IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 77002

JAMES MONTELL CHAPPELL

Appellant,

v.

WILLIAM GITTERE, Warden, and AARON FORD,
Nevada Attorney General,

Respondents.

Appeal From Order Dismissing Petition for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County
The Honorable Carolyn Ellsworth, District Judge

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Howard Brooks, Willard Ewing, David Schieck, and Clark Patrick represented Chappell during the pretrial, trial, and sentencing proceedings in 1996 and 2007.
2. Howard Brooks, Michael Miller, and JoNell Thomas represented Chappell on direct appeal.
3. David Schieck and Christopher Oram represented Chappell during post-conviction proceedings and before this Court.

4. The Federal Public Defender, District of Nevada, represented Chappell during all subsequent proceedings.

DATED this 2nd day of May, 2019.

/s/ *Brad D. Levenson*
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I. JURISDICTIONAL STATEMENT

This is an appeal from a district court order denying Chappell's Petition for Writ of Habeas Corpus (Post-Conviction) in a capital case, No. C131341. The district court mailed its Notice of Entry of Findings of Fact, Conclusions of Law and Order on August 17, 2018. 31AA7590. Chappell timely filed a Notice of Appeal on September 14, 2018. 31AA7591-7593. This Court has appellate jurisdiction over this appeal pursuant to NRS 34.575, 34.830, 177.015(1)(b), and 177.015(3).

II. ROUTING STATEMENT

This case is retained by the Supreme Court because it is a capital case. Nev. R. App. P. 17(a)(1).

III. STATEMENT OF THE ISSUES

1. Did the district court err in concluding that Chappell could not demonstrate prejudice from counsel's failure to present evidence of Fetal Alcohol Spectrum Disorder (FASD), when the jurors heard absolutely nothing about prenatal exposure to alcohol or its effects?

2. Are the substantive constitutional claims in Chappell's petition meritorious, justifying relief from his convictions and death sentence?

3. Did the district court err in holding that Chappell could not overcome the procedural default bars?

IV. STATEMENT OF THE CASE

On October 16, 1996, after a six-day trial, an all-White jury convicted Chappell of burglary, robbery with the use of a deadly weapon, and murder in the first degree with use of a deadly weapon. 4AA944-946.

The penalty hearing began on October 21, 1996, and lasted four days. The jury found four aggravating factors: (1) the murder was committed in the course of a burglary; (2) the murder was committed in the course of a robbery; (3) the murder was committed in the course of a sexual assault; and (4) the murder involved torture or depravity of mind. 4AA890-894. The jury also found two mitigating circumstances: (1) the murder was committed while Chappell was under the influence of extreme mental or emotional disturbance; and (2) "any other mitigating circumstance." *Id.* The jury found that the aggravating factors outweighed the mitigating circumstances and imposed a sentence of death. *Id.*

Chappell appealed, and this Court affirmed—despite concluding that the torture aggravator was not supported by the evidence. 3AA638-648. The United States Supreme Court then denied Chappell's petition for writ of certiorari. *Chappell v. Nevada*, 528 U.S. 853 (1999). Remittitur issued on October 26, 1999. 16AA3928.

Chappell filed a proper person petition for writ of habeas corpus (post-conviction) in the district court on October 19, 1999. 25AA6086-6144. On April 30, 2002, he filed a supplemental petition, at which time he was represented by David Schieck. 5AA1068-1131. The district court held an evidentiary hearing on September 13, 2002. 8AA1759-1826. Then, on June 3, 2004, the court granted Chappell's petition as to the penalty phase (but not the guilt phase), based on ineffective assistance of counsel. 3AA650-653. This Court affirmed the grant of a new penalty hearing, 3AA655-668, and issued remittitur on May 2, 2006, 25AA6146-6147.

The six-day penalty rehearing began on March 12, 2007. The jury, again all-White, found the sole aggravating factor alleged by the State, that the murder was committed in the course of a sexual assault. 4AA914-918. The jury found the following seven mitigating

circumstances: (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 a learning disability; and (7) Chappell was raised in a depressed housing area. *Id.* The jury concluded the mitigating circumstances did not outweigh the aggravating factor and imposed a sentence of death. *Id.* The court entered a judgement of conviction on May 10, 2007. 3AA670-671.

Chappell appealed, and, on October 20, 2009, this Court affirmed. 3AA673-704. This Court denied a petition for rehearing on December 16, 2009, 3AA706-709, and the High Court denied Chappell's petition for writ of certiorari, 16AA3925-3926. Remittitur issued on June 8, 2010. 17AA4108-4109.

Chappell filed a proper person petition for writ of habeas corpus (post-conviction) in the district court on June 22, 2010, 17AA4111-4123, and a supplemental brief in support on February 15, 2012, at which time he was represented by Christopher Oram, 4-5AA965-1046. The district court denied relief. 3AA711-721. This Court affirmed on June

18, 2015, 3AA723-738, denied rehearing on October 22, 2015, 3AA740-742, then issued Remittitur on November 17, 2015, 17AA4214.

Chappell filed a proper person petition for writ of habeas corpus in the federal district court on March 23, 2016. On April 4, 2016, the federal court appointed undersigned counsel to represent Chappell, and, on August 17, 2016, Chappell filed an amended petition for writ of habeas corpus.

On September 2, 2016, Chappell moved to stay the federal proceedings and hold them in abeyance to exhaust any available state remedies. The federal district court granted the motion on November 1, 2016, and Chappell returned to state court, filing a petition for writ of habeas corpus (post-conviction) on November 16, 2016. 1-3AA169-632. The district court granted Chappell's motion for an evidentiary hearing on the claim that trial counsel were ineffective for failing to investigate and present evidence on Fetal Alcohol Spectrum Disorder. 27AA6706-6723. That hearing took place on April 6, 2018, 29-30AA7164-7388, but, on August 8, 2018, the court dismissed the petition, concluding that it was procedurally barred. 31AA7579-7589. The court addressed only one part of one argument for good cause and prejudice in the entire

petition—ineffective assistance of post-conviction counsel for not arguing FASD. *Id.* The notice of entry was filed on August 17, 2018. 31AA7590.

On September 14, 2018, Chappell filed a notice of appeal. 31AA7591-7593.

IV. STANDARD OF REVIEW

The district court's application of procedural default rules is reviewed de novo. *Rippo v. State*, 134 Nev. __, 423 P.3d 1084, 1093, *amended on denial of reh'g*, 432 P.3d 167 (2018). This Court will give deference to the district court's factual findings unless clearly erroneous or not supported by substantial evidence. *Id.* The district court's legal conclusions are reviewed de novo. *Wells Fargo Bank, N.A., v. Radeki*, 134 Nev. __, 426 P.3d 593, 596 (2018).

V. STATEMENT OF THE FACTS

Abuse, abandonment, and neglect characterized James Chappell's life. He was born brain-damaged, to a mother addicted to drugs and alcohol. *See, e.g.*, 6AA1288 ¶¶3–4; 6AA1339 ¶14; 6AA1356-1358 ¶¶4–7, 10; 6AA1363 ¶4; 6AA1385-1386 ¶¶6–9; 26AA6463-6464 ¶¶6, 8, 10; 6AA6457-6458 ¶¶19–21, 23. When Chappell was a toddler, his mother's

addictions cost her custody of her children and then her life. *See, e.g.*, 29AA7029; 5AA1226-1227 ¶4; 6AA1329 ¶8; 6AA1358-1359 ¶¶10–11; 25AA6065; 6AA1363 ¶4; 15AA3618-3619, 3625. Chappell's grandmother obtained custody of Chappell and his siblings, but she abused them, neglected them, and deprived them of love. *See, e.g.*, 5AA1229-1232 ¶¶12–23; 6AA1307-1311 ¶¶8, 13, 16, 18–23; 6AA1370-1376 ¶¶7, 9–11, 16–22, 24; 26AA6462-6466 ¶¶3, 17, 21–23. And Chappell's brain damage, caused from prenatal exposure to drugs and alcohol, left him ill-equipped to deal with his traumatic childhood. 6-7AA1427-1549; 6AA1346 ¶15; 26AA6467 ¶25.

When Chappell met Deborah Panos, he latched on, seeking the support and stability missing from his childhood. 6AA1269, 1276 ¶¶13, 37-38; 6AA1303 ¶10; 6AA1243 ¶18; 6AA1222 ¶18. Panos was a shy person but she seemed to liven up when she was around Chappell. 6AA1303 ¶10. The early years of the relationship were positive and loving. *Id.*; 6AA1350 ¶12; 5AA1236 ¶36. The couple had three children together, and, when sober, Chappell doted on his family. 6AA1278-1279 ¶46–47; 5AA1236-1237 ¶37. But, as Chappell's crack addiction began taking over his life—an addiction caused by his FASD—his relationship

with his wife and children deteriorated. 6AA1275 ¶34; 6AA1353 ¶28; 6AA1340 ¶17; 6AA1317 ¶47; 5AA1236 ¶37; 5AA1220 ¶11; 5AA1247-1248 ¶¶3-4. But, throughout the turbulence and breakups, the couple always reconciled. 6AA1277-1284 ¶¶43, 48, 50, 60; 6AA1350 ¶¶13, 14; 6AA1304 ¶13; 6AA1380-1381 ¶¶43, 45; 6AA1304 ¶13; 17AA4228 ¶8; 26AA6450 ¶10.

During one period of reconciliation, Chappell was arrested. 17AA4128. He spent two months in jail, becoming increasingly paranoid about his relationship with Panos. 15AA3724-3725, 3728-3733. When he was released to a drug rehabilitation center, Chappell instead returned home, and, after a sexual encounter with Panos, he discovered a letter confirming his paranoid suspicions—Panos was involved with another man. 15AA3728-3733. Chappell killed his long-term girlfriend and drove away in her car. 15AA3733-3734.

Chappell was represented in his capital proceedings by overworked public defenders who were combatting prosecutors engaged in misconduct. 7AA1591-1592; 9AA2061-2063; 9AA2074-2076; 8AA1756-1757. Chappell, consequently, was convicted and sentenced to death. 4AA944-946; 4AA914-918.

VI. SUMMARY OF ARGUMENT

Chappell was sentenced to death in what should have been a noncapital case—a case with no valid aggravating factors and, at most, a charge of second-degree murder. This fundamentally unfair outcome resulted from a combination of factors—representation by overworked defense counsel, misconduct by prosecutors, and racial tension in the community. The district court refused to address all but one of Chappell's claims in the proceedings below.

First, defense counsel during the guilt phase conceded that Chappell killed Panos and that the killing was not accidental, leaving as the only possible favorable result a non-death sentence and a conviction for either second-degree murder or voluntary manslaughter. But counsel failed to investigate and present evidence crucial to obtaining these results, including the brain damage caused by Chappell's prenatal exposure to alcohol, evidence showing Chappell's innocence of both felonies underlying the charge of felony murder, and evidence undermining the sole aggravating factor.

Second, from jury selection through closing arguments, the prosecution presented irrelevant and prejudicial evidence, misstated

the facts, argued in ways designed to inflame the passions of the jurors, and—in a case with an African-American defendant accused of murdering his White girlfriend—exercised peremptory challenges in a racially biased manner.

Third, the district court largely ignored Chappell's claims and his arguments for cause and prejudice. Despite ineffective assistance from initial post-conviction counsel following both the original trial and the penalty rehearing, the district court addressed only one part of one claim. The remaining ignored claims are meritorious and deserve consideration, discovery, and an evidentiary hearing.

VII. ARGUMENT

A. The District Court Erroneously Concluded that Chappell's Petition is Procedurally Barred

The district court concluded that each claim in Chappell's petition was untimely under NRS 34.726, successive under NRS 34.810, and barred by laches under NRS 34.800. 31AA7579-7589. The district court then dismissed Chappell's petition, incorrectly determining that Chappell could not overcome those procedural bars. *Id.*

A showing of good cause and prejudice overcomes the procedural bars in NRS 34.726, NRS 34.810, and NRS 34.800. *See State v. Powell*, 122 Nev. 751, 756–59, 138 P.3d 453, 456–58 (2006); *Clem v. State*, 119 Nev. 615, 620–21, 81 P.3d 521, 525–26 (2003). To show good cause, Chappell must show that any delay in bringing these claims was not his fault, i.e., that an "impediment external to the defense" prevented him from raising his claims sooner. *Powell*, 122 Nev. at 756–59, 138 P.3d at 456–58; *see Clem*, 119 Nev. at 620–21, 81 P.3d at 525–26. And Chappell must additionally show that dismissal of the petition was unduly prejudicial. Chappell can make both showings.

1. Chappell can demonstrate good cause and prejudice based on post-conviction counsel's ineffectiveness

In capital cases, ineffective assistance from initial state post-conviction counsel constitutes good cause and prejudice to overcome procedural bars. *See Rippo*, 423 P.3d at 1093; *Crump v. Warden*, 113 Nev. 293, 304–05, 934 P.2d 247, 254 (1997). "The petitioner must demonstrate (1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced the defense." *Rippo*, 423 P.3d at 1097–98.

Counsel must reasonably investigate a client's case before making a strategic choice about which issues to pursue. *See Strickland v. Washington*, 466 U.S. 668, 691 (1984); *see also Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524–25 (2003). Reasonable investigation includes consulting experts when appropriate. *See Duncan v. Ornoski*, 528 F.3d 1222, 1235 (9th Cir. 2008); *Dugas v. Coplan*, 428 F.3d 317, 328–32 (1st Cir. 2005). And this Court's Indigent Defense Standards of Performance require post-conviction counsel to "secure the services of investigators or experts where necessary to develop claims to be raised in the post-conviction petition." 24-25AA5990-6061.

a. Post-conviction counsel was ineffective for not investigating and raising meritorious claims related to the 1996 guilt phase

Initial post-conviction counsel for Chappell's 1996 trial, David Schieck, failed to effectively litigate Chappell's claims related to the guilt phase. The few claims counsel did raise related to the guilt phase he raised deficiently, failing to investigate and hire necessary experts. *See Hinton v. Alabama*, 571 U.S. 263, 273–75 (2014); *Browning v. Baker*, 875 F.3d 444, 471–74 (9th Cir. 2017), *cert. denied sub nom.*

Filson v. Browning, 138 S. Ct. 2608; *see also* 26AA6472-6473 (declaration of investigator explaining limited nature of investigation for Chappell's state post-conviction petition).

For example, counsel failed to challenge trial counsel's inadequate preparation of Dr. Etcoff, failed to hire a new neuropsychological expert to evaluate Chappell, and failed to argue trial counsel's ineffectiveness for allowing the seating of a racist juror. *See Hinton*, 571 U.S. at 273–75; *Duncan*, 528 F.3d at 1235; *Dugas*, 428 F.3d at 328–32; *see also* 24-25AA5990-6061. Counsel also failed to investigate leads that Chappell lived in the residence with Panos and therefore could not be guilty of burglary. *See Rivas v. Fischer*, 780 F.3d 529, 547–52 (2d Cir. 2015) (concluding counsel was ineffective for failing to investigate evidence of innocence); *Browning*, 875 F.3d at 471–74 (same); *Mosley v. Butler*, 762 F.3d 579, 587–88 (7th Cir. 2014). And counsel failed to investigate witnesses from the first trial, whom effective trial counsel would have impeached. *See Grant v. Lockett*, 709 F.3d 224, 234 (3d Cir. 2013); *Reynoso v. Giurbino*, 462 F.3d 1099, 1110–18 (9th Cir. 2006). Had counsel performed effectively, he would have presented in a compelling

manner these claims and the additional guilt-phase claims raised in the current petition.

Despite the problems with Schieck's representation, the district court refused to consider Chappell's argument based on *Crump*—that Schieck's ineffectiveness during post-conviction proceedings provides good cause to overcome procedural bars. *See* 31AA7580 (concluding that Chappell could argue only ineffective assistance from initial post-conviction counsel to the 2007 penalty rehearing, Christopher Oram, to overcome procedural bars). The court did not even address *why* it was refusing to consider the *Crump* arguments, other than saying—incorrectly—that Chappell was attempting to "relitigat[e] things that have already been decided." 27AA6733; *see* 27AA6734 ("[Y]ou're just asking for discovery, to me, that seeks to go to the guilt phase and that's already been litigated."). Chappell was not trying to "relitigat[e]" anything because no court has *ever* considered Chappell's *Crump* arguments as they related to the 1996 trial. Nor could they. As this Court recognized in prior proceedings, the initial post-conviction petition following the penalty rehearing was an inappropriate place to raise guilt-phase claims. 3AA724 (explaining that guilt-phase claims

were "not properly raised because the proceeding at issue is [Chappell's] second penalty hearing"). In fact, the same district court refused to consider any guilt-phase claims in 2012, finding that "all claims regarding ineffective assistance of trial counsel, first penalty counsel, and first appellate counsel are procedurally barred or moot due to the granting of a new penalty hearing." 3AA712. And Oram's ignorance of any responsibility on his part to raise guilt-phase claims is clear—Oram ignored outrageous events that occurred during Chappell's guilt phase, including the seating of a blatantly racist juror.[1]

Because this Court affirmed the denial of relief on the guilt-phase claims, Chappell's arguments for cause to excuse procedural default were neither moot nor themselves procedurally defaulted. They instead were "on hold" until Chappell completed litigating the initial post-conviction proceedings following the penalty rehearing—and thus could make all of his *Crump* arguments in one petition. *See Rippo*, 423 P.3d at 1096 (creating rule that avoids "piecemeal litigation that would further clog the criminal justice system"); *cf. Edelbacher v. Calderon*,

[1] *See* Section I.

160 F.3d 582, 582–83 (9th Cir. 1998) ("When there is a pending state penalty retrial and no unusual circumstances, we decline to depart from the general rule that a petitioner must wait the outcome of the state proceedings before commencing his federal habeas corpus action.").

This post-conviction petition represents the first opportunity Chappell had to make arguments for cause under *Crump*. And Chappell filed the petition, in accordance with *Rippo*, within one year of this Court's issuance of remittitur in 2015. *See Rippo*, 423 P.3d at 1097. The district court's erroneous refusal to consider whether Schieck was ineffective under *Crump* requires remand.

b. Post-conviction counsel was ineffective for not investigating and raising meritorious claims related to the 2007 penalty phase

Chappell's counsel during post-conviction proceedings following the penalty rehearing, Cristopher Oram, similarly failed to do *any* extra-record investigation in support of Chappell's petition—at the same time criticizing prior counsel for identical failures. 4-5AA965-1046; *see* 29AA7180-7181, 7183-7185 (admitting to lack of investigation). Instead, counsel raised only record-based claims, which, without support from outside investigation and experts, he pled in a

deficient, conclusory manner. *See Hargrove v. State*, 100 Nev. 498, 502–03, 686 P.2d 222, 225 (1984) (explaining that "'bare' or 'naked' claims for relief, unsupported by any specific factual allegations" do not entitle movant to relief).

Counsel did request funding from the district court, recognizing at least the need for extra-record investigation. 5AA1048-1053; 7AA1638-1643; 16AA3880-3885. But counsel did not support these motions with a factual proffer of any of the readily available evidence supporting his claims. For example, counsel dedicated only one paragraph of one motion to his request for an expert "to determine the possible effects of [FASD] on Mr. Chappell." 16AA3883. Counsel's argument, in its entirety, consisted only of two general statements about FASD and a single vague statement about drug and alcohol use by Chappell's mother:

> Fetal Alcohol Spectrum Disorders are a group of disorders that can occur in a person who's [sic] mother drank alcohol during pregnancy. The effects can include physical problems and problems with behavior and learning. There was evidence that Mr. Chappell's mother may have been addicted to drugs and alcohol. A proper investigation should have been conducted to determine whether James was born to a mother

> who was ingesting narcotics and/or alcohol during her pregnancy. There is no indication in the voluminous file that counsel investigated the possibility of fetal alcohol syndrome.

Id.[2]

Counsel also requested experts to conduct neurological testing and perform a PET scan. 16AA3880-3885. But counsel did not connect these two requests to his motion for an FASD expert, and they suffer from the same deficiency as the first: counsel failed to include any of the available information showing that he was not simply going on a "fishing expedition," as argued by the State. 27-28AA6750-6751. Specifically, in his request for a PET scan, counsel relied entirely on the fact that trial counsel "never had the defendant's brain properly analyzed." 16AA3882. Similarly, in his request for a neurological examination, counsel said only that ten years had passed since the previous neurological examination, and he wished to "determine any

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[2] Even the lone statement counsel provided that was specific to Chappell is flawed. Counsel asserted that Chappell's mother *may* have been addicted to drugs and alcohol, despite evidence in the record not only that Chappell's mother *was* addicted to drugs and alcohol, but also that she actually used drugs and alcohol during her pregnancy with Chappell. 4AA914-918; 25AA6154-6155.

additional issues that may be raised on [Chappell's] behalf." 16AA3883.[3] Counsel never requested experts on Chappell's drugs use and trauma. (*See* Section F).

Finally, in his request for an investigator, counsel recited using boilerplate language that Chappell needs funding because of "the seriousness" of his conviction "and his sentence of death." 5AA1050. Counsel mentioned nothing about the witnesses an investigator would contact or the information he expected to uncover. *See Jaeger v. State*, 113 Nev. 1275, 1285, 948 P.2d 1185, 1191 (1997) (Shearing, C.J., concurring) ("[T]he guarantees of due process do not include a right to conduct a fishing expedition."); *see also Hargrove*, 100 Nev. at 502–03, 686 P.2d at 225.

In sum, counsel failed to argue with any specificity why experts and an investigator were necessary, failed to cite to the record where evidence already existed to support his request for funding, failed to obtain any information to support his motion, and failed to request

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[3] The examination conducted ten years prior was not, in fact, a neuropsychological evaluation, as pointed out by the doctor that did the exam, as well as by Dr. Paul Connor at the April 2018 evidentiary hearing. 29-30AA7205-7206, 7259-7262; 6AA1421.

certain experts. Instead, as he admitted doing "ad nauseum" in all of his capital cases, 29AA7187, counsel submitted a bare bones request for funds in the mistaken belief that the district court would ignore its deficiencies. And, when the district court denied the deficient motions, counsel did nothing on his own to investigate the claims. *See Ward v. Hall*, 592 F.3d 1144, 1159–61 (11th Cir. 2010) (affirming district court's conclusion that lack of funding did not excuse failure to obtain and present affidavits and testimony); *Dowthitt v. Johnson*, 230 F.3d 733, 758 (5th Cir. 2000) ("Dowthitt's arguments that lack of funding prevented the development of his claim are . . . without merit. Obtaining affidavits from family members is not cost prohibitive."). Had counsel performed effectively, he would have presented in a compelling manner these claims, along with the other meritorious penalty-phase claims raised in these state post-conviction proceedings.

2. The district court improperly denied Chappell the resources he needed to litigate his claims in his previous post-conviction petition

To the extent that post-conviction counsel's requests for funding were not deficient, Chappell can establish good cause because the district court's denial of that funding prevented him from discovering

the factual and legal bases supporting his claims. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); *see also Rippo*, 423 P.3d at 1094. Denial of funding for extra-record investigation and experts by the district court demonstrates a fundamental lack of understanding about the purpose of post-conviction proceedings. *See Martinez v. Ryan*, 566 U.S. 1, 13 (2012) ("Ineffective-assistance of counsel claims often depend on evidence outside the trial record."); *Rippo*, 368 P.3d at 739 (creating timeliness rule that allows post-conviction counsel "time to investigate additional claims that may not appear from the record"); *United States v. Benford*, 574 F.3d 1228, 1231 (9th Cir. 2009) ("[I]neffectiveness of counsel claims usually cannot be advanced without the development of facts outside the original record." (internal quotation marks omitted). By refusing to grant funding and an evidentiary hearing, the district court prevented Chappell from establishing the factual bases for his claims, and Chappell can thus show good cause for raising the claims now. *See Hathaway*, 119 Nev. at 252, 71 P.3d at 506.

B. Defense Counsel were Ineffective for Failing to Investigate and Present Evidence of Chappell's Brain Damage Caused by Prenatal Exposure to Alcohol[4]

Chappell was born to a mother addicted to alcohol, heroin, cocaine, and cigarettes—a mother who spent each day intoxicated, high, or both, supporting her habits by working as a prostitute on the streets of East Lansing, Michigan. 5AA1226-1227 ¶4; 6AA1259 ¶¶12–13; 6AA1288 ¶¶3–4; 6AA1292 ¶3; 6AA1306 ¶3; 6AA1324 ¶15; 6AA1329 ¶8; 6AA1332-1333 ¶¶8–10; 6AA1339 ¶14; 6AA1356-1358 ¶¶4–7, 10; 6AA1363 ¶4; 6AA1385-1386 ¶¶6–9; 26AA6463-6464 ¶¶6, 8, 10; 26AA6457-6458 ¶¶19–21, 23. Her behavior continued unchanged after she became pregnant with Chappell. 5AA1226-1227 ¶4; 6AA1288 ¶4; 6AA1306 ¶3; 6AA1333 ¶10; 6AA1339 ¶14; 6AA1357 ¶6; 6AA1385-1386 ¶¶6–9; 26AA6458 ¶¶20–21. As a result, Chappell was born with Alcohol Related Neurodevelopmental Disorder (ARND), a medical condition that falls under the umbrella of FASD. 6AA1428-1464; 6-7AA1466-1514; 7AA1516-1549. People with ARND have irreversible brain damage caused by prenatal exposure to alcohol and drugs—brain

[4] Claims One and Three.

damage that results in lifelong behavioral consequences. 6AA1428-1464; 6-7AA1466-1514; 7AA1516-1549.

Courts have long recognized the importance of FASD evidence in criminal proceedings. *See, e.g.*, *Trevino v. Davis*, 138 S. Ct. 1793, 1799–1800 (2018) (Sotomayor, J., joined by Ginsberg, J., dissenting from denial of certiorari); *Rompilla*, 545 U.S. at 390–93; *State v. Haberstroh*, 119 Nev. 173, 183–84 & n.22, 69 P.3d 676, 682–84 & n.22 (2003), *as modified* (June 9, 2003); *Williams v. Stirling*, 914 F.3d 302, 313–19 (4th Cir. 2019), *as amended* (Feb. 5, 2019); *Hurst v. State*, 18 So.3d 975, 1007–15 (Fla. 2009); *In re Brett*, 16 P.3d 601, 604–09 (Wash. 2001); *Dillbeck v. State*, 643 So.2d 1027, 1028–29 (Fla. 1994); *see also* American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, (*2003 Guidelines*) 31 Hofstra L. Rev. 913, 1060–61 (2003) (noting that "the permanent neurological damage caused by fetal alcohol syndrome" could "lessen the defendant's moral culpability for the offense or otherwise support[] a sentence less than death"). But the jurors deciding Chappell's guilt and punishment heard no mention of FASD or its devastating consequences. By failing to investigate and present this

evidence, defense counsel provided constitutionally ineffective assistance.

