IN THE SUPREME COURT OF THE STATE OF NEVADA

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JAMES MONTELL CHAPPELL, Appellant, v. WILLIAM GITTERE, et al., Respondents.	No. 77002 District Court Case No. (Death Penalty Case)

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APPELLANT'S APPENDIX

Volume 2 of 31

Appeal From
Eighth Judicial District Court, Clark County
The Honorable Valerie Adair, District Judge

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CERTIFICATE OF 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 Appendix shall be made in accordance with the Master Service List as follows:

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193. Borderline personality disorder frequently occurs together with substance use disorders. Thus, it was not out of the ordinary that Mr. Chappell would be diagnosed with this disorder. Ex. 90 at 5. The borderline condition is marked with unstable moods, behavior, and relationships, as was the case with Mr. Chappell. Id. at 4.

194. More importantly, people with borderline personality, or similar personality features, are more susceptible to the effects of drugs such as alcohol and crack-cocaine. Ex. 90 at 5, 18.

195. Even in people who do not suffer from borderline personality disorder, crack cocaine induces violent behavior. Ex. 90 at 16-17.

196. This evidence should have been presented to the jury as it would have supported the defense that Mr. Chappell killed Ms. Panos in a jealous rage. Mr. Chappell's predisposition to drug addiction would have shown the jury that Mr. Chappell's drug use was not a choice. See Ex. 125 at ¶¶5; 8. The powerful effect of addiction in lowering one's ability to control his impulses, and compelling him to do absolutely anything to obtain more drugs would have mitigated the testimony concerning Mr. Chappell's habit of stealing from his family to support his drug addiction. The tendency of crack to induce violent behavior, and Mr. Chappell's unique sensitivity to those effects, would have demonstrated that Mr. Chappell lacked intent to commit first-degree murder.

197. Defense counsel were aware early in their representation of Mr. Chappell that he suffered from addition to drugs and alcohol. Ex. 118 at ¶11; Ex. 120 at ¶9. Counsel did not have a strategic reason for failing to fully investigate, develop, and present evidence through an addiction expert that Mr. Chappell's addiction could have furthered the defense that Mr. Chappell lacked the intent to commit first degree murder. Id.

198. In sum, there is a reasonable probability that if trial counsel had challenged the State's case, prepared their witnesses, and presented the additional evidence described above, the results of the proceeding would have been different.

F. Trial counsel were ineffective for failing to present evidence that Mr. Chappell's sperm inside Ms. Panos's vagina was from pre-ejaculate fluid

199. The State presented evidence that sperm was found in Ms. Panos's vagina, and Mr. Chappell could not be excluded as the donor. Ex. 132 at 42; Ex. 136 at 17-18, 48-49. In the defense case, Mr. Chappell himself testified that while he had vaginal intercourse with Ms. Panos, he did not ejaculate. See Ex. 137 at 48-51, 103-04.

200. However, on cross-examination of Dr. Etcoff, the State posited that if the evidence showed that sperm was found inside Ms. Panos's vagina and that the sperm was consistent with Mr. Chappell's DNA profile, Mr. Chappell's testimony was "more suspect." Ex. 142 at 65-66. Dr. Etcoff answered, "That's correct." Id. at 66. Dr. Etcoff's answer left Mr. Chappell's testimony impeached. Trial counsel should have presented, on rebuttal, evidence showing that sperm can be found in pre-ejaculate, which would have supported Mr. Chappell's testimony that he did not ejaculate.

201. During sexual intercourse, the human penis secretes pre-ejaculatory fluid, a fluid produced from the bulbourethral glands and the mucus-secreting urethral glands. Semen, or ejaculate, is produced from the testicles and released during ejaculation. Spermatozoa, or sperm cells, are a component of semen.

202. There was a body of scientific evidence available in 1996 that confirmed that spermatozoa can be a per se component of pre-ejaculatory fluid—leading to the conclusion that a male does not need to ejaculate during sexual intercourse for his spermatozoa to be deposited. See Free, M.J. and Alexander, N.J., Male contraception without prescription. A reevaluation of the condom and coitus interruptus, 1976 Public Health Reports, 91(5), p.437; Clark, S., An examination of the sperm content of human pre-ejaculatory fluid, Sept. 1981.

203. Defense counsel knew that it was possible for sperm to be deposited by a male during sexual intercourse even if the male did not ejaculate. Counsel however did not present any evidence of this, and had no strategic reason for failing to do so.

Ex. 118 at ¶14; Ex. 120 at ¶11. If counsel had presented evidence that sperm can be found in pre-ejaculate fluid, this would have permitted the defense to argue that Mr. Chappell could have deposited spermatozoa without ejaculation, bolstering Mr. Chappell's credibility as to this point of his testimony—and by extension to his entire testimony. Id.

204. Based upon the available science, even the State could not have denied the possibility that sperm could have been deposited without the need for ejaculation. Counsel's failure to introduce such evidence constituted deficient performance which prejudiced Mr. Chappell.

G. Trial counsel were ineffective for failing to challenge the DNA evidence

1. Failure to cross examine Terry Cook

205. Terry Cook testified as a witness for the State. Cook was a criminalist with the Las Vegas Metro Police Department Crime Laboratory. In relevant part Mr. Cook testified Mr. Chappell could not be excluded as a source of sperm detected on the vaginal swabs taken from Ms. Panos. Ex. 136 at 6-9, 17-18. Trial counsel asked no questions of Mr. Cook on cross-examination, id. at 31, nor challenged his ability to testify as an expert. Trial counsel were ineffective for both.

206. Mr. Cook had a long history of falsifying his credentials and making laboratory errors. Bringing these facts out before the jury would have impeached the State's evidence that Mr. Chappell's sperm was found inside Ms. Panos's vagina and instead supported Mr. Chappell's testimony he did not ejaculate during their intercourse.

207. Terry Cook has a history of falsifying his credentials. For example, here Mr. Cook testified to the number of times he had been called as a witness in criminal trials. Ex. 136 at 8-9 (150 to 200 times). Historically, the number of times he claims to have testified increases significantly, even though the passage of time seems too low to

allow such for an increase. For example, in State v. Jimenez, occurring in April 1987, Mr. Cook stated that he had testified "in excess of sixty times" in Kansas and Nevada. Ex. 237 at 4. In State v. Parker, occurring in February 1991, Mr. Cook testified that he had testified "[a]pproximately a hundred" times in the Nevada courts, Ex. 238 at 2. In State v. Riker, occurring in February 1994 that number had jumped to 150, Ex. 239 at 1-4, meaning that Mr. Cook would had to have testified in at least forty trials in Nevada alone between April 1987 and February 1991, and at least fifty more trials between February 1991 and February 1994.

208. Less than four months after Riker, Mr. Cook testified in State v. Walker that he had testified in Nevada courts 175 times, "conservatively," Ex. 239 at 2-5. If true, this would mean that Mr. Cook had testified in at least twenty-five trials between Mr. Riker's trial in late February 1994 and Mr. Walker's trial in June 1994. Less than two years later, in May 1996, Mr. Cook claimed to have testified about 200 times in the case of Bolin v. State. Ex. 242 at 5. Notably, however, that 200 figure had not increased by October 1996 when Mr. Cook testified in Mr. Chappell's trial, and may have even dropped back to 150.

209. Mr. Cook also had a history of making mistakes in the laboratory—including admitting to being confused or mistaken about basic facts, to testifying inconsistently, and to conceding that his work sometimes consists of guesswork.

210. In Walker, Mr. Cook referred to the case as "one of the most confusing cases in my history." Ex. 240 at 2-7. His notes in the same case contain the notation: "What a confusing case!" Ex. 243 (emphasis in original).

211. Also in Walker, faced with an affidavit from defense counsel claiming that DNA evidence had been "lost," Mr. Cook e-mailed the prosecutor to describe his confusion about the facts of the case, and admitted to other errors in his department: "This case . . . sticks in my mind because of some issues that were embarrassing. As the transcripts detail, I was unaware that McCracken swabbed the knife . . . and as a

result was unable to blood type the remaining blood on the knife. . . . I don't recall using the word "lost" . . . [H]ow could I when I didn't know it existed? The context in which she may have been thinking was lost for DNA value as that was a seldom used option during those days . . . or possibly lost in the evidence vault, which still happens to this day. Ex. 244 (emphases added). He further noted: "The swab wasn't clearly identified as being from the knife or I believe I would have noticed it. I also believe that the facts regarding the knife came out in court and it was cleared up then. The DNA evidence has clearly been compromised after these years and the fault lies at the feet of Metro. Id. (emphases added).

212. In the first Jiminez trial in 1987, Mr. Cook testified to having observed six areas of blood on a particular item. Ex. 245 at 6. During retrial the following year, Mr. Cook testified to having observed only four. Id. He ultimately acceded to the prosecutor's suggestion that there were "between four and six." Id.

213. In Bolin, Mr. Cook admitted that he had not taken any notes regarding his analysis of a hair collected as evidence and justified his failure on the ground that "[a] lot of these things are, of course, subjective." Ex. 242 at 7.

214. Mr. Cook was required to take proficiency exams as part of his job with the Las Vegas Metropolitan Police Department. LVMPD records indicate that Mr. Cook took those tests only irregularly, and when he did take the tests, there were errors or they were incomplete. See Ex. 246. The record indicates the following:

> a. In March 1994, the laboratory received the results of a test Mr. Cook took entitled "Physiol Fluids CTS 93P." The comments indicate that Mr. Cook could not report the ESD and GLOs due to the age and condition of the sample. There were questions "about [the] calls." The test grader did not agree with Mr. Cook's conclusion that he could not test the sample for ESD and GLO.
>
> b. A hair analysis test was assigned to Mr. Cook in November 1994. The results were never received by the laboratory. There is a notation reading, "poor choice for prof. test provider."
>
> c. In June 1995, Mr. Cook was assigned three tests to complete. The comments report that some aspects of these tests were not reported,

> and that there was a "Problem – incorrect conc./clerical error in reporting."

Id. (emphasis in original).

215. The Las Vegas Metropolitan Police Department's crime lab first received its certification from the American Society of Crime Laboratory Directors (ASCLD) in 2003. Mr. Chappell is informed and believes, and on that basis alleges, that the LVMPD crime lab did not conform to the ASCLD's standards at the time of his 1996 trial, as evidenced by the numerous errors and omissions set forth above.

216. Trial counsel were ineffective for failing to review Mr. Cook's testimony in other trials, which would have revealed his pattern of testifying inconsistently or inaccurately. Counsel were also ineffective for failing to investigate Mr. Cook's credentials. Had they done so, they would have effectively been able to cross-examine Mr. Cook, and to prevent his "expert" DNA testimony from being admitted—including Cook's testimony that Mr. Chappell could not be eliminated as a possible source of semen detected on the vaginal swabs taken from Ms. Panos. Ex. 136 at 17-18. This error violated Mr. Chappell's right to the effective assistance of counsel.

2. Trial counsel were ineffective for waiving Mr. Chappell's confrontation clause rights regarding the DNA evidence

217. During the guilt-phase, the State announced that Cellmark Laboratory employee Paula Yates was ill with the flu and could not testify that day about the testing she had done on DNA evidence collected by the State. The State was instead going to call her partner, Lisa Foreman, but she had a family emergency and would not be available until the next day. The State then proposed calling Thomas Wahl of the Metro Police Department Crime Lab—despite the fact Mr. Wahl had no interaction with the testing done by Cellmark, had nothing to do with Mr. Chappell's case, and was an employee of the very agency that investigated Mr. Chappell for murder. The defense, surprisingly, did not oppose the substitution of witnesses. See Ex. 136 at 3-4. Trial counsel's failure was clearly ineffective.

218. Under the Confrontation Clause, Mr. Chappell has "the right to be confronted with witnesses against him . . . ." U.S. Const. amend. VI. Here, Mr. Chappell's counsel permitted someone completely uninvolved in the case to testify about important testing done by Cellmark labs and the DNA testing done there, including the fact that Mr. Chappell could not be excluded as the sperm donor and that his DNA profile percentage for that was one in 14 billion. Ex. 136 at 48-49.

219. Clearly established law prohibits the admission of an unavailable witness' statement when the defendant, Mr. Chappell, never had a prior opportunity to cross-examine the witness. See Ohio v. Roberts, 448 U.S. 56 (1988); Crawford v. Washington, 541 U.S. 36, 50-51 (2004); accord Bullcoming v. New Mexico, 564 U.S. 647, 658-65 (2011); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311 (2009). Counsel's inaction constituted deficient performance.

3. Trial counsel were ineffective for falling to interview Willie Wiltz

220. Not only were counsel ineffective for failing to challenge the DNA evidence, counsel were ineffective for failing to interview State's witness Willie Wiltz, Jr.

221. Mr. Wiltz was mentioned in Metro Detective J. Vaccaro's report which was in counsel's possession. Ex. 266 at 11. Specifically, Vaccaro stated that Wiltz was Ms. Panos's current boyfriend and the two had spent the night together the day before Chappell's release from jail. Id. If counsel had interviewed Wiltz, counsel would have learned, on information and belief, the following: Wiltz had unprotected sex with Panos the night before she died and had told this to Detective Vaccaro when Wiltz was interviewed; and Detective Vacarro had told him not to worry because Chappell had given a confession, all of the evidence pointed to Chappell, and there were no other suspects at the time.

