IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES MONTELL CHAPPELL, Appellant, vs. THE STATE OF NEVADA, Respondent.	Case No. 61967

PETITION FOR REHEARING

Appellant James Chappell herby petitions this Court for rehearing, following the Court's order filed June 18, 2015, affirming the denial of habeas corpus relief. Chappell petitions this Court for rehearing on the ground that it overlooked material questions of fact and law in his case. See NRAP 40(c)(2)(i).

1. This Court should grant rehearing as to the claim that the district court improperly prevented counsel from providing effective assistance by refusing to provide finding to allow counsel to investigate and present evidence that Mr. Chappell suffers from FASD (Fetal Alcohol Spectrum Disorder), in order to show that trial counsel and previous habeas counsel provided ineffective assistance by failing to investigate that disability. There is no dispute that Mr. Chappell's history indicates a likelihood that he was exposed to alcohol and/or drugs in utero, as this Court's decision acknowledges. Order at 5; Appellant's Opening Brief at 21. This Court rejects this claim on the theory that the jury was presented with evidence of the defendant's low IQ, and further investigation was not necessary to provide effective assistance in the penalty phase of a capital trial. Order at 5.

This Court's decision as to this claim overlooks, and is inconsistent with, controlling authority. "We have never limited the prejudice inquiry under

Strickland [v. Washington, 466 U.S. 668 (1984)] to cases in which there was only 'little or no mitigation evidence' presented." Sears v. Upton, 561 U.S. 945, 954 (2010) (per curiam). "We certainly have never held that counsel's effort to present some mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. To the contrary, we have consistently explained that the Strickland inquiry requires precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below." Id. (emphasis in original; footnote omitted). In Rompilla v. Beard, 545 U.S. 374 (2005), the Supreme Court cited fetal alcohol syndrome as a condition that trial counsel failed to investigate, in addition to evidence of a low IQ. Id. at 392-93. This Court itself, in State v. Haberstroh, 119 Nev. 173, 183 n.22, 69 P.3d 676, 683 n.22 (2003), recognized the mitigating effect of "partial fetal alcohol syndrome," in addition to "low average IQ," which trial counsel had not investigated or presented. See generally Brumfield v. Cain, 135 S. Ct. 2269, 2280-81 (2015) (diagnosis of Intellectual Disability must be made, when appropriate, in addition to diagnoses of other disorders).

These decisions recognize a fundamental proposition: different mental deficits are not fungible; and presenting "some evidence" of a mental health deficit does not relieve trial counsel of the duty to determine whether other exist, because additional deficits are likely to exacerbate the effects of those that may be known. For instance, FASD may aggravate the effect of a low IQ to the point where an individual can be diagnosed with Intellectual Disability, and thus would be categorically eliminated from eligibility to receive the death penalty. See Christopher Fanning, Defining Intellectual Disability: Fetal Alcohol Spectrum Disorder and Capital Punishment, 38 Rutgers L. Rec. 1, 11-13 (2010-11); Ann P. Streissguth, et al., Risk Factors for Adverse Life Outcomes in Fetal Alcohol

Syndrome and Fetal Alcohol Effects, 27 Developmental & Behavioral Pediatrics No. 4 at 228 (Aug. 2004); American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 37-40 (5th ed. 2013). By upholding the district court's refusal to fund an adequate - - that is, a thorough - - investigation into issues that trial counsel did not investigate, including the possibility of FASD in the face of evidence of pre-natal alcohol exposure, this Court not only affirms the creation of "an impediment external to the defense," e.g., Crump v. Warden, 113 Nev. 293, 302, 934 P.2d 247, 252 (1997), which will excuse any failure to present that evidence in this proceeding. It also sets at naught its own performance standards, see Nevada Indigent Defense Standards of Performance, ADKT 411 (2008), Standards 2-1(b), 3-9(e,f), and thus signals to the defense bar and to the courts that effective representation and constitutionally reliable results in capital cases should take a back seat to considerations of expediency and cost. No legal authority supports this conclusion and this Court should reject it.[1]

2. This Court's order follows the prosecution's argument, essentially without analysis, that Mr. Chappell's constitutional challenge to the premeditation and deliberation instruction given in his case is not properly before the Court. Order at 2. The basis for the ruling is that the current appeal is from the denial of habeas relief as to the second death sentence imposed, and that challenges to the underlying conviction therefore cannot be entertained because they were not made in earlier proceedings. Id. This conclusion is contrary to this Court's own precedents and ignores appellant's argument with respect to cause for overcoming

[1] This argument applies equally to the district court's refusal to fund other necessary investigations. See, e.g., Appellant's Opening Brief at 12. Neither the state nor this Court can properly rely upon the absence of the fruits of investigation or testing to prove the prejudice prong of Strickland, when the state and the district court prevented counsel from finding them.

procedural default rules.