1. Counsel performed deficiently by failing to investigate and present evidence of FASD

Both the federal and state constitutions guarantee effective representation to criminal defendants. An attorney deprives a criminal defendant of this guarantee by performing "below an objective standard of reasonableness." *Means v. State*, 120 Nev. 1001, 1011, 103 P.3d 25, 31–32 (2004); *see Strickland*, 466 U.S. at 686. By failing to investigate and present evidence of FASD to the guilt-phase and penalty-phase juries, counsel performed below this standard.

a. Counsel performed deficiently by failing to investigate red flags suggesting FASD

To provide effective representation, counsel must investigate relevant leads, or "red flags," in the record. *See Rompilla*, 545 U.S. at 387; *Wiggins*, 539 U.S. at 524–25; *Douglas v. Woodford*, 316 F.3d 1079, 1085 (9th Cir. 2003); *see also Strickland*, 466 U.S. at 691 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). But trial counsel before both the 1996 trial and the 2007 penalty rehearing failed

to utilize the abundance of evidence, both in the record and readily available from extra-record sources, showing that: (1) Chappell's mother abused drugs and alcohol while pregnant; (2) Chappell had exhibited symptoms of brain damage his entire life; and (3) FASD was directly relevant to Chappell's offenses. *See Williams*, 914 F.3d at 314–16 (concluding counsel's performance was deficient when evidence suggesting fetal alcohol syndrome—including evidence of brain damage and maternal drinking—was "reasonably available"); *Hurst*, 18 So. 3d at 1009 (similar). Counsel admit that they had no strategic reason for not investigating and presenting this evidence. 9AA2061 ¶7; 9AA2074 ¶5; 7AA1591 ¶7; 8AA1756 ¶6.

(1) Chappell was exposed to drugs and alcohol in utero

Ample evidence was available to counsel in 1996 and 2007 confirming that Chappell's mother abused drugs and alcohol while pregnant. 9AA2061 ¶7; 9AA2074 ¶5. In the record from the 1996 trial is a social-history questionnaire, filled out by defense counsel, noting that Chappell's mother had used alcohol and drugs while pregnant with him. 25AA6154-6155. That record also includes documents showing

Chappell's mother neglected Chappell and his siblings, and she lost custody of all the children when Chappell was a baby. 20AA4996, 21AA5029, 5031. Testimony from Chappell's juvenile caseworker at the 1996 trial further supports both that Chappell's mother was addicted to drugs and alcohol, and that she neglected her children. *See* 15AA3618 ("[M]ost of the major problems had occurred at a younger age and they primarily involved around the fact that [Chappell's] mother was a heroin addict and an alcoholic . . . ."); 15AA3618-3619 ("[A] year before her death, the court—there was a neglect referral to the court because of her ongoing heroin problems and Mrs. Axam, the grandmother of the juvenile, took custody of the three children a year prior to Mrs. Chappell's death in 1987 . . . ."); 15AA3625 (explaining that Chappell lived with his grandmother from the age of two "because of the situation with the mother").

Several witnesses were available to corroborate this evidence of drug and alcohol abuse, many of whom were never contacted by defense counsel. *See* 26AA6458 ¶¶20–21; 6AA1385, 1388 ¶¶6–8, 19; 6AA1288-1290 ¶¶4, 9; 6AA1306 ¶3; 6AA1357 ¶6; 6AA1259-1260 ¶¶12, 15; 6AA1324, 1326 ¶¶15, 23; 6AA1339 ¶14; 6AA1332-1334 ¶¶8–10, 12;

6AA1329 ¶8; 5AA1226-1227, 1237 ¶¶4, 39; 26AA6463-6464, 6467. Among those available witnesses was Louise Underwood, Chappell's great aunt, who reported that Chappell's mother "had a terrible substance abuse problem":

> Shirley first began abusing pills during her late teenage years. She then progressed to drinking alcohol, sniffing powder cocaine, smoking freebase cocaine, and eventually shooting heroin by the time she became pregnant with James. I personally saw Shirley taking pills, drinking alcohol, and abusing cocaine, but she did not shoot heroin in my presence. Shirley abused these substances throughout her pregnancy with James, and I continued to frequently see her intoxicated. Shirley did not change her drug habits during her pregnancy with James. I continued to see track marks all over her arms. Shirley's eyes remained squinted, and she usually seemed like she was just waking up when I saw her at various times of the day or night. Shirley's speech was often slurred throughout her pregnancy.

26AA6458 ¶20; *see also id.* ¶21 (reporting that Shirley Chappell often drank until intoxicated while pregnant). William Richard Chappell, Sr., one of Chappell's potential fathers, reported that Chappell's mother "was a heavy drinker," who "drank alcohol throughout her entire pregnancy with James," smoked one pack of cigarettes each day, and abused heroin. 6AA1385 ¶¶6–8. Similarly, James Wells, a second

potential father, reported that, while pregnant with Chappell, Chappell's mother "abused drugs on a daily basis." 6AA1288 ¶4. Chappell's sisters, Myra Chappell-King and Carla Chappell, recalled hearing adults in their lives relate that Shirley Chappell was addicted to alcohol and heroin and abused those substances while pregnant. 6AA1306 ¶3; 5AA1226-1227 ¶4. And William Earl Bonds, a friend of Chappell's mother, related that

> Shirley's lifestyle did not change at all during her pregnancies. She continued to abuse heroin and cocaine on a daily basis while she was pregnant with James. She also continued to engage in prostitution whenever she was short on cash. Shirley also continued to drink alcohol during her pregnancy with James but not as frequently as she abused other drugs. Shirley drank alcohol a couple times a week, as far as I recall, but not on a daily basis because it was not her drug of choice. Shirley liked hard liquor and usually had several drinks in one sitting when she drank, even while pregnant. Shirley typically abused heroin and cocaine on the occasions when she drank alcohol.

6AA1357 ¶6; *see also* 6AA1339 ¶14 ("Shirley was a drug addict by the time she became pregnant with James, and it is my understanding that she abused heroin throughout her pregnancy with him."); 6AA1333 ¶10 ("It was my impression that Shirley was abusing substances throughout

her pregnancies with James and Myra, because she did not change her behaviors and I observed her drunk or intoxicated on various occasions."); 6AA1259 ¶12 ("[I]t was clear to me that Shirley was a junkie. Besides abusing heroin, Shirley also drank alcohol."); 6AA1324 ¶15 (recounting when she "learned that [Shirley Chappell] had become an alcohol and a drug addict"); 26AA6463 ¶8 ("I used to watch all of Shirley's children for her when she was out running around in the streets. Besides being a drug addict, Shirley was also a prostitute and engaged in other illegal activities.").

(2) From birth Chappell experienced severe cognitive delays and adaptive deficits indicative of FASD

In addition to evidence of Shirley Chappell's addictions, ample evidence was available to counsel of Chappell's lifelong brain dysfunction. For example, the file from trial counsel in 1996 includes forty-one pages of Chappell's school records, which show chronic developmental delays, referrals for special-education services, a severe learning disability, and pervasive adaptive dysfunction throughout Chappell's childhood and early adolescence. 21AA5038-5080. In addition, a school psychologist noted discrepancies between apparent

intelligence and actual functioning that experts would later testify suggested FASD:

> There are indications that this boy has a basically pretty good intellectual ability, but is functioning at a dull normal level.
>
> . . .
>
> James is a ten year old boy who at the present time is functioning in the low average level of intellectual ability where basically he seems to have good intellectual capacity. He does not relate. He is very withdrawn and uses withdrawal as a defense. He has a poor self-concept and there seems to be some rather brittle intellectual controls which will not carry him through in terms of relating to other people.

21AA5075; *see* 6AA229-230; 30AA7333-7334.

The file also included a report from psychologist Lewis Etcoff. 20AA4980-4992; *see also* 7-8AA1741-1754. In his report, Dr. Etcoff noted several signs of brain damage: a significant split between verbal IQ and performance IQ,[5] a severe learning disability, developmental

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[5] *See Poindexter v. Mitchell*, 454 F.3d 564, 579 (6th Cir. 2006) ("[T]he incongruity between the verbal and performance scores suggested an incongruity between [petitioner's] cognitive capacities and behavioral responses, such that in a stressful situation, [the petitioner] was likely to act out in a far more primitive manner than the situation would warrant."); *People v. Superior Court, Tulare County (Vidal)*, 28

delays, and adaptive problems. 20AA4981-4992. Dr. Etcoff even opined that Chappell's problems had a "neurological origin" (though counsel in 1996 and 2007 failed to relate this information to jurors). 20AA4992. Finally, counsel in 2007 had the transcripts of testimony at the 1996 trial. These transcripts include testimony from Chappell's grandmother and his juvenile probation officer, who spoke about Chappell's placement in special-education classes and his speech delay. 15AA3619-3620, 3624, 3636-3637.

In addition to the information already in the record, Chappell's friends and family could have provided a wealth of additional information about Chappell's lifelong cognitive and adaptive delays. This information includes a diagnosis of a learning disability, trouble with executive control (including sensory integration, processing speed, and attention control), problems communicating, struggles with daily-living skills (including hygiene and grooming), and trouble socializing. 5AA1218-1219, 1222 ¶¶4–8, 18; 6AA1262-1263 ¶¶2–7; 6AA1268 ¶¶7–9;

Cal. Rptr. 3d 529, 543 (2005) (explaining that a greater than ten to fifteen point disparity between verbal and performance IQ is "an indication of neurological insult, meaning that [petitioner] had a very specific deficit that was almost certainly brain based").

6AA1294 ¶¶10–13; 6AA1301-1302 ¶¶2, 7; 6AA1325 ¶¶18–19; 6AA1339-1340 ¶16; 6AA1343-1344, 1346 ¶¶5–8, 15; 26AA6448 ¶¶2–3; 26AA6439-6441 ¶¶1, 3–8; 5AA1227-1228 ¶¶5–7, 9; 5AA1239-1243 ¶¶3–10, 12, 17; 5-6AA1250-1251 ¶¶2–4; 6AA1377-1380 ¶¶28–39, 41; 6AA1306, 1312-1318 ¶¶4, 26–37, 41–44, 50; 6AA1348-1352 ¶¶4–11, 13, 15–23; 6AA1358-1359 ¶¶8, 12; 26AA6458 ¶22; 6AA6465-6467 ¶¶14–19, 25.

b. Counsel's failure to research FASD constituted deficient performance

Given the abundance of available information about Chappell's prenatal exposure to drugs and alcohol and his cognitive delays, effective counsel would have researched FASD—research that in either 1996 or 2007 would have uncovered ample relevant information. *See Hinton*, 571 U.S. at 273 ("Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence." (quoting *Harrington v. Richter*, 562 U.S. 86, 106 (2011)); *Duncan*, 528 F.3d at 1235 (criticizing attorney for not consulting expert and emphasizing the "importan[ce]" of "counsel . . . seek[ing] the advice of an expert when he has no

knowledge or expertise about the field"); *see also Dugas*, 428 F.3d at 328–32; *In re Brett*, 16 P.3d at 607.[6]

Peer reviewed literature going back decades has found a link between prenatal alcohol exposure, its resultant brain damage, and an inability to control criminal impulses. In August 1996, two months before Chappell's trial, the Centers for Disease Control published perhaps the most well-known of those studies, Streissguth et al., *Understanding the Occurrence of Secondary Disabilities in Clients with Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects (FAE)*, Final Report to the Centers for Disease Control and Prevention (CDC), August, 1996, Seattle: University of Washington, Fetal Alcohol & Drug Unit, Tech. Rep. No. 96-06 (1996). 6AA1473-1474; 30AA7313-7314.

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[6] As the district court pointed out in its order, counsel presented some expert testimony in 2007 (also in 1996). 31AA7582; 1516AA3699-3770. But these experts were not qualified—or asked—to evaluate Chappell for FASD. *See Williams*, 914 F.3d at 307, 313–19 (concluding experienced counsel were ineffective—despite hiring a social worker, clinical neuropsychologist, clinical psychiatrist, neurologist, and forensic psychiatrist—because counsel failed to hire FASD expert); *In re Brett*, 16 P.3d at 608 ("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."); *see also Frierson v. Woodford*, 463 F.3d 982, 992 (9th Cir. 2006); *Caro v. Calderon*, 165 F.3d 1223, 1226 (9th Cir. 1999).

Among the findings in this study was that the brain damage seen in individuals with FASD leads to trouble with the law. 6AA1473-1474; 30AA7313-7314.

Information was also readily available from traditional legal resources. A number of articles were published before March 2007 (the time of Chappell's penalty rehearing), explaining the link between criminal activity and brain damage caused by FASD. *See, e.g.*, Sharon G. Elstein, *Children Exposed to Parental Substance Abuse: The Impact*, 34-Feb. Colo. Law. 29, 30–31 (2005) (reporting that "[p]renatal alcohol exposure has long-term effects on a child's cognitive abilities" and "can lead to behavior management problems, and emotional and social problems as a child grows up"); Judith A. Jones, *Fetal Alcohol Syndrome-Contrary Issues of Criminal Liability for the Child and His Mother*, 24 J. Juv. L. 165, 172–74 (2004) (discussing link between FASD and criminal behavior); Kathryn Page, Ph.D., *The Invisible Havoc of Prenatal Alcohol Damage*, 4 J. Center for Families, Child. & Cts. 67, 75–80 (2003) (describing "predisposition" in individuals with FASD "to nonproductive or even criminal behavior"). There were also numerous pre-2007 published opinions noting the relevance of FASD diagnoses in

criminal proceedings. *See, e.g.*, *Rompilla*, 545 U.S. at 392–93 (capital trial in 1984); *Haberstroh*, 119 Nev. at 183 & n.22, 69 P.3d at 683 & n.22 (capital trial in 1987); *Hurst*, 18 So. 3d at 1010–13 (capital trial in 2000); *In re Brett*, 16 P.3d at 608 (capital trial in 1992); *see also Sullivan v. Zebley*, 493 U.S. 521, 533–34 n.13 (1990) (describing fetal alcohol syndrome as a "well-known childhood impairment").[7]

Finally, a simple Internet search by counsel—at least before the 2007 penalty rehearing—would also have revealed relevant information. For example, the National Organization on Fetal Alcohol Syndrome had available factsheets on FASD for the general population, NO-FAS, *FASD: What Everyone Should Know*, https://web.archive.org/web/20060926011030/http://www.nofas.org/MediaFiles/PDFs/factsheets/everyone.pdf (archived Sept. 26, 2006), and for people working in the criminal justice system, NO-FAS, *FASD: What the Justice System Should Know*, https://web.archive.org/web/20060926011055/http://www.nofas.org/MediaFiles/PDFs/factsheets/justice.pdf (archived Sept. 2, 2006). Both of these factsheets note the lifelong difficulties faced by

[7] By the early 2000s, a list of some of these cases was also available through the University of Washington. 30AA7312.

individuals with FASD, including problems with judgment and reasoning, social immaturity, and difficulties with impulse control. Other resources would have provided counsel with similar information. *See, e.g.*, The Asante Centre for Fetal Alcohol Syndrome, *Legal Resources*, https://web.archive.org/web/20070301165728/http://www.asantecentre.org/legal.html (archived March 1, 2007) (providing list of resources on FASD and the law for criminal practitioners); Wikipedia, *Fetal Alcohol Spectrum Disorder*, https://web.archive.org/web/20051215000000/http://en.wikipedia.org/wiki/Fetal_alcohol_spectrum_disorder (archived Dec. 15, 2005) (describing consequences of prenatal exposure to alcohol, including "stunted physical and emotional development, behavioral problems, [m]emory and attention deficits, impulsiveness, [and] an inability to reason from cause to effect").

2. Counsel's deficient performance prejudiced Chappell

Because of counsel's deficient performance, no juror heard evidence of Chappell's FASD and brain damage. Experts have now administered testing, prepared reports, and presented testimony that counsel in 1996 and 2007 failed to do. Had counsel presented this

evidence to jurors, there is a reasonable probability of a different result in both the penalty phase and guilt phase of Chappell's trials. *See Strickland*, 466 U.S. at 694; *Means*, 120 Nev. at 1011, 103 P.3d at 32.

Dr. Paul Connor performed a neuropsychological evaluation over the course of two days. 29-30AA7204-7263; 6AA1428-1464. The results of that evaluation included several indications of FASD. For example, Chappell's intelligence testing revealed "splits" in intelligence over different domains, which is consistent with unequal brain development seen in individuals exposed to alcohol in utero. 29AA7233-7236, 7239-7234; 6AA1432-1434. The results of academic testing, both current and prior, also were consistent with FASD: Chappell consistently has performed poorly in mathematics, which, because of its abstract nature, generally is difficult for individuals with FASD. 29-30AA7241-7242, 7254-7255; 6AA1433. Chappell also exhibits "considerable difficulties" in executive functioning, such as planning and problem solving. 6AA1435-1436. Finally, Chappell has substantially impaired adaptive functioning, displaying child-like coping skills and performing poorly on low-structure tasks. 29-30AA7244-7254; 6AA1436-1437. In sum, Chappell displayed deficits in nine domains of functioning, well above

the three domains needed for a diagnosis of FASD. 30AA7256-7257; 6AA1438-1439.

Dr. Julian Davies diagnosed Chappell with ARND. 30AA7263-7299; 7AA1516-1549. In diagnosing Chappell, Dr. Davies relied on extensive evidence both of maternal drinking and of brain damage, including the results of Dr. Connor's neurological evaluation and the results of a Quantitative EEG. 7AA1518-1519. Dr. Davies also considered other potential causes of Chappell's brain damage: drug and alcohol abuse, genetic risks, prenatal drug exposure, environmental contaminants, and childhood trauma. 30AA7285-7286; 7AA1541-1544. None of these differential diagnoses, however, adequately explains all of Chappell's symptoms. 30AA7285-7286; 7AA1541-1544.

Finally, Dr. Natalie Brown confirmed that Chappell's ARND diagnosis was consistent with all the material she reviewed and her own interview of Chappell. 30AA7301-7369; 6-7AA1428-1464. She then explained the effect that ARND had on Chappell's life. 30AA7301-7369; 6-7AA1428-1464. Because of ARND and his childhood traumas, Chappell's coping skills at the time of the homicide were equivalent to those of a twelve-year-old child. 30AA7344-7347; 6AA1489-1498.

Chappell also exhibited significant dysfunction in executive skills, such as planning and problem solving. 30AA7349-7355; 6-7AA1490, 1493-1495. And, because of the way that alcohol affected the formation of his hypothalamic-pituitary-adrenal system, Chappell from birth has been hyper-reactive to stress. 30AA7343, 7349-4350, 7355; 6AA1497. In combination, these factors substantially impair Chappell's ability to plan, make rational decisions, and control his behavior and emotions. 30AA7324-7357; 6AA1489-1498. Dr. Brown added that Chappell's ARND likely contributed to his own drug addiction; prenatal exposure to alcohol and drugs actually changes the structure of the brain, she explained, "hard-wiring" individuals with FASD with a biological craving for addictive substances throughout their lives. 30AA7356-7357; 6AA1498-1499.

a. Chappell's FASD is compelling mitigating evidence fundamentally different than anything else presented to the penalty-phase jury

The jury deciding Chappell's sentence in 2007 heard nothing about FASD or brain damage. And the State in fact admitted it was "tough to know what effect [FASD evidence] would have on a jury."

30AA7372-7373. But the district court nevertheless concluded that this evidence would have made no difference to the penalty verdict. 31AA7585. The district court's conclusion is incorrect; as several courts have noted, FASD is powerful mitigation evidence, unlike any other evidence jurors might hear. *See, e.g.*, *Trevino*, 138 S. Ct. at 1799–1800 (Sotomayor, J., joined by Ginsberg, J., dissenting from denial of certiorari) (explaining that FASD evidence "had remarkable value" and was "completely different in kind from any other evidence that the jury heard"); *Williams*, 914 F.3d at 313–19 (characterizing evidence of fetal alcohol syndrome as fundamentally different than other mitigating evidence); *see also* American Bar Association, *2003 Guidelines*, 31 Hofstra L. Rev. 913, 1060–61 (2003) (noting that "the permanent neurological damage caused by fetal alcohol syndrome" could "lessen the defendant's moral culpability for the offense or otherwise support[] a sentence less than death"). This is because evidence of FASD can establish "both *cause and effect*" for a defendant's actions; it provides a causal link between prenatal exposure to alcohol, resulting brain damage, and criminal activity. *Williams*, 914 F.3d at 315; *see Trevino*, 138 S. Ct. at 1799–1800 (Sotomayor, J., joined by Ginsberg, J.,

dissenting from denial of certiorari). "Without this information, the jury could have assumed that [Chappell] was an individual who—despite challenges in his home life, education, and mental health—was generally responsible for his actions, and therefore would have assigned greater moral culpability to him for his criminal behavior." *Williams*, 914 F.3d at 318.

The district court's conclusion to the contrary rests on an incorrect premise—that FASD evidence was cumulative to other evidence presented at the 2007 penalty rehearing. 31AA7582-7583, 7585-7586. The jury in 2007 heard *nothing* about FASD. Over the course of the five-day penalty trial, not one witness, lay or expert, mentioned brain damage or the effects of prenatal exposure to alcohol. All the jury heard were statements about some of the symptoms Chappell had exhibited, which the experts tied to a personality disorder and drug addiction, *not* brain damage. 19-20AA4735-4737, 4746-4749, 4751-4754, 4762-4764, 4767, 4772, 4815, 4828-4829; *see* 30AA7260-7261 (testimony from Dr. Paul Connor explaining difference between symptoms and cause); *see*

also Williams, 914 F.3d at 315.[8] These were completely inadequate explanations for Chappell's symptoms. Chappell exhibited signs of brain damage his entire life, long before his own drug use could have affected his brain. 30AA7331-7332; 7AA1541-1544. And evidence of a defendant's personality disorder is usually considered to be aggravating, not mitigating, of his moral culpability. *See Harris v. Pulley*, 885 F.2d 1354, 1381–83 (9th Cir. 1988) (noting that the "ordinary citizen" would not consider evidence of personality disorder as mitigation like other mental disorders); *see also Bejarano v. State*, 106 Nev. 840, 842–43, 801 P.2d 1388, 1390 (1990) (concluding that counsel's decision to exclude evidence of personality disorders was not deficient, as it "may have inflamed the jury even more"). Most importantly, the district court ignored the crucial difference between this testimony and FASD testimony that counsel should have presented: unlike individuals

[8] In addition, neither of the experts was qualified to testify about FASD or brain damage, 6AA1423; 19AA4564-4656, 4567, and neither performed the tests necessary to assess neurological dysfunction, 30AA7259-7262; 19AA4567; 6AA1421-7422 ¶¶7, 12, 14. Counsel hired these experts to testify about psychological, not neurological, conditions, and counsel did not even properly prepare them to perform that work. 19AA4568, 4578-4584; 19-20AA4724-4725, 4781-4782, 4786-4787, 4799-4805; 6AA1421-1422 ¶¶9, 10, 12.

who develop drug addictions or psychological disorders as adults, Chappell because of his mother's actions was *born* already with a damaged brain, which had a devastating effect on his life trajectory. *See Williams*, 914 F.3d at 305, 318; *Trevino*, 138 S. Ct. at 1799–1800 (Sotomayor, J., joined by Ginsberg, J., dissenting from denial of certiorari).

The district court further noted that the jury found as mitigating factors that "Chappell was born to a drug/alcohol addicted mother" and "suffered a learning disability." 31AA7583; 4AA914-918. But defense counsel introduced *no* evidence of maternal drinking or alcoholism. The jurors did hear some isolated statements about Shirley Chappell's *drug* addiction. 18AA4295 at 255-256, 4316 at 340. But, as experts explained at the evidentiary hearing, alcohol exposure affects developing fetuses differently than other kinds of drugs. 30AA7285-7286, 7310-7311, 7322-7323. Although heroin, cocaine, and tobacco are still harmful, "alcohol is definitely the more worrisome exposure in terms of being the most damaging to the developing brain." 30AA7285.

In any event, even had defense counsel introduced evidence that Shirley Chappell was an alcoholic, the evidence would not have

undermined the prejudicial effect of counsel's deficient performance. There is a fundamental difference between knowing that Chappell's mother was addicted to drugs and alcohol and knowing that, because of her addiction, Chappell's mother *permanently damaged the brain of her unborn child*, impacting his entire life. *See Williams*, 914 F.3d at 307–08, 315–16 (concluding petitioner was prejudiced despite evidence showing mother's alcoholism). None of the jurors could have known, without expert testimony, of the devastating consequences of that diagnosis. Similarly, without experts to explain the consequences of FASD for Chappell's life and criminal offenses, simply learning he had a learning disability as a child is unlikely to have had much effect on the jury's deliberations. *See Williams*, 914 F.3d at 315–16.

b. Had counsel performed effectively, there is a reasonable probability of a different result in the guilt phase

Counsel's failure to investigate and present evidence of FASD also prejudiced him in the guilt phase. The jurors found Chappell guilty of first-degree murder, a specific-intent crime. *Hancock v. State*, 80 Nev. 581, 583, 397 P.2d 181, 181–82 (1964); *see Wilson v. State*, 127 Nev. 740, 746, 267 P.3d 58, 61 (2011) (explaining that felony murder in

Nevada requires intent to commit the underlying felony).[9] But the trial court also instructed the jurors on second-degree murder and voluntary manslaughter. 25-26AA6233-6263. Because of the inability of people with FASD to cope effectively with stress and other negative emotions, 6AA1498; 30AA7343-7355, Chappell's disorder undermines evidence of the mental state required for first-degree murder. *See Ewish v. State*, 111 Nev. 1365, 1367, 904 P.2d 1038, 1039 (1995) (reversing conviction for specific-intent crime when defendant "suffered mental impairment, had the mental age of a thirteen year-old, was susceptible to control by others, including the co-defendant, and was intoxicated at the time of the arson offenses"); *Jennings v. Woodford*, 290 F.3d 1006, 1013–19 (9th Cir. 2002) (concluding counsel was ineffective for failing to investigate mental-health defense that may have negated mental state necessary to convict for first-degree murder); *Dillbeck*, 643 So.2d at 1028–29 ("Evidence concerning certain alcohol-related conditions has long been admissible during the guilt phase of criminal proceedings to show lack of specific intent.").

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[9] The jurors signed a general verdict form, not selecting a theory for first-degree murder. 4AA944-946.

In addition, the State introduced in the guilt phase evidence of Chappell's drug use and turbulent relationship with the victim. Evidence of FASD would have provided a causal explanation for Chappell's drug addiction—because Chappell's mother exposed him to drugs and alcohol in utero, he was hard-wired to crave those substances throughout his life. 6AA1498-1499; 30AA7356-7357. And, just as Chappell's impaired executive control impacted his actions on the day of the homicide, it influenced his previous assaults on the victim. 6AA1498-1499; 30AA7355-7356. Had counsel introduced this evidence, there is a reasonable probability of a different result. *See Duncan*, 528 F.3d at 1235 (concluding defense counsel was ineffective for failing to present available evidence undermining state's evidence); *Troedel v. Wainwright*, 667 F. Supp. 1456, 1461–62 (S.D. Fla. 1986) (same), *aff'd sub nom. Troedel v. Dugger*, 828 F.2d 670 (11th Cir. 1987).

3. Conclusion

Counsel ignored copious evidence, some already in their files and the rest readily available, strongly suggesting Chappell's mother damaged his developing brain by drinking and abusing drugs while pregnant. Because there is a direct link between this sort of brain

damage (FASD) and an inability to control criminal impulses, counsel's failure to present this evidence was deficient and prejudicial. *See Bemore v. Chappell*, 788 F.3d 1151, 1171 (9th Cir. 2015).