222. If Wiltz had been interviewed, defense counsel could have challenged the DNA evidence arguing the DNA results were flawed because Wiltz was a source of the

DNA evidence. This would have taken away a major argument the state put forward—that because the DNA pointed to Chappell, then Chappell must have lied in all parts of his testimony. Counsel's failure to interview Wiltz was prejudicial. [20]

4. Prejudice

223. Counsel did not contest any of the DNA evidence admitted by the State, including Wahl's and Cook's testimony. See Ex. 136 at 4 ("'We are not contesting any of this DNA evidence . . . ."). However, by leaving unchecked the State's presentation of evidence that Mr. Chappell's sperm was found inside the victim, the defense impeached their own client's testimony that while he had sexual intercourse with the victim he did not ejaculate. Upon information and belief it is alleged that the DNA testing in this case was riddled with errors and counsel should have raised concerns about it, including independent testing. If counsel had done so, they would have learned that Mr. Chappell was not likely the person who deposited sperm inside of Ms. Panos. The fact the defense failed to contest it, or any of the witnesses who introduced such testimony, prejudiced Mr. Chappell. Mr. Chappell's conviction should be reversed.

H. Trial counsel were ineffective in failing to conduct an adequate voir dire

224. A criminal defendant is guaranteed the right to an impartial jury. Part of this guarantee mandates an adequate voir dire in order to ferret out biased jurors or to rehabilitate death-scrupled jurors. Here, counsel were ineffective in both respects.

1. Biased jurors

225. Counsel were ineffective for failing to challenge a number of biased jurors including jurors Fittro, #461, Hill, #474, Ewell, #435, and Ochoa, #467.

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[20] To the extent that evidence Wiltz and Panos had unprotected sexual intercourse the night before the killing was exculpatory, and was in the State's possession, the State's failure to disclose this constituted Brady error.

226. During voir dire, Fittro stated that he would have a problem remaining impartial if the defendant and victim were of different races. Ex. 130 at 63-64. He also wrote in his questionnaire that he disagreed with the statement that "It's Ok for black people and white people to date each other and have children together," Ex. 212 at 6, and that he would have "a very hard time" if his children dated people of different races, id.

227. Although defense counsel (Brooks) questioned Fittro during voir dire, Ex. 130 at 66-67, counsel did not ask any follow up questions as to Fittro's concern about sitting on a jury where the defendant and victim were of different races. There simply could not have been any strategic reason for not asking such follow-up questions as Fittro clearly carried a bias against couples dating from opposite races—which was the case for Mr. Chappell and Ms. Panos. Even the trial court was concerned about the issue. See Ex. 130 at 68. Fittro was eventually selected for the jury. Id. at 96. Counsel were ineffective for not challenging for cause juror Fritto or using a peremptory to remove him from the panel.

228. Seated juror Hill was a 911 operator employed by Las Vegas Metro Police Department, the investigating agency in Mr. Chappell's case, Ex. 130 at 118. Ms. Panos had been a 911 operator in Tucson. Ex. 135 at 34-35. Hill thus is presumed to have been biased towards Ms. Panos because Hill likely would have put herself in Ms. Panos's position during trial. See id. at 118–19, 120–21. Because there existed a relationship between this juror and an aspect of the litigation such that she could not have remained impartial, bias should be presumed. Defense counsel did not move to excuse Hill for cause, and Hill became a seated juror, Ex. 131 at 96, and the jury foreperson, participating in the deliberations that led to Mr. Chappell's conviction. Ex. 143 at 5. Counsel were ineffective.

229. Seated juror Ewell was a monorail driver at the MGM Hotel. Ex. 117. To the statement on the questionnaire "Black people cause more crime than white people"

Ewell responded, "True. That's what seems to happen. Look around." Ex. 117 at 6. Trial counsel, during voir dire, did not question Ewell about this statement nor posed any question related to Ewell's racial bias. Ex. 129 at 88-89. There can be no strategic reason for failing to question Ewell on this response, at a minimum. Counsel should have moved to excuse this juror and their failure to do so was ineffective.

230. Alternate juror Ochoa was in a domestic abuse situation wherein her "1st spouse abused [her]" Ex. 162, for six years. Ex. 130 at 92. Ochoa was thus situated comparably to the victim, who also had been in a domestic abuse situation. It would have been difficult for Ochoa to refrain from feeling sympathy for the victim in Mr. Chappell's case, and thus would have trouble remaining impartial. Ochoa should be presumed to have been biased against Mr. Chappell. Defense counsel did not move to excuse Ochoa for cause, and Ochoa became a seated alternate juror. Ex. 131 at 84, 96. Counsel were ineffective for failing to move to excuse Ochoa.

2. Death Scrupled Jurors

231. Trial counsel were also ineffective for failing to life qualify death-scrupled jurors. Here, several jurors were excused because of their seemingly anti-death penalty views, and counsel failed to attempt to rehabilitate them.

232. For example, prospective juror Podkowski, #440, stated she had a problem with the death penalty as applied and could never agree to it. She was excused by the court immediately. Ex. 111 at 59. Counsel were ineffective for never asking any follow-up questions of Podkowski—especially in light of the fact the State had not even challenged this juror.

233. Counsel were also ineffective for failing to ask prospective juror Seward, #403, a single question after that juror stated he had a philosophical problem with the death penalty and was immediately excused. Ex. 129 at 11, 14-15. Counsel were also ineffective in seeking to rehabilitate prospective jurors Ferrell, #403 (does not agree with the death penalty); Lloyd, #422 (did not want to sit in judgment); Emmert, #407

(would have a problem at the penalty phase); Patfiled, #471 (did not believe anyone but God could order death); Rainwater, #417 (could not impose the death penalty); Marra, #467 (same); Jelleman, #443 (same), after they were removed and without counsel asking any questions meant to rehabilitate them. See Ex. Ex. 111 at 59-60; Ex. 129 at 12, 15-16, 18-20. For that matter, when prospective juror Kelly stated she could not impose the death penalty, defense counsel actually stipulated to her excusal without raising a single question. Ex. 130 at 6-7. Counsel's overall failure to rehabilitate death-scrupled jurors amounted to deficient performance.

234. Here, as a result of the trial court's improper death-qualification, numerous jurors were excluded. Because counsel was ineffective as described above, Mr. Chappell should be afforded a new trial.

I. Trial counsel were ineffective for failing to object to numerous instances of improper closing argument and questioning

235. During closing arguments at the guilt phase of Mr. Chappell's trial, counsel failed to object to repeated instances of improper argument by the prosecutor. Specifically, the State argued improper victim impact evidence, improperly articulated the test for reasonable doubt, improperly raised the issue of punishment at the guilt phase, and improperly commented on Mr. Chappell's right to remain silent. See Claim Fifteen. These arguments were not only improper, but were meant to inflame the passions of the jury. This misconduct, both singularly and cumulatively, violated Mr. Chappell's federal constitutional rights.

236. Trial counsel has a duty to object to inadmissible evidence or improper argument and establish a record reflecting adverse rulings by the court. See 1989 ABA Guidelines, Guideline 10.8, cmt. ("One of the most fundamental duties of an attorney defending a capital case at trial is the preservation of any and all conceivable errors for each stage of appellate and post-conviction review") (internal citation omitted); ABA

Standards for Criminal Justice, Defense Function, 4-7.1(d) (defense counsel "has a duty to have the record reflect adverse rulings").

237. First, the prosecutor improperly argued victim impact evidence without drawing an objection from the defense. See Estelle v. McGuire, 502 U.S. 62, 75 (1991) (petitioner is entitled to relief if evidence introduced at either the guilt or penalty trial renders his trial fundamentally unfair); Payne v. Tennessee, 501 U.S. 808, 825 (1991). Here, the prosecutor argued:

> All evil required was a cowering victim. Deborah Ann Ms. 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?

Ex. 142 at 80. At the evidentiary hearing on the initial post-conviction petition, defense counsel was asked whether he objected to this argument and admitted that he did not. When asked if he had a strategic reason not to object, counsel stated, "No. I had no strategic reason not to do so." Ex. 109 at 29. The prosecutor's argument was prejudicial and a different result would have been likely had the jury not been subjected to the inflammatory argument. See Bains v. Cambra, 204 F.3d 964, 974-75 (9th Cir. 2000); Valdez v. State, 196 P.3d 465, 478 (Nev. 2008) (prosecutors should not attempt to inflame the jurors fears or passions in pursuit of a conviction).

238. There was no objection from trial counsel to the argument by the prosecutor which improperly quantified reasonable doubt. See Ex. 142 at 163-64 (Mr. Chappell incorporates by reference the facts from Claim Fifteen, subsection (E)). There was no objection to this improper argument because defense counsel did not know it was improper. See Ex. 109 at 31. However, it is improper for a prosecutor to equate decisions in "everyday life" to constitutional standards applicable to criminal cases. Defense counsel's failure to object was prejudicial.

239. Trial counsel also failed to object to the prosecutor's improper questioning during cross-examination of Mr. Chappell.

240. Trial counsel failed to object to the prosecutor's questions concerning the punishment Mr. Chappell wanted to receive and whether he wanted a death sentence or life without parole. Ex. 137 at 64-67. Mr. Chappell was asked if he was making an effort to present himself in such a way to minimize his punishment. Id. at 66. The prosecutor also asked Mr. Chappell if he would prefer life with parole. Id. at 67. At the guilt phase the subject of punishment is not relevant. Further, raising the possibility that Mr. Chappell would be released on parole was improper. The failure to object to the irrelevant and prejudicial questioning constituted deficient performance.

241. Trial counsel failed to object to cross-examination of Mr. Chappell that implied that he made up his testimony after hearing all the evidence. Ex. 137 at 64-65 (Mr. Chappell incorporates by reference that facts in Claim Fifteen, subsection (B)). The questioning by the prosecutor violated Mr. Chappell's Fifth Amendment right to remain silent.

J. Trial counsel were ineffective for failing to lodge contemporaneous objections

242. At the guilt phase of Mr. Chappell's trial, defense counsel failed to make contemporaneous objections throughout, including failing to object to erroneous or missing jury instructions; failing to object to prospective jurors who should have been excused; failing to object to improper victim impact evidence, and failing to object to improper arguments made by the prosecution (see Claims Five, Seven, and Fifteen, post). Further, counsel's failure to raise objections was 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 thus they "were so exhausted by the rulings in the case" that counsel was "emotionally exhausted" and "everything seemed futile." Ex. 109 at 29. Mr. Brooks admitted that, even though the defense was exhausted and felt they were being unfairly ruled against, they should have continued to voice objections. Id. Counsel's failure to continue defending their

client because the case felt futile and they were emotionally exhausted fell far below the standard of reasonableness expected of capital counsel.

243. The Supreme Court has acknowledged that counsel's failure to preserve a constitutional claim of error for appellate or habeas review may form the basis for a claim of ineffective assistance of counsel. Murray v. Carrier, 477 U.S. 478, 496 (1986). Indeed, the Court noted that "[t]he ability to raise ineffective assistance claims based in whole or in part on counsel's procedure critical safeguard to prevent the procedural default doctrine from producing "unremedied manifest injustices." Id.

244. All of the failures to object were unreasonable and fell below prevailing professional norms.

K. Trial counsel were ineffective for failing to make certain arguments on behalf of their client

245. Trial counsel was ineffective for failing to argue that that Mr. Chappell could not have been convicted of burglary because he could not have burglarized his own home. State v. White, 330 P.3d 482, 486 (Nev. 2014) (discussing the common law notion that "a person with an absolute unconditional right to enter a structure cannot burglarize that structure"). For the same reason, counsel was ineffective for failing to argue that Mr. Chappell could not have been convicted of felony murder based upon the underlying predicate of burglary.

220. Counsel was also ineffective for failing to argue that Mr. 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 v. State, 167 P.3d 430, 435 (Nev. 2007).

246. If counsel had made these arguments to the jury, on behalf of their client, Mr. Chappell would not have been convicted of burglary or felony murder. Counsel's inaction prejudiced Mr. Chappell.

L. Cumulative prejudice

247. 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; Strickland, 466 U.S. at 694 ("[A] defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case."); Brown v. Myers, 137 F.3d 1154, 1157 (9th Cir. 1998).

248. 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 v. Morrison, 477 U.S. 365, 384 (1986). 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) ("Separate errors by counsel at trial and at sentencing should be analyzed together to see whether their cumulative effect deprived the defendant of his right to effective assistance. They are, in other words, not separate claims, but rather different aspects of a single claim of ineffective assistance of trial counsel.") (internal citations omitted).

249. There is a reasonable probability that, but for all of trial counsel's errors enumerated above, the results of the proceeding would have been different. The jury heard that Mr. Chappell was a violent drug abuser who beat and stole from his children's mother for years then finally killed her. If trial counsel had performed effectively, the jury would have heard that, as a result of his mother's prenatal drinking, Mr. Chappell suffered from brain damage and a predisposition to drug and alcohol dependence. The jury would have heard that Mr. Chappell and Ms. Panos loved each other very much, but Mr. Chappell's brain damage, combined with the effects of crack, prevented him from controlling his impulses and caused him to react violently

when the two had arguments. The jury would also have heard that Mr. Chappell's drug addiction was so severe that he could not control his impulse to do whatever it took to feed his addiction, including stealing from Ms. Panos and his children. The jury would have heard that the combined effect of Mr. Chappell's brain damage and drug addiction impaired his impulse control so severely on the day of the offense that, when he discovered Ms. Panos had been cheating on him, he literally could not control his rage and acted in the heat of passion. There is a reasonable probability that, if the jury had heard this evidence, the results of the proceeding would have been different.

