IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES MONTELL CHAPPELL, Appellant, vs. THE STATE OF NEVADA, Respondent.	Electronically Filed Oct 01 2015 10:43 a.m. Tracie K. Lindeman Clerk of Supreme Court CASE NO: 61967

ANSWER TO PETITION FOR REHEARING

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, STEVEN S. OWENS, and answers the Petition for Rehearing in the above-captioned appeal.

This answer is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 1st day of October, 2015.

Respectfully submitted,

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

BY */s/ Steven S. Owens*
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MEMORANDUM
POINTS AND AUTHORITIES

On June 18, 2015, in an unpublished Order, this Court unanimously affirmed the denial of a habeas petition following a redo of the penalty hearing in a capital case. On July 6, 2015, Chappell petitioned this Court for rehearing. On September 17, 2015, this Court filed an Order directing the State to answer the petition within 15 days. The Court may consider rehearings in the following circumstances: (A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or (B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case. NRAP 40(c)(2). Matters presented in the briefs and oral arguments may not be reargued in the petition for rehearing, and no point may be raised for the first time on rehearing. NRAP 40(c)(1).

Chappell first argues that this Court should rehear his claim that the district court erred by refusing to provide funds for a P.E.T. scan to investigate FASD (Fetal Alcohol Spectrum Disorder). In resolving this claim, this Court concluded that expert psychological testimony was introduced at the second penalty hearing and that, "[a]s his cognitive deficits had been extensively documented and the jury nevertheless concluded that they were not sufficiently mitigating, Chappell failed to demonstrate that counsel were deficient in not obtaining a P.E.T. scan or that he

would have benefited from a more thorough investigation." Order, at p. 5. Chappell believes this conclusion overlooks and is inconsistent with controlling authority which holds that counsel's effort to present some mitigation evidence does not foreclose an inquiry into prejudice under Strickland.

However, the "overlooked" case authority cited by Chappell is not pertinent to the situation in the present case nor in conflict with this Court's reasoning. For example, in Sears v. Upton, the lower court erred in concluding that because trial counsel did present "some" mitigation evidence of a reasonable defense theory at the penalty phase, that it was "impossible" to know what effect a different mitigation theory would have had on the jury. Sears v. Upton, 561 U.S. 945, 952, 130 S.Ct. 3259, 3264 (2010). In rejecting this analysis, the Supreme Court held that the prejudice inquiry under Strickland is not limited to cases where only "little or no mitigation evidence" was presented. Sears v. Upton, 561 U.S. 945, 954, 130 S.Ct. 3259, 3266 (2010). Trial counsel presented only a "superficially reasonable" mitigation theory that the defendant came from a good family and the offense was completely out of character, while overlooking and failing to conduct psychological testing which showed that defendant had a profound personality disorder and pronounced frontal lobe pathology all of which the jury did not hear. Id. Likewise, in Rompilla v. Beard, counsel had relied unjustifiably on the defendant's own

description of an unexceptional background and failed to investigate and present to the jury "pretty obvious signs" found in school records and his prior conviction file of a troubled childhood, mental illness and alcoholism. Rompilla v. Beard, 545 U.S. 374, 393, 125 S.Ct. 2456, 2469 (2005). The new evidence of organic brain damage, extreme mental disturbance, impaired cognitive functions, and fetal alcohol syndrome, "adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury." Id.[1] None of these facts resemble the situation in the present case, which is that trial counsel already investigated and presented significant psychological mitigation evidence consistent with Fetal Alcohol Syndrome.

In the present case, trial counsel had not one, but two, psychological experts evaluate Chappell and testify at the penalty hearing. Dr. William Danton, a clinical psychologist, testified to the relationship between Chappell and the murder victim and how that fit in with a "circle of domestic violence." 14 AA 3317-74. He testified that Chappell was diagnosed with a borderline personality disorder and had great instability in relationships and extreme sensitivity to abandonment due to the death

[1] Chappell's reliance upon Haberstroh is misplaced because it makes only a passing reference to Fetal Alcohol Syndrome in a footnote which was relevant to a harmless error analysis for the death penalty when the jury was improperly instructed on the invalid aggravating circumstance of depravity of mind. State v. Haberstroh, 119 Nev. 173, 183 n.22, 69 P.3d 676, 683 n. 22 (2003).