C. Chappell is Actually Innocent[10]

This Court has explained that a petitioner overcomes the procedural bars if "the petitioner makes a colorable showing he is actually innocent of the crime or is ineligible for the death penalty." *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); *see Bejarano v. State*, 122 Nev. 1066, 1072, 146 P.3d 265, 270 (2006); *Leslie v. Warden*, 118 Nev. 773, 780, 59 P.3d 440, 445 (2002). In that situation, failure to consider the claims "amounts to a fundamental miscarriage of justice." *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537; *see Bejarano*, 122 Nev. at 1072, 146 P.3d at 270; *Leslie*, 118 Nev. at 780, 59 P.3d at 445.

Chappell can show "actual innocence" of both the death penalty and his crimes. The sole aggravating factor supporting Chappell's death sentence is invalid, making him ineligible for the death penalty.

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[10] Claims One, Three, Four, and Eleven.

Similarly, Chappell has made a colorable showing that, in light of the compelling mitigation evidence presented in the petition, no reasonable juror would have found him death-eligible, especially if instructed on the correct burden of proof under *Hurst*. *See Bejarano*, 122 Nev. at 1072, 146 P.3d at 270; *State v. Bennett*, 119 Nev. 589, 596–97, 81 P.3d 1, 6–7 (2003); *Leslie*, 118 Nev. at 780, 59 P.3d at 445. The State also failed to prove either felony underlying the charge of felony murder (which also make up separate charges) and failed to prove premeditated and deliberate murder. Finally, Chappell's severe mental illness renders him ineligible for the death penalty.

1. Chappell is innocent of the death penalty

A petitioner is "actually innocent" of the death penalty if "there is a reasonable probability that absent [an invalid] aggravator the jury would not have imposed death. . . ." *Leslie*, 118 Nev. at 780, 59 P.3d at 445. There is more than a "reasonable probability" here; there is a certainty. By the time of the penalty rehearing, only one possible aggravating factor remained: that the murder was committed in furtherance of a sexual assault. *See* NRS 200.033(13). 4AA914-918. And the State supported its presentation of this invalid aggravating factor

with scant, misleading evidence—which defense counsel failed to adequately rebut.

a. Scant evidence supports the aggravating factor

At the time of Chappell's trial, sexual assault was defined as, "sexual penetration . . . against the victim's will or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct." NRS 200.366(1) (1995). But the State presented evidence *only* of sexual contact between Chappell and Panos, which Chappell also admitted to. *See Carter v. State*, 121 Nev. 759, 762, 121 P.3d 592, 594 (2005) ("[K]nowledge of lack of consent is an element of sexual assault."). There was no evidence that the sexual encounter differed from every previous sexual encounter within the ten-year relationship. Dr. Sheldon Green, the chief medical examiner for Clark County, Nevada testified that he found no injuries consistent with sexual assault. 18AA4274. Dr. Todd Cameron Grey, chief medical examiner for the state of Utah, also testified to no signs of forcible sexual assault. 19AA4655.

Moreover, additional evidence was readily available showing that the sexual encounter was consensual. Clare McGuire and Dina Richardson were friends of Panos who testified for the State both at Chappell's first trial and at the penalty rehearing. Both could have also testified for Chappell about the nature of his turbulent relationship with Panos, involving frequent separations always followed by reconciliation. 7AA1733-1734; 17AA4222-4224.

Reasonably effective trial counsel would have interviewed these witnesses and presented their testimony. By failing to do so, Chappell's counsel rendered ineffective assistance. *See Strickland*, 466 U.S. at 694; *Means*, 120 Nev. at 1011, 103 P.3d at 32.

b. The scant evidence that the State did present was misleading

(1) Bruises

The State used bruising on Panos to argue the sexual encounter between her and Chappell was nonconsensual. 16AA3851. But the "evidence" they presented supporting that contention was invalid and contradictory.

Dr. Green performed the autopsy on Panos and testified at Chappell's preliminary hearing. 18AA4271-4272; 9AA2126-2146. At that hearing, he testified that medical examiners classify bruises as recent, intermediate, or old, based on their color. 9AA2131. But it is impossible, he added, to opine with any more specificity. *Id.* As for the bruising on Panos, the most he could say was that they occurred on the same day she died. *Id.* Dr. Green repeated this testimony during Chappell's trial. 12AA2838-2840. At the penalty rehearing, however, Dr. Green substantially narrowed this window—Panos's bruising, he said, occurred roughly fifteen to thirty minutes before her death. 18AA4275 at 176.

Dr. Green did not explain why he changed his testimony or the testing he relied on. Nor could he. Scientists generally agree that experts "cannot reliably predict the age of a bruise by its color." Laura Mosqueca, et. al., *The Life Cycle of Bruises in Older Adults*, 53 J. of Am. Geriatrics 1532, 152 (2005); *see also* Ari J. Schwartz & Lawrence R. Ricci, *How Accurately can Bruises be Aged in Abused Children? Literature Review and Synthesis*, 97 Pediatrics 254, 256 (1996) ("The available literature does not permit the estimation of a bruise's age

with any precision based solely on color. Even for the practitioner to state … that a particular bruise is 'consistent with' a specific age implies a level of certainty not supported by the literature.").

Defense counsel failed to impeach Dr. Green by questioning him about his change in testimony—in contrast to the original trial, sexual assault was the only available aggravating factor at the penalty rehearing. And defense counsel failed to do even minimal investigation and research undermining the testimony. These failures allowed the prosecution to craft a novel theory supporting the sole aggravating factor. Trial counsel's performance fell below an objective measure of reasonableness and prejudiced Chappell. *See Strickland*, 466 U.S. at 686; *Means*, 120 Nev. at 1011, 103 P.3d at 31–32.

(2) Presence of sperm

The State also presented misleading evidence that the presence of DNA in Panos's vagina conflicted with Chappell's testimony that they had consensual vaginal intercourse, but he did not ejaculate. *See* 14AA3309-3312, 3364-3365. During the guilt phase, Criminalist Terry Cook testified that Chappell could not be excluded as the source of sperm detected on vaginal swabs taken from Panos. 13AA3208-3211,

3219-3220. During the penalty rehearing, this testimony subtly changed; Detective James Vaccaro testified that "the DNA of James Chappell was found in the form of *semen* inside the vagina of Deborah Panos." 20AA4897 at 80 (emphasis added); *see* 20AA4897-4898 at 80-81 (testifying that the presence of semen meant that Chappell ejaculated). The State then questioned a defense witness, Dr. Louis Etcoff, about this testimony:

> Q: How about the fact that the DNA evidence in this case showed that there was semen in the vaginal vault of the victim. That would directly contradict [Chappell's] story that he did not ejaculate in the victim. Wouldn't it?
>
> A: Yes. If it was his semen. Yes.
>
> Q: It makes the whole story afterwards just sound kind of bogus?
>
> A: Yes, it does.

20AA4805; *see also* 19AA4659 at 26-27 (similarly questioning second defense expert). And the State relied heavily on this testimony during closing argument. 16AA3852-3853; 20AA4958 at 137-139.

All of this testimony was incorrect and the argued implication misleading. *Sperm*, not semen, was found in Panos. 13AA3250. Semen

and sperm are not the same. Semen, a fluid deposited when a man ejaculates, may or may not contain sperm. DifferenceBetween.net, *Difference Between Sperm and Semen*, http://www.differencebetween.net/science/health/difference-between-sperm-and-semen/. Sperm, on the other hand, can be present in the absence of semen or ejaculation. *Id.* Defense counsel, however, failed to explain this difference between semen and sperm, failed to object when the State elicited scientifically incorrect testimony, and failed to correct the misimpression made in the mind of their own expert witnesses. Further, counsel failed to introduce testimony that Panos had unprotected sex the night before with her then boyfriend, Willie Wiltz.

This incorrect and misleading testimony was unsurprising, as Vaccaro was a police officer with no training in medicine or forensic science, and Cook had a history of falsifying his credentials. Over the course of six years, Cook wildly varied his testimony about the number of times he has been called as an expert, in ways inconsistent with the realities of the criminal justice system. 24AA5886; 24AA5890; 24AA5894-5897; 24AA5900-5903; 24AA5922. Cook has also admitted losing and mishandling evidence, 24AA5990-5905; 24AA5926-5930;

24AA5932-5933, varied on the amount of blood found on an item in the course of the same case, 24AA5940, described science as "subjective," 24AA5924, admitted to not taking notes during the course of his work, 24AA5923-5924, and struggled to pass proficiency examinations, 24AA5942-5945. Defense counsel failed to object to either witness's testimony or cross-examine them on these grounds.

c. The State failed to show that a sexual assault occurred immediately before, during, or after the homicide

Because the State sought to use sexual assault to obtain a death sentence, it was required to prove that "nonconsensual sexual penetration" occurred "immediately before, during or immediately after the commission of the murder." NRS 200.033(13). This temporal requirement conflicts with the evidence—Panos was fully dressed when she died. 19AA4655 at 11.

The State made no attempt to resolve this inconsistency. In fact, on appeal from the partial grant of relief during the first state post-conviction proceeding and during closing argument of the penalty rehearing, the State argued that Chappell formed the intent to kill Panos long after the sexual encounter. *See* 20AA4943 at 77-78 (arguing

that Chappell killed Panos fifteen to thirty minutes after the sexual assault); 24AA5981 (arguing that Chappell killed Panos after completing sexual act, leaving the home, discovering a letter, then returning to the home). If Chappell formed the intent to kill after the sexual encounter, then the murder could not have occurred during the perpetration of a sexual assault. *See* NRS 200.033(13). *Cf. Nay*, 123 Nev. at 333, 167 P.3d at 435 (concluding that elements of felony murder are not satisfied when intent to commit underlying felony arises after homicide).

d. The sexual-assault aggravating factor fails to narrow the class of eligible defendants

Under the State and federal Constitutions, an underlying felony that elevates a homicide to felony murder cannot also function as an aggravating factor for a capital sentence. *See McConnell v. State*, 120 Nev. 1043, 1069–70, 102 P.3d 606, 624–25 (2004); *see also Lowenfield v. Phelps*, 484 U.S. 231, 241 (1988). And even an uncharged felony cannot support a death sentence if it "occurs during an indivisible course of conduct having one principal criminal purpose." *McConnell*, 120 Nev. at

1069–70, 102 P.3d at 624–25. That is because duplicating the felony fails to adequately narrow the class of death-eligible defendants. *Id.*

During the original trial and initial post-conviction proceedings in district court, the State argued that Chappell's alleged robbery, burglary, sexual assault, and murder were part of one course of conduct. 16AA3784, 3788; 25AA6220; 25AA6069. Under *McConnell*, then, sexual assault could not support Chappell's death sentence. Likely recognizing this problem, the State changed course after *McConnell* and instead insisted that any sexual assault occurred separately from the homicide. 24AA5981. As explained above, this also invalidates the aggravating factor, as it did not occur "immediately before, during or immediately after" the killing. NRS 200.033(13).

e. Introduction of the DNA evidence violated Chappell's rights under the Confrontation Clause

Paula Yates, an employee with Cellmark Laboratory, performed the DNA testing in Chappell's case. She did not testify, however. Neither did Yates's partner at the crime lab, Lisa Foreman. 13AA3205-3206. Instead, an employee of the Las Vegas Metropolitan Crime Lab

testified, Thomas Whal. Whal had nothing to do with testing Chappell's DNA or creating the report. But defense counsel did not object.

The Confrontation Clause prohibits the State from introducing testimonial hearsay unless the declarant is unavailable and the defendant has had a prior opportunity for cross-examination. *See Crawford*, 541 U.S. at 53–56. When the State introduces scientific reports, the Confrontation Clause requires the State to present testimony from the individual who created the report. *See Bullcoming v. New Mexico*, 564 U.S. 647, 658–65 (2011). Introducing the report through Wahl—instead of Yates—violated Chappell's rights under the Confrontation Clause.[11] In addition, counsel's failure to object or assert Chappell's rights under the Confrontation Clause was deficient. In light of the confusion in DNA evidence and misleading testimony, this deficient performance prejudiced Chappell.

[11] To the extent that a plurality of the Supreme Court held differently in *Williams v. Illinois*, 567 U.S. 50, 56 (2012), the decision was wrongly decided and does not apply to Chappell. *See Stuart v. Alabama*, 139 S. Ct. 36, 36–37 (2018) (Gorsuch, J., joined by Sotomayor, J., dissenting from the denial of cert.).

f. Counsel were ineffective for failing to request a jury instruction on mistaken consent

A reasonable but mistaken belief of consent is a defense to the crime of sexual assault under Nevada law. *See Carter*, 121 Nev. at 766, 121 P.3d at 594; *Honeycutt v. Nevada*, 118 Nev. 660, 670, 56 P.3d 362 (2002). The trial court must instruct the jury about mistaken consent if the defendant requests the instruction. *See Crawford v. State*, 121 Nev. 744, 751, 121 P.3d 582, 586 (2005).

The defense presented ample evidence to support Chappell's reasonable belief that the sexual intercourse was consensual. Dr. Etcoff testified that, in his forensic interview, Chappell related that the sex was consensual and that he, not Panos, chose to end the encounter. 20AA4804. Neither Dr. Grey nor Dr. Green found any physical evidence of sexual assault. 19AA4655 at 9-10. And Dr. Danton testified that, based on his analysis of the relationship history between Chappell and Panos, the sex was likely consensual. 19AA4573-4574. Had counsel performed adequately in interviewing and presenting witnesses, Panos's friends would have confirmed that she and Chappell frequently broke up and resumed their relationship with sex. 7AA1733 ¶¶3-4, 8.

The defense claimed that Chappell and Panos had consensual sex prior to her death. Because a jury instruction was available making clear to the jury that reasonable belief in consent is a defense to a charge of sexual assault, it was ineffective for counsel not to request it.

g. Conclusion

The State during the 1996 penalty trial sought to prove four aggravating factors. By the time of the 2007 penalty rehearing, the State had been forced to abandon all but one. A combination of trial court errors, prosecutorial misconduct, and ineffective assistance prevented anyone from recognizing that this factor, too, was invalid.

2. Chappell is innocent of the crimes of conviction

Chappell was convicted of burglary, robbery, and first-degree murder. 4AA944-946. The evidence supporting each of these charges was insufficient for conviction.

a. Burglary

Nevada law criminalizes entering *someone else's* home "with the intent to commit grand or petit larceny, assault or battery on any person or any felony." NRS 205.060; *see State v. White*, 130 Nev. 533, 538–39, 330 P.3d 482, 485–86 (2014) (holding that a person cannot

burglarize their own home). The State failed to prove either that Chappell intended to commit a felony when he entered or he did not live in the trailer with Panos.

Chappell, like he had done on other occasions, simply entered his home through a window. *See* 14AA3307-3308, 3359-3360. The State introduced no evidence that Chappell entered the home in a criminal or surreptitious manner. 12AA2790-2791, 2796-2797; 13AA3169-3170 (stipulation); 6AA1414-1415 (photo of window). What the evidence *did* show was Chappell had lived with Panos for years, sharing the home with their three children. 14AA3269-3270, 3290-3291, 3297.

Moreover, ample additional evidence was available supporting the fact that Chappell lived in the trailer.[12] Wilfred Gloster, Jr, Panos's friend, could have testified Chappell was living with Panos in Las Vegas:

[12] Defense counsel were ineffective for not presenting this evidence to the jury.

A few weeks after meeting Debbie in Las Vegas, she told me that she was going to buy James a bus ticket so that he could come to Las Vegas and live with her and their children. I told Debbie that it was a terrible idea and reminded her of all of the reasons that she needed to move on with her life. I tried talking her out of it to no avail. Debbie's mind was made up and nothing was going to stop her from moving forward with her plan.

Shortly after the bus ticket discussion, I learned that Debbie had moved James into her trailer home in Las Vegas. Debbie's best friend, Clare McGuire, was a close friend of mine, so I had some opportunities to interact with Debbie. I expressed my disappointment in Debbie's decision to move James to Las Vegas, and she could not defend her actions. It seemed like she just wanted to be with James.

7AA1588 ¶¶ 4–5. What's more, Gloster once encountered Chappell entering the trailer through the window, and a responding police officer warned Gloster that Chappell, as a resident of the home, could enter anyway he chose. *Id.* ¶6. And, as far as Gloster knew, Panos never filled out paperwork removing Chappell's name as a resident at the trailer. 7AA1589 ¶7; *see also* 17AA4223 ¶10; 17AA4219 ¶12; 7AA1733-1734 ¶¶8-9. Finally, counsel's own files contained a letter from the City of Las Vegas Municipal Court, dated August 1995, addressed to Chappell at the residence he shared with Panos. 16AA3877-3878.

The State's failure to prove either that Chappell entered with intent to commit a felony or he did not live in the home requires reversal of Chappell's burglary and murder convictions.

b. Robbery

Nevada defines robbery as "[t]he unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property." NRS 200.380. A taking is by means of force or fear if force is used to: (1) "obtain or retain possession of the property"; (2) "prevent or overcome resistance to the taking"; or (3) "facilitate escape." NRS 200.380.

The State theorized Chappell had robbed Panos because, after her death, he took her car. But the State presented no evidence contradicting Chappell's testimony he took the car as an afterthought, not knowing what else to do. 14AA3317-3321. Because Chappell's intent to take the car did not arise until after force had been used against Panos, there was no joint operation of act and intent necessary to constitute the crime of robbery. *See Nay v. State*, 123 Nev. 326, 333, 167 P.3d 430, 435 (2007) ("Robbery does not support felony murder where the evidence shows that the accused kills a person and only later forms the intent to rob that person."); *accord Phillips v. Woodford*, 267 F.3d 966, 982 (9th Cir. 2001).

c. First-degree murder

The State argued two theories of first-degree murder, 4AA838-843; 6AA1299, felony murder and premeditated and deliberate murder. *See* NRS 200.030(l)(a), (1)(b). But Chappell cannot be guilty of felony murder because the State failed to prove either of the underlying felonies. As for premeditated and deliberate murder, the trial court failed to properly instruct the jury on the elements of the offense. And the evidence presented does not come close to establishing the crime. Chappell, a brain-damaged man, killed Panos in a fit of jealous rage—establishing, at most, second-degree murder or voluntary manslaughter. *See* NRS 200.030, 200.050; *Ewish*, 111 Nev. at 1367, 904 P.2d at 1039 (reversing conviction for specific-intent crime when defendant "suffered mental impairment, had the mental age of a thirteen year-old, was susceptible to control by others, including the co-defendant, and was intoxicated at the time of the arson offenses").

d. Double jeopardy

Even had the State introduced sufficient evidence of the underlying felonies, they still would be invalid. Because an underlying felony is a lesser-included offense within felony murder, the State

cannot, consistently with the Double Jeopardy Clause, obtain valid convictions for both. *See Whalen v. United States*, 445 U.S. 684, 693–94 (1980) (concluding that Double Jeopardy Clause prohibits consecutive sentences for rape and for a killing committed in the course of the rape, as a "conviction for killing in the course of a rape cannot be had without proving all the elements of the offense of rape"); *Harris v. Oklahoma*, 433 U.S. 682, 682–83 (1977) ("When . . . conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime, after conviction of the greater one.").

This Court in *Talancon v. State* came to the opposite conclusion, however, holding that underlying felonies do not merge with felony murder and cumulative punishments are permissible. 102 Nev. 294, 297-301, 721 P.2d 764, 766–69 (Nev. 1986). This conclusion is contrary to federal law. This Court in *Talancon* assumed that the Nevada Legislature had intended cumulative punishments for robbery and felony murder because the statutes are aimed at "two separate evils." *Id.* at 768. But the same could be said for any two statutory provisions. That is why the Hihg Court has focused the inquiry on the elements of

the offenses absent "a clear indication" that the legislature intended cumulative punishment. *Whalen*, 445 U.S. at 692. There is no clear indication that the Nevada Legislature intended cumulative punishments for predicate felonies and felony murders.

D. The State Exercised Peremptory Challenges in a Racially Biased Manner[13]

The State violates the Equal Protection Clause by striking potential jurors because of their race. *See Batson v. Kentucky*, 476 U.S. 79, 86, 91 (1986); *Williams v. State*, 134 Nev. __, 429 P.3d 301, 305 (2018). But the State before both the guilt phase and the penalty rehearing did just that—striking multiple potential African-American jurors from the panel. The State's conduct "constitutes structural error requiring reversal." *Williams*, 429 P.3d at 305; *McCarty v. State*, 132 Nev. __, 371 P.3d 1002, 1010 (2016). The district court erred by rejecting this claim without analysis or an evidentiary hearing.

[13] Claims Six and Eight.

1. Race-based peremptory strikes before the guilt phase

The jury that convicted Chappell consisted entirely of White jurors. 11AA2695-2696. And of the four alternates, three were White and the fourth was Hispanic. 11AA2708-2709. The State caused this complete absence of African-American individuals on the jury by exercising its peremptory challenges to exclude both potential African-American jurors, Bourne and Marshall. 11AA2703.[14]

Defense counsel, recognizing that Chappell was "faced with an all-white jury panel," requested a *Batson* hearing. *Id.* In response, the State offered essentially the same justification for striking both jurors—that both "were extremely equivocal regarding capital punishment." 11AA2704. Comparative juror analysis shows that this "race-neutral" justification was a pretext for race-based discrimination. *See Miller-El*

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[14] The Supreme Court has stated that "statistical evidence alone [can] raise[] some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors." *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003) (finding highly suspect and indicative of purposeful discrimination the fact that "91% of the eligible African-American venire members" were excluded from service, while "only one served on [Miller-El]'s jury." *Id.* In Chappell's case, *all* eligible African-American venire members were excluded through peremptory strikes. "Happenstance is unlikely to produce this disparity." *Id.*; *see also Shirley v. Yates*, 807 F.3d 1090, 1107 (9th Cir. 2015).

v. Dretke, 545 U.S. 231, 241 (2005) ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step."); *see also Ford v. State*, 122 Nev. 398, 404–05, 132 P.3d 574, 578–79 (2006); *Reed v. Quarterman*, 555 F.3d 364, 377–81 (5th Cir. 2009).[15]

a. Bourne and Marshall were no more equivocal about capital punishment in general than White potential jurors

The State, insisting that Bourne and Marshall were "extremely equivocal regarding capital punishment," pointed to a handful of responses in the jury questionnaires. 11AA2704-2705. Bourne wrote that the death penalty "[s]hould be used rarely if at all." 11AA2705; 3AA748. And, in response to a question asking if she could personally vote for the death penalty, Bourne wrote "I don't know." 11AA2705. The State also argued that Bourne's answer to whether "we should have

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[15] Because the State proffered reasons for the peremptory challenges, and the trial court considered Chappell's arguments that those reasons were pretextual, it is unnecessary for this Court to consider the first two steps of the *Batson* analysis. *See Hernandez v. New York*, 500 U.S. 352, 359 (1991); *Williams*, 429 P.3d at 306–07.

capital punishment in the State of Nevada" was problematic: "she thought about it and then indicated that she leaned away from the death penalty and actually was undecided on that particular issue." *Id.*[16] As for Marshall, the State said that "she simply doesn't have any opinion about the death penalty." *Id.* The State pointed to Marshall's statements that she did not "know how [she] really fe[lt] about the death penalty" and did not know whether she could personally impose the death penalty. *Id.*; 4AA757.

Both Bourne and Marshall clarified during voir dire, however, that they could impose the death penalty. The court first asked Bourne whether she had any "moral, religious or conscientious objections to the imposition of the death penalty," and she replied "No." 10AA2453. When the State asked whether she could vote for whichever of the four punishments she thought was appropriate (death penalty included), Bourne said, "I think so." 10AA2456. Bourne then explained that she "would have to be involved in what is happening . . . the facts in that

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[16] Bourne stated, "I don't know if we should have [the death penalty]," 10AA2455-2456, "I'm not quite convinced," 10AA2455, and "I tend to say no, but then sometimes I hear some case and I say yes, we need it." *Id.*

particular case," because, when imposing the death penalty, "you can always—might get the wrong man." 10AA2455-2456. But Bourne assured the parties that she would fairly consider all four forms of punishment. *Id.* And when the State asked Bourne whether she could imagine a set of circumstances in which "capital punishment would be proper," she replied, "Yes, sir." 10AA2456. Furthermore, as the State admitted, 11AA2704, Bourne was a well-educated woman with a master's degree, 3-4AA744-751, and would have been capable of setting aside her own feelings and objectively applying the law.

Similarly, when the court asked Marshall whether she could "keep an open mind and give fair consideration to all four forms of penalty," she replied "Yes." 11AA2666. The court asked again, and Marshall responded, "I think I can." *Id.* And Marshall then added that any reservation was explained by the lack of information she had at that point about the case: "I don't know as far as not really actually being involved in it . . . I can't elaborate on something I don't know." 10AA2668.

Defense counsel further clarified Marshall's views:

> Q: With regard to some of the questions Mr. Harmon was asking you . . . your position is you are open to the death penalty but the decision as to whether or not you would apply it depends on the facts that you hear during the trial; is that right?
>
> A: Right.

10AA2672. Marshall also showed a willingness to set aside her personal feelings and follow the court's instructions. In her questionnaire she said that she would not consider the defendant's background during the penalty phase, 4AA757, but during voir dire defense counsel rehabilitated her:

> Q: If the court instructs you [that] you should consider the evidence and if some of that evidence includes background information, will you consider that evidence?
>
> A: Yes.

10AA2671-2672.

Several other White venirepeople, who were eventually seated as jurors, gave similar answers about the death penalty. *See Miller-El*, 545 U.S. at 241; *Reed*, 555 F.3d at 377–81. Juror Fitzgerald on his questionnaire stated he did not have an opinion on the death penalty:

35. The Death Penalty I HAVENT A OPINON AT THIS TIME

4AA784. During voir dire, when asked whether he wanted capital punishment in Nevada," Fitzgerald gave the less-than-enthusiastic replies, "I guess so, yeah," and, "I don't really have a better plan." 11AA2599. Juror Taylor, just like Bourne, thought that the death penalty should be reserved for "very extreme cases":

35. The Death Penalty It should be given reluctantly after much thought and only as a last resort or in very extreme cases

4AA775; *see also* 9AA2011 (opining that the death penalty was appropriate "mostly for mass murder or [serial] killers"). Alternate Juror Lucido, just like Marshall, said during voir dire that her vote to impose the death penalty "depends upon what happened, the oral presentation of the evidence in the case." 10AA2341-2342. And Juror Parr likewise said that her verdict "would be based on the information that is submitted." 10AA2350.

Moreover, the State's questioning of Bourne and Marshall lasted considerably longer than their similarly situated White counterparts. *See Miller-El*, 545 U.S. at 255–63 (examining differences between

questions asked of White potential jurors and African-American potential jurors); *see also United States v. Mahbub*, 818 F.3d 213, 227–28 (6th Cir. 2016). The State questioned Bourne about capital punishment for a full two pages of trial transcript, 10AA2455-2456, but limited the voir dire of Juror Fitzgerald to a mere four questions. 11AA2599, 2601.

b. Marshall's religious views did not prevent her from considering the death penalty

The State also relied on Marshall's religious beliefs when proffering "race-neutral" reasons for exercising its peremptory strikes:

She's a religious woman which frankly I consider to be to her credit, she indicates in the questionnaire she goes to church regularly, she acknowledged that the Bible is important to her during the voir dire, she mentioned that the Bible tells us not to kill and furthermore indicated that she wouldn't be prepared to go against God's will. However, on the other hand there was an ambiguity because she suggested she would try, but the bottom line each time is I don't know what I would do when faced with the decision regarding the death sentence.

When the court asked the question that is asked of all of the prospective jurors do you have any religious, moral or conscientious objection to the death penalty, once again this juror said that's the one I have a problem with.