CLAIM TWO (GUILT PHASE JURY INSTRUCTIONS)

Mr. Chappell's conviction is invalid under the federal constitutional guarantees of the right due process, confrontation, effective counsel, equal protection, trial before an impartial jury, freedom from cruel and unusual punishment, and a reliable sentence because the trial court failed to properly instruct the jury. U.S. Const. amends. V, VI, VIII, XIV; Nev. Const. art. 1, §§ 1, 6, 8, and art. 4 § 21.

SUPPORTING FACTS

A. Premeditation and Deliberation

1. Mr. Chappell's jury was instructed that: "Murder of the First Degree is murder which is (a) perpetrated by any kind of willful, deliberate and premeditated killing . . . ." Ex. 47 at 21.

2. Jury Instruction 22, which was not objected to at trial, informed the jury that:

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

Ex. 47 at 22.

3. The prosecutor explained first degree murder to the jury as follows: "all 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." Ex. 142 at 101. "If I walked up to any one of you and I had a gun and I drew down and shot any one of you, there is no doubt that that's first degree murder. That is a simple act of drawing down and shooting someone is

premeditation." Ex. 142 at 160. Based on these instructions, the jury found Mr. Chappell guilty of first degree murder. Ex. 41.

4. After Mr. Chappell's conviction and sentence were affirmed on direct appeal, the Nevada Supreme Court decided the Byford v. State, 994 P.2d 700, 713 (Nev. 2000) case, in which it concluded that the above instruction blurred the distinction between first and second-degree murder by eliminating the element of deliberation from the definition of first-degree murder and by confusing the distinction between first and second- degree murder. See Byford, 994 P.2d at 713-714. The court disapproved the use of the instruction in future cases, and directed that a new standard instruction be used. Id. at 714-15.

5. In 2007, a unanimous panel of 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); Francis v. Franklin, 471 U.S. 307, 26 (1985); In re Winship, 397 U.S. 358, 364 (1970); Fiore v. White, 531 U.S. 225, 228–29 (2001).

6. The following year, the Nevada Supreme 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, 198 P.3d 839, 844-51 (Nev. 2008).

7. The first degree murder instructions given in Mr. Chappell's case were unconstitutional for multiple reasons.

8. First, if the Nevada Supreme Court was correct in Nika that Byford changed the law, and if the Nevada Supreme Court was correct in Byford that its previous decisions erased the distinction between first and second degree murder by reducing "premeditation and deliberation to simply 'intent,'" then it necessarily follows that Nevada law at the time of Mr. Chappell's conviction was unconstitutionally vague

and ambiguous. See Kolender v. Lawson, 461 U.S. 352, 357 (1983). Even more important, however, is that the "complete erasure" of the distinction between first and second-degree murder left juries with no "adequate guidelines" for determining when a homicide is first rather than second-degree murder. The absence of such adequate standards does not merely "encourage arbitrary and discriminatory enforcement," Id. at 357 (citations omitted), but virtually ensures it.

9. This constitutional violation leads, in turn, to two other constitutional violations. First, the "standardless sweep" of the definition will result 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).

10. Second, Nevada law restricts imposition of the death penalty to cases involving convictions of first-degree murder. Nev. Rev. Stat. 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 in violation of the narrowing requirement of the Eighth Amendment. Basing death-eligibility on a vague aggravating factor invites "arbitrary and capricious application of the death penalty." Stringer v. Black, 503 U.S. 222, 228, 235-236 (1992); cf. Jones v. State, 707 P.2d 1128, 1134 (Nev. 1985) (high degree of premeditation is a prerequisite to death eligibility). Basing death-eligibility on a conviction for a capital offense, when the conviction is predicated upon a vague definition of the elements that are supposed to distinguish it from second-degree murder, is even more arbitrary and capricious.

11. The conflation of premeditation and deliberation with simple intent to kill also has the effect of eliminating any necessity of showing any actual evidence from which the jury could infer that the defendant actually premeditated and deliberated. The "instantaneous" premeditation theory has the practical effect of eliminating the necessity for any such evidentiary showing from which premeditation and deliberation can be inferred. See State v. Thompson, 65 P.3d 420, 427 (Ariz. 2003). If a court can simply recite that premeditation can be instantaneous, and essentially identical to, and arising at the same time as, simple intent to kill, it can completely ignore the absence of any evidence that would support an inference that premeditation and deliberation actually occurred.

12. 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 Mr. Chappell's trial unconstitutionally relieved the State of its burden of proving every element of first degree murder beyond a reasonable doubt. See Riley v. McDaniel, 786 F.3d 719, 724 (9th Cir. 2015).

13. Either way—whether Nevada law at the time required the State to prove willfulness, premeditation, and deliberation, or whether it required the State to simply prove intent—the first degree murder instructions given at Mr. Chappell's trial were unconstitutional.

14. The use of the unconstitutional instruction had a substantial and injurious effect on the outcome of the proceeding. The record reflects that Mr. Chappell, a man with a low IQ and substantial mental disabilities, killed his long-time girlfriend, who was the mother of their three children, during the heat of an argument over a letter to her from another man that Mr. Chappell discovered shortly before the killing. Ex. 132 at 47-49; Ex. 137 at 53-55, Ex. 142 at 17-18. Mr. Chappell used a common kitchen knife that was found in the couple's home and did not bring any

weapon with him. Mr. Chappell's first jury found a mitigating circumstance of murder committed while the defendant was under the influence of extreme mental or emotional disturbance, thus establishing that the jury had significant concerns about Mr. Chappell's mental state at the time of the offense. Ex. 146 at 4; Ex. 30 at 4-5. Mr. Chappell's defense was that he was guilty of second-degree murder, yet, under the instructions given, the jury had no way of distinguishing whether Mr. Chappell was guilty of first or second-degree murder. Accordingly, the instruction had a substantial and injurious effect on the outcome of the proceeding.

B. Malice

15. Malice aforethought" is an essential element of murder under Nevada law. Nev. Rev. Stat. 200.010(1). The jury was provided the following "malice aforethought" instruction, pursuant to Nev. Rev. Stat. 200.020(2):

> Malice aforethought means the intentional doing of a wrongful act without legal cause or excuse or what the law considers adequate provocation.
>
> . . . .
>
> Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.
>
> Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

Ex. 47 at 20–21 (Guilt Phase Instructions Nos. 19–20).

16. This instruction violated clearly established federal constitutional law and substantially prejudiced Mr. Chappell. The "implied malice" component relieved the prosecutor of their burden to prove each element beyond a reasonable doubt, subverted the presumption of innocence, and invaded the jury's fact-finding province. The "implied malice" component created a mandatory presumption that malice shall be implied both in the absence of provocation and when the circumstances of the killing

demonstrated an "abandoned or malignant heart." This explicit and unqualified command foreclosed any independent jury consideration of whether the facts established "malice aforethought"—an essential element of second-degree murder.

17. This instruction was also unconstitutional because it created a reasonable likelihood that the jury convicted Mr. Chappell of first-degree murder without any rational basis for distinguishing between first-degree and second-degree murder. The definition of premeditation as instantaneous was indistinguishable from the express malice aforethought doctrine in second-degree murder cases. The absence of a rational distinction prevented an evenhanded and consistent application of either the first-degree or second-degree murder statutes. The inability to adequately distinguish between first-degree or second-degree murder also failed to narrow the class of death-eligible defendants.

18. Moreover, the instruction was unconstitutionally vague because it failed to identify the facts from which malice shall be implied. This instruction prevented Mr. Chappell from adequately identifying and arguing to the jury those facts which supported a second-degree murder rather than first-degree murder conviction.

C. Felony-murder—robbery theory

19. In addition to premeditated murder, the State also alleged a felony murder theory of first-degree murder based, in part, upon robbery. Ex. 24; Ex. 41, Ex. 47 at 11. The evidence revealed that, after he killed her, Mr. Chappell took Ms. Panos's vehicle. Ex. 137 at 57-60. The evidence further revealed that Mr. Chappell regularly used Ms. Panos's vehicle while she was alive. Ex. 134 at 16, 27, 31-32, 44. Mr. Chappell did not need to kill Ms. Panos in order to gain access to her car, and there was no evidence indicating that Mr. Chappell intended to take the car at the time he killed Ms. Panos. Rather, the evidence strongly suggested that Mr. Chappell did not develop the intent to take the car until after Ms. Panos was dead.

20. The jury was not instructed that, in order to find Mr. Chappell guilty of felony murder, it had to find he formed the intent to commit the underlying felony of robbery before the murder. Ex. 47 at 11, 21; see also Ex. 142 at 94, 100-01. 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 v. State, 167 P.3d 430, 435 (Nev. 2007). The failure to instruct the jury relieved the State of its burden of proof of every element of the offense in violation of Mr. Chappell's right to due process. In re Winship, 397 U.S. 358, 364 (1970).

21. Based on the evidence presented, and the lack of an instruction that afterthought robbery does not satisfy the felony murder rule, it is impossible to know whether the jury relied upon the felony murder theory when it found Mr. Chappell guilty of first degree murder, or whether it found the robbery occurred as an afterthought to the killing. The lack of an instruction had a substantial and injurious effect on the outcome of the proceeding because we are left with a grave doubt as to whether the jury would have convicted Mr. Chappell had it been properly instructed.

D. Felony-murder- burglary theory

22. The State also argued that Mr. Chappell was guilty of first-degree murder based on a burglary felony murder theory. Ex. 24; Ex. 41, Ex. 47 at 11. The evidence was undisputed that Mr. Chappell entered the trailer through a window. Mr. Chappell testified that he lived in the trailer with Ms. Panos and that he entered with the intent to simply go home and see his girlfriend. Ex. 137 at 46-48. Other witnesses confirmed that Mr. 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 that "the defendant has resided there, on occasion, 839 North Lamb, space 125." Ex. 142 at 86.

23. Under Nevada law, a person cannot be convicted of burglarizing his own home. State v. White, 330 P.3d 482, 486 (Nev. 2014) ("one cannot burglarize his own

home so long as he has an absolute right to enter the home."). However, the trial court failed to instruct the jury that a person cannot be convicted of burglarizing his own home. What is worse, the State erroneously argued that it did not matter if Mr. Chappell lived there, he could still be guilty of burglary. Ex. 142 at 92 ("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 Mr. Chappell's right to due process. In re Winship, 397 U.S. 358, 364 (1970).

24. Based on the evidence presented, and the lack of an instruction that a person cannot burglarize his own home, it is impossible to know whether the jury relied upon the burglary felony murder theory when it found Mr. Chappell guilty of first degree murder, or whether it believed Mr. Chappell lived in the trailer with Ms. Panos. The lack of an instruction had a substantial and injurious effect on the outcome of the proceeding because we are left with a grave doubt as to whether the jury would have convicted Mr. Chappell had it been properly instructed.

E. Equal and exact justice

25. The equal and exact instruction improperly minimized the State's burden of proof. The jury was instructed as follows:

> Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be and by the law as given to you in these instructions, with the sole, fixed and steadfast purpose of doing equal and exact justice between the Defendant and the State of Nevada.

Ex. 47 at 46 (Guilt Phase Instruction No. 46)).

26. By informing the jury that it must provide equal and exact justice between Mr. Chappell and the State, this instruction created a reasonable likelihood that the

jury would not apply the presumption of innocence in favor of Mr. Chappell, and would thereby convict and sentence based upon a lesser standard of proof than the constitution requires.

27. The defect in this instruction is in the final clause: jurors are told to deliberate "with the sole, fixed and steadfast purpose of doing equal and exact justice between the defendant and the State of Nevada." This "equal and exact" language improperly quantifies the proportion of "justice" to be allocated between the defendant and the State. The qualitative element of justice injected by the "equal and exact" language creates a reasonable likelihood that a juror will ignore the constitutionally mandated imbalance between the burdens placed upon the parties in a criminal prosecution which requires the State to bear the burden of proof beyond a reasonable doubt and affords the defendant the presumption of innocence. Instead, the jury is instructed to view the parties on "equal" footing, as if they were a civil case. An instruction to do "equal and exact justice" to both parties fundamentally corrupts the sentencing determination and constitutes structural error that is prejudicial per se. In the alternative, this error was prejudicial and had a substantial and injurious affect upon the jury.

F. Reasonable doubt

28. The trial judge instructed the jury on reasonable doubt:

> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

Ex. 47 at 36 (Guilt Phase Instruction No. 36)).

29. There are two defects in this instruction which inflated the constitutional standard of doubt necessary for acquittal. The second sentence provided that reasonable doubt "is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life." This language provided an inappropriate characterization of the degree of certainty required to find proof beyond a reasonable doubt. It offered an explanation of reasonable doubt itself, not a standard by which reasonable doubt can be determined. This language has proven to be a historical anomaly. As far as can be discerned, no other state currently uses this language in its reasonable doubt instruction, and the few states which previously used it have since disapproved it.

30. The final sentence of the trial judge's instruction was also constitutionally infirm. The trial judge instructed for "[d]oubt to be reasonable" it "must be actual, not mere possibility or speculation." This language was similar to language condemned by the United States Supreme Court and when read in conjunction with the "govern or control" language, created a reasonable likelihood that the jury would convict based upon a lesser degree of proof than the Constitution required. The "actual, not mere possibility or speculation" language elevated the threshold for determining reasonable doubt. As a result, the jurors in Mr. Chappell's case received instructions that made identifying reasonable doubt unconstitutionally difficult to recognize while determining the lack of reasonable doubt was more easily determinable.

