witnesses were reasonable strategic decisions (State's Answering Brief pp. 24). In Doleman v. State, 112 Nev. 843, 848, 941 P.2d 278, 280 (1996), this Court held that reasonable strategic decisions on the part of defense counsel are virtually

unchallengeable. The State contends that the failure to call available mitigation witnesses is a strategic choice which is unchallengeable. Again, the State's argument is belied by logic. According to defense counsel, the decision was made to relieve the witnesses of their duties pursuant to a subpoena, because of employment concerns. Therefore, defense counsel chose to permit the witnesses to leave rather than present them to the jury in an effort to spare Mr. Chappell's life. Notably, defense counsel called a few witnesses out of order, in the State's case in chief. However, no attempts were made to put on these mitigation witnesses out of order. Had defense counsel requested that the mitigation witnesses be called out of order, this would not be an issue for review. Defense counsel's concern for the employment status of these extremely important mitigation witnesses pales in comparison to the necessity to save Mr. Chappell's life. Defense counsel had a duty to Mr. Chappell, not for the employment concerns of these witnesses.

The State claims that Mr. Chappell failed to produce any convincing theory as to why these witnesses live testimony would change the outcome of the proceedings (State's Answring Brief pp. 24). On appeal from post-conviction, this Court determined that Mr. Chappell should receive a new penalty phase based in part on the failure to call available mitigation witnesses. Here, defense counsel (who had been post-conviction counsel) made the same identical mistake that

cause reversal.

The State's contention that Mr. Chappell has not provided a convincing theory of why the live witnesses testimony would have changed the outcome is belied by the law of the case. Why did Mr. Chappell receive a new penalty phase for the failure to call the mitigation witnesses and thereafter defense counsel again failed to present the mitigation witnesses. The error is identical. Mr. Chappell is entitled to a new penalty phase.

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

Counsel was ineffective for properly investigating the defendant's past and his relationship with Debra while living in Arizona. In the supplemental petition, Mr. Chappell raised this contention. Mr. Chappell filed a motion for authorization to obtain an investigator and for payment of fees simultaneously with his supplemental petition. Mr. Chappell requested resources for an investigator to assist in these endeavors. The State opposed the motion. In the district court, the State claimed "a defendant who alleges a failure to investigate must demonstrate how a better investigation would have benefitted his case and changed the

outcome of the proceedings" Molina v. State, 120 Nev. 185, 87 P.3d 533 (2004).

Citing United States v. Porter, 924 F.2d 395, 397 (1st Cir. 1991), the State argued that Mr. Chappell should have alleged with specificity what the investigation would have revealed and how it would have changed the outcome of the trial (20 ROA 4445). The State concludes that Mr. Chappell has made naked allegations which do not warrant relief (20 ROA 4445) (citing, Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Here, upon information and belief, there was limited investigation into Mr. Chappell's relationship, while living in Arizona. Mr. Chappell requested an evidentiary hearing to question counsel as to what efforts were made to investigate the relationship and background of the couple in Arizona.

Mr. Chappell specifically requested funding for an investigator to assist in this investigation. The State opposed the motion claiming that Mr. Chappell made bare allegations without specific information. It is true that Mr. Chappell has been unable to investigate this matter because he has not been authorized an investigator. It is grossly unfair for the State to preclude Mr. Chappell the funds to investigate, then claim he has failed to present any specifics regarding an investigation that the State has thwarted. The State's argument proves that Mr. Chappell should have been granted an evidentiary hearing and reasonable funding

for an investigation.

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).

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

B. FAILURE TO OBTAIN AN EXPERT

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

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

Dr. Sheldon Green performed the autopsy on Ms. Panos. A sexual assault kit was taken by the crime scene analyst with negative results (15 ROA 3673). Ms. Panos was fully clothed when she was discovered. This couple had a long and turbulent relationship. The couple lived in Michigan, Arizona and Nevada. Each time, Ms. Panos assisted Mr. Chappell in relocating. Often, the couple would have fights and split up. However, reconciliation was always inevitable.

Some witnesses testified that Ms. Panos was attempting to flee the grip of Mr. Chappell. However, a careful review of the record provides a somewhat different story. Each time witnesses claimed that Ms. Panos was fleeing, Ms. Panos then enabled Mr. Chappell to come and reconcile the relationship. Originally, the couple lived in Michigan. However, Ms. Panos' parents moved to Tucson, Arizona. Eventually, Ms. Panos made arrangements to assist Mr. Chappell in reuniting and living together in Arizona (13 ROA 3054).