11AA2706. Although Marshall did express some hesitancy to impose the death penalty because of her "religious belief," the judge immediately rehabilitated her, 11AA2666, defense counsel clarified her views, 11AA2672, and Marshall also expressed her belief that people should "pay" for their crimes, 11AA2667.

Moreover, several other potential jurors noted religious beliefs on their questionnaires, but the State failed to question them whether

their religious beliefs would interfere with their duties. Juror Lucido attended a Catholic church "about 4 to 5 times a week." 9AA2018. Jurors Ewell and Taylor attended Mormon church every week. 9AA2054; 4AA773. And Juror Yates attended church "2 to 3 times a week." 9AA2027. The State's failure to question these jurors about their religious beliefs reveals that this reason for striking Marshall was pretextual. *See Miller-El*, 545 U.S. at 255–63; *Mahbub*, 818 F.3d at 227–28.

c. Bourne's "hesitation" before answering questions was a pretext for discrimination

The State next pointed to hesitation by Bourne, expressing concern that Bourne "thought about" the State's questions before answering:

> When asked if we should have capital punishment in the State of Nevada if the matter was left solely up to her, she thought about it and then indicated that she leaned away from the death penalty and actually was undecided on that particular issue.

11AA2705. In addition to the problematic subjective nature of this reason, *see Snyder v. Louisiana*, 552 U.S. 472, 479 (2008); *United States v. Atkins*, 843 F.3d 625, 639–41 (6th Cir. 2016), Juror Gritis, who was White, also hesitated before answering this same question, 10AA2359-2360.

2. Race-based peremptory strikes before the penalty rehearing

During Chappell's penalty rehearing, from a qualified panel of thirty-two prospective jurors, the State exercised peremptory challenges to strike two African-American venire members, Mills and Theus. Though the State's decision to strike two African-American venire-members established a prima facia *Batson* violation, trial counsel did not raise a *Batson* challenge, and no hearing was held on the record. Comparative juror analysis reveals that the State's purpose for challenging these jurors was discriminatory. Thus, had counsel challenged the State's racially biased use of peremptory strikes, there is

a reasonable probability of a different result. *See Strickland*, 466 U.S. at 694; *Means*, 120 Nev. at 1011, 103 P.3d at 32.[17]

a. Comparative juror analysis reveals that the State's decision to strike Mills was discriminatory

Mills gave several answers during voir dire that were favorable to the State. *See Miller-El*, 545 U.S. at 242 (considering potential juror's expressed views in favor of death penalty); *Reed*, 555 F.3d at 376–78 (noting that struck potential juror would have been "ideal" for the State). Mills supported the death penalty, was willing to fairly listen to both sides and deliberate with other jurors, could personally vote for the death penalty, and was able to consider all four potential punishments with an open mind. 16AA3958-3960. But the State still struck Mills. No answer in Mills's questionnaire or voir dire distinguishes her from other White venirepeople, whom the State did not strike.

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[17] In addition to trial counsel's ineffectiveness, direct appeal counsel was ineffective for failing to utilize the record-based information in support of this claim. And initial post-conviction counsel was ineffective for failing to challenge trial counsel's effectiveness on this basis.

(1) History of substance abuse and domestic violence

Mills's husband abused substances and, when under the influence of drugs and alcohol, abused Mills, sometimes in front of their children. 16AA3958; 21AA5184. But, over time and with counseling, Mills's husband "turned his behavior around." 16AA3959-3960. Mills affirmed several times that this experience would not affect her ability to be fair and impartial in Chappell's case. *Id.*

Other members of the venire were similarly situated to Mills but became jurors for the penalty rehearing. 21AA5130-5131. Juror Taylor's ex-wife died from substance abuse. 16AA3951. Taylor, who was White, affirmed that he was "close to" this situation and had "prejudice against drugs." *Id.* Similarly, Juror Forbes, along with his mother and two sisters, was the victim of domestic violence. 21AA5106-5107. White juror Smith raised his step-daughter's two children because of her drug use. 16AA3970 at 159. Juror Noahr, who was White, was born to alcoholics and witnessed her father abusing her mother. 16AA3979-3980 at 196-198. And Juror Morin, also White, had a brother and "a few other family members" with substance abuse problems. 16AA3990 at

237-238. The State failed to question any of these jurors as extensively as it questioned Mills.[18]

(2) Views on the court system

In response to a question about the criminal-justice system, Mills wrote that her son "was a victim of medical malpractice," and "[n]o justice was done." 21AA5185. She added at voir dire that this experience could affect her ability to be fair in Chappell's case because she "was angry at first with the lawyers and the judge." 16AA3959 at 116. When the State asked Mills to "explain that a little," however, Mills replied that she would "want[] to see the facts and see how strong [the case] is and how it happened." 16AA3960 at 117. She also confirmed that she was able to set aside her feelings and consider Chappell's case fairly and impartially; in fact, she pointed out that her poor opinion of lawyers and judges only existed "at the time" of her son's case. 16AA3959-3960.

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[18] The State asked Mills twenty-two questions relating to substance abuse and domestic violence. 16AA3958-3959. *Compare* Taylor, 16AA3951 (nine questions); Smith, 16AA3970 (seven questions); Forbes, 21AA5106-5107 (eleven questions); Noahr, 16AA3979 (seven questions); Morin, 16AA3989-3990 (no questions). *See Miller-El*, 545 U.S. at 255–63.

Mills was not alone in evincing a cynical opinion of the justice system, but all of the others, who were White, survived the State's peremptory challenges. Juror Forbes felt that his brother "got railroaded" by the public defender's office, harbored "some bitterness about that," and "felt guilty because if [he] had had the money at the time, [he] could have . . . hired an attorney and [his brother] never would have went to prison." 21AA5107 at 54-55. Juror Bundren described similar feelings about the justice system: "It all depends on who can afford the best attorney." 22AA5284. Juror Morin wrote that the system has "lot of loopholes," 21AA5229, adding that, when "cases get dismissed over the slightest things, it just doesn't seem fair," 16AA3990 at 238. Similarly, Juror Kaleikini-Johnson expressed that the system "can be a little to [sic] lenient." 21AA5239. The State questioned only two of these jurors about their cynical views.

(3) Desire to serve on the jury

Mills said at the end of her questionnaire that she did not want to serve on the jury because she did not "like to talk much," and it took her "longer to comprehend question." 21AA5188. When the State asked Mills whether she would have a problem discussing the case with the

other jurors, though, Mills responded "No." 16AA3959 at 115. The State repeated the question, and Mills again replied "No." *Id.* Mills reiterated in response to defense counsel's questions that she would make her voice heard:

> Q: If you have something important to say, you'd make sure they heard it?
>
> A: Yes, absolutely.

16AA3960.

To the extent that Mills's questionnaire revealed simply a reluctance to serve, five members of the jury, who were White, expressed similar sentiments. Four members, Juror Kaleikini-Johnson, Juror Morin, Juror White, and Juror Forbes were worried about their jobs, 21AA5243; 21AA5232; 22AA5298; 22AA5309: Juror Forbes thought serving was "[t]oo much responsibility," 22AA5309: and Juror Bundren had neither "the time [n]or desire," 22AA5287. The State again did not question any of these jurors about their unwillingness to serve; all were seated on Chappell's jury. 21AA5130-5131.

(4) Views on race differences between defendant and victim

Recognizing the racial implications of Chappell, an African-American man, killing his White girlfriend, the juror questionnaire asked about the prospective jurors' ability to be fair and impartial:

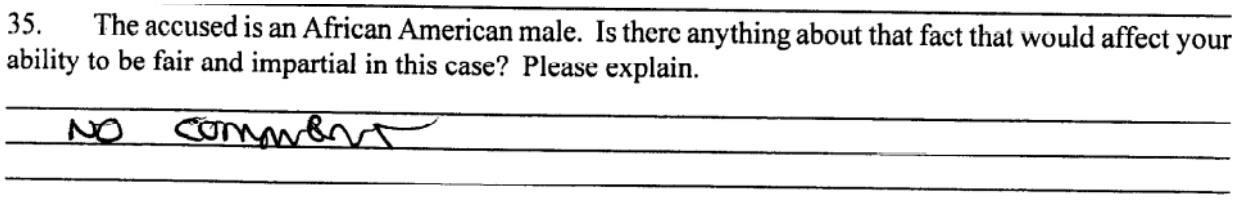
36. If the evidence shows that the victims in this case are of a different racial background than the accused, would that affect your ability to be fair and impartial?

See, e.g., 21AA5186. Mills responded "Probably so." *Id.* But defense counsel rehabilitated Mills during voir dire, showing that Mills's answer was likely simply a mistake:

> Q: Now, also there was a question that asked something about if the victim was of a different racial background, if you'd think [differently] about the case, and you responded, probably so.
>
> A: I don't recall that.
>
> Q: So if the victim was of a different racial background than Mr. Chappell, you wouldn't have a problem with that?
>
> A: No.
>
> Q: It wouldn't make you automatically think that he was more or less guilty than he actually is?
>
> A: No.

16AA3960 at 120.

Other White prospective jurors responded similarly but were not struck by the State. Juror Forbes responded, "Yes possibly" to the question about racial differences between the defendant and victim, 22AA5307, and he provided an enigmatic "No comment" to a similar question:


35. The accused is an African American male. Is there anything about that fact that would affect your ability to be fair and impartial in this case? Please explain.

NO comment

22AA5306. Juror Feuerhammer stated his view of race differences "would depend on the evidence." 22AA5340. Neither the State nor defense followed up on this response.

b. Comparative juror analysis reveals that the State's decision to strike Theus was discriminatory

Theus also gave answers that would have made her a favorable juror for the State. *See Miller-El*, 545 U.S. at 242; *Reed*, 555 F.3d at 376–78. She explained that she would be able to impose the death penalty if she thought it appropriate, considering all the surrounding facts and circumstances, that she would listen to all of the evidence

before making a decision, and that she would follow the law and the instructions. 16AA3976-3979. Like Mills, though, the State exercised a peremptory strike against Theus. Comparing Theus's questionnaire statements and voir dire responses to the other prospective jurors, who were White, reveals that she was not materially different from the White jurors the State found acceptable.

(1) Religious beliefs

Theus in the juror questionnaire expressed some religious opposition to the death penalty. 22AA5351-5352. In that same questionnaire, however, Theus denied holding "any strong moral or religious views about the death penalty." 22AA5352. And she also confirmed that she could consider the death penalty in certain circumstances. *Id.* Theus then clarified her stance during voir dire:

> I don't believe anybody has the right to take somebody's life, period. And just because you take a life doesn't mean you take theirs. I don't believe that, but under certain circumstances, if I have to vote for that, I have to see without a reasonable doubt. But if I have a reasonable doubt, I could not vote for a death penalty.
>
> . . .

> I don't like the idea of passing judgment. We all shouldn't pass judgment. But on a [sic] certain circumstances, I can pass [judgment] if I have to.

16AA3976 at 182, 184. Theus went on to affirm that, though she was personally opposed to the death penalty, she would be able to impose it:

> Q: If you heard all of the evidence in this case and you felt that death was the appropriate verdict, would you be able to come back with that judgment?
>
> A: I would be, yes.
>
> Q: So even though religiously you feel like the death penalty shouldn't be allowed, you feel that that's something you could still do?
>
> A: Correct.

16AA3977 at 186; *see also* 16AA3979 (confirming again that she could impose the death penalty).

Theus was not alone in these views. Juror Feuerhammer "[a]gree[d] with the death penalty," 22AA5340, but did not agree with the principle of "an eye for an eye," writing that "it is up to God to make that determination." 22AA5341. When asked to explain this apparent inconsistency, he replied, "we have to go by the laws of the state . . . [i]t's not up to me to take judgment. I leave that up to the state."

21AA5106 at 52.[19] Juror Scott, a member of the Catholic Church, recognized that his religion "does not support the death penalty." 22AA5361, 5363; 21AA5110-5111. Juror Staley was "a very religious person," 21AA5124 at 123-124, who would find it "hard to take a life," 22AA5373, and did not "believe in vengeance," 22AA5374. And Juror Noahr did not "believe in a life for a life," 22AA5428, or "an eye for an eye," 22AA5429, but could consider the death penalty in certain circumstances, *Id.*; *see* 16AA3979 at 195-196. These jurors were White.

Nor was Theus alone in wishing to hear all of the facts and circumstances before making a decision on the appropriateness of the death penalty. Juror Kaleikini-Johnson wrote that the death penalty might fit "depending on the crime [and] the circumstances." 21AA5241. Juror Taylor felt he had "to hear everything first," and "it would have to be shown that the person was basically a hundred percent guilty." 16AA3952. Juror Henck wrote that "[e]very person deserves [a] fair trial where evidence can be presented so a proper verdict can be made." 22AA5396. Juror Smith wrote that punishment "all depends on the

[19] Juror Feuerhammer also was opposed to a sentence of forty years' imprisonment. 21AA5106 at 49.

circumstances of the case," and he wanted to serve so he could "hear the facts and decide his level of punishment based on those facts." 22AA5407-5408. Juror Cardillo believed that the jurors "need[ed] all the information on the case to decide the appropriate punishment." 22AA5418. And Juror Morin "would want to hear information before [making] a decision." 16AA3989-3990.

The State declined to exercise peremptory challenges on any of these White prospective jurors. 21AA5130-5131. Although the State questioned Theus on the subject of her religion for four pages and twenty-three questions, 16AA3976-3977, the State touched only fleetingly on this subject with other jurors.

(2) Criminal activity

Theus revealed on her questionnaire and during voir dire that she had close family members involved in the criminal justice system. 16AA3977 at 186-187; 22AA5350. Her son was then awaiting trial for domestic assault. 16AA3977 at 187-188. Her husband was "[i]n and out of jail more than half his life." 16AA3977-3978 at 188-189. Her nephew was in prison on robbery charges. 16AA3978 at 189-190. Her brother went to prison because of his involvement in a gang. 16AA3978 at 190.

And Theus had been to court, but for moral support, not to testify. *Id.* Theus confirmed that the prosecutions against her family members happened in the same courthouse as Chappell's trial, and the prosecutors were from the same District Attorney's office, though neither of Chappell's prosecutors had been involved. *Id.*

Several White prospective jurors similarly revealed that they and their family members had criminal histories. Juror White had been arrested for domestic violence. 16AA3938 at 29, 3993 at 252. Juror Henck had two cousins, to whom he was close, who were convicted "for selling drugs in school zones." 16AA3961 at 121. Juror Smith's grandson and step-daughter abused drugs and had criminal histories, and he was raising his step-daughter's children as a result. 22AA5405; 16AA3970 at 159. Juror Morin's brother was in prison for attempted murder. 16AA3989 at 234-235. Although the conviction was in Las Vegas, the State did not ask Juror Morin about the courthouse or prosecutors involved. *Id.* Juror Forbes's brother was "railroaded" by "the public defender's office" for solicitation, 21AA5107 at 54, and Juror Forbes felt "bitterness" and guilt about it. *Id.* Finally, Juror Scott was arrested for "disorderly conduct." 21AA5111 at 70. The State did not

ask Juror Forbes or Juror Scott where these crimes had occurred. 21AA5107, 5111.

3. Conclusion

Chappell is African American, and the victim—Chappell's girlfriend—White. Because of wide-spread bias against interracial relationships and African-American capital defendants, *see, e.g.*, https://deathpenaltyinfo.org/documents/FactSheet.pdf, a racially balanced jury would have added some much-needed fairness to the proceedings. Yet Chappell was convicted and sentenced to death by two all-White juries—an outcome achieved by the State's use of peremptory challenges against African-American prospective jurors. This discrimination by the State requires reversal. *See Batson*, 476 U.S. at 86, 91; *Williams*, 429 P.3d at 305.

E. Trial Counsel were Ineffective for Failing to Present Abundant Evidence of Chappell's Childhood Trauma and Losses[20]

When considering counsel's effectiveness defending capital cases, both the United States Supreme Court and this Court have repeatedly

[20] Claim Three.

recognized the importance of investigating a defendant's background. *See, e.g.*, *Porter v. McCollum*, 558 U.S. 30, 38–42 (2009) (per curiam); *Wiggins*, 539 U.S. at 521–37; *Williams v. Taylor*, 529 U.S. 362, 395–99 (2000); *Doleman v. State*, 112 Nev. 843, 848–50 921 P.2d 278, 281–82 (1996) (per curiam); *Wilson v. State*, 105 Nev. 110, 113–15, 771 P.2d 583, 584–86 (1989) (per curiam).

Chappell's counsel for the penalty rehearing were acutely aware of these responsibilities—the district court had granted Chappell a new penalty hearing precisely because counsel in 1996 had failed to adequately prepare for the penalty phase. 3AA650-653; *see also* 3AA655-668 (affirming grant of new penalty hearing). But counsel for the 2007 penalty rehearing repeated the mistakes of the prior attorneys, failing to investigate readily available witnesses and present compelling mitigation testimony. *See* 26AA6475-6477 (declaration from defense investigator for Chappell's penalty rehearing remarking on limited and poorly organized mitigation investigation). In fact, counsel failed to present some of the same witness testimony that led to reversal of Chappell's first death sentence. And the reason for this failure was not strategic—counsel simply miscalculated the time the

witnesses needed to be in Las Vegas. 20AA4925-4926 at 5-10; 5AA1223 ¶22; 5AA1244 ¶20; 6AA1267 ¶2–4; 6AA1318 ¶51; 26AA6477 ¶¶14–16; *see Hinton*, 571 U.S. at 273–75 (explaining that lack of investigation based on mistaken belief constitutes deficient performance that cannot be characterized as strategic); *Williams*, 529 U.S. at 395 (similar); *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (similar). Had counsel presented this testimony and other readily available evidence, there is a reasonable probability that at least one juror would not have voted for death. *See Wiggins*, 539 U.S. at 537; *see also Porter*, 558 U.S. at 38–42 (emphasizing importance of jurors hearing mitigation evidence that can humanize defendant and decrease moral culpability); *Rompilla*, 545 U.S. at 393 (same). Post-conviction was also ineffective for failing to conduct such an investigation (for that matter, post-conviction counsel did no investigation).

1. Counsel performed deficiently by failing to present readily available evidence of Chappell's traumatic childhood

Chappell was born to a mother addicted to alcohol, heroin, cocaine, and nicotine—a mother who abused these substances while pregnant, permanently damaging the brain of her unborn son. 6AA1288

¶¶3-4. Her addictions had additional ramifications for her family: Shirley Chappell lost custody of her children, then died while walking intoxicated along the interstate in the early hours of the morning. 6AA1292 ¶3. After his mother's death, Chappell was left in the care of his abusive and neglectful grandmother, without the cognitive ability to improve his life on his own. 6AA1293-1294 ¶ 5-8; 6AA1386-1387 ¶¶11-14. But counsel presented only enough of this evidence for the State to have something to ridicule in closing argument. *See generally* 15AA3675. Counsel's failure to present compelling evidence of Chappell's traumatic childhood constituted deficient performance. *See Porter*, 558 U.S. at 38–42; *Rompilla*, 545 U.S. at 393; *Wiggins*, 539 U.S. at 537.

a. Because of a family history of substance abuse and mental illness, Chappell faced adversity from before birth

Chappell was born into a family with a long history of problems, not the least of which was addiction. Most of Chappell's family members struggled with substance abuse—indeed, "[t]he people in [the] family who do not struggle with some form of addiction are a small minority." 5AA1236 ¶35; *see* 6AA1307 ¶5 ("Drug addiction was a major problem in

the lives of almost all of my family members, including my siblings, our mother and fathers, our aunts and uncles, and some nieces and nephews."). There are several accounts of addiction within Chappell's family, to drugs, alcohol, and gamling. 6AA1258-1259 ¶¶7–8, 11; 6AA1301 ¶3; 6AA1307-1308 ¶¶5, 9–10; 6AA1322-1325 ¶¶5, 10, 15; 6AA1328-1329 ¶¶4, 8; 6AA1338 ¶12; 6AA1352 ¶24; 6AA1363 ¶4; 6AA1372, 1375 ¶¶13, 23; 6AA1386-1388 ¶¶13, 15–16; 26AA6440 ¶6; 26AA6443-6445 ¶¶6, 8–11; 26AA6454-6457 ¶¶7–8, 10, 19. People close to Chappell additionally reported widespread cognitive delays and mental illnesses among members of Chappell's family, including his grandmother, aunts, and uncles. 5AA1227 ¶6; 5AA1219 ¶5; 6AA1258-1259 ¶¶6, 9–10; 6AA1301-1302 ¶3; 6AA1309 ¶12; 6AA1328 ¶7. For example, Chappell's great uncle, Jimmy Underwood, lived and died "on the streets," even though he had a home, 5AA21219 ¶5; 6AA1258 ¶6; 26AA6444-6445 ¶9; 26AA6455 ¶10, and Chappell's maternal aunts and uncles all received special-education services, 5AA1227 ¶6; 6AA1328 ¶7; 6AA1337-1338 ¶9.

Chappell's mother, Shirley Chappell, exemplified this family history. Shirley Chappell was an addict, who, working as a prostitute to

fund her addictions, abused prescription pills, heroin, cocaine, and alcohol. 5AA1226-1227 ¶4; 6AA1259 ¶¶12–13; 6AA1288 ¶¶3–4; 6AA1292 ¶3; 6AA1306 ¶3; 6AA1324 ¶15; 6AA1329 ¶8; 6AA1332-1333 ¶¶8–10; 6AA1339 ¶14; 6AA1356-1358 ¶¶4–7, 10; 6A1363 ¶4; 6AA1385-1386 ¶¶6–9; 26AA6463-6464 ¶¶6, 8, 10; 26AA6457-6458 ¶¶19–21, 23. She was unable to quit drinking and abusing drugs while pregnant with Chappell and his siblings—unable even to decrease her use of those substances. 5AA1226-1227 ¶4; 6AA1288 ¶4; 6AA1306 ¶3; 6AA1333 ¶10; 6AA1339 ¶14; 6AA1357 ¶6; 6AA1385-1386 ¶¶6–9; 26AA6458 ¶¶20–21. She almost lost her pregnancy with Chappell because of her alcohol use, slipping and falling down a flight of stairs. 6AA1385 ¶8. And her addiction-addled parenting decisions continued after her children were born. She gave away one daughter, Carla Chappell, 5AA1226 ¶2; 6AA1259-1260 ¶14, and neglected the others, 6AA1357-1358 ¶¶7, 9; 26AA6464 ¶¶10–11; 26AA6458 ¶23. When Chappell was a toddler, his mother's addictions finally cost her custody of her children. 6AA1363 ¶4; 20-21AA4996, 5029, 5031; 15AA3618-3619, 3625. Chappell's other parent was no better equipped to take custody—both of the men who potentially fathered Chappell, James Wells and William Chappell, were

dealing with their own drug addictions and intermittent incarcerations. 5AA1221 ¶14; 5AA1226, 1233-1234 ¶¶3, 28–29; 5AA1241 ¶11; 6AA1259 ¶12; 6AA1268, 1273 ¶¶6, 26; 6AA1288-1289 ¶¶2–3, 6–8; 6AA1306 ¶2; 6AA1325-1326 ¶21; 6AA1332-1333 ¶¶7, 9–10; 6AA1339 ¶14; 6AA1343 ¶3; 6AA1348 ¶2; 6AA1357 ¶¶5, 7; 6AA1363 ¶4; 6AA1384-1388 ¶¶4–5, 9–10, 14, 18; 26AA6458 ¶21; 6AA1369-1370, 1375-1376 ¶¶3–5, 24. As a result, Chappell's grandmother, Clara Axam, was forced to take custody of Chappell and three of his siblings. One year later, Shirley Chappell was decapitated by a police cruiser while walking along the interstate, intoxicated and alone, at 4:25 a.m. 29AA7029; 5AA1221 ¶13; 5AA1226-1227 ¶4; 6AA1268 ¶6; 6AA1289 ¶6; 6AA1292 ¶3; 6AA1329 ¶8; 6AA1339 ¶15; 6AA1358-1359 ¶¶10–11; 6AA1370 ¶6; 25AA6065. She was 24 years old. 29AA7029.

b. Chappell's life with his grandmother was characterized by abuse, neglect, and loss

Chappell remained in his grandmother's custody after his mother's death. Unfortunately, she was not able to provide him with a loving and supportive home. Just as she did to her own children, 6AA1323 at ¶10-12; 6AA1328 at ¶¶3, 5–6; 6AA1333 ¶11; 6AA1337-1338

¶¶8–10; 6AA1387 ¶15; 26AA6457 ¶17; 26AA6462-6463 ¶4, Clara Axam physically and emotionally abused her grandchildren, 5AA1221-1222 ¶¶16–17; 5AA1229-1231 ¶¶12–21; 6AA1251, 1253 ¶¶6, 8; 6AA1263 ¶¶9–10; 6AA1272 ¶23; 6AA1293-1294 ¶¶8–9; 6AA1301-1302 ¶3; 6AA1309-1311 ¶¶13, 16, 18–23; 6AA1324-1325 ¶16; 6AA1344-1345 ¶¶10, 12; 6AA1353 ¶29; 6AA1370-1376 ¶¶7, 9, 11, 16–22, 24; 6AA1386-1387 ¶¶12–13; 26AA6457 ¶18; 26AA6465-6466 ¶¶17, 23. She beat her grandchildren with anything she could get her hands on—"belts, shoes, clothes hangers, extension cords, broom sticks, wooden support sticks from the box spring located under her bed, and tree limbs and branches that she made [them] go outside to pick [them]selves." 5AA1229 ¶13. Clara Axam's beatings "almost always left bruises, welts, and sometimes cuts," and "she screamed at [her grandchildren] throughout." *Id.* Chappell, when forced to watch his grandmother abuse his siblings, "often rocked himself back and forth as he cried and sucked his finger, with snot running from his nose and saliva drooling from his mouth." 5AA1230 ¶17.

As for the verbal abuse, Chappell's grandmother frequently "screamed and cursed" at the children "over minor issues, or even when

she was just having a bad day." 6AA1229 ¶12. She would use racial slurs against her grandchildren, and she yelled at them when they asked about their deceased mother. 6AA1373-1374. Chappell's sister, years later, remembered the verbal abuse as more scarring than the physical:

> Looking back, I believe the verbal abuse that we experienced was much worse than physical abuse. Our grandmother's words emotionally wounded us all more deeply than her beatings. Bruises and cuts left by the whippings healed. However, the emotional injuries caused by her words are still with me today. Sometimes I wish she could have just whipped me instead [of] putting me through her verbal abuse.

6AA1311 ¶23.