31. The characterization of standard of proof as an "abiding conviction of the truth of the charge," did not cure the defects in this instruction. That statement cannot be linked to any proper definition of the reasonable doubt standard. In conjunction with the language which immediately preceded this statement, it provided the prosecutors' with an impermissibly low standard of proof.

32. This instruction had a substantial and injurious effect on the outcome of the proceeding. See Ex. 125.

33. Mr. Chappell acknowledges that this Court in Ramirez v. Hatcher, 136 F.3d 1209, 1214 (9th Cir. 1998), upheld the constitutionality of this instruction. Chappell also recognizes, of course, that this Court is bound to follow Ramirez until it is overruled and at best can only urge the en banc court to overrule its holding that the instruction is constitutional. However, neither Ramirez nor any other case reviewing the Nevada instruction has ever addressed numerous authorities containing compelling analysis of the defects in the instruction. See Commonwealth v. Weber, 59 Mass. 295, 320 (1850); Commonwealth v. Miller, 21 A. 138, 140 (Pa. 1891); State v. Carter, 182 P.2d 90, 94 (Ariz. 1947); McAllister v. State, 88 N.W. 212 (Wisc. 1901); Minich v. People, 9 P. 4, 13 (Colo. 1885); State v. Pedersen, 802 P.2d 1328, 1332 (Utah App. 1990); see Monk v. Zelez, 901 F.2d 885, 889-90 (10th Cir. 1990).

G. **Conclusion**

34. The State cannot demonstrate that these unconstitutional instructions, singly and cumulatively, were harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967). Specifically, the instructions defining first degree murder were all unconstitutional. As instructed, none of the theories of first-degree murder submitted to the jury are valid. Whether the jury convicted Mr. Chappell of premeditated murder or felony murder, the conviction is invalid based on the invalid instructions. The instructional error necessarily had a prejudicial effect on the outcome of the proceeding.

CLAIM THREE (IAC PENALTY PHASE)

Mr. Chappell's death sentence is invalid under federal constitutional guarantees of due process, confrontation, right to counsel, a reliable sentence, and equal protection due to the ineffective assistance of trial counsel during the second penalty phase of the proceedings. U.S. Const. Amends. V, VI, VIII, XIV; Nev. Const. art. 1, §§ 1, 6, 8, and art. 4 § 21.

SUPPORTING FACTS

A. Standard of Practice

1. The prevailing professional norms at the time of Mr. Chappell's penalty re-trial were reflected in the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, [hereinafter 2003 ABA Guidelines]. These guidelines require counsel "at every stage . . . to conduct thorough and independent investigations relating to the issues of both guilt and penalty." 2003 ABA Guidelines, Guideline 10.7(A). This is reiterated in Guideline 10.11(A), which states that "counsel at every stage of the case have a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation." Id., Guideline 10.11(A).

2. Local professional norms similarly obligated counsel "at every stage . . . to conduct a thorough and independent investigation relating to issues of both guilt and penalty." Nevada Indigent Defense Standards of Performance: Capital Case Representation (2008), attached as Ex. 248, Standard 9(a). Penalty investigation must be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be presented. Id. at Standard 9(a)2. Furthermore, effective counsel should "secure the assistance of all expert, investigative, and other ancillary

professional services reasonably necessary or appropriate to provide high-quality legal representation at every stage of the proceedings." Id. at Standard 1(b)1(A).

3. Penalty phase preparation should include hiring experts to "rebut or explain evidence presented by the prosecutor." 2003 ABA Guidelines, Guideline 10.11(F)(1), and hiring experts "to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense . . . ." Id., Guideline 10.11(F)(2); see also ABA Standards for Criminal Justice: Providing Defense Services, Standard 5-1.4 Commentary (3d ed. 1992) (National standards on defense services have consistently recognized that quality representation cannot be rendered unless assigned counsel has access to, among other things, expert witnesses.).

4. In particular, mental health experts are essential to defending capital cases. A defendant's psychological and social history, and his emotional and mental health are often of vital importance to the jury's decision at the punishment phase. Dr. Richard Dudley and Pamela Leonard, Getting it Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment, 36 Hofstra L. Rev. 963, 975 (2008); Gary Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U. L. Rev. 299, 323–24 (1983). Neurological and psychiatric impairment are common among persons convicted of violent offenses on death row. See, e.g., Craig Haney, The Social Context of Capital Murder: Social Histories and the Logic of Mitigation, 35 Santa Clara L. Rev. 547, 559–83 (1995). As a result, counsel must compile extensive historical data, as well as obtain, when appropriate, a thorough physical and neurological examination. Diagnostic studies, neuropsychological testing, appropriate brain scans, blood tests or genetic studies, and consultation with additional mental health specialists may also be necessary. See Douglas S. Liebert, Ph.D. & David V. Foster, M.D., The Mental Health Evaluation in Capital Cases: Standards of Practice, 15 Am. J. Forensic Psychiatry 43, 43-64 (1994).

5. Mitigating evidence provides a context for the crime by describing an individual's life experiences that serve to inspire compassion, empathy, mercy, and/or understanding. Indeed, mitigating evidence is any evidence that "might serve 'as a basis for a sentence less than death.'" Tennard v. Dretke, 542 U.S. 274, 287 (2004) (quoting Skipper v. South Carolina, 476 U.S. 1, 5 (1986)). The presentation of such evidence is imperative at the penalty phase of a capital trial.

B. Trial Counsel Were Ineffective for Failing to Investigate and Present Compelling Mitigating Evidence at the Penalty Hearing

1. Trial counsel failed to adequately prepare for the penalty retrial

6. David Schieck was appointed on November 29, 1999, to represent Mr. Chappell for post-conviction proceedings following his 1996 conviction for murder and sentence of death. Ex. 249. On April 30, 2002, Mr. Schieck filed a supplemental petition in state court,[21] arguing that trial counsel were ineffective for failing to call lay witnesses; for failing to object timely to the jury selection that systematically excluded African Americans; for failing to object to unconstitutional and improper jury instructions; and for failing to object and move to strike overlapping aggravating circumstances. Id. Ex. 46 at 10–34.

7. The state court granted Mr. Chappell an evidentiary hearing regarding the ineffective assistance of counsel (IAC) claim, which was held on September 24, 2002. See Ex. 109. At the hearing, trial counsel admitted that they had not sought lay witnesses to testify as to the nature of the relationship between Mr. Chappell and the victim, Ms. Panos. Id. at 12–13. Mr. Schieck elicited testimony that trial counsel had not called as witnesses Ernestine Harvey, Shirley Sorrell, James C. Ford, Ivri Marrell, Myra Chappell, Carla Chappell, Chris Birdow, or David Green. Id. at 18, 20, 22, 23. Mr. Schieck specifically asked counsel about his attempts to locate witnesses in

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[21] Mr. Chappell had previously filed a pro per petition for writ of habeas corpus on October 19, 1999.

Lansing, Michigan, where Mr. Chappell had grown up and where his relationship with Ms. Panos began: "Now, when you say you spent the full day looking for people, wouldn't it be more accurate that you spent the day interviewing the people that you knew how to find and didn't really go looking for other people?" Id. at 21. To which, trial counsel Howard Brooks replied, "That's correct." Id.

8. Mr. Schieck also asked Mr. Brooks about whether he had objected to the jury selection system in Clark County because it systematically excluded African-Americans. Mr. Brooks replied that he had made a Batson objection and filed a document during trial to dismiss the charges based upon the disparate treatment of defendants based on race. Ex. 109 at 25. Mr. Schieck also asked Mr. Brooks if he had any strategic reason for failing to object to particular arguments made by the State, and Mr. Brooks responded that he and his co-counsel were emotionally exhausted halfway through the trial due to all the rulings that had been made against Mr. Chappell but that he had no strategic reason for failing to object to various arguments. Id. at 26–31. Mr. Schieck also elicited testimony from Mr. Brooks that he did not have any strategic reason for failing to offer to the court specific jury instructions regarding mitigating circumstances the defense wanted the jury to consider or informing the jury that they must decide aggravating and mitigating circumstances and weigh them before considering any character evidence. Id. at 42–43.

9. Mr. Schieck also asked whether Mr. Brooks or his investigator had interviewed any of the State's witnesses. Ex. 109 at 43. Mr. Brooks responded that they did not do so and were consequently stunned by the extent of the testimony of State's witnesses to prior domestic batteries by Mr. Chappell. Id. at 44.

10. The state court permitted Mr. Schieck to supplement the record with affidavits from the mitigation witnesses that he had demonstrated trial counsel had failed to locate and call to testify on behalf of Mr. Chappell. Ex. 109. Consequently, Mr. Schieck retained an investigator to help locate witnesses and travelled to Lansing,

Michigan for two days in November of 2002 to interview and obtain affidavits from witnesses. Ex. 250. Mr Schieck filed with the court in March of 2003, affidavits from Clara Axam, Barbara Dean, Shirley Sorrell, Ivri Marrell, Benjamin Dean, James Ford, and from investigator Dennis Reefer regarding witnesses David Green, Chris Birdow, and Ernestine Harvey in support of Mr. Chappell's petition. Ex. 28; Ex. 29. These affidavits explained what testimony each witness would have offered if called at trial and demonstrated to the court the prejudice that Mr. Chappell suffered as a result of trial counsel's ineffective assistance.

11. Based upon the information provided at the evidentiary hearing and in the affidavits submitted to supplement the petition, the court granted in part Mr. Chappell's petition. See Ex. 6. The state court determined that trial counsel were deficient for failing to locate, interview, and call as witnesses at Mr. Chappell's penalty hearing numerous witnesses who would have established mitigating circumstances. Id. at 4. Mr. Chappell's death sentence was vacated, and Mr. Chappell was granted a new penalty hearing. Id. at 5.

12. Mr. Schieck continued to represent Mr. Chappell through an appeal and cross-appeal to the Nevada Supreme Court of the partial grant of Mr. Chappell's state post-conviction petition. The Nevada Supreme Court affirmed the trial court's decision to grant a new penalty hearing based upon ineffective assistance of counsel at Mr. Chappell's trial. Ex. 5 at 6–7. The Nevada Supreme court also determined that two of the three remaining aggravating circumstances violated McConnell v. State, 102 P.3d 606 , 624(Nev. 2004), as discussed in greater detail in Claim Four. The State was left with only one aggravating circumstance to allege at the second penalty hearing.

13. Mr. Schieck also continued to represent Mr. Chappell through his second penalty hearing in 2007. Mr. Schieck was, by that time, the Special Public Defender for Clark County, Nevada. Deputy Special Public Defender Clark Patrick, who had

never before tried a capital case, joined Mr. Schieck as second chair for Mr. Chappell's penalty re-trial. Ex. 108 at ¶¶4, 5.

14. As part of their preparation for Mr. Chappell's second penalty trial, counsel conducted the same hit-and-run kind of witness interviews Mr. Schieck had criticized first trial counsel for conducting.[22] The Nevada Supreme Court issued its order of affirmance regarding Mr. Chappell's granted second penalty hearing in April of 2006, but none of the witnesses that Mr. Schieck said first trial counsel failed to contact were interviewed before February of 2007 in preparation for a March 2007 hearing. To conduct those interviews, Mr. Chappell's defense team flew to Lansing, Michigan for two days, hardly enough time to locate and interview the eight people Mr. Schieck had identified during post-conviction proceedings as potential witnesses who should have testified and certainly not enough time to locate and interview others who had yet to be identified through ongoing investigation. See Ex. 334 at ¶9–11. The defense team did not arrive in Lansing until nearly midnight, at which time they conducted a group interview with groups of six or seven witnesses at one time. Ex. 334 at ¶9. The following day, counsel met with three of Mr. Chappell's family members—one during her lunch break—and four of Mr. Chappell's friends, who were interviewed in two groups of two. On their final day in Lansing, counsel met with only one individual. Counsel made no further trips to Michigan to locate or interview other potential witnesses. See Ex. 334 at ¶12.

15. Trial counsel retained expert witnesses but failed to provide adequate materials or time for those experts to properly prepare for trial. Dr. William Danton, a psychologist with expertise in domestic abuse, was retained to explain to a jury why Ms. Panos would have had consensual sex with Mr. Chappell on the day of her death,

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[22] This may have been due, at least in part, to Mr. Schieck's reluctance to rely on his investigator to determine who to interview or to conduct witness interviews, preferring to take on these tasks himself. See Ex. 333; see also Ex. 334.

rebutting the State's sole aggravator of sexual assault. Dr. Danton's practice was located in Reno, Nevada, and he travelled to Las Vegas to testify. Ex. 251. Dr. Danton was in Las Vegas for less than twenty-one hours during which time he met and interviewed Mr. Chappell for the first and only time and testified at Mr. Chappell's penalty hearing. Id. Because of the extremely tight time frame, Dr. Danton met with Mr. Chappell for only two hours at 10:00 p.m. the night before he testified. Ex. 72 at 66, 64. The only materials he reviewed were a summary of the facts of the case and a report prepared in 1996 by neuropsychologist Lewis Etcoff. Ex. 172 at 53. Dr. Danton conducted no other interviews with Mr. Chappell and performed no independent testing of Mr. Chappell. Id. at 65, 75.

16. Dr. Lewis Etcoff, a neuropsychologist who had conducted limited psychological testing of Mr. Chappell in 1996 and testified at Mr. Chappell's first trial, was also retained by second trial counsel to testify at Mr. Chappell's second penalty hearing. In preparation for his testimony in 2007, Dr. Etcoff was only asked by counsel to read the report that he had drafted in 1996, notes he had taken during his 1996 interview of Mr. Chappell, and his testimony at the 1996 trial. Ex 85 at ¶12. He was not asked to conduct any further neuropsychological testing, was not given access to additional witnesses who could provide insight into Mr. Chappell or corroborate Mr. Chappell's self-reports, was not given any documents that could have bolstered his testimony, and was not provided an opportunity to speak with Mr. Chappell again. Id. In total, Dr. Etcoff spent only 4.5 hours preparing for his 2007 testimony. Ex. 252.