Ms. Panos and Mr. Chappell continued to have children together. In fact,

Mr. Chappell left Arizona for a period of time and Debra begged him to return to Arizona (15 ROA 3644). During the lengthy relationship, there were numerous alleged incidents of domestic violence. Yet, each and every time Ms. Panos continued to reconcile the relationship.

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

These facts are necessary to establish, in part, that no sexual assault occurred. This Court found evidence of sexual assault based on five factors. The most important factor, was the conclusion that Mr. Chappell had lied to the police when he claimed consensual sexual contact with Debra, but denied ejaculation. This Court then concluded that Mr. Chappell must have lied because semen matching his DNA was recovered. (Order of Affirmance, 10/20/ 2009, pp. 3-4).

A brief analysis of these factors is necessary to establish the district court error in denying Mr. Chappell an expert. First, the State has continuously argued that Ms. Panos was curled up in a fetal position and highly fearful when she found

out that Mr. Chappell had been released from jail. However, the facts clearly show that Ms. Panos then left the safety of her friends home and went directly back to her apartment where she surely would have known that Mr. Chappell would go. It makes no sense that a person so highly fearful of Mr. Chappell would leave the safety and comfort of a friends home to proceed back to a place of great danger. It makes much more sense that the pattern of the relationship was continuing. Ms. Panos would again consider reconciliation (no matter how unwise) with Mr. Chappell.

Next, the State would contend that Ms. Panos had told Mr. Chappell the relationship was over. Perhaps, this is true. However, that assertion was made by this couple ad nauseam. The relationship was constantly over and reconciliation constantly occurred. It is much more consistent that the pattern was continuing at the time that Ms. Panos left the security of a safe house and proceeded back to the trailer where she knew that Mr. Chappell would proceed.

The State contends that Ms. Panos was in the process of moving so that Mr. Chappell could not find her. At one point, when the relationship was over, Mr. Chappell moved back to Michigan and Ms. Panos begged him to return. While working at the police department in Arizona, Ms. Panos was a victim of domestic violence. Ms. Panos quit her job and proceeded to Las Vegas wherein she again

assisted Mr. Chappell to reconcile and continue their lengthy relationship in Las Vegas.

Therefore, the factors relied upon by the State all seem to be easily countered. However, the most devastating fact in proving sexual assault was proof that Mr. Chappell had lied. At trial and in the second penalty phase, counsel stood idly by and let this ridiculous fact stand as proven. This fact is contradicted by common sense. Unfortunately, both the State and the defense accepted this archaic belief, as true. Even though science is in direct contradiction to this fact. Mr. Chappell admitted a sexual encounter with Ms. Panos shortly before the murder. Hence, Mr. Chappell could have been telling the truth that a sexual encounter occurred, he did not ejaculate, and semen was found.

Dr. Roger Harms, M.D., drafted an article, "Birth Control: Can Pre-ejaculation Fluid Cause Pregnancy?". In the beginning of the article, Dr. Harms first word is "yes". Dr. Harms concludes, "pre-ejaculation fluid may contain sperm, which means that a women can get pregnant even when ejaculation doesn't occur within the vagina". Countless studies have come to the same obvious conclusion.

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

The very fact that this assertion is not obvious is proof of ineffective assistance of counsel for failing to present an expert on this issue. In the State's response, they claim that there was overwhelming evidence of sexual assault. The State also proceeds to outline how Dr. Gray testified that there was no physical evidence that would support a finding of sexual assault (State's Answering Brief pp. 26). The State admits that Dr. Danton testified that Ms. Panos would use sex to calm Mr. Chappell when he was angry (State's Answering Brief pp. 26).

In the State's Answering Brief, the State explains that the defense called three witnesses to rebut the allegation of the sexual assault aggravator (State's Answering Brief pp. 26). However, the State fails to recognize that none of the three experts called by the defense provided testimony rebutting this contested fact

The State claims that Mr. Chappell failed to identify an expert who was available to testify and how the testimony would have changed the outcome of the case (State's Answering Brief pp. 26). Again, the State opposed Mr. Chappell's reasonable request for funding for an expert. The district court denied the funding. Therefore, Mr. Chappell had no means to obtain the expert. It is disingenuous for the State that Mr. Chappell did not identify an expert whose testimony could have changed the outcome of the case because the expert request was denied.