Clara Axam also neglected her grandchildren, again repeating the damage she had done to her own children. 5AA1221-1222 ¶¶15–17; 6AA1231-1232 ¶¶22–23; 5AA1241-4242 ¶¶11, 14; 6AA1251 ¶5; 6AA1263 ¶11; 6AA1272-1273 ¶¶25–26; 6AA1293 ¶¶5–7; 6AA1301-1302 ¶3; 6AA1307, 1309 ¶¶8, 13; 6AA1323-1325 ¶¶10, 16; 6AA1339-1340 ¶16; 6AA1345-1346 ¶¶11, 14; 6AA1371 ¶10; 6AA1386-1387 ¶¶13, 15; 26AA6440 ¶¶5–7; 26AA6462, 6466 ¶¶3, 21–22. People close to Chappell when he was a child report that he was underfed at home, 5AA1221

¶15; 5AA1242 ¶14; 6AA1272 ¶25; 6AA1293 ¶7; 26AA6440 ¶¶6–7; 26AA6466 ¶22, was frequently left without adult supervision, 5AA1221-1222 ¶¶16–17; 5AA1231-1232 ¶¶22–23; 5AA1241 ¶11; 6AA1251 ¶5; 6AA1263 ¶11; 6AA1272-1273 ¶¶25–26; 6AA1293 ¶¶5–6; 6AA1301-1302 ¶3; 6AA1307, 1309 ¶¶8, 13; 6AA1345 ¶11; 6AA1371 ¶10; 6AA1386-1387 ¶13; 26AA6440 ¶6, and received no support from his grandmother while he struggled throughout his school years, 26AA6440 ¶5; 26AA6466 ¶21. Perhaps most critically, several people reported that Clara Axam neglected her grandchildren's emotional needs. A family friend summarized the parenting deficiencies of Chappell's grandmother:

> Clara deprived James and his siblings of love and affection. Clara was not the type of caregiver who picked up her grandchildren, read books to them, or provided them with hugs and kisses. Clara was not a nurturing person. She did not talk to James and his siblings about life, or the consequences of certain actions and behaviors. She just spanked and yelled at them. James was never placed in a position to thrive, as far as I observed.

6AA1293-1294 ¶8; *see* 5AA1229 ¶12 ("I have no recollections of Clara saying that she loved us, hugging us, picking us up, or playing with us."); 6AA1251 ¶6 (Clara was not a warm person, and I did not see her give them much love, attention, or affection. She basically just provided

them with a place to live and food to eat."); 6AA1263 ¶9 ("James's Grandmother Clara seemed like a bitter woman when I was growing up and acted like she resented having to raise her grandchildren."); 6AA1301-1302 ¶3 ("Clara was not an affectionate person. I never heard her speaking to James and his siblings in a loving manner. I did not ever see Clara hugging or kissing James and his siblings, or telling them that she loved them."); 6AA1310 ¶20 ("Clara almost never recognized our achievements or told us that she loved us, but she frequently pointed out our short comings and made us feel small."); 6AA1345 ¶12 ("Clara was not an affectionate person and seemed to have no emotional connection to James and his siblings. . . . It seemed like they were worth nothing more than a check to her."); 6AA1371 at ¶9 ("'Love' or 'I'm sorry' were not a part of our household vocabulary."); 6AA1386 ¶12 ("Clara was not a warm person, and I never personally witnessed her ever show my children any affection."); *see also* 10AA2290-2291 (explaining the harmful effects when a child is deprived of love and affection).

Since Chappell and his siblings could not depend on their grandmother for love and support, they turned to their uncle, Anthony

Axam. 5AA1232 ¶23; 6AA1274 ¶31; 6AA1295 ¶15; 6AA1375 ¶23. But this relationship, too, ended badly. Anthony Axam was murdered, stabbed to death in the neighborhood where they all lived. 5AA1221 at ¶13; 5AA1232-1233 ¶¶23, 25; 6AA1253 ¶10; 6AA1269-1270, 1273-1274 ¶¶14–15, 26, 30–31; 6AA1295 ¶14–15; 6AA1329 ¶8; 6AA1336 ¶1; 26AA6444-6445 ¶9; 6AA1375 ¶23.

c. Chappell spent his childhood in a poverty-stricken neighborhood

The neighborhood Chappell grew up in was crime ridden, filled with "drug dealers, junkies, thieves, prostitutes, pimps, rapists and other criminals." 6AA1270 ¶16; *see* 6AA1307, 1309 ¶¶7, 17; 6AA1338-1339 ¶13; 6AA1343 ¶4; 6AA1352 ¶24; 6AA1363-1364 ¶6; 6AA1371-1372 ¶¶11–12. Chappell's cousin, Laura Underwood, was murdered in her home. 5AA1221 ¶13; 5AA1232 ¶24; 6AA1253 ¶10; 26AA6444-6445 ¶9. And Chappell frequently witnessed additional violent episodes. 5AA1221 ¶13; 5AA1232 ¶24; 6AA1253 ¶10; 6AA1270-1271 ¶16–18, 20. The neighborhood was eventually demolished, after officials acknowledged the extent of pollution from an abandoned factory—a factory that Chappell and his friends used as a childhood playground

(perhaps explaining the high concentration of special-education students in the area). 5AA1220 ¶9; 6AA1240-1242 ¶¶7, 13; 6AA1264 ¶13; 6AA1275 ¶36; 6AA1295 ¶17; 6AA1372 ¶12; 26AA6441 ¶¶8–9.

d. Chappell's brain damage left him unable to cope with the trauma of his childhood

Adding to his traumatic childhood, Chappell was born brain damaged because of his prenatal exposure to drugs and alcohol. 6AA1428-1464; 6-7AA1466-1514; 7AA1516-1549. As a result, he was mentally unequipped to deal with the environment in which he grew up. *See* 6AA1346 ¶15 ("If you asked all of our old neighborhood friends and associates who among us was most likely not to succeed, they would say James. James was mentally slow, emotionally damaged, and not equipped to take care of himself."); 26AA6467 ¶25 ("From an early age, and by no fault of his own, James did not have a chance at ever having a normal and productive life. There were too many hurdles for him to overcome."). Other children frequently teased Chappell because of his delays in bladder control, hygiene, communication, and academics. 5AA1218-1222; 5AA1227-1228; 5AA1239-1241; 5AA1250 ¶2; 5AA1268; 5AA1271; 6AA1262-1263; 6AA1294-1295; 6AA1312-1316; 6AA1325 ¶18;

6AA1343-1344; 6AA1348-1349; 6AA1358-1359; 6AA1364-1365 ¶9; 6AA1379 ¶34; 26AA6448 ¶2; 26AA6465 ¶¶15–16. Not helping matters, an adult babysitter, fed up with Chappell's teenage toileting accidents, put him in a diaper and paraded him around the neighborhood. 5AA1228 ¶10; 6AA1271 ¶22; 6AA1295 ¶17; 6AA1316 ¶45; 6AA1377-1378.

e. Chappell began using drugs as a way to escape the realities of his life

Because of the abuse he suffered, the poverty he grew up in, and the predisposition to addiction caused by his prenatal exposure to drugs and alcohol, Chappell, along with his siblings, turned to substances in his adolescence. 5AA1220-1221 ¶¶11–12; 5AA1234-1237 ¶¶30–31, 33–35, 37–38; 5AA1242-1243 ¶16; 6AA1251 ¶5; 6AA1263-1264 ¶¶8, 11–12; 6AA1272-1275 ¶¶25, 27–30, 33–35; 6AA1303 ¶9; 6AA1306-1309, 1311 ¶¶4–5, 9, 13–15, 24; 6AA1340 ¶17; 6AA1345-1346 ¶¶11, 13–14; 6AA1352-1353 ¶¶24–26; 6AA1359 ¶13; 6AA1371-1373, 1377, 1380 ¶¶11, 13, 27, 40; 26AA6457-6459 ¶¶19, 24–25. Chappell started smoking marijuana and drinking alcohol during junior high school, 5AA1220 ¶11; 5AA1235-1236 ¶¶33–34; 5AA1242-1243 ¶16; 6AA1251

¶5; 6AA1263; 6AA1273-1274 ¶¶27–29; 6AA1303 ¶9; 6AA1309 ¶¶14–15; 6AA1345 ¶13; 6AA1353 ¶25; 6AA1380 ¶40, then during his late teens started combining the marijuana with crack cocaine, 5AA1220-1221 ¶12; 5AA1234-1235 ¶¶30, 33; 5AA1242-1243 ¶16; 6AA1263; 6AA1274-1275 ¶¶33–34; 6AA1309 ¶¶14–15; 6AA1340 ¶17; 6AA1345 ¶13; 6AA1353 ¶26; 6AA1380 ¶40.

2. Because of counsel's deficient performance, jurors heard almost none of this mitigating evidence

Counsel, because of their failure to properly investigate Chappell's background, presented hardly any evidence to jurors that was truly mitigating. The jurors heard that Chappell lost his mother in a car accident, 19AA4576; 19AA4730-4732; 18AA4291-4292 at 240-241, 4313 at 328; 20AA4929 at 22, but not her drinking and drug use that immediately preceded the car accident. *See* 20AA4944 at 84 (the State: "Are we prepared to immunize everybody from the death penalty that had a mother that died at an early age or didn't know their father?"). And the jurors heard that Chappell's grandmother "spanked" and "whooped" her grandchildren. 19AA4576; 20AA4784-4785; 18AA4292-4294 at 243, 248-249, 4300 at 273, 4312 at 324, 4317 at 344. But the

jurors heard nothing countering the State's characterization of this evidence: that Chappell's grandmother, overwhelmed by four misbehaving grandchildren, reasonably resorted to corporal punishment. 20AA4787-4788; 18AA4304-4306 at 291-297, 4317-4318 at 342-345; 20AA4938-4939 at 60-61; *see also* 19AA4731 ("[H]is grandmother wasn't the greatest. Although you have to give her credit for taking the kids in."); 20AA4787-4788 ("I'm not says [sic] that she wasn't a saint for taking four kids in and trying her darn best to give them a life . . . ."); 20AA4940 at 65 (arguing in closing that Clara Axam "stood up and did a very heroic thing for these children"). And lastly, with regard to Chappell's brain damage, counsel presented evidence only that Chappell was a "psychologically disturbed kid," 19AA4731, who was unhappy, "slow," and "not overly bright," 18AA4373-4374; 19AA4749; 20AA4929 at 23-24, and who "often t[ook] what appear[ed] to him to be the easy way out," 19AA4735. *See* 19AA4575, 4613; 19-20AA4732, 4738-4740, 4751, 4763; 18AA4293 at 245-246, 4298-4299 at 265-267, 269-270, 4309-4310 at 309, 313, 4313 at 325-326.

3. Had counsel performed effectively, there is a reasonable probability of a different result

Jurors found only one aggravating factor, which they balanced against seven mitigating circumstances. And the jurors selected those mitigating circumstances despite defense counsel presenting only isolated selections from Chappell's life. Had counsel presented jurors with a full picture of Chappell's traumatic childhood, there is a reasonable probability that at least one juror would not have voted for death. *See Porter*, 558 U.S. at 41–44 (concluding petitioner was prejudiced by counsel's failure to present evidence of physical abuse and brain abnormality); *Rompilla*, 545 U.S. at 390–93 (same when counsel failed to present evidence of neglect, intellectual disability, and maternal alcoholism); *Wiggins*, 539 U.S. at 534–38 (same when counsel failed to present evidence of "excruciating life history"); *Williams*, 914 F.3d at 317–19 (affirming grant of habeas relief based on counsel's failure to present FASD evidence).

F. Defense Counsel were Ineffective for Failing to Present Critical Expert Testimony[21]

"Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence." *Hinton*, 571 U.S. at 273 (quoting *Harrington*, 562 U.S. at 106); *see Duncan*, 528 F.3d at 1235; *Dugas*, 428 F.3d at 328–32. This was one of those cases.

1. Expert on neuropharmacology

Because of genetic vulnerability and prenatal exposure to drugs and alcohol, Chappell was predisposed from birth to drug abuse. 7AA1551, 1553, 1558-1560. Making matters worse, he spent his childhood and adolescence around drugs and addicts, environmentally shaping Chappell, through modeling and enculturation, to abuse drugs. *Id.* When Chappell succumbed to this genetic and environmental predisposition in his early teenage years, his alcohol and cocaine use further affected his still-developing personality and neurocognitive development. 7AA1568. Unsurprisingly, then, Chappell became

[21] Claims One and Three.

severely addicted to crack cocaine, going to extreme lengths to support his addiction. 7AA1553.

Both sets of defense counsel were aware early in their representation that Chappell was addicted to drugs. 9AA2062 ¶11; 9AA2075 ¶9; 7AA1592 ¶10; 8AA1757 ¶9; 9-10AA2122-2280. Counsel did not have a strategic reason for failing to fully investigate, develop, and present evidence through an addiction expert. 9AA2062 ¶11; 9AA2075 ¶9; 7AA1592 ¶10; 8AA1757 ¶9. Had defense counsel hired an expert in neuropharmacology to explain these factors to the jurors, they would have combatted some of the more prejudicial aspects of the State's case. *See Strickland*, 466 U.S. at 694; *Means*, 120 Nev. at 1011, 103 P.3d at 32. Post-conviction was also ineffective for failing to hire such an expert.

a. Guilt phase

The State during the guilt phase presented evidence that Chappell sold his children's furniture and diapers, repeatedly assaulted Panos, and rented out her car to people at a housing project. 12AA2952-2954; 13AA3076, 3092-3095. There were readily available explanations for this behavior. Chappell was predisposed to abuse drugs and alcohol

from birth. 9AA2114 ¶¶5, 8. And, once he became addicted, Chappell had little ability to control his impulses. But the jurors heard none of this.

The evidence that defense counsel did introduce, that Chappell suffered from a learning disability and borderline personality disorder, did nothing to rehabilitate Chappell in the eyes of the jurors. *See Harris*, 885 F.2d at 1381–83 (noting that the "ordinary citizen" would not consider evidence of personality disorder as mitigation like other mental disorders); *see also Bejarano*, 106 Nev. at 842–43, 801 P.2d at 1390. But a neuropharmacologist could have assisted in this area, too: borderline personality disorder frequently occurs together with substance use disorders, and individuals with borderline personality disorder, or similar personality features, are more susceptible to the effects of drugs. 7AA1554-1555, 1568.

b. Penalty rehearing

Defense counsel elicited testimony during the penalty rehearing that Chappell abused drugs. 14AA3282, 3292-3294, 3297, 3322, 3331-3334; 20AA4935 at 45; 19AA4571-4572; 19AA4736-4737; *see also* 19AA4729-4731 (referring to Chappell's drug abuse during opening

statements). But counsel failed to introduce evidence that would transform this negative information into mitigation. *See* 20AA4959 at 144 (arguing that Chappell's drug abuse is not mitigating because he chose to use, decided not to seek treatment, and was not high on the day of the offenses). No witness explained Chappell's genetic, in-utero, and environmental predisposition to drug addiction, how drugs affected his developing adolescent brain, or how his addiction impaired his already fragile impulse control. *See* 7AA1552-1568. And no witness explained to the jury how Chappell's addiction—and need to avoid withdrawal—caused him to steal from his own children. 15AA3672-3673; *see also* 5AA1247 ¶2; 13AA3246; 19AA4673-4674 at 84-85; 18AA4496 at 147-148.

Also missing was any evidence of the effect cocaine had on Chappell's brain as an adult. A neuropharmacologist would have explained to a jury that cocaine addiction is debilitating, the effects of the drug on the brain continuing long after the drug leaves the addict's system. 7AA1560. People who use cocaine may be suspicious, paranoid, have magical thinking, or feel insecure long after use of the drug has

stopped, increasing the likelihood of physical violence against a domestic partner. *Id.*

2. Expert on trauma

Defense counsel focused part of the penalty rehearing on Chappell's childhood, presenting testimony from a handful of Chappell's friends and family members. But counsel failed to hire an expert to explain the impact Chappell's traumatic childhood had on his life trajectory. *See Hinton*, 571 U.S. at 273. Post-conviction was also ineffective for failing to hire such an expert.

Had counsel hired an expert in trauma, they could have presented evidence similar to that contained in Dr. Matthew Mendel's report. 10AA2282-2300. Dr. Mendel summarizes the "truly extraordinary number of deficits, traumas, and losses" Chappell experienced "over the course of his childhood"—the abuse, abandonment, neglect, and poverty that characterized Chappell's life. *Id.* "Any one of these alone," Dr. Mendel explained, "would be considered a risk factor, likely to contribute to problems later in life." 10AA2293. And, as the number of risk factors increases, so too does the probability of a negative outcome. *Id.* Compared to his siblings—who all struggled with addiction and

criminality—Chappell "appears to have had an even greater number of childhood traumas and, critically, poorer resources with which to deal with the negative events in his life." *Id.* As Dr. Mendel concluded, "it would take a person of enormous skill and insight to overcome the childhood James Chappell had." *Id.* Chappell, "unfortunately, has minimal resources of these sorts." *Id.*

3. Conclusion

Counsel during the guilt phase and penalty rehearing presented only isolated snippets of Chappell's life history. The State, on the other hand, presented ample evidence, much of it improper, to support its attempts at character assassination. Presenting testimony from experts knowledgeable about Chappell's individual struggles would have gone a long way in combatting the State's harmful presentation. *See Hinton*, 571 U.S. at 273.

G. Trial Counsel were Ineffective for Failing to Adequately Prepare Witnesses[22]

"Witness preparation is a critical function of counsel." *Doe v. Ayers*, 782 F.3d 425, 442–43 (9th Cir. 2015). That preparation must

[22] Claims One and Three.

include providing necessary information, requesting experts perform necessary tests, and preparing witnesses for the courtroom. *See Bean v. Calderon*, 163 F.3d 1073, 1078 (9th Cir. 1998); *Bloom v. Calderon*, 132 F.3d 1267, 1278 (9th Cir. 1997); *Clabourne v. Lewis*, 64 F.3d 1373, 1385 (9th Cir. 1995). Counsel presented testimony from only a handful of witnesses, expert and lay, during the two phases of Chappell's trial. None were adequately prepared to testify.

1. Dr. Louis Etcoff

Counsel in 1996 hired one expert, psychologist Louis Etcoff, but did not ask him to perform a neuropsychological examination. 30AA7259-7262; *see Doe*, 782 F.3d at 439–40 (emphasizing that counsel unreasonably limited scope of expert's evaluation); *Yun Hseng Liao v. Junious*, 817 F.3d 678, 690–95 (9th Cir. 2016) (concluding that counsel was ineffective in not asking expert to perform sleep study). Nor did counsel allow Dr. Etcoff to interview Chappell's friends and family members, who had a wealth of information about Chappell's traumas and delays. 6AA1421 ¶10. And counsel provided Dr. Etcoff only a small portion of the available information to review—a police report of the crime, a statement by one potential prosecution witness, some letters

Chappell wrote to the victim, and Chappell's school records. *Id.* ¶7; *see Bloom*, 132 F.3d at 1278. As a result, the State was able to discredit Dr. Etcoff and his evaluation. 15-16AA3741-3768; *see Yun Hseng Liao*, 817 F.3d at 690–95. "[W]hen the defense's only expert requests relevant information which is readily available, counsel inexplicably does not even attempt to provide it, and counsel then presents the expert's flawed testimony at trial, counsel's performance is deficient." *Bloom*, 132 F.3d at 1278.

Before the 2007 penalty rehearing, counsel did no better. Despite knowing the weaknesses in Dr. Etcoff's testimony from the 1996 transcript, counsel simply asked Dr. Etcoff to review his previous notes and report. 19-20AA4724-4725, 4781-4783, 4786-4787, 4799-4805; 6AA1422. They did not request Dr. Etcoff meet again with Chappell, meet for the first time with Chappell's friends and family members, or review additional documents. The State emphasized this lack of preparation during closing argument:

> But what we heard in this courtroom was only what the doctor did not know. And it became so obvious to all of us who have sat through this proceeding, you've heard the evidence, the things he didn't know, to come in and give assessments

> based upon a two-hour interview, when you see the enormity of what was going in this case. It just doesn't cut it. It doesn't even come close.

20AA4939 at 63; *see* 19AA4589, 4602-4603; *see also* 20AA4766-4818, 4830-4837 (discrediting Dr. Etcoff during cross-examination). Counsel admits having no strategic reason for failing to better prepare Dr. Etcoff. 7AA1591-1592 ¶¶8–9; 8AA1756 ¶¶7–8.

2. Dr. William Danton

Before the penalty rehearing, counsel hired Dr. William Danton, a clinical psychologist who works with victims and perpetrators of domestic violence. Counsel hired Dr. Danton to explain the cycle of violence in abusive relationships and describe reasons why the sexual encounter between Chappell and Panos was likely consensual. Counsel, however, only provided Dr. Danton a synopsis of the facts of the case and Dr. Etcoff's report. *See Bloom*, 132 F.3d at 1278. And, although Dr. Danton did interview Chappell, that interview lasted only two hours and occurred at 10:00 the night before Dr. Danton's testimony. Dr. Danton performed no testing, read no police reports, and interviewed none of Chappell's family or friends. The State exposed this lack of preparation on cross-examination, undermining Dr. Danton's credibility

and the validity of his conclusions. 19AA4578-4581; *see Yun Hseng Liao*, 817 F.3d at 690–95.

3. Dr. Todd Cameron Grey

Dr. Grey was a defense witness who was called to testify that there was no physical evidence that Panos had been sexually assaulted. However, on cross-examination Dr. Grey conceded that he did not know that sperm was present in the victim's vagina based upon a report he had not seen. 19AA4659. If Dr. Grey had been given the report by defense counsel prior to his testimony, he could have been prepared to testify that the report in question did not state there was sperm but rather, the presence of material that was tested for blood type. And second, Dr. Grey also could have explained that sperm can be present without ejaculation. Counsel was ineffective for failing to properly prepare Dr. Grey.

4. Lay witnesses

Defense counsel was similarly deficient in preparing lay witnesses to testify. *See Hamilton v. Ayers*, 583 F.3d 1100, 1121 (9th Cir. 2009) ("[T]he failure to prepare a witness adequately can render a penalty phase presentation deficient."); *Allen v. Woodford*, 395 F.3d 979, 1002

(9th Cir. 2005) (concluding counsel's preparation of mitigation witnesses over single week preceding trial was deficient); *Alcala v. Woodford*, 334 F.3d 862, 889–90 (9th Cir. 2003) (concluding that counsel was ineffective for not preparing lay witness to testify).

Chappell testified during the 1996 guilt phase, and the State read his testimony to the jury during the 2007 penalty rehearing. 14AA3278-3381; 17-18AA4242-4254 at 42-91. But, because of inadequate preparation, Chappell's testimony was harmful to his case. *See Bemore*, 788 F.3d at 1163–64 (noting that "the first and only time" counsel met with defendant "to prepare the alibi testimony was the night before [defendant] was to take the stand"); *Alcala*, 334 F.3d at 889 (explaining that witness's discredited testimony "is evidence of a lack of preparation"). Similarly, the State was able largely to discredit witnesses who testified during the penalty rehearing, 18AA4291-4295 at 239-356, and these witnesses all reported later that they were inadequately prepared to testify, 5AA1223-1224 ¶¶21–23; 5AA1243-1244 ¶¶19–20, 22; 6AA1251, 1253-1255 ¶6, 11–17; 6AA1318 ¶51; 6AA1381-1382 ¶47. *See Doe*, 782 F.3d at 442–43; *Hamilton*, 583 F.3d at 1121; *Douglas*, 316 F.3d at 1088.

5. Conclusion

Although the witnesses counsel presented in 1996 and 2007 could not have filled all of the gaps left by counsel's inadequate investigation, they had important information to provide—about Chappell, his background, and the offenses. But, because of counsel's deficient preparation of these witnesses, they were not given that chance.

H. Trial Counsel Were Ineffective for Failing to Investigate and Present Important Evidence[23]

The State spent considerable time portraying Chappell as an abusive addict. Had counsel properly investigated Chappell's case before the trial, they would have discovered evidence placing these areas in a different light.

1. The relationship between Chappell and Panos

The State presented a very one-sided portrayal of the relationship between Chappell and Panos, casting Chappell as a freeloader, serial abuser, and bad father to his three children. But the ten-year relationship between Chappell and Panos was much more complicated than that.

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[23] Claim One.

Panos was Chappell's only long-term relationship. They met in high school and were together from that point until Panos's death. 6AA1269, 1276 ¶¶13, 37-38; 6AA1303 ¶10; 5AA1243 ¶18; 5AA1222 ¶18. The early years of the relationship were positive and loving. 6AA1350 ¶12; 5AA1236 ¶36. But there was some conflict, stemming from the disapproval Panos's parents had of the interracial relationship between their daughter and Chappell. 6AA1276 ¶39; 5AA1236 ¶36. When Panos finally introduced Chappell to her parents, they greeted him with hostility, racism, and rejection, confusing Chappell. 6AA1276-1277 ¶¶40, 42; 6AA1380-1381 ¶43; 6AA1303-1304 ¶12; 6AA1350 ¶12; 7AA1733 ¶6. Despite this hostility, the relationship continued. 6AA1276-1277 ¶40; 5AA1236 ¶36. When Panos became pregnant with the couple's first child, her parents made her leave the family home. 6AA1278 ¶44; 5AA1236 ¶36. But because Chappell's grandmother also did not approve of the relationship, she forbade Panos from living in her home as well. 6AA1278 ¶44; 5AA1236 ¶36. As a result, Chappell and Panos were both homeless for a time, living in spare rooms in other people's homes. 6AA1278 ¶44; 5AA1236 ¶36.

Over time, the relationship between Panos and Chappell became strained, resulting in numerous fights, break-ups, and reconciliations. 6AA1277-1280 ¶¶43, 48. During some of these fights, Panos called Chappell and their first-born son racist slurs, and she would often move back in with her parents for extended periods, leaving Chappell with their infant son and no electricity or heat. *Id.* ¶¶43, 48, 49; 6AA1317 ¶49. Sometimes Chappell would be the one to leave. 6AA1281 ¶53. But he always returned, telling his friends and family members that he loved Panos too much to leave for good. 6AA1277, 1280 ¶¶43, 50; 6AA1350 ¶13; 6AA1304 ¶13; 6AA1380-1381 ¶¶43, 45.

When Panos's parents relocated to Tucson, they invited Panos and her son to move with them, with one condition—that she leave Chappell in Lansing. 6AA1282 ¶55. But this arrangement did not last long; Panos brought Chappell to Tucson a few months later and put him in an apartment on the other side of town. *Id.* Chappell once again was forced to hide from Panos's parents, and the fighting between the couple continued. 6AA1282-1283 ¶57; 6AA1381 ¶45; 6AA1317 ¶49. Chappell's grandmother eventually sent Chappell a plane ticket to return to Lansing. 6AA1282-1283 ¶57; 6AA1381 ¶45; 7AA1733 ¶4. Over the next

few years, Chappell moved back and forth between Tucson and Lansing, breaking up with Panos and then reconciling. 6AA1304 ¶13; 6AA1350 ¶14; 17AA4228 ¶8; 26AA6450 ¶10; 6AA1284 ¶60. During this time, Chappell's drug use escalated significantly. 6AA1380 ¶41; 17AA4218 ¶8; 17AA4223 ¶8; 17AA4227 ¶6.

Eventually, Chappell and Panos moved together to Las Vegas. 7AA1730 ¶7; 7AA1733-1734 ¶8; 17AA4219 ¶12; 17AA4223 ¶10. But the same problems that had plagued their relationship followed—Panos kicking Chappell out of the house and then asking him to return, and Chappell abusing drugs and alcohol. 6AA1284-1285 ¶¶61–62; 17AA4223 ¶11; 7AA1734 ¶9; 6AA1296-1297 ¶21.

Had counsel presented this evidence, they would have corroborated Chappell's own testimony about his relationship with Panos, casting a much different and more accurate light on the complicated situation between the two, and supporting Chappell's arguments that he lived with Panos and did not kill her in a premeditated and deliberate manner.

2. Chappell's addictions

The State presented evidence of Chappell's addiction in an attempt at character assassination—portraying Chappell as someone who would steal money and furniture from his own wife and children to buy crack cocaine. In reality, Chappell's addiction represents a life-long battle with substance abuse—much of it out of Chappell's control, especially in light of his FASD.