17. Trial counsel retained only one other expert, a forensic pathologist who testified that there was no physical trauma to the victim's genitals indicating that a sexual assault occurred.

18. As a result of their inadequate investigation and failure to adequately prepare their experts, trial counsel's penalty phase presentation was less than compelling. The few lay witnesses who testified only scratched the surface of Mr.

Chappell's traumatic life history, and each of the experts was severely impeached based on their inadequate preparation. Because of this inadequate preparation, Mr. Chappell was again sentenced to death. As explained in detail below, trial counsel's performance fell below objective standards of reasonableness, and there is a reasonable probability of a more favorable outcome if they had performed effectively.

2. If trial counsel had adequately investigated and prepared for the penalty retrial, they could have presented compelling mitigating evidence

19. James Chappell's challenges began before he was born. His mother, Shirley Chappell, was a heroin addict and heavy drinker who abused drugs, alcohol, and cigarettes throughout her entire pregnancy with James[23]. See, e.g., Exs. 60 at ¶¶3, 4; 74 at ¶¶ 6, 7; 64 at ¶3; 67 at ¶8; 330 at ¶20–21. His father was one of two men his mother was sexually involved with at the time, her husband, Willie Chappell, or her paramour, James Wells. See, e.g.,Ex. 74 at ¶¶3–5. Each man battled his own heroin addiction at some point, and neither man was a part of Mr. Chappell's life. Exs. 74 at ¶¶9, 4, 14; 60 at ¶2, 6–8; 67 at ¶10. James and his four siblings had a common mother but were fathered by three or four different men. See, e.g., Exs. 64 at ¶2; 71 at ¶24. The oldest sibling, LaPriest Blocker, was raised by his father, but Willie, Jr. (who was also known as Ricky), Carla, James, and Myra stayed together in the same household with their mother. Ex.61 at ¶4.

20. Shirley Chappell's drug and alcohol addictions led to severe consequences for James. For example, when she was five to seven months pregnant with James, Shirley was so intoxicated that she slipped and fell down a flight of stairs, resulting in injuries that required medical attention and risked the pregnancy. Ex. 74 at ¶8. Due to prenatal alcohol exposure, Mr. Chappell suffers from organic brain damage and has

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[23] For the purposes of Mr. Chappell's life history, he will be referred to as "James," rather than Mr. Chappell. His friends and family members will similarly be referred to by first names in this section.

been diagnosed with Alcohol-Related Neurodevelopmental Disorder, which is a Fetal Alcohol Spectrum Disorder. As a result, Mr. Chappell has impaired intellectual functioning; problems with memory; limited language and communication skills; an inability to problem-solve, control emotions, or inhibit inappropriate behavior; and myriad other challenges that render him wholly unable to function independently.

21. In order to support her drug habit, Shirley prostituted herself during James's first few years. Ex. 71 at ¶4. When Shirley's substance abuse problems caused her to neglect her children, James, who was only two at the time, and his siblings were removed from her care and placed in the home of their maternal grandmother, Clara Axam, a cold, neglectful, and abusive woman, who lived in a depressed neighborhood. Exs. 140 at 37–38, 72 at ¶4. On August 23, 1973, when James was only three, Shirley got high on drugs, walked in or across an interstate highway, and was struck by a police car and decapitated. Exs. 253; 71 at ¶10; 61 at ¶3; 68 at ¶15. After her death, James and his siblings remained with Clara, living with her in a filthy, dilapidated house on a street filled with drug dealers, prostitutes, poverty, and toxic waste. See, e.g., Ex. 72 at ¶6.[24]

22. Nellers Court, the street where James lived with his grandmother for most of his formative years, was in what was perhaps the worst neighborhood in Lansing, Michigan at the time. Ex. 72 at ¶6. Crime and violence were commonplace. Exs. 140 at 60–61; 72 at 6. Nellers Court ran alongside the shuttered Diamond Reo auto plant. See History Reo Motor Car Company Plant, Lansing Michigan, Historic

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[24] Search of Michigan Department of Environmental Quality's Environment Mapper, http://web1.mcgi.state.mi.us/environmentalmapper/mcgi.aspx# (select the "Layers" button in the upper left hand side, select the hybrid option for the map, select "Environmental Management:, select the brown box between Baker St. and Garden St. in Lansing Michigan, select the "Get Details" button in the upper left hand side, and click the "Sites of Environmental Contamination (Part 201)" option).

Structures.[25] Despite the fact that oil and fuel slicks could be seen and the air carried a heavy scent of oil and fuel, the children in the neighborhood played at the abandoned Diamond Reo factory site, climbing inside of empty storage tanks and playing in the dirt. See, e.g., Exs 73 at ¶12; 58 at ¶13. During the mid-1980s, environmental ground contaminants and toxins from the Diamond Reo plant were discovered under the homes on Nellers Court. Ex. 61 at ¶17. Ultimately, the city condemned the neighborhood, purchased the homes which were still occupied, and razed all the houses. Exs. 58 at ¶13; 61 at ¶17.

23. Clara's house, one of those eventually purchased and destroyed due to contamination, was sandwiched between two railroad tracks and situated between two abandoned houses that were used by drug dealers, dope fiends, prostitutes, and others to engage in criminal activity. Exs. 73 at ¶12; 72 at ¶6. The children in the neighborhood came from single-family homes and did not even use the word "father" with one another. See, e.g., Exs. 69 at ¶3; 52 at ¶14. The men that they did see in the neighborhood beat their wives, girlfriends, or prostitutes almost daily. Exs. 69 at ¶4; 59 at ¶¶16–18.

24. Clara Axam frequently left the children alone in this neighborhood with only bare necessities to go on gambling vacations, never hugged or otherwise expressed love or affection, criticized the children as stupid, and beat them with almost anything at hand. See, e.g., Exs. 74 at ¶¶12, 13; 73 at ¶11. When Clara assumed responsibility for her grandchildren permanently in 1973, she did so only to avoid having the children split up by the state. Ex. 73 at ¶7. Clara felt her only duty was to provide her

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[25] http://www.historicstructures.com/mi/lansing/reo_motors2.php; Search of Michigan Department of Environmental Quality's Environment Mapper, http://web1.mcgi.state.mi.us/environmentalmapper/mcgi.aspx# (select the "Layers" button in the upper left hand side, select the hybrid option for the map, select "Environmental Management:, select the brown box between Baker St. and Garden St. in Lansing Michigan, select the "Get Details" button in the upper left hand side, and click the "Sites of Environmental Contamination (Part 201)" option).

grandchildren with food, clothes, and a roof over their heads, and she did little beyond that. Id.; see also Ex. 66 at ¶¶3–6. Clara spoke to others about her grandchildren's basic human needs, like food and shelter, as privileges that she could take away because the children were not deserving. Ex. 63 at ¶3. Clara received government financial assistance to raise her grandchildren, but she spent little of the funds she received on anyone other than herself. Exs. 72 at ¶5; 63 at ¶3; 64 at ¶17; 331 at ¶22. She filled a large wardrobe with clothes, purchased new cars regularly, travelled often, and enjoyed life as a "single woman." See, e.g., Ex. 64 at ¶17.

25. Clara also enjoyed gambling and may have had a gambling addiction.[26] See, e.g., Ex 66 at ¶4; Ex. 328 at ¶8. She played the horses at various race tracks, bingo, the state lottery, and weekend card games at the homes of various friends. See, e.g., id.; Ex. 74 at ¶13. Clara also traveled frequently to various gambling destinations, such as Atlantic City, Las Vegas, and Louisville for the Kentucky Derby. Exs. 74 at ¶13; 61 at ¶6. She enjoyed other vacations to destinations such as Hawaii and the Caribbean as well. Exs. 53 at ¶18; 61 at ¶6. But Clara did not include her grandchildren on these trips. Exs. 64 at ¶17; 53 at ¶22 73 at ¶10. She left them home with an aunt who was a teenager or without any supervision at all. Exs. 68 at ¶16; 53 at ¶22; 73 at ¶10. When the children were teenagers, the lack of supervision resulted in James's house becoming known as the neighborhood hang-out where kids drank and did drugs. See, e.g., Ex. 64 at ¶13.

26. Clara neglected her grandchildren emotionally, as well. She did not offer hugs or kisses, did not hold her grandchildren's hands, did not pick up her grandchildren, never told her grandchildren she loved them. Exs. 73 at ¶9; 64 at ¶16; 53 at ¶12; 63 at ¶3; see also Exs. 68 at ¶9; 66 at ¶6; 65 at ¶12. She used to tell James

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[26] Clara's father, William Underwood, likely had a gambling addiction as well. Ex. 328 at ¶8. William began gambling at the coal mine where his father worked after he left school in the fifth grade, and his winnings surpassed his father's earnings at the mine. Id.

that she could not wait until he was able to take care of himself and left her home. Ex. 63 at ¶3. Clara did not help her grandchildren with homework. Ex. 73 at ¶11. On one occasion when James's older brother, Willie, asked Clara for help with her homework, she called him "nigger" and told him "get your bad ass over there and sit at the table, and you already know how to do it, don't play with me, you do your own homework." Ex. 169 at 246. This was how she responded when any of her grandchildren asked for assistance with school work. Id.

27. Calling her grandchildren "niggers" was not unusual for Clara, who regularly verbally abused her grandchildren. Ex. 73 at ¶16. Clara criticized, demeaned, and demoralized her grandchildren by pointing out their shortcomings and telling them they would amount to nothing. Exs. 64 at ¶20; 73 at ¶16. She frequently cursed at them and scolded them for little or no reason. See, e.g., Ex. 64 at ¶¶21–23. On one occasion, when Myra, who was thought by her siblings to be Clara's favorite, called Clara "Mommy" because she had no other mother figure, Clara yelled and cursed at her, making her feel unloved and unwanted. Ex. 64 at ¶22. This emotional abuse left deeper scars than any beating because, unlike physical wounds, the injuries caused by Clara's words never healed. Ex. 64 at ¶23.

28. That the injuries from Clara's beatings healed is remarkable given the frequency and severity of the physical abuse she meted out. She was known to have beaten her own children with hair brushes, shoes, belts, sticks, and tree branches, screaming and cursing as she did so. Ex. 65 at ¶11. Clara was at least as abusive toward her grandchildren. She beat them for long periods of time, cursing and screaming. See, e.g., Ex. 73 at ¶19. She beat her grandchildren with extension cords, broom sticks, belts, her hands, bed boards, wooden planks, tree switches, clothes hangers, toy racecar tracks, wooden support sticks from her box spring, and almost anything else within reach. Exs. 73 at ¶19; 64 at ¶18; 53 at ¶13; 59 at ¶23. On one occasion, she beat Willie so viciously with a broomstick that he jumped out of a second-floor window to escape

the beating. Exs. 73 at ¶20; 53 at ¶19. Clara often made her grandchildren strip off their clothing before a whipping to make sure they felt each blow. Ex. 73 at ¶19. Once, when Clara made Willie strip down to his underwear and beat him with an extension cord for stealing $5 from her, the beating was so severe that Willie ran out of the house to a neighbor's to stop the abuse. Ex. 73 at ¶24. On yet another occasion, Willie was beaten for such an extended period of time that he needed to use the restroom and begged Clara to stop to let him use the toilet. Exs. 73 at ¶21; 53 at ¶18. Clara refused to stop, and Willie defecated in a shoebox while Clara continued to beat him and his siblings were forced to watch. Id.

29. James and Myra, as the younger siblings, often witnessed Willie and Carla being severely punished by Clara. See, e.g., Ex. 64 at ¶19. Witnessing his older siblings being beaten was incredibly traumatizing for James. Ex. 53 at ¶18. Willie was not only beaten by Clara; he was also beaten by Clara's brother, Bobby Underwood. Ex. 53 at ¶20. Uncle Bobby would stand Willie next to a wall and repeatedly punch his head into the wall until he collapsed. Id. Uncle Bobby would then pick Willie up off the floor, stand him next to the wall again, and resume punching him in the head. Id. Carla was the victim of many of Clara's most painful beatings, often being beaten when her siblings did not complete their chores. Id. at ¶14. Clara's beatings intensified and became more violent when Carla grew immune to the pain and refused to cry, because Clara liked to see her grandchildren shed tears when they were whipped. Exs. 64 at ¶19; 53 at ¶17. The other children all cried and begged Carla to cry in the hopes Clara would stop. Ex. 53 at 17. James would often rock back and forth, crying and sucking his finger, with snot running from his nose and saliva drooling from his mouth as Carla was being beaten. Id.

30. Clara's roof also provided cover for incest and sexual abuse. Carla was raped by a friend of the family when she was thirteen. Ex. 53 at ¶11. On another occasion, Clara's brother, Jimmy Underwood, attempted to rape Carla, his grandniece,

only stopping because someone walked in and witnessed the attack. Id. When the witness reported the attack to Clara, she did nothing, and Uncle Jimmy was allowed to frequent the house where Carla and her siblings lived. Id. Myra's daughter Jasmine was also sexually abused while living in Clara's home. Id.