Next, the State argues that Mr. Chappell fails to demonstrate how an expert

witness would have benefitted his case (State's Answering Brief pp. 26) (citing, Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S.Ct. 2052 (1984) and State v. Molina, 120 Nev. at 192, 87 P.3d at 538). Here, Mr. Chappell can clearly show how the expert would have benefitted his case. If Mr. Chappell's attorneys had called an expert to establish that an individual can have sexual intercourse, not ejaculate, and leave semen, than the State would not have been able to conclude that Mr. Chappell was lying. Mr. Chappell was denied funding for an expert. Mr. Chappell had a right to present an expert to correct the record. Without this aggravating circumstance, Mr. Chappell is not death eligible.

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

Defense counsel's performance for failure to obtain an expert to prove the obvious was deficient. But for the deficiency, the result of the penalty phase would have been different because the aggravating circumstance could not be proven beyond a reasonable doubt. See, Strickland v. Washington, 466 U.S. 668, 104 S.

Ct. 2052, 80 L. Ed. 2d 674 (1984). Mr. Chappell received ineffective assistance of counsel in violation of the sixth and fourteenth amendments to the United States Constitution.

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

In the instant case, Mr. Chappell had an extremely low IQ. It appears that Mr. Chappell's mother may have been addicted to drugs and alcohol. A proper investigation should have included whether Mr. Chappell was born while his mother was ingesting narcotics and/or alcohol during her pregnancy.

It does not appear from the record that fetal alcohol syndrome was investigated. During closing argument, defense counsel argued Mr. Chappell's mother was addicted to drugs and alcohol and was quite possibly using drugs and/or alcohol while she was pregnant (16 ROA 3788).

In Haberstroh v. Nevada, 119 Nev. 173, 69 P.2d 676 (2003), this Court reversed Mr. Haberstroh's sentence of death for a new penalty phase. In the decision, this Court noted that mitigation evidence which had not been offered at the first sentencing hearing, should be offered at a new hearing which included "evidence that he suffers from partial fetal alcohol syndrome, mild neuropsychological impairment, a low average IQ, personality disorder, and that he grew up with alcoholic parents and suffered physical and emotional abuse" 69

P.3d at 683. The Court's decision in Haberstroh is important because it recognizes the substantial impact of fetal alcohol syndrome at sentencing and provides support for an argument that the failure to develop such evidence would be prejudicial.

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

> Considering that the jury found that the defendant was born to a drug, alcohol addicted mother, defendant fails to demonstrate that obtaining a PET scan and/or brain imaging even if these tests would have revealed that the defendant did have fetal alcohol syndrome would have led to a more favorable outcome at his penalty hearing. Thus, defendant fails to meet his burden under Strickland and this claim must fail (20 ROA 4449).

The State's entire conclusion disregards the reasoning and discussion in Haberstroh.

In the matter of the personal restraint of James Leroy Brett, 142 W.2d 868,

16 P.3d 601 (Washington, 2001), the Washington Supreme Court reversed the first degree murder conviction and death sentence based upon ineffective assistance of counsel. The Washington Supreme Court held that trial counsel was ineffective based on 1) trial counsel knew or should have known that petitioner had significant medical and mental conditions; 2) substantial medical and psychiatric opinion was available; 3) counsel failed to conduct a reasonable investigation into the medical and mental conditions; and 4) the reference hearings expert legal testimony established that counsel, by failing to take any meaningful steps to develop petitioner's defense deprived petitioner of effective assistance of counsel. Id. In Brett, the Washington Supreme Court explained,

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

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

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

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

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

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

E. FAILURE TO PROPERLY PREPARE A LAY MITIGATION WITNESS

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

In the State's Answering Brief, they provide limited analysis regarding each of the witnesses that Mr. Chappell complained about.

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

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

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

Dr. Grey had not been properly prepared for cross-examination. The defense

had failed to present expert testimony establishing the obvious. Dr. Grey even admitted that the presence of sperm is conclusive proof of ejaculation.

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

Mr. Benjamin Dean was contradicted extensively with his own affidavit. An evidentiary hearing should have been held to determine whether defense counsel presented the affidavit to Mr. Dean prior to testimony. It is of concern that Mr. Dean did not appear to testify consistently with his affidavit. In Jackson v. Warden, 91 Nev. 430, 537 P.2d 473 (1975), 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 the trial. Jackson, 92 Nev. at 433, 537 P.2d at 474.

In the instant case, counsel's performance fell below a standard of reasonableness. Had counsel properly prepared for the penalty phase, the result

would have been different. Mr. Chappell has met both standards enunciated in Strickland, 466 U.S. 668, 104 Sup. Ct. 2052 (1984).

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.

This argument stands as enunciated in the Opening Brief.

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.

This argument stands as enunciated in the Opening Brief.

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.