of his mother and absence of his father. 14 AA 3324. Dr. Lewis Etcoff, a forensic neuropsychologist with experience in assessing brain damage and learning disabilities in capital murder defendants, conducted a detailed neuropsychological evaluation of Chappell which included a personality test, an intelligence IQ test, an academic achievement test, an interview and review of police and school records. 14 AA 3469 – 15 AA 3587. The jury heard that Chappell was in special education in elementary school and was classified as "severely learning disabled" and "emotionally handicapped" and tested with low IQ scores and low verbal skills. 14 AA 3483-91. Chappell felt worthless, inadequate, guilt-ridden, sensitive to humiliation, dependent and mistrustful. 14 AA 3501. He concocted fantasies of his girlfriend victim seeing other men and worked himself into a frenzy. 14 AA 3504-05. Two of Chappell's siblings, older brother Willie and younger sister Mia, both testified that their mother had a drug problem. 15 AA 3694, 3715. From all of this testimony counsel was able to successfully argue to the jury that, "[h]is mother was addicted to drugs and alcohol, and it's quite possible that she was using either drugs and/or alcohol while she was pregnant." 16 AA 3788. The jury then found as a mitigating circumstance that Chappell was born to a drug, alcohol addicted mother" and "suffered a learning disability." 16 AA 3822-23. The State did not argue against this mitigating evidence. If a third psychological expert and P.E.T. scan were to

confirm a diagnosis of Fetal Alcohol Syndrome, the evidence would not differ substantially from what the jury already found insufficient to outweigh the aggravating circumstances.

Assuming *arguendo* that Chappell could be tested and diagnosed with Fetal Alcohol Syndrome, [2] such evidence would be cumulative in kind and degree to what the jury already heard and considered. Under the Strickland standard, where the new evidence "would barely have altered the sentencing profile presented," there is no reasonable probability that the omitted evidence would have changed the sentence imposed and relief is unwarranted. Strickland v. Washington, 466 U.S. 668, 699-700, 104 S.Ct. 2052, 2071 (1984). "The likelihood of a different result must be substantial, not just conceivable." Harrington v. Richter, 562 U.S. 86, 112, 131 S.Ct. 770, 792 (2011). There is no prejudice under Strickland where the new evidence is

[2] According to the National Task Force on Fetal Alcohol Syndrome and Fetal Alcohol Effect in conjunction with the National Center on Birth Defects and Developmental Disabilities, there are no specific or uniformly accepted diagnostic criteria available for determining whether a person has Fetal Alcohol Syndrome. Centers for Disease Control and Prevention, Nat'l Center on Birth Defects and Developmental Disabilities, Fetal Alcohol Syndrome: Guidelines for Referral and Diagnosis, (July 2004), (available at http://www.cdc.gov), p. 2-3. Additionally, "diagnostic criteria are not sufficiently specific [enough] to ensure diagnostic accuracy, consistency, or reliability." Id. at 2. Further, these Guidelines not only state that "it is easy for a clinician to misdiagnose" Fetal Alcohol Syndrome, but that there currently exist no diagnostic criteria to distinguish Fetal Alcohol Syndrome from other alcohol-related conditions. Id. at 3

"merely cumulative" of the evidence actually presented. Wong v. Belmontes, 558 U.S. 15, 22-23, 130 S.Ct. 383, 387 (2009). In Wong v. Belmontes, the jury was "well-acquainted with Belmontes' background and potential humanizing features" such that "[a]dditional evidence on these points would have offered an insignificant benefit, if any at all." Id. The Court firmly rejected the simplistic "more-evidence-is-better" approach to assessing prejudice under Strickland. Id., 558 U.S. at 25, 130 S.Ct. at 389.

In Schiro v. Landrigan, evidence that defendant "was exposed to alcohol and drugs *in utero*, which may have resulted in cognitive and behavioral deficiencies consistent with fetal alcohol syndrome . . . and may have been genetically predisposed to violence," did not result in Strickland prejudice in part because the sentencing court had in fact already heard and considered much of this same evidence in a proffer and "any additional evidence would have made no difference in the sentencing." Schiro v. Landrigan, 550 U.S. 465, 480-81, 127 S.Ct. 1933, 1943-44 (2007); see also Cullen v. Pinholster, 563 U.S. ___,131 S.Ct. 1388, 1409 (2011) ("There is no reasonable probability that the additional evidence Pinholster presented in his state habeas proceedings would have changed the jury's verdict. The 'new' evidence largely duplicated the mitigation evidence at trial."). Accordingly, this Court's analysis of Strickland prejudice in the present case is

consistent with United States Supreme Court precedent and rehearing is unwarranted.[3]