31. Rumors floated around the neighborhood that James was being molested at the Nellers Court house by a male caregiver. Ex. 61 at ¶17. Robert, a friend of family and a gay transvestite who also went by the name "Marge," periodically babysat James and his siblings at Clara's house. Ex. 64 at ¶45. When James was approximately thirteen, he wet himself or his bed when Marge was at the house. Exs. 64 at ¶45; 53 at ¶10. Marge was so angry that he removed all of James's clothes, wrapped him in only a towel that was made to look like a diaper, and forced James to walk around the block while the kids in the neighborhood laughed. Id.

32. This was one of countless occasions on which James wet himself or his bed, a problem that is common among sexual abuse victims. James wet his bed until age fourteen or fifteen. Exs. 59 at ¶21; 64 at ¶44; 53 at ¶9. He also urinated in plastic bottles that he stored without emptying in his room. Ex. 64 at ¶44. James also wet his pants when awake. Exs. 53 at ¶9; 59 at ¶21; 73 at 29. His friend James Ford once saw James run down a flight of stairs, bump into a table, and urinate on himself when James was thirteen or fourteen. Ex. 59 at ¶21. His bladder problems were so severe and well-known that he was given nicknames like "Pissy" by the children in his neighborhood. Exs. 59 at ¶21; 73 at ¶29.

33. Trauma dominated James's childhood. James's mother was killed in an accident involving a police car when he was three. Exs. 253; 71 at ¶10; 61 at ¶3. James's Uncle Anthony, a Vietnam veteran who was addicted to heroin but was the only family member who showed affection to James and his siblings, was stabbed to death in a fight that began in a neighborhood bar when James was twelve. Exs. 53 at ¶23; 73 at ¶23. Clara's niece, Laura Underwood, who was a like a sister to James and his siblings,

was shot to death in Clara's sister's home. Ex. 53 at ¶24. A close friend of James's mother, Nadine, who babysat James and his siblings when they were young and treated them like family, was murdered in Detroit in a domestic dispute. Id. Another family member, Uncle James Underwood, froze to death in 1987. Id. at ¶25. Several other family members died in the 1980s. James expressed to friends that he thought the people he loved most either died or left him. Ex. 59 at ¶31. James also witnessed horrific events. When he was about thirteen, James witnessed an older man in the neighborhood, a man who was kind to James and paid him to do small jobs, shoot and kill another man on Nellers Court. Ex. 59 at ¶20. This was in addition to the near-daily beatings he saw on his street and in his home.

34. James was less equipped than most to handle the daily traumas of his childhood. Everyone who knew James thought he was mentally slow. See, e.g., Exs. 70 at ¶5; 58 at ¶2; 56 at ¶2; 68 at ¶16; 61 at ¶11; 73 at ¶28; 331 at ¶14–15 . James was a special education student from early elementary school until he dropped out of school around tenth grade.[27] See, e.g., Exs. 61 at ¶11; 59 at ¶7; 53 at ¶5; 56 at ¶2; 327 at ¶5. Friends knew that James could not read well and often read materials for him, even into his twenties. See, e.g., Exs. 59 at ¶8; 61 at ¶13. In addition to struggling with reading, James found writing and mathematics difficult. See, e.g., Ex. 72 at 7.

35. James also struggled socially. He was thought to be immature, unable to predict consequences for his behavior, and lacking a sense of self. See, e.g., Exs. 61 at ¶10; 59 at ¶9; 73 at ¶¶30, 36; 70 at ¶9. For the most part, James interacted with a limited circle of friends, all kids from his neighborhood who protected James. See, e.g., Exs 59 at ¶12; 58 at ¶6. James was uncomfortable with people generally and especially

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[27] Michigan did not fully fund its special education programs until the late 1970s, following passage of the federal "Education for All Handicapped Children Act" in 1975. Ex. 327 at ¶3. At James's elementary school, special education students were welcomed as a source of additional funding but did not receive comprehensive special education services. Id. at ¶4.

with people he did not already know. See, e.g., Exs. 73 at ¶42; 53 at ¶7; 59 at ¶12. James would also have episodes when he stared off into space, oblivious to what was going on around him. See, e.g., Ex. 59 at ¶24. Friends or family members would need to call James several times or even touch him to regain his attention. See, e.g., Exs. 59 at ¶24; 69 at ¶7; 63 at ¶7.

36. Perhaps as a means to escape or cope, Mr. Chappell turned to alcohol and drugs as a pre-teen, abused drugs throughout his teens, and suffered a hopeless addiction to crack cocaine in his twenties. Beginning around age twelve, James drank alcohol and smoked marijuana. See, e.g., Exs. 59 at ¶27; 64 at ¶14. During a typical school week, James drank twenty to forty 40-ounch bottles of malt liquor beer. Ex. 59 at ¶28. On the weekends, James consumed more alcohol than his combined weekday consumption. Id. This alcohol was often purchased for James by a gay neighbor, Rob Williams, who invited neighborhood boys to his house for barbecue and drinks. Ex. 53 at ¶33. James also hid empty bottles of Boone's Farm wine under his bed. Id. On one occasion, when cleaning, Carla found enough empty wine bottles in James's room to fill three trash bags. Id.

37. In addition to using alcohol, James smoked marijuana (often from a stash belonging to James's Uncle Rodney) in his early teens, which progressed to marijuana laced with crack cocaine in his later teen years. See, e.g., Exs. 54 at ¶16; 53 at 34; 59 at ¶33. Eventually, James smoked straight crack, even competing with a friend to see who could smoke the most at one time.[28] Ex. 59 at 33.

38. Substance abuse was a common plague that spanned generations of James's family. His sister Carla developed a drug habit that led her to steal, hustle, and prostitute herself for drug money. Ex. 53 at ¶31. His sister Myra began smoking

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[28] On another occasion, James, his great-aunt Louise, his uncle Rodney, his aunt Sharon, his sister Carla, and his brother Ricky obtained enough crack to cover the top of a long table and smoked it together. Ex. 330 at ¶25.

marijuana at nine. Id. at ¶34. His brother Willie started smoking marijuana at eleven, using drugs to escape the emotional pain of his upbringing. Ex. 73 at ¶13. James's aunt and uncles, great-aunts and great-uncles, and cousins abused drugs. Id.; Ex. 330 at ¶19. James's and all of his siblings' fathers and the other men in his mother's life abused drugs. Ex. 53 at ¶35. Drug use was so prevalent in the family and community where they were raised that James's siblings thought people who did not use drugs were strange. Ex. 73 at ¶13; see also Ex. 53 at ¶35.

39. James continued to smoke crack when he moved to Tucson, Arizona in his early twenties to be with his long-time girlfriend and mother of his then two children, Debbie Panos. Ex 59 at ¶35. While living in Tucson, James's drug problem grew beyond his control. In 1992, he called a friend, Terrence Wallace, in Lansing, and said, "It's not handling, get me out of here," which was James's way of requesting help because he was spiraling out of control. Ex. 70 at ¶14. James then requested a bus ticket to return to Lansing. Id. When he was back in Lansing, James told Terrance that he was "on the tip" and doing badly in Arizona; "on the tip" meant James was abusing drugs heavily and felt like he was losing control of himself. Id.

40. Eventually, James returned to Tucson to be with Debbie, and, in 1994, the couple and their three children relocated to Las Vegas. James's addiction grew even more onerous in Las Vegas. James smoked crack morning, noon, and night, every single day. Ex. 55 at ¶5. His addiction was so serious that other crack addicts thought he smoked more than anyone they knew. Id. James's addiction grew beyond his control and consumed his life. Exs. 59 at ¶¶61, 55 at ¶5.

41. At Mr. Chappell's second penalty hearing, the jury heard about the negative ways in which Mr. Chappell's impairments manifested themselves, but heard little about the deficits, traumas, and losses James suffered. The jury was left with an incomplete and unsympathetic portrait of Mr. Chappell because his trial counsel were ineffective.

3. Trial counsel were ineffective for failing to identify, prepare, and present lay witnesses

42. Mr. Chappell was granted a second penalty hearing because the state court determined that defense counsel at Mr. Chappell's 1996 trial was "deficient in not locating and presenting [several available] witnesses at the penalty hearing" and that this failure was so serious as to deprive Mr. Chappell of a fair penalty hearing. Ex. 4. The decision to vacate Mr. Chappell's original sentence and order a new penalty hearing was based upon post-conviction counsel's successful argument that Mr. Chappell's original trial counsel were ineffective for failing to produce and present specific witnesses. Ex. 46 at 13–14; 254 at 2–3.[29] In support of his argument, Mr. Schieck presented several affidavits from potential witnesses detailing what testimony they would have offered if they had been given the opportunity. Ex. 28; Ex. 29.[30] Mr. Schieck failed to present the testimony of many of the very witnesses he had argued first trial counsel were ineffective for failing to call. As a result, the jury at Mr. Chappell's second penalty hearing did not hear many details of Mr. Chappell's horrible childhood or other mitigating evidence. Second penalty hearing counsel were ineffective for not presenting all available mitigation evidence.

a. Witnesses James Ford and Ivri Marrell were available to testify

43. Mr. Schieck interviewed James Ford and Ivri Marrell in order to obtain affidavits in support of Mr. Chappell's claim of ineffective assistance of first trial counsel, see Ex. 28; Ex. 29, and again in preparation for Mr. Chappell's second penalty

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[29] Post-conviction counsel argued that first trial counsel were ineffective for failing to call Ernestine "Sue" Harvey, Shirley Sorrell, James Ford, Ivri Marrell, Myra Chappell, Carla Chappell, Chris Birdow (mistakenly spelled Bardow), and David Green to testify on behalf of Mr. Chappell. Ex. 46 at 13–14; Ex. 254 at 2–3.

[30] Post-conviction counsel filed affidavits from Clara Axam, Barbara Dean, Shirley Sorrell, Ivri Marrell, Benjamin Dean, and James Ford. Ex. 28; Ex. 29. In addition, post-conviction counsel filed an affidavit by Investigator Dennis Reefer detailing what David Green and Chris Birdow told him in interviews about Mr. Chappell. Ex. 28.

hearing, Ex. 250. Trial counsel flew Mr. Ford and Mr. Marrell from Lansing, Michigan to Las Vegas, Nevada to testify at Mr. Chappell's second penalty hearing, but failed to call either as a witness at trial. Ex. 59 at ¶¶2, 4; Ex. 334 at ¶¶14, 15. Trial counsel also did not have either witness deposed, sign a new declaration, or give a sworn statement of any kind to preserve his testimony. Ex. 59 at ¶ 3; Ex. 334 at ¶16.

44. Voir dire began on March 12, 2007, and the State's case began on March 14, 2007. See Exs. 155, 170. Trial counsel knew from the State's witness list that they had seventy-two witnesses to present. Ex. 264. Despite this knowledge, trial counsel inexplicably flew Mr. Ford and Mr. Marrell to Las Vegas on Tuesday, March 13, 2007, in order to testify that week and return to Lansing on Saturday, March 17, 2007. Ex. 59 at ¶2. Because of trial counsel's poor timing, the men spent most of their time sightseeing, only meeting with attorneys for a few minutes on two separate occasions. Id. at ¶4. Each witness needed to return to Lansing as planned in order to retain his employment and was unable to extend his stay to testify when the defense began its case on Monday, March 19, 2007. Id. at ¶¶2, 4; see also Exs. 169, 334. Three expert witnesses for the defense testified out of order before March 19, presumably due to scheduling issues. See Exs. 172 at 48–105; 173 at 3–43; Ex. 174 at 19-138. Trial counsel could similarly have called Mr. Ford and Mr. Marrell out of order to ensure the jury heard their testimony.

45. Instead, the defense allowed the men to return home without preserving their testimony and simply presented their investigator, Maribel Rosales, who had interviewed James Ford and Ivri Marrell in a group setting before the second penalty hearing. The investigator testified that Mr. Ford and Mr. Marrell said that Mr. Chappell was a good cook, tried to stop others from fighting, was afraid Deborah Panos's parents would call the police if they learned he was in their house, was a great father to his first son, and that what the men learned about how Mr. Chappell behaved in Tucson, Arizona and Las Vegas, Nevada was not the Mr. Chappell they knew in

Lansing, Michigan. Ex. 176 at 7–10. This hardly captured the mitigation evidence that Mr. Ford and Mr. Marrell would have presented had they testified.

(1) James Ford

46. Mr. Ford was Mr. Chappell's best friend in Lansing, beginning when the two attended elementary school. Ex. 59 at ¶5. Mr. Ford would have testified to the trauma that Mr. Chappell suffered, the deficits he appeared to have, and the ways in which he coped or failed to cope with his circumstances. Mr. Ford would have told the jury that Mr. Chappell used more drugs at times when he appeared depressed, and that crack made Mr. Chappell behave in a paranoid manner. Id. at ¶¶33–34. Mr. Ford would have told the jury that James needed the support of his family and friends to help him manage the stressors in his life, to problem solve, and to feel safe. Id. at ¶¶ 12, 59. Mr. Ford would have explained that Mr. Chappell often expressed with hopelessness that he wished his life could have been different and more positive, but that there was no escaping what his life actually was. Id. at ¶32.

(2) Ivri Marrell

47. Mr. Marrell[31] was one of Mr. Chappell's best friends during high school and beyond. Ex. 29 at 3. Mr. Marrell would have told the jury that, despite the fact that Mr. Chappell was very much in love with Ms. Panos, he was unhappy living with her in Tucson. Id. at 4. Mr. Marrell would have testified that crack cocaine must have changed Mr. Chappell because the friend he knew was incapable of the things Mr. Chappell was accused of doing. Id. at 5.