In the instant case, there was no evidence that Mr. Chappell was arrested ten times in front of this children. However, undoubtedly the jury would have believed the prosecutor. Interestingly enough, the State argued in the district court that "further, defendant argues that there is no evidence in the record that he was arrested ten times. This is false" (20 ROA 4455). Unfortunately, the State has chosen to take Mr. Chappell's complaint out of context. Mr. Chappell specifically complained that there was no evidence that his children had observed him arrested on ten occasions. In the supplemental brief filed in the district court, Mr. Chappell made it abundantly clear stating, "in the instant case there is no evidence that Mr. Chappell was arrested ten times in front of this children" (A.A. Vol. 20 pp. 4601). The State simply responded by establishing that Mr. Chappell may have been arrested numerous times, failing to address Mr. Chappell's specific complaint that there was no evidence his children had seen him arrested on ten occasions. It is obviously disturbing to an average juror to believe that Mr. Chappell's children would have consistently observed him arrested, based upon his criminal activities.

The State recognizes that the assertion was false.

Next, the State argues that the arguments of counsel are not evidence, citing to Randolph v. State, 117 Nev. 970, 984, 36 P.3d 424, 433 (2001). First, the prosecutor's question is not the argument of counsel. Next, the prosecutor does not have carte blanche permission to make any unfounded and outrageous assertion and simply conclude that the arguments of counsel are not evidence.

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); Jiminez v. State, 106 Nev. 769, 772, 801 P.2d 1366, 1368 (1990); Collier v. State, 101 Nev. 473, 478, 705 P.2d 1126, 1129 (1985).

There is no room for a prosecutors sarcasm wherein a gross exaggeration of such highly prejudicial information is presented to the jury. The statement also violated NRS 48.045(2) because it presented facts in such a way as to imply that

evidence of other crimes, wrongs or acts were present in Mr. Chappell's history. A reasonable juror would conclude that the prosecutor was wholely accurate in the statement. The issue should have been raised on direct appeal

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

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 State's district court response, the State concluded that referring to Mr. Chappell as a "despicable human being" was warranted and not improper (20 ROA 4457). Mr. Chappell disagrees. Mr. Chappell received ineffective assistance of counsel for failure to raise these issues on direct appeal in violation of the sixth, eighth and fourteenth amendments to the United States Constitution.

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.

In the State's response, they concede that the prosecutor's questioning of

Mr. Dean was improper (State's Answering Brief pp. 45). However, the State argues that the error does not warrant reversal. Again, the State appears to contend that no matter how many improper arguments the prosecutor makes, none of it constitutes reversal. At some point, blatant errors must be punished. Prosecutors by nature enforce punishment upon others. Yet, here the State seems to feel that they have an absolute right to commit misconduct and then simply argue that their misconduct would not change the result of the proceedings.

The State simply ignores a long line of federal cases that have consistently frowned upon prosecutor's committing gross acts of misconduct. Noticeably absent is any effort to explain how the prosecutor could have provided such an improper line of questioning. Simply permitting this type of misconduct encourages prosecutors within this State to continue this behavior even when a human being is facing life or death.

Additionally, this Court should consider this admitted error along with the numerous errors which occurred in this case as cumulative error and reverse Mr. Chappell's sentence of death.

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).

In the State's Answering Brief, they fail to address the merits of Mr. Chappell's argument. Instead, the State chooses to claim that the issue should have been raised on direct appeal and is therefore barred pursuant to NRS 34.810 (1)(b)(2) (State's Answering Brief pp. 48). Mr. Chappell specifically complained that his appellate counsel was ineffective for failing to raise the issue on appeal (Supplemental Brief pp. 45). Mr. Chappell had a right to effective assistance of appellate counsel on direct appeal. Apparently, the State believes that Mr. Chappell did not have a right to effective assistance of counsel on direct appeal which is in violation of clearly established federal case law. The State refuses to address the issue proving the meritorious assertions listed in Mr. Chappell's

supplement. Based on the State's failure to address the merits, Mr. Chappell is entitled to a reversal of his sentence of death.

IX. THE DEATH PENALTY IS UNCONSTITUTIONAL

This argument stands as enunciated in the Opening Brief.

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

This argument stands as enunciated in the Opening Brief.

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

This argument stands as enunciated in the Opening Brief.

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

This argument stands as enunciated in the Opening Brief.

CONCLUSION

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

DATED this 15 day of September, 2014.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

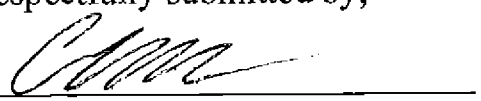
I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using 14 point font of the Times New Roman 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 18,500 words and 40 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 15 day of September, 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 September 15 2014. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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