Chappell starting drinking alcohol and smoking marijuana when he was twelve years old—around the sixth grade. 6AA1273 ¶¶27-28; 6AA1353 ¶25; 6AA1345 ¶13; 6AA1263 ¶8; 6AA1309 ¶14; 5AA1235-1236 ¶¶33-34; 5AA1242-1243 ¶16; 5AA1220 ¶11. As he got older, Chappell drank an average of twenty to forty beers during the workweek, and he would binge drink on the weekends, mixing beer and hard liquor. 6AA1273 ¶¶27-28; 6AA1353 ¶25; 6AA1345 ¶13; 6AA1263 ¶8; 6AA1309 ¶14; 5AA1235-1236 ¶¶33-34; 5AA1242-1243 ¶16; 5AA1220 ¶11. One time, Chappell's sister found enough wine bottles under Chappell's bed to fill three trash bags. 5AA1235 ¶33.

Chappell continued abusing marijuana and alcohol in high school, 6AA1380 ¶40; 6AA1303 ¶9; 6AA1263 ¶11; 5AA1235 ¶33; 6AA1251 ¶5,

but he started abusing a new drug—crack cocaine, 6AA1353 ¶26; 6AA1274-1275 ¶33; 6AA1345 ¶13; 6AA1340 ¶17; 6AA1309 ¶14; 5AA1234-1235 ¶30; 5AA1242-1243 ¶16; 6AA1379 ¶35; 5AA1220-1221 ¶12. When he was sober, drinking beer, or smoking marijuana, Chappell was easy-going and fun loving. 6AA1275 ¶34; 6AA1353 ¶28; 6AA1340 ¶17; 5AA1236-1237 ¶37; 5AA1220 ¶11; 5AA1247-1248 ¶¶3-4. When Chappell was on crack, however, he became paranoid and behaved oddly, becoming jumpy, overly alert to his surroundings, aggressive, agitated, and easily frightened. 6AA1275 ¶34; 6AA1353 ¶28; 6AA1340 ¶17; 5AA1236-1237 ¶37; 5AA1220 ¶11; 5AA1247-1248 ¶¶3-4. Chappell during this time had an unlimited supply of drugs at his disposal because his uncle, aunt, brother, and friends all were addicts. 6AA1272 ¶24; 5AA1234-1236 ¶¶30, 34; 5AA1242-1243 ¶16.

Over time, Chappell's addictions took over his life. He began stealing from Panos to support his drug habit. 6AA1340 ¶17; 6AA1317 ¶47; 5AA1236-1237 ¶37; 26AA6459 ¶26. He also shoplifted, using the proceeds to purchase drugs. 5AA1247 ¶2.

Had counsel presented this testimony, the jurors would have had more context for the bad-act evidence they heard. Without it, however,

the jurors were left with only prejudicial evidence that undermined the jurors' ability to make an informed and unbiased decision on Chappell's guilt. Counsel's ineffectiveness was prejudicial to Chappell.

3. Chappell's learning disabilities

Finally, because of counsel's ineffectiveness, the jurors heard little about Chappell's learning disabilities. Additional evidence would have explained why Chappell could hold only temporary, menial jobs. And additional evidence would have explained why Chappell was so dependent on Panos, and why the possibility of her leaving caused him such anguish.

Chappell suffered from a learning disability at an early age and was in special education classes throughout his school years. 6AA1268 ¶7; 6AA1379 ¶35; 6AA1343 ¶5; 6AA1294 ¶11; 6AA1306, 1312 ¶¶4, 26; 6AA1364 ¶7; 5AA1227 ¶5; 5AA1239 ¶3; 26AA6458 ¶22. He was not academically inclined, struggling with reading, writing, and math. 6AA1268 ¶7; 6AA1353 ¶17; 6AA1343 ¶5; 6AA1339-1340 ¶16; 6AA1262 ¶¶2-3; 6AA1306, 1312 ¶¶4, 26; 6AA1362, 1364 ¶¶2, 7; 5AA1227 ¶5; 5AA1239-1240 ¶¶3, 5; 5AA1218 ¶4; 5AA1250 ¶2. And, because he was "slow" and a special education student, Chappell was often teased in

school and around the neighborhood. 6AA1262 ¶5; 6AA1312 ¶26; 5AA1227 ¶5; 5AA1250 ¶2.

Chappell also struggled outside the school setting. He often needed to ask friends and family members to read things for him. 6AA1268 ¶¶7-8; 6AA1294 ¶13; 6AA1312 ¶27; 5AA1240 ¶5. This continued when Chappell was a grown man. 6AA1268 ¶¶7-8; 6AA1294 ¶13; 6AA1312 ¶27; 5AA1240 ¶5. Chappell also had a poor sense of direction and was not able to learn to drive. 6AA1351-1352 ¶¶18-19, 22; 5AA1241 ¶10. He spoke slowly, had trouble processing information, and was physically uncoordinated. 6AA1343-1344 ¶¶6, 8; 6AA1262 ¶5; 5AA1218 ¶4. He had a short attention span and had difficulty focusing on anything for more than a few minutes. 6AA1378 ¶30; 6AA1262 ¶3; 5AA1239 ¶4; 5AA1218 ¶4. Even when he was repeatedly shown how to do tasks, Chappell was not able to learn new things. 6AA1378 ¶33; 6AA1262 ¶2. And he had a limited vocabulary and normally used words with few syllables. 6AA1379 ¶34; 6AA1262 ¶2; 6AA1313 ¶¶29, 31; 5AA1239 ¶4; 5AA1250 ¶2. Because of Chappell's difficulty functioning, he was only able to secure menial jobs that did not require much skill or interaction with the public. 6AA1296 ¶18; 6AA1312 ¶26; 5AA1227 ¶5.

There is a reasonable probability of a more favorable outcome had counsel presented this evidence.

I. Jury Issues during the Guilt Phase and Penalty Rehearing Violated Chappell's Constitutional Rights[24]

The juries that convicted Chappell and sentenced him to death included biased jurors who were not selected from a fair cross-section of the community. As a result, Chappell's convictions and death sentence are invalid.

1. Several jurors during both phases of Chappell's trial were biased

The Sixth Amendment guarantees defendants an "impartial jury." *Bishop v. State*, 92 Nev. 510, Fn. 2, 554 P.2d 266 (1976); *see Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). If even one juror is prejudiced against the defendant, the defendant deserves a new trial. *See McNally v. Walkowski*, 85 Nev. 696, 700, 462 P.2d 1016, 1018 (1969); *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998).

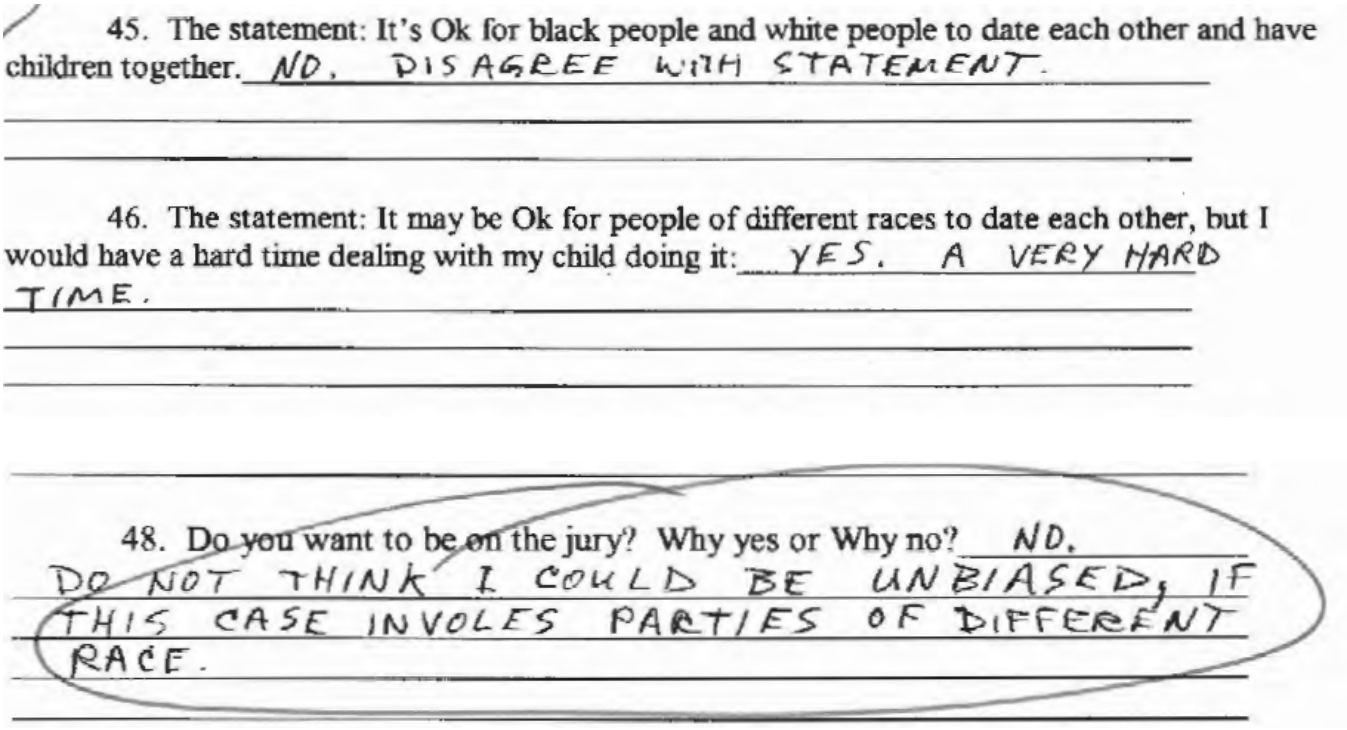
Juror bias may be actual or implied. *See Sayedzada v. State*, 134 Nev. __, 419 P.3d 184, 191 (2018) (citing *United States v. Torres*, 128

[24] Claims Seven, Nine, and Eighteen.

F.3d 38, 45–48 (2d Cir. 1997)); *United States v. Olsen*, 704 F.3d 1172, 1196 (9th Cir. 2013). Actual bias "arises where the juror demonstrates a state of mind that prevents the juror from being impartial." *Sayedzada*, 419 P.3d at 191; *see Preciado v. State*, 130 Nev. 40, 44, 318 P.3d 176, 179 (2014). Implied bias depends on "the juror's background and/or relationship to the parties or case." *Sayedzada*, 419 P.3d at 191–92; *see also United States v. Mitchell*, 568 F.3d 1147, 1151 (9th Cir. 2009) (explaining that bias is presumed "where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances").

a. Biased jurors during the guilt phase

Chappell, an African-American man, stood accused of murdering his White girlfriend with whom he had fathered three children. But Juror Fittro, on his questionnaire expressed racist views about interracial dating:



45. The statement: It's Ok for black people and white people to date each other and have children together. NO. DISAGREE WITH STATEMENT.

46. The statement: It may be Ok for people of different races to date each other, but I would have a hard time dealing with my child doing it: YES. A VERY HARD TIME.

48. Do you want to be on the jury? Why yes or Why no? NO. DO NOT THINK I COULD BE UNBIASED, IF THIS CASE INVOLES PARTIES OF DIFFERENT RACE.

9AA2070. Juror Fittro did not stray from this sentiment during voir dire:

> Q: Now, you suggested in the questionnaire in one of your answers that there might be a problem if the parties involve persons of different races?
>
> A: Yeah, that's a possibility. I may have a problem.
>
> . . .
>
> Q: If I suggest to you in this case that, even though the evidence will show that they have been boyfriend and girlfriend, that they were not of the same race, is that going to be a factor that would be troubling to you to the point that you can't render equal and exact

justice both to Mr. Chappell, the defendant, and to the prosecution?

A: I believe it could be.

11AA2549-2550. Juror Fittro thus admitted that his racist views would impact his ability to fairly serve as a juror in this case—that he was actually biased against Chappell. *See White v. State*, 112 Nev. 1261, 1268–69, 926 P.2d 291, 295–96 (1996) (Rose, J., dissenting); *see also United States v. Henley*, 238 F.3d 1111, 1121 (9th Cir. 2001) ("The government does not dispute that a juror who answered in the affirmative questions about whether race would influence his decision would be subject to a challenge for cause."); *Fields v. Saunders*, 278 P.3d 577, 580–81 (Okla. 2012) (reversing judgment when juror "entertained bias against the plaintiffs' race"). The Supreme Court has recognized the "unique opportunity" for racial bias to infect a capital trial. *Turner v. Murray*, 476 U.S. 28, 35 (1986); *see Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 867-69 (2017). That is exactly what happened

here. Counsel, however, failed to move to strike Juror Fittro for cause or exercise a peremptory challenge.[25]

b. Biased jurors during the penalty rehearing

Several jurors for the penalty rehearing were either actually or impliedly biased against Chappell. Defense counsel again failed to move to strike the jurors for cause or exercise a peremptory challenge against them.

Juror Forbes was both actually and impliedly biased against Chappell. Juror Forbes expressed racist views on her juror questionnaire:

35. The accused is an African American male. Is there anything about that fact that would affect your ability to be fair and impartial in this case? Please explain.

NO COMMENT

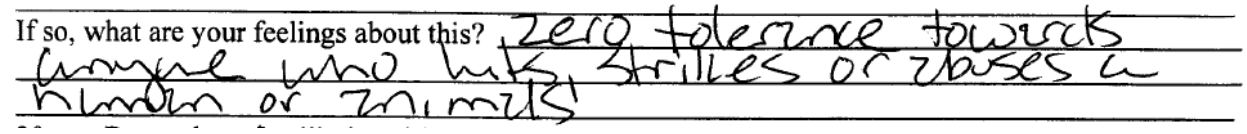
36. If the evidence shows that the victims in this case are of a different racial background than the accused, would that affect your ability to be fair and impartial?

YES POSSIBLY

[25] These failures rendered defense counsel's performance ineffective.

22AA5306-5307. During voir dire, Juror Forbes backtracked from these opinions, saying Chappell's race was "so irrelevant" and "ma[de] no difference." 21AA5108 at 59. But this did not cure the actual bias stated in the juror questionnaire.

In addition, several jurors had experienced domestic violence and were biased as a result. Juror Forbes, along with his mother and two sisters, experienced violence at the hands of his stepfather, over a period of six or seven years. 22AA5305; 21AA5106-5107 at 52-53. (Juror Forbes also had an unfavorable view of public defenders, expressing in both the questionnaire and during voir dire that they "railroaded" his brother. 22AA5306; 21AA5107 at 54.) Similarly, Juror Bundren displayed actual prejudice against domestic abusers:



22AA5283. And Juror Bundren further related that her uncle had murdered her aunt—a crime for which she believed her uncle deserved the death penalty. 22AA5285; 16AA3982-3983 at 206, 209. Juror Noahr wrote that her "mother and sperm donor father" had an abusive relationship when "[she] was 10 years old," and she "never had a close

relationship with him." 22AA5426. In fact, she "feared him." *Id.* Noahr added that she witnessed and remembered the abuse, and that she acted as a protector to her two younger siblings. 16AA3979 at 194. Because this case involved evidence of Chappell's abuse of Panos, these jurors were impliedly biased. *See Brioady v. State*, 133 Nev. __, 396 P.3d 822, 825 (2017) (granting new trial for child molestation because juror failed to disclose that she was a victim of a similar crime), *reh'g denied* (Oct. 2, 2017).

Juror Taylor demonstrated actual bias against addicts. His ex-wife died because of her addiction, and Juror Taylor admitted "hav[ing] prejudice against drugs." 16AA3951 at 83-84. Juror Smith similarly was biased against addicts. His step-daughter was an addict, and he ended up raising her two children—a situation he characterized as "very bad." 22AA5404; 16AA3970 at 159. Defense counsel inquired whether he would "give more or less weight to somebody's testimony" because of drug use, and he responded, "Possibly." 16AA3971 at 164. Similarly, Juror Morin's brother and other family members were addicts. 21AA5228; 16AA3990 at 237-238. During an interview with an investigator for undersigned counsel, Juror Morin expressed having

neither the time nor the sympathy to deal with substance abusers, and he did not believe that drug abuse could constitute mitigating evidence. 22AA5433 ¶ 6. Morin felt the same way about domestic abusers. *Id.* Chappell was addicted to crack cocaine, and both sides presented evidence of that addiction during the penalty rehearing. Bias by several jurors against addicts and drug use thus deprieved Chappell of a fair trial. *See Sayedzada*, 419 P.3d at 191; *Preciado*, 130 Nev. at 44, 318 P.3d at 179.

Next, several jurors, because of their connection to law enforcement, were impliedly biased against Chappell. Juror Smith worked for the Flagstaff police department while in college, 16AA3971 at 163; had trained with the Las Vegan Metropolitan Police Department the year before the penalty rehearing, 22AA5403; and, at the time of the penalty rehearing, worked at Searchlight Justice Court and volunteered with the Las Vegas Metropolitan Police Department, *Id.*; *see* 16AA3971 at 161-163. Juror Taylor's son worked as a police officer, and he talked frequently to his son about the work. 24AA5912; 16AA3952 at 85. Juror Noahr's son was a correctional officer and her ex-husband a police captain. 22AA5427. Juror Washington worked as a

pretrial officer for the City of Las Vegas, a position she had held for twenty-four years. 21AA5099 at 23. Because of her occupation, she knew quite a few people in law enforcement, and she interacted with police officers "all the time." *Id.* Lastly, Juror Morin's cousin-in-law was a police officer in Long Beach, California. 22AA5295. These jurors would have been more likely to credit testimony from law enforcement, including the seven police officers who testified for the State, solely based on their profession. *See People v. Johnson*, 452 N.Y.S.2d 53, 54 (N.Y. App. Div. 1982); *People v. Sellers*, 423 N.Y.S.2d 222, 222 (N.Y. App. Div. 1979).

Finally, Juror Feuerhammer said during voir dire that he had a problem with a "term of years" sentence with the possibility of parole. 21AA5106 at 49. Juror Feuerhammer should have been challenged and removed for cause, and his remaining on the jury violated Chappell's right to a fair trial. *See Ross v. Carpenter*, 487 U.S. 81, 85–86 (1988); *Wainwright v. Witt*, 469 U.S. 412, 424 (1985); *Adams v. Texas*, 448 U.S. 38, 44 (1980).

2. The trial court erred by failing to remove jurors that Chappell challenged for cause

Chappell during the penalty rehearing moved to strike three prospective jurors for cause: Hibbard, Ramirez, and Button. 16AA3964 at 133, 3988 at 229; 21AA5130 at 146. Hibbard refused to consider mitigating circumstances (other than insanity), and would almost always vote for the death penalty. 16AA3955-3956 at 99-102; *see also* 16AA3956 at 101 ("Murder is a pretty severe action. Unless there's insanity at the time of committing it, I don't know how you justify that."). Ramirez expressed several problematic beliefs: (1) the death penalty was not enforced enough; (2) the concept of mitigating factors was foreign to him; (3) he might not be able to follow the court's instructions and hold the State to its burden; (4) he believed in an eye for an eye; and (5) he agreed with the system in Texas where jurors decided between only two options, life without the possibility of parole and death. 16AA3974-3976 at 174-182. He added that, if he were in Chappell's position, he would not want twelve people like him sitting on the jury. *Id.* Button was unsure how any sentence other than death

could be appropriate.[26] She had already made up her mind, she added, and she would not be able to follow the court's instructions. 21AA5121-5122 at 112-116.

The trial court denied all three of the challenges, forcing Chappell to use peremptory challenges to remove these biased prospective jurors. 16AA3964, 3988; 21AA5130 at 146. Chappell was then unable to use peremptory challenges to remove several remaining biased jurors. *See Ross*, 487 U.S. at 85–86 (1988) (directing inquiry after erroneous denial of for-cause challenge "on the jurors who ultimately sat"); *see also Boonsong Jitnan v. Oliver*, 127 Nev. 424, 434, 254 P.3d 623, 630 (2011).

3. The jurors were not drawn from a fair cross-section of the community

The Nevada and Federal Constitutions guarantee a jury venire drawn from a fair cross-section of the community. *See Duren v. Missouri*, 439 U.S. 357, 364 (1979); *Williams v. State*, 121 Nev. 934, 940, 125 P.3d 627, 631 (2005). But African-American residents, despite being a distinctive group in the community, *see Williams*, 121 Nev. at

[26] The transcript misidentifies Button as Bundren.

941, 125 P.3d at 632, were significantly underrepresented on Chappell's jury venires.[27] "[T]his underrepresentation [was] due to systematic exclusion of the group in the jury-selection process." *Duren*, 439 U.S. at 364.

The jury selection process in Clark County is not racially neutral. A computer program selects the jury pool using lists compiled by the Nevada Department of Motor Vehicles. 23AA5735, 5746. Although local court rules allow for the use of databases, this was not put into practice until 2002. 24AA5799, 5817-5818; *see also Williams*, 121 Nev. at 942 n.18, 125 P.3d at 632 n.18. Using the DMV database excludes nearly ten percent of Clark County's adult population. *Id.* In addition, courts mail jury summons to addresses on file with the DMV, further excluding community members from jury venires. 23AA5746. And court rules allow excusal of jurors for "child care problems or severe economic hardship"—both problems which fall disproportionately on economically

[27] On information and belief, Chappell alleges that his first venire included seven persons of Hispanic origin and fourteen African Americans.

disadvantaged minorities (and exacerbated by inadequate compensation for jurors). 24AA5753.

As a result of these processes, African Americans are under-represented on jury venires by over 25%, while other racial minorities are under-represented by 21.4%. 23-24AA5736, 5745-5746, 5754. The likelihood that these findings are the result of chance, rather than other factors, is less than 1%. *Id.*

J. The Prosecutors Committed Misconduct throughout the Guilt Phase and Penalty Rehearing[28]

From voir dire to closing argument, prosecutorial misconduct pervaded both the guilt and penalty phases of Chappell's trial. The prosecutors improperly appealed to the passions of the jurors, commented on irrelevant and prejudicial facts, disparaged Chappell, referenced Chappell's post-arrest silence, misstated the law, and misstated the record. This misconduct "so infected" the proceedings "with unfairness," as to make the resulting convictions and death sentence "a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643

[28] Claims Fifteen and Sixteen.

(1974)); *see Valdez v. State*, 124 Nev. 1172, 1189, 196 P.3d 465, 477 (2008).[29]

1. Inflaming the passions of the jury

"Prosecutors may not make comments calculated to arouse the passions or prejudices of the jury." *United States v. Leon-Reyes*, 177 F.3d 816, 822 (9th Cir. 1999); *see Viereck v. United States*, 318 U.S. 236, 247–48 (1943); *Lisle v. State*, 113 Nev. 540, 552, 937 P.2d 473, 480 (1997). But Chappell's prosecutors repeatedly did just that.

As an initial note, one of Chappell's prosecutors, Mel Harmon, actually insisted that "words uttered in open court" by prosecutors—no matter how improper—cannot constitute misconduct. Mel Harmon, *A Trout in the Milk* at 93–113 (AuthorHouse 2011); *see id.* at 103 ("[T]he seriousness of open-court prosecutorial misconduct is debatable. In my view, most instances of rhetorical prosecutorial misconduct are superficial and inconsequential." (emphasis omitted)); *id.* at 108 ("The

[29] Trial counsel were ineffective for failing to object to every instance of misconduct, and appellate and first post-conviction counsel were ineffective for failing to effectively raise these issues on appeal and in the first post-conviction proceedings. *See Zapata v. Vasquez*, 788 F.3d 1106, 1112 (9th Cir. 2015) (analyzing as ineffectiveness claim counsel's failure to object to prosecutorial misconduct).

Supreme's crusade, against what they're choosing to call misconduct, continues unabated." (emphasis omitted)); *id.* at 109 ("There are plenty of legitimate issues in trial work without making up imaginary monsters or bogeymen." (emphasis omitted)); *id.* at 109 ("[R]hetorical misconduct is a palpably nonsensical creation of the Judiciary, for the most part." (emphasis omitted)); *id.* at 112 ("It's not a small matter to improvidently tie the tongues of prosecutors in closing argument. Those who do it are guilty of judicial misconduct. They are striking foul blows at the very heart of the adversary system." (emphasis omitted)).

Turning to the misconduct in Chappell's case, during the opening statement of the guilt phase, the prosecutor promised to answer a question for the jurors: "why victims in domestic violence stay with a person who is continually violent to them." 11AA2732. Counsel objected, the court overruled the objection, and the prosecutor continued: "You will answer that question because for Deborah Panos, the decision to leave, the decision to say I'm not going to take your violence, that decision was a deadly decision." 11AA2732-2733. It is misconduct for prosecutors to imply a connection between a jury's verdict and alleviation of societal problems. *See McGuire v. State*, 100 Nev. 153,

157, 677 P.2d 1060, 1064 (1984); *United States v. Weatherspoon*, 410 F.3d 1142, 1149–51 (9th Cir. 2005); *see also United States v. Johnson*, 968 F.2d 768, 771 (8th Cir. 1992).

Next, the prosecutors made several comments on irrelevant subjects, designed to portray Chappell as a bad or immoral person: (1) Chappell never married Panos, despite fathering three children with her, 11AA2733; 16AA3801-3802, 3833; (2) Chappell's children all had their mother's last name, 11AA2737-2738; (3) Chappell did not work consistently (though the prosecutor during the guilt phase exaggerated the extent of Chappell's unemployment), 11AA2734; 18AA4460 at 8; *see also* 20AA4937 at 53 (referring to Panos as a "single mother"); and (4) Chappell sold his baby's diapers to buy drugs, *id.* at 56.

Further, the prosecution asked Chappell a series of improper questions during cross-examination at the guilt phase concerning the punishment he wanted to receive and whether he wanted a death sentence. 14AA3325-3328. During the guilt phase, the subject of punishment is irrelevant. *See Zant v. Stephens*, 462 U.S. 862, 911 n.5 (1983).

In addition, the prosecutor during the penalty rehearing repeatedly referenced Holocaust victims in his effort to have Chappell sentenced to death. The prosecutor compared the victim's life living with Chappell to Anne Frank's life during the Holocaust:

> Look how [Panos] chose to live her life over that ten years of what was a living hell with the defendant. This thing of weekly beatings by him, the pain, the concern for her children. She had every reason to want to give up. She had every reason to take it out on other people, but how did she respond to that. I don't think of all of the misery, but the beauty that still remains. A quote from a young woman that lived decades ago that suffered a lot of pain and anguish and fear for an extended period of time, as well.
>
> And yet the beauty that still remains. You know it really is a matter of perspective. It's a matter of how people pick themselves up and go on with their lives.

20AA4936 at 51 (quoting *Anne Frank, The Diary of a Young Girl* (Knopf Doubleday Publishing Group 2010)).

The prosecution also committed misconduct by appealing to justice for the victim and "the State of Nevada." 20AA4960 at 145-147; *see also* 20AA4938 at 58 ("[Y]ou can make some corrections now. We can't bring Debbie back, but we can see that justice is done."); 20AA4944 at 83

("Mercy is something that comes in sideways based upon some circumstances, and then it's decided that it will apply. And it will kind of take over the demands of justice, which would normally be a life for a life."). Due process requires jurors to decide a case based on its particular facts, not to exact revenge for the victims. *See Rose v. State*, 123 Nev. 194, 210, 163 P.3d 408, 419 (2007); *Drayden v. White*, 232 F.3d 704, 711–13 (9th Cir. 2000); *State v. Schumacher*, 322 P.3d 1016, 1024 (Kan. 2014).