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[31] Mr. Marrell died in 2013 and was therefore unavailable for interview by undersigned counsel. Representations regarding what he would have testified to in 2007 are based upon the affidavit executed March 3, 2003 in support of Mr. Chappell's first state post-conviction petition. See Ex. 29. Because this affidavit was based upon a brief interview in a group setting, it is likely that Mr. Marrell would have been able to testify to additional facts not included in the affidavit.

b. Trial counsel failed to call other lay witnesses he had previously identified as important to Mr. Chappell's mitigation case

48. Trial counsel failed to call additional witnesses whom he had alleged prior counsel were ineffective for failing to present. These witnesses would have provided additional mitigation evidence that the jury did not hear.

(1) Ernestine Harvey

49. Ernestine Harvey, known to friends as "Sue," was a friend of Mr. Chappell's when he lived in Las Vegas. Ex. 55 at ¶1. She knew Mr. Chappell to be a kind and gentle person when sober. Id. at ¶2. She would have told a jury that Mr. Chappell suffered from a terrible crack addiction during the time that she knew him. Ex. 55 at ¶5. Ms. Harvey, who was a crack user herself, would have told a jury that she did not know anyone who smoked as much crack as Mr. Chappell. Id. at ¶¶4, 5. Ms. Harvey would have explained to a jury that Mr. Chappell's addiction was so consuming that his entire life revolved around obtaining more money to buy more crack. Id. at 5. In order to support his prolific drug habit, Mr. Chappell resorted to shoplifting items to sell to people who lived in the apartment complex where Ms. Harvey resided. Id. at ¶2. Ms. Harvey would have explained to the jury that Mr. Chappell's personality changed for the worse when he smoked crack cocaine and that, sometimes when he was high, Mr. Chappell became extremely paranoid and would stop talking, stand with his back against a wall, and look around as if looking for someone who was about to come after him. Ex. 55 at ¶4. Id.

(2) Carla Chappell

50. Carla Chappell is Mr. Chappell's older sister. Ex. 53 at ¶1. She lived with a family friend for the first five or six years of her life before moving to live with her grandmother after her mother was killed. Id. at ¶¶2, 4. She had a different (but equally absent father) than Mr. Chappell. Id. at ¶3. Carla would have told a jury that sexual

molestation was permitted in her grandmother's house, that she herself had been raped at thirteen, and that her grandmother did nothing to protect her, not even from family members who attempted to rape her. Id. at ¶11. Carla would have told a jury that Mr. Chappell would watch her being beaten by her grandmother and was so traumatized that he rocked himself back and forth, crying, sucking his finger, with snot running from his nose and saliva drooling from his mouth. Id. at ¶17. She would have told a jury that she told teachers who asked about bruises and welts and cuts that her grandmother inflicted the injuries during severe beatings, but that no one helped her out of her situation or even showed sympathy for her. Id. at ¶13. She would have told the jury about child protective services workers who came to her home and left without helping her or her siblings. Id. She would have told a jury that the fact that no one would render aid or offer compassion made her feel as a child that her life and her siblings' lives did not matter. Id.

c. Trial counsel failed to identify, interview, or present other witnesses who could have offered mitigating testimony

51. Myriad other witnesses were available to testify to Mr. Chappell's tragic upbringing, his obvious intellectual deficits, and that the drugs he used to escape overpowered him. The jury heard extensive victim impact testimony and should have heard equally substantial mitigating testimony. See Ex. 211 at ¶24. James Wells; Ex. 330; Ex. 327; Ex. 329.

52. James Wells was one of at least two men who may have fathered Mr. Chappell. See Ex. 60 at ¶1, 5. He was a heroin addict who got high with Mr. Chappell's mother daily, even when she was pregnant with James. Id. at ¶¶3, 4. Mr. Wells was never contacted by Mr. Chappell's trial counsel. Id. Had he been called to testify at James's trial he would have told the jury that Mr. Chappell was exposed to drugs in utero and that Mr. Chappell's mother received little to no prenatal care. Id. at ¶4. He

would have told a jury that he did not raise Mr. Chappell and completely lost touch with him at some point during Mr. Chappell's childhood. Id. ¶8. He would have told a jury that he was not able to maintain a relationship with James because Mr. Chappell's grandmother, Clara, interfered and because he was struggling with the repercussions of his own drug addiction. Id. at 7. He would have asked the jury to spare his son's life. Id. at 9.

(1) William Richard Chappell, Sr.

53. William Richard Chappell, Sr. was the husband of Mr. Chappell's mother, Shirley, and believes himself to be Mr. Chappell's father, despite the fact that Shirley was also sexually involved with James Wells at the time. Ex. 74 at ¶¶1, 5. William Chappell was never contacted by his son's trial counsel, despite the fact that he was in regular contact with other family members. Id. at ¶19. He would have testified that he disapproved of the horrific treatment of his children by James's grandmother, but he knew that, as an unemployed, drug addict, ex-convict, he would not be given custody by any court. Id. at ¶14. He would have told the jury that Mr. Chappell needed a male role model, but that he was too caught up in his own problems to be one. Id. at ¶18. He would have asked the jury to spare his son's life. Id. at 19.

(2) Sharon Axam

54. Sharon Axam is Mr. Chappell's maternal aunt. Ex. 68 at ¶1. She and Mr. Chappell's mother had the same mother, Clara Axam, but Clara's four children were fathered by three different men, none of whom were in their children's lives. Id. at ¶2. Ms. Axam testified at Mr. Chappell's first trial, but she was never contacted by Mr. Chappell's counsel at his second penalty hearing. Id. at ¶19–20. She would have told a jury that her mother beat her severely, neglected her, and provided no affection, causing all of Mr. Chappell's maternal aunts and uncles to have low self-worth and drug and alcohol problems. Id. at ¶¶ 8–10, 12. She would have told a jury that Mr.

Chappell was easy-going and fun-loving but became paranoid, agitated and aggressive when he used crack cocaine. Id. at ¶17.

(3) Rodney Axam

55. Rodney Axam is the maternal uncle of Mr. Chappell. Ex. 66 at ¶1. Although he spoke with trial counsel, he was not asked to testify. He would have told a jury that all of Mr. Chappell's maternal aunts and uncles were diagnosed with learning disabilities and identified as special education students and battled alcohol and drug addictions. Id. at ¶¶7, 8. He would have told a jury that Mr. Chappell was frequently locked out of the house as a child and climbed through windows to get inside when no one was home. Id. at ¶9. He would have asked the jury to spare his nephew's life. Id. at ¶10.

(4) Benjamin Dean

56. At Mr. Chappell's second penalty hearing, the defense called Benjamin Dean as a mitigation witness. See Ex. 169 at 302–317. Mr. Dean had known Mr. Chappell since the two were in elementary school. Id. at 303. Mr. Dean also knew Ms. Panos and saw her with Mr. Chappell. Id. at 308–09.

57. On direct examination, Mr. Dean was asked about Mr. Chappell's relationship with Ms. Panos, to which he testified: "I didn't see any problems with them . . . ." Ex. 169 at 312. However, on cross-examination Mr. Dean was severely impeached. On cross, Mr. Dean was asked whether he believed Ms. Panos was controlling and manipulating. Id. at 314–15. Mr. Dean responded that he had never said that. Id. at 315. Mr. Dean also denied being of the opinion that Ms. Panos kept Mr. Chappell away from his friends in order to control him. Id. Mr. Dean also denied ever stating that Ms. Panos was verbally abusive to Mr. Chappell. Id.

58. After Mr. Dean denied making various statements characterizing Ms. Panos as controlling, manipulative, and demanding, Mr. Dean was shown his signed

affidavit from March 2003 in which he affirmed that Ms. Panos was controlling, described her as manipulative and abusive, and that she did not like for Mr. Chappell to be around his old friends. Ex. 169 at 315–16. Mr. Dean had no credible answer for why his previous affidavit was so different from his current testimony.

59. Defense counsel did not properly prepare Mr. Dean for his testimony. It appears that counsel did not even have Mr. Dean review his affidavit before taking the stand. This was a part of a larger pattern of the failure to prepare for the penalty phase re-trial. Mr. Chappell is entitled to a new penalty phase due to ineffective assistance of counsel.

(5) Charles Dean

60. Charles Dean testified at Mr. Chappell's second penalty hearing but gave only the sparsest of details about Mr. Chappell's life. See Ex. 169 at 349–56. For example, Mr. Dean testified that every house on Nellers Court was condemned and torn down, but he did not explain that the reason why the area was condemned was environmental toxins from the defunct Diamond Reo automobile plant. Id. at 350–51; Ex. 54 at ¶13. Had he been asked, he would have told the jury that he and James played on the site of closed factory, throwing dirt and playing tackle football in the soil. Ex. 54 at ¶13. He would have told the jury that he and James climbed into large storage tanks on the property when playing hide and seek and that the tanks smelled so strongly of chemicals that Mr. Dean got headaches. Id. He would have told the jury about a huge fire that destroyed much of the facility, a fire that engulfed the neighborhood in a cloud of smoke and filled the air with a choking chemical odor. Id. Mr. Dean was never asked about these things by Mr. Chappell's trial counsel. He felt trial counsel so poorly prepared him to testify at Mr. Chappell's penalty hearing that he and other witnesses spent time gambling in casinos in the hopes of raising money to pay for new lawyers. Id. at ¶22.

(6) Terrance Wallace

61. Terrance Wallace was a childhood friend of Mr. Chappell and occasionally let Mr. Chappell live with him. Ex. 70 at ¶1. He would have testified that Mr. Chappell called him from Tucson, Arizona in 1992 expressing that he was spiraling out of control and needed a bus ticket home to Lansing, Michigan. Id. at ¶14. He would have told the jury that once in Michigan, Mr. Chappell told him that Mr. Chappell was "on the tip," which meant abusing drugs heavily and losing control of himself. Id. He would have told a jury that Mr. Chappell had once taken Mr. Wallace's stepfather's car without permission. Id. at ¶19. He would have told the jury that Mr. Chappell was drunk and crashed the car, but that his stepfather understood that Mr. Chappell had intellectual deficiencies. Id. at ¶19. Mr. Wallace was never contacted by Mr. Chappell's trial counsel. Id. at ¶31.

(7) Joetta Ford

62. Joetta Ford is the mother of James's best friend, James Ford and was a nurse. Ex. 61 at ¶¶1, 11. She met James when he was three or four and living on Nellers Court. Id. at ¶1. Ms. Ford would have testified that she questioned Clara's decision to leave her grandchildren alone when she went on vacation to which Clara responded, "They are my daughter's kids, not my kids. I didn't ask to raise anyone else's kids," and said that she had a life of her own to live. Id. at ¶5. She would have told a jury that James was always hungry and asked for extra servings at the school cafeteria, crying if he was refused. Id. at ¶7. She would have told a jury that she heard rumors that Marge was sexually abusing James and that she herself questioned why a grown man would strip an almost grown teenage boy as punishment. Id. at ¶17. Ms. Ford would have told a jury about receiving a collect call from James in the middle of the night in 1995. Id. at ¶21. James was wandering the streets following a fight with Ms. Panos, and he called because he felt alone and afraid and needed to hear the voice of someone

who loved him. Id. Ms. Ford never told a jury these things because she was only interviewed by defense attorneys with another person and was asked no questions by the attorneys in the half hour they spent with the two women. Id. at ¶22.

(8) Harold Kuder

63. Harold Kuder was a childhood friend of Mr. Chappell and grew up on Nellers Court with him. Ex. 58 at ¶1. He would have told the jury that Mr. Chappell was often teased for being mentally slow, for the way he dressed, for the way he spoke. Ex. 58 at ¶5. He would have told the jury that Mr. Chappell cried easily, was a social misfit, and had difficulty making friends. Id. at ¶¶5–6. He would have told the jury that Mr. Chappell's grandmother left her home so often that Mr. Chappell's friends would crawl through a window and hang out in the house even when Mr. Chappell was not home. Id. at ¶11. Mr. Kuder was never interviewed by trial counsel. Id. at ¶15.

(9) Sheron Barkley

64. Sheron Barkley was a friend of Mr. Chappell who grew up in the same neighborhood. Ex. 69 at ¶1. She would have told a jury that everyone in her circle of friends was from a single-parent home and that no one mentioned fathers because they just tried not to think about the fact that no one had one. Id. at ¶3. She would have testified that the neighborhood where she and Mr. Chappell grew up was filled with drug dealing, drug addiction, prostitution, poverty, and violence. Id. at ¶4. She would have told a jury that, as a child, Mr. Chappell was slow, used nonsensical speech, and was physically uncoordinated. Ex. 69 at ¶¶6, 8. She would have told a jury that, even among children who grew up in a depressed environment filled with negative influences, Mr. Chappell was thought the least likely to succeed. Id. at ¶¶4, 15. Ms. Barkley was never contacted by Mr. Chappell's trial counsel.

(10) Michael Chappell

65. Michael Chappell is a paternal first-cousin of James Chappell. Ex. 63 at ¶1. He would have testified that James was a quiet, withdrawn teenager, who often stared off into the distance with a haunted look on his face. Id. at ¶7. He would have told a jury that James Chappell did not seem to want to return home when other kids went in, lingering with his head held down. Id. He would have told a jury that James Chappell seemed to use drugs to decrease his emotional pain and used more marijuana and alcohol when he was depressed and less when he was having a good day. Id. at ¶9. He would have told a jury that James Chappell did not come up with plans to get himself out of his negative family situation and the drugs he was exposed to in Lansing, that, instead, James Chappell seemed to think his problems would magically disappear when he moved to Tucson. Michael Chappell was never contacted by James Chappell's trial counsel. Id. at ¶14.