The Indigent Defense Standards do not condone expenditure of public monies in post-conviction proceedings for every conceivable test and expert in an effort to find something somewhere that trial counsel neglected to do, especially when it would not have changed the outcome of the case. Instead, the Standards only require those experts and investigations which are "reasonably necessary or appropriate." ADKT 411, Standard 2-1(b)(1)(A). The Supreme Court has recognized that, "[t]here are any number of hypothetical experts – specialists in psychiatry, psychology, ballistics, fingerprints, tire treads, physiology, or numerous other disciplines and subdisciplines – whose insight might possibly have been useful," but which a reasonable defense counsel may elect to forego. Harrington v. Richter, 562 U.S. 86, 107, 131 S.Ct. 770, 789 (2011), *citing* Strickland, 466 U.S. at 691, 104 S.Ct. 2052. The above analysis of Strickland prejudice accepts as true and assumes that a P.E.T. scan would be favorable to Chappell in confirming FASD, but then reasons that it would not have changed the outcome of the penalty hearing. If a habeas petition can

[3] Even if this Court's analysis of Strickland prejudice were to warrant rehearing, Chappell does not dispute and has not sought rehearing on his failure to show deficient performance. Chappell must prevail on both prongs of Strickland in order to be entitled to relief.

be resolved without expanding the record, the district court must do so. NRS 34.770; 34.790. Therefore, Chappell has not been denied funding to develop facts necessary to resolution of his habeas claims.

To the extent Chappell argues that FASD may aggravate the effect of a low IQ to the point where an individual can be diagnosed with intellectual disability, such issue was not raised below nor in the briefs in this appeal. Appellant "cannot change [his] theory underlying an assignment of error on appeal." Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995). This Court will not consider claims for relief that were not raised in the original post-conviction petition for habeas corpus or considered by the district court. See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991). No point may be raised for the first time on rehearing. NRAP 40(c)(1).

In Chappell's second ground for rehearing, he maintains that this Court overlooked that ineffective assistance of first post-conviction counsel, David Schieck, constitutes good cause to excuse the failure to raise a challenge to the Kazalyn Instruction from the guilt-phase of trial in 1996. First, such issue was not raised below nor in the briefs in this appeal and may not be considered for the first time on rehearing. NRAP 40(c)(1). Chappell's position has been that the procedural bars do not apply to his guilt phase issues, not that he had good cause to overcome

the bars. Although Chappell claims on rehearing that he raised the issue on page 58 of his Opening Brief, none of his allegations on that page asserted ineffectiveness of prior post-conviction counsel as good cause to overcome procedural bars. Even if it did, Chappell did not raise such issue below, despite the State alerting him to his failure to allege good cause for a successive petition (20 AA 4463-64), and this Court will not consider claims on appeal that were not raised in the original post-conviction petition for habeas corpus nor considered by the district court. Davis, *supra*.

Second, Chappell is mistaken that prior counsel failed to raise the Kazalyn issue. Prior post-conviction counsel David Schieck raised it as Claim 5 in a supplemental habeas petition filed on April 30, 2002. 10 AA 2455-59. It was again raised and rejected in the subsequent post-conviction appeal on April 7, 2006, and became law of the case. 11 AA 2789-90. Also, as this Court recognized in footnote 1 of its Order of Affirmance, prior counsel raised the issue yet again in the direct appeal from the second penalty hearing where it was again denied. Chappell v. State (Chappell III), Docket No. 49478 at 27-28 (Order of Affirmance, October 20, 2009) ("Byford does not apply to cases that were final when it was decided. . . . Byford was decided on February 28, 2000; Chappell's conviction was final on October 4, 1999"). The fact that prior counsel did in fact raise the issue repeatedly belies

Chappell's claim that the instant successive habeas petition was the first opportunity in which the claim could be raised.

WHEREFORE, the State respectfully requests that rehearing be denied.

Dated this 1st day of October, 2015.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this petition for rehearing/reconsideration or answer 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this petition complies with the type-volume limitations of NRAP 40 or 40A because it is proportionately spaced, has a typeface of 14 points and contains 2,305 words.

Dated this 1st day of October, 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 October 1, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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SSO//ed