The prosecutor then improperly warned the jurors that Chappell was attempting to "con" them:

> Don't be conned. It's interesting, Dr. Etcoff in the beginning of his testimony said, you know, the defendant, he's just not sophisticated enough to lie. I would know that. Then we heard on cross-examination all of these things the defendant flat out lied to him about, that the doctor didn't know. And here's a Ph.D person who just got totally conned by the defendant, and he conned the system, and he conned Mr. Duffy, sat across from him for two hours saying he really wanted to do something about that drug problem enough that Duffy let him go, and he went straight over to kill Debbie. He would like to see you conned in this case, ladies and gentlemen. Don't be conned.

20AA4945 at 86-87.[30] The prosecutor repeated this argument a short time later: "And it wasn't just [parole officer William] Duffy that got snowed by the defendant. Dr. Etcoff was snowed just as well." 20AA4959. These comments improperly characterized Chappell as a liar and his expert witness as gullible and not credible. *See Kellogg v. Skon*, 176 F.3d 447, 451–52 (8th Cir. 1999) (concluding prosecutor committed misconduct by referring to defendant as a "monster," a "sexual deviant," and "a liar"); *Cristy v. Horn*, 28 F. Supp. 2d 307, 318–19 (W. D. Pa. 1998) (calling "unfair and prejudicial" prosecutor's reference to defendant as "Great Manipulator").

The prosecution improperly urged the jurors to weigh the worth of the victim and her family against Chappell. The prosecution repeatedly referred to the victim's unique qualities, describing the victim's "beauty that still remains," eulogizing the victim as a "person that people loved to be around," who was "giving," "compassionate," and a "hero," and

[30] Dr. Etcoff did not testify that Chappell was too unsophisticated to lie; the opposite, in fact: "Could he lie, sure. You don't have to be that sophisticated to lie." 19AA4746.

portraying her as a "nice young mother." 20AA4936-4938 at 50-53, 60. The prosecution then compared these qualities to Chappell's:

> She was even a giving person with respect to the defendant, Mr. Chappell, the person that killed her, the person that took her life. . . . Debbie was a great person, because she dealt with her difficulty. The defendant, Mr. Chappell, did not. He chose the easy course. He chose the selfish course. He chose not to suffer. He chose to inflict suffering on other people.

20AA4936, 4939 at 52, 62. The prosecutor concluded by telling the jurors they should impose death because Panos and her family did not receive the benefits that Chappell would receive with a lesser sentence. 20AA4944-4955 at 84-85.

2. Misstating the law

A prosecutor commits misconduct by misstating the law during argument. *See Boyde v. California*, 494 U.S. 370, 384 (1990); *United States v. Williams*, 836 F.3d 1, 14–15 (D.C. Cir. 2016). The prosecutors several times incorrectly stated the law to the jurors, and the trial court's instructions did not cure the prejudice this misconduct caused. *See Zapata*, 788 F.3d at 1123 (rejecting argument that general jury instruction about attorney arguments neutralized prejudice from

prosecutorial misconduct); *see also Emmons v. State*, 107 Nev. 53, 60, 807 P.2d 718, 722 (1991), *overruled on other grounds by Harte v. State*, 116 Nev. 1054, 1072, 13 P.3d 420, 432 (2000); *Deck v. Jenkins*, 814 F.3d 954, 982 (9th Cir. 2014).

a. Premeditation and deliberation

During closing argument of the guilt phase, the prosecutor attempted to define for the jury the elements of "a willful, deliberate, and premeditated killing." 16AA3796. But the prosecutor conflated the elements of premeditation and deliberation: "[A]ll that is required is that the defendant formed in his mind either at the moment of the killing or immediately before it the clear design to kill and if that is satisfied, it is *deliberate and premeditated murder*." 16AA3796-3797 (emphasis added); *see also* 16AA3855-3857.

Deliberation is not merely a synonym of premeditation; they are separate elements the State must separately prove beyond a reasonable doubt. *See Byford v. State*, 116 Nev. 215, 235–36, 994 P.2d 700, 713–14 (2000); *Hern v. State*, 97 Nev. 529, 532, 635 P.2d 278, 280 (1981). Specifically, to establish premeditation the State must prove "a design, a determination to kill, distinctly formed in the mind by the time of the

killing." *Byford*, 116 Nev. at 237, 994 P.2d at 714. Deliberation, on the other hand, "connot[es] a dispassionate weighing process and consideration of consequences before acting." *Id.* at 235, 994 P.2d at 714; *see State v. Brown*, 836 S.W.2d 530, 539 (Tenn. 1992), *quoted in Byford*, 116 Nev. at 235, 994 P.2d at 714.

The separate proof required for deliberation and premeditation led this Court in 2000 to reject the "*Kazalyn* instruction," which conflated the two elements. *Byford*, 116 Nev. at 234–37, 994 P.2d at 713–15. "By defining only premeditation and failing to provide deliberation with any independent definition," this Court explained, "the *Kazalyn* instruction blurs the distinction between first- and second-degree murder." *Id.* at 235, 994 P.2d at 713. But Chappell's prosecutor did precisely what this Court criticized in *Byford*—he "defin[ed] only premeditation and fail[ed] to provide deliberation with any independent definition." *Byford*, 116 Nev. at 234–37, 994 P.2d at 713–15; *see Riley v. McDaniel*, 786 F.3d 719, 723–24 (9th Cir. 2015).

This conflation between premeditation and deliberation prejudiced Chappell. The evidence of deliberation—"a dispassionate weighing process and consideration of consequences," *Byford*, 116 Nev. at 235,

994 P.2d at 714—is underwhelming. The facts presented by the prosecution showed not a preplanned murder but a killing by a brain-damaged individual after discovering that his girlfriend was involved in a new romantic relationship. *See Riley*, 786 F.3d at 724–27 (conflation of premeditation with deliberation prejudicial because defendant was upset and intoxicated at time of killing); *see also Ewish*, 111 Nev. at 1367, 904 P.2d at 1039 (reversing conviction for specific-intent crime when defendant "suffered mental impairment, had the mental age of a thirteen year-old, was susceptible to control by others, including the co-defendant, and was intoxicated at the time of the arson offenses").

b. Reasonable doubt

"[W]hen prosecutors attempt to rephrase the reasonable doubt standard, they venture into troubled waters." *Wesley v. State*, 112 Nev. 503, 514, 916 P.2d 793, 801 (1996). But the prosecution during closing argument improperly quantified reasonable doubt:

> A reasonable doubt is one which is based on reason. It's a reasonable doubt. It's not mere possible doubt. So it's not possibilities, it's not speculation because it says, "Doubt to be reasonable must be actual, not mere possibility or speculation," okay. It's got to be something based on reason, okay. It's not an impossible burden,

> ladies and gentlemen. Prosecutors across the country everyday meet this burden. It's not an impossible burden. It's a doubt based on reason.
>
> It's a type of doubt that would control a person in the weighty affairs of life. What is a weighty affair of life? Well, for some people it could be the decision to get married. For some people it could be the decision to have a child or switch occupations or perhaps—let me put it to you this way. You have all made reasonable doubt or, excuse me, you have all made weighty affair of life decisions. You have all made them. You have all probably, at some time, bought a home. So, what are some of the things you look for in buying a home?

16AA3859-3860.

It is improper for a prosecutor to equate decisions in "everyday life" to constitutional standards applicable to criminal cases. *See Quillen v. State*, 112 Nev. 1369, 1382–83, 929 P.2d 893, 901–02 (1996). Individuals do not use the reasonable-doubt standard to make decisions in ordinary life, even "weighty" decisions; "[a]ccording to the Federal Judicial Center, 'decisions we make in the most important affairs of our lives—choosing a spouse, a job, a place to live, and the like—generally involve a heavy element of uncertainty and risk-taking,'" and thus the decisions "are wholly unlike the decisions jurors

ought to make in criminal cases." Michael D. Cicchini, *Instructing Jurors on Reasonable Doubt: It's All Relative*, 8 Cal. L. Rev. Online 72, 74–75 (2017) (quoting Fed. Jud. Ctr. Pattern Crim. Jury Instructions No. 21 (1987)); *see Quillen*, 112 Nev. at 1382–83, 929 P.2d at 901–02.

c. Voluntary manslaughter

Voluntary manslaughter is a killing that involves "a serious and highly provoking injury," which is "sufficient to excite an irresistible passion in a reasonable person." NRS 200.050; *see Allen v. State*, 98 Nev. 354, 356, 647 P.2d 389, 390–91 (1982). The prosecution twice misstated this definition.

First, the prosecutor told the jurors that the victim must be "the aggressor" in cases of voluntary manslaughter: "[W]hat this whole crime contemplates is that the aggressor is the victim and she attacked him and either tried to kill him or inflicted in some manner, whether it was a direct physical attack or in some other way, inflicted a serious and highly provoking injury upon him." 16AA3792-3794; *see* 16AA3835 ("[I]s voluntary manslaughter another pretty term for murder in the first degree for what he did to Deborah Panos? I submit to you it is."). This definition improperly conflated self-defense with voluntary

manslaughter. *Compare* NRS 200.120, *and* NRS 200.190 (self-defense), *with* NRS 200.050 (voluntary manslaughter). *See also Williams v. State*, 91 Nev. 533, 535, 539 P.2d 461, 462 (1975) (on appeal from conviction for voluntary manslaughter, concluding that self-defense instruction was inappropriate because "appellant was the aggressor").

Second, the prosecutor told the jury that only a very specific factual scenario qualified as voluntary manslaughter:

> A manslaughter case, well, that would probably be a case, for example, where you have a husband and wife of say 20 years, he works everyday real hard, goes out to make a living for his wife and his kids, and, as he is busting his back everyday, he comes home one night after 20 years of marriage and he actually finds his wife and his best friend in bed and in the heat of passion, before the voice of reason can come into his mind, he grabs the nearest object and he kills them. That is a voluntary manslaughter case. That's a voluntary manslaughter case. It's certainly not the facts of this case now, is it?

16AA3832. The charge of course does not depend on the length of the relationship, the defendant's employment status, or whether the defendant "actually finds his wife and his best friend in bed." *See Crawford*, 121 Nev. at 747, 121 P.3d at 584 (concluding evidence supported voluntary-manslaughter instruction when defendant,

believing she was lying to him, killed his girlfriend of seven months); *Roberts v. State*, 102 Nev. 170, 171–74, 717 P.2d 1115, 1115–17 (1986).

d. Presumption of innocence

Criminal defendants are presumed innocent. Crucially, the presumption "(1) remains with the accused throughout every stage of the trial, including, most importantly, the jury's deliberations, and (2) is extinguished only upon the jury's determination that guilt has been established beyond a reasonable doubt." *Mahorney v. Wallman*, 917 F.2d 469, 472 n. 2 (10th Cir. 1990); *see Cool v. United States*, 409 U.S. 100, 104 (1972); *Pagano v. Allard*, 218 F. Supp. 2d 26, 33 (D. Mass. 2002). The prosecution misstated that presumption, however:

> Ladies and gentlemen, when this defendant walked into this courtroom, he was presumed innocent, but with every piece of [evidence] here, with each piece, a layer of that presumption has been lifted and I submit to you he sits there before you in all of his naked guilt.

16AA3859. No mountain of evidence could have lifted a layer away from the presumption of innocence. *See Pagano*, 218 F. Supp. 2d at 33. The prosecutor's statement, however, lifted that presumption and rendered Chappell's trial fundamentally unfair.

3. Violating Chappell's right to remain silent

A long line of cases establish it is improper for a prosecutor to elicit testimony on a defendant's post-arrest silence. *See, e.g.*, *Doyle v. Ohio*, 426 U.S. 610, 617–20 (1976); *Anderson v. State*, 121 Nev. 511, 516–17, 118 P.3d 184, 187–88 (2005); *Murray v. State*, 113 Nev. 11, 17–18, 930 P.2d 121, 124–25 (1997). But the prosecutors repeatedly referenced the timing of Chappell's stipulation and testimony, implying that his silence until that point negated his sincerity in admitting wrongdoing. 14AA3325-3326; 16AA3851-3853; *see also* 16AA3853 (implying that Chappell fabricated story of consensual sex after learning of DNA results).[31] This questioning and commentary by the prosecution violated Chappell's right to remain silent. *See Doyle*, 426 U..S. at 611; *Hurd v. Terhune*, 619 F.3d 1080, 1085–88 (9th Cir. 2010).

[31] This argument also represents one of the several times the State mentioned O.J. Simpson: "He did an OJ on her, but he can't claim the OJ because he's stuck. He left the evidence in her and he can't claim that anyone planted this evidence. So he's stuck." 16AA3853. The prosecution's repeated references to Simpson, in a case involving an African-American man killing his White girlfriend, constituted prosecutorial misconduct.

4. Insulting Chappell

Prosecutors have a duty "not to ridicule or belittle the defendant." *Earl v. State*, 111 Nev. 1304, 1311, 904 P.2d 1029, 1033 (1995); *see McGuire*, 100 Nev. at 157, 677 P.2d at 1064 ("Disparaging comments have absolutely no place in a courtroom, and clearly constitute misconduct."). But the prosecutors repeatedly insulted Chappell, starting during closing argument of the guilt phase:

> The philosopher Pascal has made this observation. "Evil is easy and has infinite forms."
>
> All evil required on August the 31st, 1995 was two hours—two months of incarceration from June the 26th until August the 31st, a malignant and vengeful heart and unfortunate release at about 10:45 in the morning, a sinister choice by the inmate released from custody.
>
> All evil required with sturdy legs and resolute strides from an opposite Main Street and Bonanza does to North Lamb Boulevard.
>
> . .
>
> All evil required was a kitchen knife . . . . Not a large knife, but deadly in its consequences for Deborah Panos. All evil required was a cowering victim. Deborah Ann Panos, 26 years of age, the mother of three little children aged seven, five, and three. Where is the promise of her years once

> written on her brow? Where sleeps that promise now?

16AA3778. (This argument, along with several other statements made throughout, also includes improper victim-impact information.) The prosecutors continued this theme during the remainder of closing argument, calling Chappell "heartless," 16AA3839, "a cold, calculated, selfish murderer," 16AA3839-3840, 3858, "cruel," 16AA3805, and a liar, 16AA3858. A different set of prosecutors repeated this misconduct during the penalty-phase closing argument. *See* 20AA4936 at 52, 4960 at 147 ("evil"); 20AA4937 at 56 ("despicable"); 20AA4938 at 58 ("appalling"); 20AA4939 at 62, 4955 at 128, 4960 at 147 ("selfish"); 20AA4955 at 127 ("sexist"); 20AA4960 at 147 ("treacherous").

Courts routinely conclude similar insults are improper. *See Darden*, 477 U.S. at 180 & n.11 ("animal"); *Jones v. State*, 113 Nev. 454, 469, 937 P.2d 55, 65 (1997) ("rabid animal"); *Pacheco v. State*, 82 Nev. 172, 178–80, 414 P.2d 100, 103–04 (1966) ("mad dog"); *Comer v. Schriro*, 480 F.3d 960, 988 (9th Cir. 2007) (en banc) (Paez, J., concurring) (per curiam) ("monster," "filth," and "reincarnation of the devil"); *Kellogg*, 176 F.3d at 451–52 ("monster," "sexual deviant," and "a liar").

5. Disparaging legitimate defense strategies

Prosecutors have a duty to not "ridicule or belittle" the defense. *See Earl*, 111 Nev. at 1311, 904 P.2d at 1033; *Pickworth v. State*, 95 Nev. 547, 550, 598 P.2d 626, 627 (1979). But the prosecution spent significant time in closing arguments chastising Chappell for daring to "blame" his crimes on his upbringing. 20AA4938-4939 at 58-64, 4941 at 69-70, 4944-4945 at 83-84, 86. And, the prosecutor added, the only reason the jury was even hearing mitigation evidence is because of an "extremely out-dated sexist view of violence" in domestic relationships:

> It's probably a certain prejudice that we all sort of internalize to some degree the idea that a murder between two people who knew each other isn't that bad. It's not as bad or scary as a stranger murder. Because if a stranger had climbed through Debbie Panos' window, raped her, had beat her up, stabbed her to death and then stole her car, there wouldn't be a whole lot of commentary about marijuana houses on the street he grew up on. There wouldn't be a whole lot of commentary about, well, maybe she liked him, or maybe she wanted him back. Wouldn't be discussing that at all. We'd be discussing the violence of the act of that day. And that's what this case is about.

20AA4955 at 127-128. The prosecutor then compared Chappell's traumas to those experienced by Viktor Frankl, a Holocaust survivor,

and criticized Chappell for not doing what Frankl did—"rise above" and "conquer" his "travails of life." 20AA4939 at 62-64. This was an improper characterization of Chappell's mitigation presentation. *See Butler v. State*, 120 Nev. 879, 898–99, 102 P.3d 71, 84–85 (2004) (vacating death sentence after prosecutor "portrayed Butler's presentation of mitigating evidence and defense tactics as a dirty technique"); *Baer v. Neal*, 879 F.3d 769, 787 (7th Cir. 2018); *Gall v. Parker*, 231 F.3d 265, 313–15 (6th Cir. 2000); *State v. MacLennan*, 702 N.W.2d 219, 236 (Minn. 2005).

In addition, the prosecution sarcastically ridiculed Chappell's defense throughout closing argument. *See Earl*, 111 Nev. at 1311, 904 P.2d at 1033; *Pickworth*, 95 Nev. at 550, 598 P.2d at 627. In addressing testimony that the victim was controlling and abusing, the prosecutor responded, "My goodness, just incredible." 20AA4938 at 60. Similarly, in response to testimony about Chappell's childhood abuse, the prosecutor said, "And we hear, my goodness, physical abuse." 20AA4939 at 61. Responding to the mitigating evidence, the prosecutor continued, "Just amazing all the blame that's going out every direction from the defendant." *Id.* When addressing whether Chappell was remorseful, the

prosecutor again disparaged Chappell's defense: "Those were his comments of remorse. She got caught and he wasn't going to let her get away with it. And he's going to write a book. Undoubtedly, recounting all the wrong that have been done to James Chappell over the years. It's offensive." 20AA4955 at 127.

Finally, the prosecution improperly argued to the jurors that mitigation evidence not connected to the crime is inconsequential: "Now, certainly the fact that he had this troubled up-bringing and he was in an environment that apparently a lot of people were doing drugs than, would make his life more difficult. But it doesn't erase what he did on August 31st." 20AA4957 at 135; *see also id.* at 134 ("[I]t's important to remember that this crime wasn't done by a 9-year-old boy. This crime wasn't done by a 10-year-old boy."). Mitigation evidence does not need to be connected to the crime. *See Tennard v. Dretke*, 542 U.S. 274, 284–85 (2004); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976); *Poyson v. Ryan*, 879 F.3d 875, 887 (9th Cir.) (en banc), *cert. denied*, 138 S. Ct. 2652 (2018).

6. Misstating the record

Prosecutorial misconduct also deprived Chappell of due process at the direct appeal stage. During oral argument in front of this Court, the prosecutor made three misrepresentations: (1) that Chappell had stipulated only to killing the victim, 7AA1609; (2) that the State needed to admit Chappell's prior bad acts because there was no stipulation at the start of the trial, 7AA1612; and (3) that Chappell, not the State, was responsible for admitting evidence that Chappell shoplifted after the killing, was a thief, was called "the regulator," and was unemployed, 7AA1613. All of these statements were incorrect. *See* 4AA820-822 (stipulation); 8AA1766-1767 (testimony that Chappell entered into stipulation before the start of trial); 12-13AA2967-2968, 2981, 2983-2984, 2998-3003 (transcript showing the State introducing irrelevant and prejudicial evidence); 13AA3086-3087, 3114-3115 (same).

7. Withholding evidence

The State called Deborah Turner as a witness at the guilt phase of Chappell's trial. The State, however, failed to turn over to defense counsel evidence that Turner had criminal charges pending against her

at the time of her testimony. In addition, there is a suggestion in the record that Turner received an undisclosed benefit for testifying.

Police arrested Turner for robbery with a deadly weapon on August 30, 1996, and the State charged her with conspiracy to commit robbery and attempted robbery. 26AA6371-6372. Turner pled guilty to the charges on September 16, 1996. 26AA6374-6378. One month later, Turner testified against Chappell. 12AA2951-2965. But more than six months passed before Turner was sentenced, and she received a significantly lighter sentence than the sixteen years she was facing: twelve to thirty-six months' imprisonment for conspiracy and twelve to forty-eight months for attempt robbery, to run concurrently. 26AA6374-6378; 26AA6380-6381; 26AA6390-6398.

The prosecution's failure to disclose exculpatory evidence in violation of its discovery obligations constituted misconduct. *See* NRS 174.235, 174.285(2); *see also United States v. Bagley*, 473 U.S. 667, 682 (1985); *Giglio v. United States*, 405 U.S. 150, 153–54 (1972); *Brady v. Maryland*, 373 U.S. 83, 86–90 (1963). To the extent that the prosecution knowingly presented false testimony, this also violated Chappell's constitutional rights. *See Strickler v. Greene*, 527 U.S. 263, 281–82

(1999); *Napue v. Illinois*, 360 U.S. 264, 269 (1959). The district court erred by denying this claim without an evidentiary hearing and discovery.

8. Improperly impeaching defense witnesses

Chappell's childhood friend, Fred Dean, testified during the penalty rehearing. 18AA4297-4307 at 263-301. On direct examination, Dean testified about past felony convictions for drug trafficking and drug possession. 18AA4302 at 282-283. The prosecutor, however, took this information and went well beyond what the rules permit for impeachment, asking about dismissed charges, specifics of the offense, length of the sentence, and plea offers. 18AA4303 at 268-288; *see Jacobs v. State*, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (Nev. 1975) ("The questions asked of Jacobs when he testified were whether he had ever been convicted of a felony and what the sentence was. It was error to allow the question concerning the term that was imposed."); *see also* NRS 50.095.

9. Conclusion

Despite the State's insistence to the contrary, Chappell's case was a close one. Chappell had no prior felony convictions, had lived with the

victim for a decade, and had a damaged brain, which impacted his ability to control his actions. But prosecutorial misconduct throughout Chappell's guilt phase and penalty rehearing "so infected" the proceedings as to result in both a conviction for first-degree murder and a sentence of death.

K. Improper Jury Instructions[32]

The jury instructions following both the guilt phase and the penalty rehearing were improper. These errors, individually and cumulatively, deprived Chappell of a fair trial. *See Cupp v. Naughten*, 414 U.S. 141, 146–47 (1973).

1. Premeditation and deliberation

At trial, the court instructed the jury that first-degree murder was "murder which is (a) perpetrated by any kind of *willful, deliberate and premeditated* killing." 5AA1153 (emphasis added). But the court then provided an instruction on the elements of that offense, which removed the element of deliberation:

> Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.

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[32] Claims Two and Five.

> Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successful thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing was preceded by and is the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is a willful, deliberate and premeditated murder.

5AA1154. Based on these instructions, the jury found Chappell guilty of first-degree murder. 3AA634-636.

After Chappell's conviction and sentence were affirmed on direct appeal, this Court decided that this instruction, by eliminating the element of deliberation, improperly blurred the distinction between first and second-degree murder. *Byford*, 116 Nev. at 234–35, 994 P.2d at 713–14. The Court disapproved the use of the instruction in future cases and directed that courts use a new standard instruction. *Id.* at 236, 994 P.2d at 714–15.

A few years later, the Ninth Circuit found the instruction "clearly defective because it relieved the State of the burden of proof on whether the killing was deliberate as well as premeditated." *Polk v. Sandoval*, 503 F.3d 903 (9th Cir. 2007); *see also Sandstrom v. Montana*, 442 U.S.

510, 521 (1979). The following year, this Court held that the Ninth Circuit was wrong in *Polk* because, prior to *Byford*, Nevada law did not require proof of both premeditation and deliberation. *See Nika v. State*, 124 Nev. 1272, 1278–89, 198 P.3d 839, 844–51 (2008).

Based upon the above, the first-degree murder instructions given in Chappell's case were unconstitutional for multiple reasons. First, Nevada law at the time of Chappell's conviction was unconstitutionally vague and ambiguous, *see Kolender v. Lawson*, 461 U.S. 352, 357 (1983), and the "complete erasure" of deliberation left juries with no adequate guidelines for determining when a homicide is first- rather than second-degree murder.

Second, the "standardless sweep" of the definition results in disparate treatment of similarly situated defendants, whose offenses will be indistinguishable, but whose treatment, by conviction of first- or second-degree murder, will be determined by the "personal predilections" of juries. This gives rise to a violation of the equal-protection guarantee that "all persons similarly situated should be treated alike," *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985), unless there is a "rational basis for the difference in treatment."

Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000)) (per curiam) (citations omitted).

Third, Nevada law restricts imposition of the death penalty to cases involving convictions of first-degree murder. NRS 200.030(4)(a). A state system that limits the application of the death penalty to first-degree murders, but then erases the distinction between first- and second-degree murders, necessarily results in arbitrary imposition of the death penalty and violates the narrowing requirement of the Eighth Amendment.

Fourth, conflating premeditation and deliberation with simple intent to kill eliminates any requirement that the State actually prove premeditation and deliberation. *See State v. Thompson*, 65 P.3d 420, 427 (Ariz. 2003). If a court can simply recite that premeditation can be instantaneous, essentially identical to, and arising at the same time as, simple intent to kill, the jury can completely ignore the absence of any evidence on the elements of premeditation and deliberation.

Assuming, however, that Nevada's first degree murder statute always meant what it said, and always required proof of all three elements—willfulness, premeditation, and deliberation—then the

instruction given at Chappell's trial unconstitutionally relieved the State of its burden of proving every element of first degree murder beyond a reasonable doubt. *See Riley*, 786 F.3d at 724.

Chappell's defense was that he was guilty of, at most, second-degree murder. And the jury during the original trial found as a mitigating circumstance that the murder was committed while Chappell was under the influence of extreme mental or emotional disturbance. 4AA889-894. Yet, under the instructions given, the jury had no way of distinguishing whether Chappell was guilty of first- or second-degree murder. The use of the unconstitutional instruction was not harmless.

2. Malice aforethought

The implied-malice instruction required Chappell's jury to find malice "when no considerable provocation appears." 5AA1152-1153. In other words, the mandatory presumption of malice applies when there is nothing more than proof of a killing. These predicate facts, which do not constitute facts at all but the absence of facts, are not "so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding the ultimate fact." *See Yates v.*

Evatt, 500 U.S. 391, 406 n.10 (1991). A jury could find a killing without also finding it was committed with malice.

In addition, the alternative predicate facts of an "abandoned and malignant heart" are so vague they are devoid of content and pejorative, and allow a finding of malice simply because the defendant is a bad man. *See United States v. Hinckle*, 487 F.2d 1205, 1207 (D.C. Cir. 1973) ("Juries are to determine whether specific acts have been committed with requisite culpability, not whether defendants have generally depraved, wicked and malicious spirits."); *People v. Phillips*, 414 P.2d 353 (Cal. 1966) (disapproving language on non-constitutional grounds); *cf. Dixon v. United States*, 548 U.S. 1, 7 (2006) (noting vagueness of "evil mind" mental state). The language in the jury instruction improperly lowered the State's burden of proof and requires reversal of Chappell's convictions. *See In re Winship*, 397 U.S. 358, 364 (1970).