There can be no reasonable dispute that ineffectiveness of counsel constitutes cause for the failure to raise the unconstitutionality of the Kazalyn instruction, see Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992), at trial and on direct appeal. See, e.g., Hathaway v. State, 119 Nev. 248, 254-55, 71 P.3d 503, 508 (2003); Evans v. State, 117 Nev. 609, 648, 28 P.3d 498, 523 (2001); Pertgen v. State, 110 Nev. 554, 559-60, 875 P.2d 361, 364 (1994), disapproved on other grounds by Pellegrini v. State, 117 Nev. 860, 881-82, 34 P.3d 519, 533-34 (2001). Further, under Crump v. Warden, 113 Nev. 293, 302-03, 934 P.2d 247, 253 (1997), ineffective assistance of counsel constitutes cause to excuse the failure to raise the claim in the first post-conviction proceeding. That proceeding, however, resulted in the vacation of the death sentence. Because counsel on the direct appeal from the second penalty hearing did not raise the issue, Mr. Chappell's only recourse was to raise the issue in this habeas proceeding, in which he could enforce his right to effective assistance of first habeas counsel under Crump. This Court's decision on this issue eliminates any avenue of review of first habeas counsel's ineffectiveness as to other claims solely because this Court vacated the penalty judgment, which is inconsistent with the Court's administration of its own procedural default rules, which are intended to afford a petitioner an adequate opportunity to enforce his right to effective assistance of post-conviction counsel. See Nika v. State, 120 Nev. 600, 605-07, 97 P.3d 1140, 1144-45 (2004). McNelton v. State, 115 Nev. 396, 416, 990 P.2d 1263, 1275 (1999). Mr. Chappell has asserted the ineffective assistance of previous counsel with respect to this claim, see Appellant's Opening Brief at 58, and this Court cannot properly reject this claim without ordering a hearing on whether counsel's reasons for not raising this claim, if any, were within the range of reasonable competence.

As to the substantive merits of the claim, this Court should address the question it did not resolve in Nika v. State, 124 Nev. 1272, 198 P.3d 839, (2008). In Nika, this Court held that, between the time of the decision in Kazalyn, and the decision in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000), deliberation was not a separate element of first degree murder, and so the conflation of premeditation and deliberation was not a violation of due process of law. Nika, 124 Nev. at 1286-87, 198 P.3d at 849-51.[2] The question that the Nika court did not answer, however, was how the Kazalyn instruction could satisfy the notice requirements of the federal and state guarantees of due process of law (as well as the federal and state equal protection guarantees, and the Eighth Amendment requirement of narrowing the class of death-eligible offenses and offenders), when it had the effect of "eras[ing]" the distinction between first and second degree murder, and essentially reducing the mens rea component of first degree murder to mere intent to kill. Byford, 115 Nev. at 235, 994 P.2d at 713. This is the flaw in the Kazalyn instruction that no analysis of what we call the individual pieces of the required mens rea can resolve: in fact, under the Kazalyn instruction, there is no rational distinction between first and second degree murder that any jury could discern. That is a violation of due process of law under any circumstances.

This Court should accordingly address this issue on the merits and conclude that the use of the Kazalyn instruction in Mr. Chappell's case violated his right to due process of law. This Court should accordingly review this claim and remand

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[2] Since this Court is the final arbiter of the meaning of state law, we must accept the Nika court's reasoning that the element of deliberation disappeared from the statute in 1992, and reappeared in 2000, without any relevant change in the statutory language. In other contexts, this Court might characterize its action as impermissible "judicial legislation." E.g., City of Las Vegas v. Eighth Jud. Dist. Ct., 118 Nev. 859, 867, 99 P.2d 477, 483 (2002), disapproved on other grounds by State v. Castaneda, 126 Nev. ___, 245 P.3d 550, 553 n.1 (2010).

for a hearing on Mr. Chappell's allegations of cause due to ineffective assistance of counsel.

3. For these reasons, this Court should grant rehearing and reverse the judgment of the district court.

DATED this 6th day of July, 2015.

Respectfully submitted:
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CERTIFICATE OF COMPLIANCE

I hereby certify that this petition for rehearing 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 petition for rehearing/reconsideration complies with the page or type-volume limitations of NRAP 40 or 40A because it is proportionately spaced, has a typeface of 14 points or more and contains 1,442 words.

DATED this 6th day of July, 2015.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on July 6, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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