3. Felony murder—robbery

In addition to premeditated murder, the State also alleged a felony-murder theory of first-degree murder based, in part, on robbery. 4AA838-843; 4AA944-946; 5AA1143. The evidence revealed that, after he killed Panos, Chappell took her vehicle. 14AA3318-3321. The

evidence further revealed that Chappell regularly used Panos's vehicle while she was alive. 12AA2953, 2964, 2968-2969, 2981. Chappell did not need to kill Panos in order to gain access to her car, and the evidence shows that Chappell did not develop the intent to take the car until after Panos was dead.

The jury was not instructed that, in order to find Chappell guilty of felony murder, it had to find he formed the intent to commit the underlying felony of robbery before the murder. 5AA1143, 1153; *see also* 16AA3790, 3796-3797. Nevada law is clear that "[a] conviction for felony murder will not stand if the jury finds the felony occurred as an afterthought to the killing." *Nay*, 123 Nev. at 333, 167 P.3d at 435. The failure to instruct the jury relieved the State of its burden of proof of every element of the offense in violation of Chappell's right to due process. *See Winship*, 397 U.S. at 364.

4. Felony murder—burglary

The State also argued that Chappell was guilty of first-degree murder based on a burglary. 4AA838-843; 4AA944-946, 5AA1143. The evidence was undisputed that Chappell entered the trailer through a window. But Chappell testified that he lived in the trailer with Panos

and that he entered with the intent to simply go home and see his girlfriend. 14AA3307-3309. Other witnesses confirmed that Chappell lived in the trailer at some point in time, though there was a factual dispute as to whether he lived there at the time of the offense. The State itself conceded, "the defendant has resided there, on occasion, 839 North Lamb, space 125." 16AA3782.

Under Nevada law, a person cannot be convicted of burglarizing his own home. *White*, 130 Nev. at 539, 330 P.3d at 486. However, the trial court failed to instruct the jury of this rule. What is worse, the State erroneously argued that it did not matter whether Chappell lived there—he could still be guilty of burglary. 16AA3787-3788 ("Consent to enter is not a defense to the crime of burglary . . . It doesn't matter how many times he had been in there before."). The failure to instruct the jury relieved the State of its burden of proof of every element of the offense in violation of Chappell's right to due process. *See Winship*, 397 U.S. at 364.

5. Equal and exact justice

At the guilt phase of a capital trial, the State bears the burden of proving the defendant's guilt beyond a reasonable doubt; the

Constitution affords the defendant the presumption of innocence. Clearly, the parties are not on "equal" footing. And, at the penalty phase, federal law mandates application of the reasonable-doubt standard to all death-eligibility factors. But the trial court instructed Chappell's jury that it must do "equal and exact justice between the defendant and the State of Nevada." 5AA1178. This instruction created a reasonable likelihood the jury would convict and sentence Chappell based on a lesser standard of proof than the Constitution requires. *See Winship*, 397 U.S. at 364; *Sullivan v. Louisiana*, 508 U.S. 275, 279-82 (1993).[33]

6. Reasonable Doubt

The statutorily mandated reasonable-doubt instructions unconstitutionally minimized the State's burden of proof. 5AA1168; 4AA934. First, the "actual, not mere possibility or speculation" language in this instruction is similar to language condemned by the Supreme Court. *See Cage v. Louisiana*, 498 U.S. 39, 41 (1990) (per

[33] Chappell acknowledges this Court has rejected similar challenges to this instruction. *See, e.g., Leonard v. State*, 114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998). Those decisions, however, have not addressed *Winship* and *Sullivan*.

curiam). Second, the "govern or control" language essentially reverses the burden of proof, in violation of *Victor v. Nebraska*, 511 U.S. 1, 20 (1994). *See, e.g., McAllister v. State*, 88 N.W. 212, 214–15 (Wis. 1901); *Commonwealth v. Miller*, 21 A. 138, 140 (Penn. 1891). The characterization of the standard of proof as an "abiding conviction of the truth of the charge," cannot be linked to any proper definition of the reasonable doubt standard and, in conjunction with the language immediately preceding this statement, provided the State with an impermissibly low standard of proof. This instruction is prejudicial per se. *Sullivan*, 508 U.S. at 278-79.

Chappell acknowledges this Court and the Ninth Circuit have rejected similar challenges to this instruction. *See Canape v. State*, 109 Nev. 871-72, 859 P.2d 1023, 1028 (1993); *Nevius v. McDaniel*, 218 F.3d 940, 944–45 (9th Cir. 2000); *Ramirez v. Hatcher*, 136 F.3d 1209, 1211–13 (9th Cir. 1998). But none of those decisions addressed the authorities, such as *McAllister* and *Miller*, upon which Chappell relies.

7. Outweighing beyond a reasonable doubt

The jury found Chappell eligible for the death penalty because it found one aggravating circumstance, which the mitigation evidence did not outweigh. But the district court failed to instruct the jury that the State was required to prove *beyond a reasonable doubt* that the mitigation evidence did not outweigh the aggravating circumstances. *See Hurst v. Florida*, 136 S. Ct. 616, 619 (2016) ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."); *id.* at 621 (explaining Sixth Amendment, "in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt").

This Court recently rejected this argument in a direct appeal. *See Jeremias v. State*, 134 Nev. __, 412 P.3d 43, 53–54; *reh'g denied* (Apr. 27, 2018), *cert. denied*, 139 S. Ct. 415 (2018). *Jeremias* was wrongly decided and this Court should reconsider this issue.

8. Unanimity

Chappell's death sentence is invalid because the trial court instructed the jurors they had to unanimously find mitigating circumstances. 4AA925 ("The entire jury must agree unanimously . . .

whether the mitigating circumstances outweigh the aggravating circumstances."); *see Mills v. Maryland*, 486 U.S. 367, 375–80 (1988); *McKoy v. North Carolina*, 494 U.S. 433, 439–41 (1990). This denied Chappell his constitutional right to an individualized sentencing determination. *See Davis v. Mitchell*, 318 F.3d 682, 688–89 (6th Cir. 2003).

9. Anti-sympathy

The court instructed the jury that "[a] verdict may never be influenced by sympathy, prejudice or public opinion." 4AA939. The court did not qualify the anti-sympathy instruction in terms of "mere" sympathy. *See California v. Brown*, 479 U.S. 538, 542 (1987). In addition, unlike the statute at issue in *Brown*, Nevada does not ever require the jury to impose the death penalty. *See Bennett v. State*, 111 Nev. 1099, 1109–10, 901 P.2d 676, 683 (1995). Thus, this instruction interfered with the jury's ability "to dispense mercy on the basis of factors too intangible to write into a statute." *Gregg v. Georgia*, 428 U.S. 153, 222 (1976) (White, J., concurring). In addition, it precluded the jury from considering intangible mitigating factors, in violation of Chappell's right to an individualized sentence. *See Eddings*, 455 U.S. at 113-14

(holding that the "State may not . . . preclude the sentencer from considering any mitigating factor."); *see also Nevius v. State*, 101 Nev. 238, 250, 699 P.2d 1053, 1061 (1985) (concluding that error in mitigation instructions was "compounded by the repeated admonition that the jury should not be influenced by pity or sympathy for the defendant" (*citing People v. Lanphear*, 680 P.2d 1081, 1083 (Cal. 1984)).

L. Defense Counsel were Ineffective in Various Additional Ways throughout the Guilt Phase and Penalty Rehearing[34]

1. Failure to adequately impeach Deborah Turner

Deborah Turner was a State's witness who offered damaging testimony against Chappell during the guilt phase. According to Turner, after Chappell killed Panos, Turner saw Chappell at the housing project driving Panos's car. 12AA2954-2958. Chappell was selling shrimp and pie and renting out Panos's vehicle for $15. *Id.* Chappell was acting normally, joking, and dancing. *Id.*

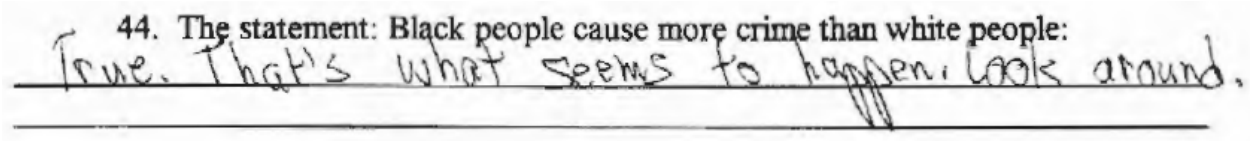
Counsel were unable to impeach Turner because they failed to investigate and interview her before trial. Turner had multiple felony

[34] Claims One, Three, and Twenty-Four.

charges pending against her at the time of Chappell's trial and received a possible benefit in exchange for her testimony. 9AA2062 ¶13; 9AA2075 ¶10; 26AA6371-6372; 26AA6373-6398. Assuming the information about Turner's case was contained in the State's open file and trial counsel failed to impeach her with that information, trial counsel were ineffective. 9AA2062 ¶13; 9AA2075 ¶10; *see Reynoso*, 462 F.3d at 1120.

2. Failure to move to excuse biased jurors

Counsel were ineffective for failing to challenge a number of biased jurors during the guilt phase. Juror Fittro expressed difficulty with interracial relationships. 11AA2549-2550; 22AA5443. Counsel did not ask any follow up questions, and Fittro was selected for the jury. 11AA2552-2554. Juror Hill was a 911 operator, just like Panos. 11AA2604-2607; 13AA3082-3083. Defense counsel did not move to excuse Hill for cause, and she became the jury foreperson. 11AA2709, 16AA3873. Finally, Juror Jerry Ewell expressed the racist belief that "Black people cause more crime than white people":



Defense counsel did not question Ewell about racial bias. 10AA2389-2390.

Counsel were similarly ineffective during voir dire at the penalty rehearing.

3. Failure to rehabilitate death-scrupled jurors

Trial counsel were also ineffective for failing to life qualify death-scrupled jurors. Prospective juror Podkowski stated she had a problem with the death penalty as applied and could never agree to it. She was excused by the court. 8AA1985. Counsel were ineffective for never asking any follow-up questions, especially in light of the fact the State did not challenge this juror.

Counsel were also ineffective for failing to ask prospective juror Seward a single question after he stated he had a philosophical problem with the death penalty and was immediately excused. 10AA2312, 2315-2316. Counsel were also ineffective in failing to attempt to rehabilitate prospective jurors Ferrell (did not agree with the death penalty); Lloyd (did not want to sit in judgment); Emmert (would have a problem at the

penalty phase); Patfiled (did not believe anyone but God could order death); Rainwater (could not impose the death penalty); Marra (same); Jelleman (same), after they were removed and without counsel asking any questions meant to rehabilitate them. 8AA1985-1986; 10AA2313, 2316-2317, 2319-2321. Counsel's overall failure to rehabilitate death-scrupled jurors amounted to deficient performance.

Counsel during the penalty rehearing repeated these mistakes. The court excused three jurors for cause after they expressed discomfort with imposing the death penalty. 21AA5112 at 73-75, 5125-5126 at 128-131; *see also* 21AA5129 at 144. Defense counsel did not ask these jurors a single question to attempt to demonstrate that they would be able to consider all four potential punishments.

4. Failure to object

Throughout the guilt phase and penalty rehearing, counsel failed to object to: (1) repeated instances of prosecutorial misconduct; (2) erroneous and missing jury instructions; (3) prospective jurors who should have been excused for cause; (4) improper victim impact evidence; (5) unrecorded bench conferences; (6) hearsay statements during the penalty rehearing; (7) improper impeachment of defense

witnesses; (8) erroneous introduction of presentence reports; and (9) erroneous introduction of gruesome crime-scene and autopsy photographs. These failures were not strategic. During the post-conviction evidentiary hearing on the initial state post-conviction petition, counsel stated that "[n]one of [their] objections were successful," and they "were so exhausted by the rulings in the case," that counsel was "emotionally exhausted" and "everything seemed futile." 8AA1787. Counsel admitted that they should have continued to voice objections nonetheless. *Id.* Counsel's failure to continue litigating objections because the case felt futile and they were emotionally exhausted fell below the standard of reasonableness expected of capital counsel. *See Murray v. Carrier*, 477 U.S. 478, 496 (1986).

5. Failure to make proper arguments

Trial counsel were ineffective for failing to argue that Chappell could not have been convicted of burglary because he could not have burglarized his own home. *White*, 130 Nev. at 538-39, 330 P.3d at 485-86. For the same reason, counsel was ineffective for failing to argue that Chappell could not have been convicted of felony murder based upon the underlying predicate of burglary.

Counsel was also ineffective for failing to argue that Chappell was not guilty of felony murder under a predicate of robbery because an afterthought robbery cannot support a conviction for felony murder. *See Nay*, 123 Nev. at 333, 167 P.3d at 435.

6. Cumulative error

To establish prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Wiggins*, 539 U.S. at 534.

A single, serious error by counsel may be a sufficient basis on which to grant relief on a claim of ineffective assistance of counsel. *Kimmelman*, 477 U.S. at 384. Nonetheless, it is not necessary that any one error alone rise to the level of prejudice; multiple errors considered together may also warrant relief under *Strickland*. *See Daniels v. Woodford*, 428 F.3d 1181, 1210 (9th Cir. 2005); *Sanders v. Ryder*, 342 F.3d 991, 1001 (9th Cir. 2003).

There is a reasonable probability that, but for all of trial counsel's errors enumerated above and below, the results of the proceedings would have been different.

M. Severe Mental Illness Renders Chappell Ineligible for Execution[35]

Chappell is categorically exempt from the death penalty, as he suffers from a severe mental illness, which renders his execution cruel and unusual. The severe mental illness stems from Chappell's prenatal exposure to alcohol, along with repeated and prolonged trauma. The neuropsychological damage that resulted from these factors affects his ability to process information, reason rationally, solve problems, and restrain impulses.

The litany of deficits suffered by Chappell are akin to those identified in *Roper v. Simmons*, 543 U.S. 551 (2005), and *Atkins v. Virginia*, 536 U.S. 304, 318, 320–21 (2002); *see also* Scott E. Sundby, *The True Legacy of Atkins and Roper: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling*, 23 Wm. & Mary Bill Rts. J. 487, 512–24 (2014); John D. King, *Candor, Zeal and*

[35] Claim Sixteen.

the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant, 58 Am. U. L. Rev. 207 (2008).

Both the legal and mental health communities recognize that imposing the death penalty on an individual who suffers from severe mental illness violates the evolving standards of decency that underpin our maturing society. *See* American Bar Association, *Report on the Task Force on Mental Disability and the Death Penalty*, 2–7 (2006); American Psychiatric Association, *Position Statements on Diminished Responsibility in Capital Sentencing*, http://www.psychiatry.org/File%20Library/Learn/Archives/Position-2014-Capital-Sentencing-Diminished-Responsibility.pdf.

Atkins, *Roper*, and their progeny recognize that the execution of an intellectually disabled or juvenile defendant is not justified by retribution or deterrence. Neither are these ends achieved by execution of the severely mentally ill.

N. Nevada's Death-Penalty Scheme is Unconstitutional[36]

Chappell recognizes that the High Court has upheld the general constitutionality of the death penalty, as has this Court. But Chappell asserts and preserves the argument that the death penalty is cruel and unusual punishment under the Eighth Amendment and Article I, Section 6 of the Nevada Constitution, and that the death penalty is otherwise unconstitutional for the reasons below.

1. Inflicted in an arbitrary and capricious way

To pass constitutional muster, a capital-sentencing scheme must genuinely narrow the class of persons eligible for the death penalty. *See Arave v. Creech*, 507 U.S. 463, 474 (1993); *Zant*, 462 U.S. at 877. But Nevada law permits broad imposition of the death penalty for virtually all first-degree murders. *See* NRS 200.033.

In addition, Nevada law requires this Court to review each death sentence but does not dictate the standards for this Court's review. NRS 177.055(2). This absence of standards renders the purported review unconstitutional. *See Harris ex rel. Ramseyer v. Blodgett*, 853 F. Supp.

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[36] Claims Thirteen, Twenty-Two, and Twenty-Five.

1239, 1291 (W.D. Wash. 1994), *aff'd sub nom. Harris ex rel. Ramseyer v. Wood*, 64 F.3d 1432 (9th Cir. 1995); *cf. Campbell v. Blodgett*, 997 F.2d 512, 523 n.13 (9th Cir. 1992). Finally, NRS 177.055(3) is unconstitutional because it allows this Court to act as sentencer. *See Hurst*, 136 S. Ct. at 619; *Sochor v. Florida*, 504 U.S. 527, 539 (1992).

2. Unavailability of clemency

Nevada law allows for clemency applications to the State Board of Pardons Commissioners. NRS 213.010. As a practical matter, Nevada does not grant clemency to death penalty inmates. Since 1973, well over 100 people have been sentenced to death, yet only a single death sentence has been commuted—because the recipient was intellectually disabled and no longer eligible for execution. Nevada's clemency statutes further fail to ensure that capital inmates receive procedural due process.

3. Unacceptable risk of cruel pain and suffering

Nevada law requires that the State execute condemned inmates by injecting a legal drug. NRS 176.355(1). The protocol used in Nevada violates the State and Federal Constitutions.

Chappell acknowledges that this Court has held that an attack on the method of execution is not cognizable in habeas proceedings. *McConnell v. State*, 125 Nev. 243, 246–49, 212 P.3d 307, 310–11 (2009), *as corrected* (July 24, 2009); *accord Nevada Department of Corrections v. Eight Judicial Dist Court*, Nos. 74679, 74722, 2018 WL 2272873, *2 (Nev. May 10, 2018) (unpublished order). The *McConnell* ruling, however, amounts to an unconstitutional suspension of the writ, Nev. Const. Art. 1 § 5, based upon the construction of the habeas statute. Further, the State has not conceded exhaustion of this claim in state proceedings is unnecessary to obtain federal review, *see* 28 U.S.C. § 2254(b), and has continued to argue federal courts cannot address a lethal injection claim if it is not first raised in state proceedings (and that the claim can be procedurally defaulted if not properly raised in state court). Until the State ceases to invoke the doctrines of exhaustion and procedural default to attempt to bar this claim, Chappell must raise it in State proceedings.

4. Racially biased manner of imposition

Purely by virtue of an uncontrollable circumstance of birth—Chappell is African-America and his victim was White—Chappell's odds

of receiving the death penalty were significantly higher. *See* https://deathpenaltyinfo.org/documents/FactSheet.pdf. Nevada's death penalty, like the death penalty around the country, is applied discriminatorily against African-American males with White victims. It is arbitrary cruel and unusual punishment in violation of the Eighth amendment, and it also fails to equally protect non-White male offenders and victims, in violation of the Fourteenth Amendment. *See McCleskey v. Kemp*, 481 U.S. 279 (1987); *State v. Gregory*, 427 P.3d 621 (Wash. 2018).

5. Unconstitutional length of time on death row

The State has unjustifiably held Chappell on death row for more than twenty years. The principal social purposes of retribution and deterrence sought through the death penalty have lost their compelling purpose in this case by the passage of time. Executing Chappell, after the state has inflicted the torturous punishment of holding him in near-solitary confinement for twenty years, would push his total punishment beyond what our evolving standards of decency can tolerate. *See, e.g., Trop v. Dulles*, 356 U.S. 86, 100 (1957).

O. Nevada's System of Electing Judges Renders Chappell's Convictions and Death Sentence Invalid[37]

Chappell's convictions and death sentence are invalid because popularly elected judges, subject to removal if they make a controversial or unpopular decision, presided over Chappell's guilt phase, penalty rehearing, and appeals. *See Tumey v. Ohio*, 273 U.S. 510, 532 (1927). Chappell acknowledges that this Court has rejected similar claims. *See McConnell*, 125 Nev. at 256, 212 P.3d at 316. But, unlike in *McConnell*, the judge presiding over Chappell's guilt phase was running for a seat on the Nevada Supreme Court at the time he oversaw Chappell's trial. Judge Maupin was consequently motivated to appear tough on crime and to rule in favor of the State.

P. Direct appeal counsel was ineffective[38]

Chappell is entitled to relief due to the ineffectiveness of his appellate counsel on both the first and second direct appeal. *See Evitts v. Lucey*, 469 U.S. 398, 396 (1985).

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[37] Claim Twenty-Three

[38] Claims Nineteen and Twenty.

First direct appeal counsel was ineffective for: failing to assert deficiencies with the jury instructions (Section K); failing to raise a comprehensive comparative juror analysis regarding the State's discriminatory *Batson* peremptory challenges (Section D); failing to challenge the unconstitutional voir dire (Section I); and failing to raise various claims of prosecutorial misconduct (Section J).

And second direct appeal counsel was ineffective for: failing to raise proper arguments against the sexual assault aggravator (Section C); failing to argue that the State exercised peremptory strikes in a discriminatory manner (Section I); failing to adequately challenge all of the constitutionally infirm jury instructions (Section K); failing to raise additional arguments concerning biased jurors; failing to argue that Chappell should be categorically excluded from the death penalty based on severe mental illness (Section M); failing to argue that elected judges rendered the proceedings unfair (Section O); and failure to challenge Nevada's death penalty scheme and lethal injection procedures (Section N).

There is a reasonable probability of a more favorable outcome on direct appeal if these claims had been raised.

Q. The trial court erred in not striking the State's notice of intent

The Fifth Amendment provides that no person shall be held to answer on criminal charges without a finding of probable cause by a grand jury. The United States Supreme Court long ago endorsed a probable cause finding by a neutral magistrate by way of a preliminary hearing as a legal alternative to a grand jury indictment. *See Hurtado v. California*, 110 U.S. 516, 538 (1884).

Here, no aggravating circumstances were alleged in the justice court and, thus, the State did not produce any evidence to support the existence of aggravating circumstances. Nor did the State request the justice court make any finding that probable cause supported the existence of any aggravating factors.

After Chappell appeared in the district court, the State filed a Notice of Intent to Seek the Death Penalty alleging four factors. 4AA845-846. The defense filed a motion to strike the notice, which was denied. 4AA849-865.

Since the allegation of aggravating factors requires the same procedural protections as the allegation of essential elements of a crime

(i.e., proof beyond a reasonable doubt), the rules that allow the State to file the notice of intent to seek death without a probable cause hearing violate a defendant's due process rights and deny him the same protections accorded other criminal defendants. By allowing the State to unilaterally file a notice of intent to seek death penalty without a probable cause showing, violating Chappell's due process rights, the Information or Indictment can be amended at any time by the State, thereby allowing the charging document to become the Information or Indictment, not of the justice court or grand jury.

R. Cumulative error[39]

Chappell is entitled to relief based upon the cumulative errors in his trial, sentencing and rehearing, appeal, and state post-conviction proceedings. *See Valdez*, 124 Nev. at 1195–96, 196 P.3d at 480–81; *Parle v. Runnels*, 505 F.3d 922, 927–28 (9th Cir. 2007); *Mak v. Blodgett*, 970 F.2d 614, 619 (9th Cir. 1992). While many of these issues have been raised before on direct appeal and prior post-conviction, this Court must review them again to access their cumulative prejudice.

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[39] Claim Twenty-Six.

Chappell received a patently unfair guilt trial before a biased and partial jury. *See* Claim Seven. He was represented at the guilt phase by lawyers who failed to interview any of the State's witnesses or subject the State's case to any meaningful adversarial testing. *See* Claim One. The trial court allowed the State to admit irrelevant and unduly prejudicial evidence concerning prior bad acts committed by Chappell during the years preceding the homicide. The evidence was irrelevant, untrustworthy, and unduly prejudicial, and trial counsel were ineffective for failing to litigate this issue. *See* Claims One and Ten.

The prosecutors committed blatant misconduct throughout the guilt phase, including failing to disclose the existence of impeachment evidence against one of its witnesses and making improper argument at both the guilt and penalty phases of trial. *See* Claims Fifteen and Sixteen. The jury then convicted Chappell of first-degree murder based on constitutionally inadequate instructions that relieved the State of its burden of proof. *See* Claim Two.

After this Court ordered a new penalty hearing, counsel failed to conduct a constitutionally adequate investigation and, therefore, failed

to present a compelling case in mitigation. *See* Claim Three. The trial court again empaneled a biased jury and again allowed the State to present inadmissible and prejudicial evidence. *See* Claim Nine. The State again committed misconduct throughout the proceedings. *See* Claim Sixteen. Chappell was sentenced to death by a jury that was improperly instructed as to the standard of proof for death eligibility, based on a single aggravating factor that the State failed to prove by sufficient evidence. Chappell now awaits execution for a crime he committed in the heat of passion and an aggravating factor the State failed to prove. *See* Claims Four, Five. And the trial court admitted unreliable hearsay statements in violation of the confrontation clause, and improperly admitted Chappell's testimony from his prior trial. *See* Claim Seventeen. And finally, the trial court allowed improper victim impact evidence above that which is constitutionally permitted. *See* Claims Three and Twelve.

The cumulative effect of the errors was to deprive Chappell of fundamental fairness and a constitutional sentence. Whether or not any individual error requires the vacation of the judgment or sentence, the totality of these multiple errors and omissions resulted in substantial

prejudice. The State cannot demonstrate that these errors were harmless beyond a reasonable doubt.

S. The laches doctrine does not bar Chappell's petition

The district court found Chappell's claims procedurally barred under NRS 34.800. 31AA7582. But any delay raising the facts and claims in the current petition is the result of initial post-conviction counsel's ineffectiveness and the district court's limitations on prior post-conviction proceedings; the delay is not attributable to Chappell. *See* NRS 34.800; *Powell*, 122 Nev. at 759, 138 P.3d at 458; *see also State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 239, 112 P.3d 1070, 1079 (2005) (explaining State likely would have been unsuccessful in pleading laches "given our determination that [petitioner] had established cause and prejudice under NRS 34.726 for the untimely filing of his petition.").

In addition, the laches doctrine does not account for *Crump* petitions. Chappell filed his petition within "a reasonable time"—one year—after the claims became available. *See Rippo*, 423 P.3d at 1097. Despite Chappell's diligence, however, six years had passed since remittitur after the prior direct appeal. 25AA6146-6147. And Chappell's

timeline is typical of other capital cases. *See, e.g.*, *Rippo*, 423 P.3d at 1092 (ten years). Thus, applying laches to timely *Crump* petitions deprives petitioners, including Chappell, of the opportunity to vindicate their right to effective assistance of post-conviction counsel. *Cf. Langir v. Arden*, 82 Nev. 28, 36, 409 P.2d 891, 895 (1966) ("Especially strong circumstances must exist to sustain the defense of laches when the statute of limitations has not run."). This Court should therefore decline to impose the laches bar. *See* NRS 34.800(1) (explaining that a "petition *may* be dismissed" under certain circumstances (emphasis added)); *Rippo*, 423 P.3d at 1093 n.7 (choosing not to address laches).

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VIII. CONCLUSION

For the foregoing reasons, Chappell respectfully requests this Court reverse the order of the district court and vacate Chappell's convictions and death sentence. In the alternative, Chappell requests this Court remand this case with instructions that the district court grant an evidentiary hearing to demonstrate good cause and prejudice and the merit of his claims.

DATED this 2nd day of May, 2019.

Respectfully submitted,

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Respectfully submitted,

/s/ *Brad D. Levenson*
BRAD D. LEVENSON

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 2nd day of May, 2019, electronic service of the foregoing APPELLANT'S OPENING BRIEF shall be made in accordance with the Master Service List as follows:

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