(11) Phillip Underwood

66. Phillip Underwood is Mr. Chappell's great-uncle and brother of Mr. Chappell's late grandmother, Clara Axam. Mr. Underwood was never contacted by Mr. Chappell's counsel. Mr. Underwood would have told a jury that his mother was only eighteen when Clara was born and that Clara herself had her first child, Shirley, at fourteen. Ex. 65 at ¶¶5, 8. He would have told a jury that Clara beat her own children with anything within reach and swung as though she did not care where she hit them. Id. at ¶11. He would have told a jury these beatings were accompanied by Clara's screaming and cursing and were frightening to witness. Id. He would have told a jury that Shirley accused one of Clara's boyfriends of sexually abusing her, but Clara accused Shirley of making up the story. Id. at ¶13. He would have told a jury that Mr. Chappell was a slow, shy child, who smiled and laughed often. Id. at ¶18. He would have asked a jury to spare his nephew's life. Id. at ¶23.

(12) William Earl Bonds

67. William Earl Bonds was a friend of Mr. Chappell's mother, Shirley Chappell. He was available to trial counsel and would have testified that Shirley and her friends shot heroin, snorted cocaine, freebased, and drank alcohol, even during her pregnancy with James. Ex. 71 at ¶¶5–6. He would have told a jury that Shirley drank a couple of times a week, liked hard liquor, had several drinks in one sitting on days she drank, and typically used heroin and cocaine when she drank. Id. at ¶6. He would have told a jury that Shirley prostituted herself to earn money for drugs, even while pregnant with James, walking the main prostitution strolls in search of customers. Id. at ¶¶4, 6. He would have told a jury that he saw Shirley get high on the night of her death and that she left the house at 2:00 or 3:00 in the morning and never returned. Id. at ¶10. He would have told a jury that he later learned Shirley had been hit by a sheriff's officer driving a squad car. Id. at ¶10. He would have told a jury that the same officer had stopped Shirley just minutes before he hit her, asking her why she was out on the streets so late. Id. at ¶11. He would have told a jury that people suspected Shirley was killed intentionally. Id. He would have told a jury that, following his mother's death, Mr. Chappell shut down and stopped speaking, often staring into the distance with a blank look on his face. Id. at ¶12. Mr. Bonds did not testify because he was never contacted by Mr. Chappell's counsel. Id. at ¶15.

(13) William Roger Moore

68. William Roger Moore was a juvenile probation officer in Ingham County, Michigan, where James lived as a child, and he supervised Mr. Chappell and two of his siblings for about six years in that capacity. Ex. 72 at ¶1. Mr. Moore offered the most compelling testimony presented at Mr. Chappell's original trial in 1996, but he was never contacted by Mr. Chappell's 2007 trial counsel, and second counsel admitted they had no strategic reason for failing to contact Mr. Moore. Id. at ¶¶14, 17; Ex. 94 at ¶11;

Ex. 108 at ¶10. Mr. Moore would have testified that Mr. Chappell and his siblings were removed from his mother's care because she neglected them due to her drug abuse. Id. at ¶4. He would have testified that Mr. Chappell's grandmother took custody of the children at that time and assumed permanent custody when Mr. Chappell's mother died. Id. He would have testified that Mr. Chappell grew up in a dilapidated house that was situated between two abandoned houses that were used by drug dealers and prostitutes in one of the worst neighborhoods in Lansing. Id. at ¶6. He would have told the jury that Mr. Chappell followed him like a puppy, craving the attention of an adult male. Id. at ¶9. He would have told the jury that in hindsight, Mr. Chappell should have been in a residential program where he could receive twenty-four-hour intensive care, but that budget cuts allowed Mr. Chappell to fall through the cracks. Id. at ¶10. He would have told the jury that Mr. Chappell had little to no chance to succeed in life because he lacked the intellect, intuition, and self-esteem to help himself out of his circumstances. Id. at ¶12.

(14) Georgette Sneed

69. Georgette Sneed grew up in the same neighborhood where Mr. Chappell's maternal great-grandparents, William and Gladys Underwood, raised their children. Ex. 57 at ¶1. Ms. Sneed would have told the jury at Mr. Chappell's second penalty hearing that William Underwood beat his children nearly daily, picking a tree branch switch as he walked home without even knowing that any of his children had misbehaved. Id. at ¶4. She would have told the jury that Mr. Chappell's maternal uncle Jimmy appeared to have mental health issues, living on the street like a homeless person, wearing the same clothes for days or weeks at a time, and ultimately dying on the street despite have $7,000 in the bank. Id. at ¶ 6. She would have told the jury that Mr. Chappell's great-uncle Bobby was an alcoholic who drank himself to death. Id. at ¶7. She would have told the jury that Mr. Chappell's Great-uncle Tommy was an

alcoholic and drug addict. Id. at ¶8. She would have told the jury that Mr. Chappell's great-aunt Louise had been diagnosed with schizophrenia, mutilated herself, and tried to hurt others. Id. at ¶9. She would have told the jury that Mr. Chappell's Uncle Rodney was mentally slow, received special education service at school, and frequently talked to himself as if he had an undiagnosed mental illness. Id. at ¶10. She would have told the jury that Mr. Chappell's Uncle Anthony appeared to have a mental illness and returned from military service in Vietnam a drug addict Id. at ¶11. She would have told the jury that Mr. Chappell's mother was a heroin addict and a prostitute who frequently left her children in other people's care so she could run around the streets. Id. at ¶¶ 12–14. Ms. Sneed was never contacted by Mr. Chappell's trial counsel. Id. at ¶15.

(15) Rose Wells-Canon

70. Rose Wells-Canon is Mr. Chappell's paternal aunt and the sister of James Wells. Ex. 67 at ¶1. She would have told the jury that Mr. Chappell's possible father was a military veteran who once held a good job at Oldsmobile, had a nice apartment and a beautiful car, but lost everything when he became addicted to drugs. Id. at 6–7. She would have told the jury that, because of drugs, Mr. Wells was arrested several times, was homeless at times, and became estranged from his probable children, James and Myra Chappell. Id. at ¶7. Ms. Wells-Canon was never contacted by Mr. Chappell's trial counsel. Id. at ¶12.

(16) Wilfred Gloster, Jr.

71. Wilfred Gloster, Jr. was a neighbor and friend of Ms. Panos. Ex. 93 at ¶1. He first met Ms. Panos in 1990 or 1991 when she and Mr. Chappell were living in Tucson, Arizona and reconnected with Ms. Panos in 1994 when both were living in Las Vegas. Id. at ¶2. Ms. Panos told Mr. Gloster that she had moved Mr. Chappell to Las Vegas to be with her and that Mr. Chappell was living with her in the trailer. Id. at

¶4–5. Mr. Gloster also learned that Ms. Panos had listed Mr. Chappell as a resident of the trailer and therefore had a right to enter the home. Id. at 6. To Mr. Gloster's knowledge, Ms. Panos never removed Mr. Chappell's name from the tenant roster, and, at the time of the killing, Mr. Chappell was still an official resident of the trailer. Id. at ¶7. Mr. Gloster could have corroborated Mr. Chappell's assertion that he was a resident of the trailer with Ms. Panos even until the day of her death. Mr. Gloster was never contacted by trial counsel.

(17) Lila Godard

72. Lila Godard lived next door to Mr. Chappell and Ms. Panos in Tucson. Ex. 104 at ¶1.Her daughter was in the same kindergarten class with Mr. Chappell's oldest son. Id. Ms. Godard never heard any arguments from Mr. Chappell and Ms. Panos's home, never saw any bruises or injuries on Ms. Panos and never heard of any arguments or injuries from Ms. Panos. Id. at ¶3. Ms. Godard helped Ms. Panos load a small rented moving truck with the family's belonging before they moved to Las Vegas. Id. at ¶5. Many items were left behind in Tucson, and the couple did not take enough to furnish a new home in Las Vegas. Id. at ¶6. On the day after she helped Ms. Panos to pack the truck, Ms. Godard drove Ms. Panos, Mr. Chappell, and their children to the airport. Id. at ¶7. Ms. Panos had arranged for someone to drive their belongings to Las Vegas. Id. Had Ms. Godard testified to what she knew about the move to Las Vegas, her testimony would have corroborated Mr. Chappell's 1996 testimony about the move, making Mr. Chappell's entire testimony more credible in the eyes of the jury. Her testimony would also have provided a plausible explanation for why the Las Vegas trailer was sparsely furnished. Ms. Godard was never contacted by trial counsel.

(18) Angela Mitchell

73. Angela Mitchell worked with Ms. Panos at the Tucson Police Department in the early 1990s. Ex. 168 at ¶1. Ms. Mitchell socialized with Ms. Panos outside of

work and visited Ms. Panos's home. Id. at ¶3. When Ms. Mitchell met Ms. Panos, Mr. Chappell was a stay-at-home father who kept the house clean and the children fed; Ms. Panos seemed happy. Id. at ¶4. After Ms. Mitchell had been friends with Ms. Panos for one-and-a-half to two years, Mr. Chappell developed a drinking problem and later began smoking crack cocaine. Id. at ¶5–6. It was then that Ms. Mitchell noticed that Ms. Panos came to work with bruises and learned that Mr. Chappell was abusive. Id. at ¶6. Under the influence of drugs, Mr. Chappell grew increasingly paranoid, id. at ¶9, but Ms. Panos always saw something worthwhile in Mr. Chappell and was determined to help him. Id. at ¶7. Had Ms. Mitchell been called to testify, she would have showed the jury that Mr. Chappell's drug abuse caused him to be paranoid and to hurt Ms. Panos. Ms. Mitchell was never contacted by trial counsel.

(19) Rosemary Pacheco

74. Rosemary Pacheco worked with Ms. Panos at the Tucson Police Department in the 1990s. Ex. 166 at ¶1. Ms. Pacheco met Mr. Chappell at a social gathering shortly after Ms. Panos began work at the police department. Id. at ¶3. She observed that Mr. Chappell was a loving father who played with his children, fed them, and cleaned them up. Id. Ms. Pacheco was so impressed by Mr. Chappell that she told Ms. Panos that she was lucky to find a man who was so loving and gentle. Id. Months later, Mr. Chappell began doing drugs and became aggressive when Ms. Panos refused to give him money for drugs. Id. at ¶6. Mr. Chappell changed from the pleasant person Ms. Mitchell initially met to one who was unkempt and angry. Id. at ¶9. It was after Mr. Chappell was using drugs that Ms. Panos began coming to work with bruises. Id. at ¶8. Ms. Mitchell knew that Ms. Panos relocated Mr. Chappell to Las Vegas to keep him in their children's lives and in the hopes of him overcoming his drug addiction once out of Tucson. Id. at ¶12. Had Ms. Mitchell been called to testify, she would have told the jury that drugs changed Mr. Chappell from a loving and gentle man to one who was

capable of violence. She would have corroborated Mr. Chappell's testimony that Ms. Panos relocated him to Las Vegas to live with her. Ms. Mitchell was never contacted by trial counsel.

d. Trial counsel were ineffective for failing to present expert testimony to explain the impact of Mr. Chappell's childhood traumas and losses

75. Despite their constitutionally inadequate investigation, trial counsel were aware that Mr. Chappell suffered from numerous instances of childhood trauma. Trial counsel presented what little evidence they had about Mr. Chappell's hardships, but failed to put those experiences into context by hiring an expert to explain the impact they had on Mr. Chappell. A clinical psychologist with experience evaluating the impact of childhood trauma upon later functioning would have explained to the jury that any one of the deficits, traumas, and losses that Mr. Chappell faced in childhood was "a risk factor, likely to contribute to problems later in life." Ex. 128 at 12.

76. The State argued that Mr. Chappell's childhood was irrelevant to the crime and the sentence to be imposed for the crime. See, e.g., 176 at 60–64, 134–35, 144–46. The State argued that Mr. Chappell's "troubled up-bringing . . . would make his life more difficult. But it doesn't erase what he did on August 31st." Id. at 135. The State told the jury that "there's no question that the defendant in this case did not have an ideal childhood . . . [b]ut it'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." Id. at 134.

77. A childhood trauma expert would have explained that "the greater the severity of the problems faced by a child, the poorer his prognosis [for adult functioning] is likely to be." Ex. 128 at 6. For example, a child who as limited cognitive abilities but is nurtured and supported by the adults around him may surpass expectations, or a child who is physically abused by one adult but loved and supported by another may do well in adulthood. Id. Mr. Chappell's childhood did not provide such a balance.

Instead, the insults and injuries were layered one upon another upon another without any counterveiling protective factors. Id.

78. From the outset, Mr. Chappell faced prenatal drug and alcohol exposure, absence of a father, the death of his mother, and cognitive and other developmental delays. Id. Mr. Chappell lost his mother at an age when the fundamental psychosocial tasks he faced were to "develop a sense of trust as opposed to mistrust; and a sense of autonomy as opposed to shame and doubt." Id. at 3. The death of his mother at this critical age caused Mr. Chappell to move through his entire life "with a deep sense of mistrust and fear of abandonment." Id. Then, instead of living in a loving, supportive home, Mr. Chappell was raised by a grandmother who resented his presence and was severely physically, verbally, and emotionally abusive, physically neglectful, and emotionally neglectful. Id. at 7. It was the emotional neglect that was perhaps the most impactful on Mr. Chappell. Research has shown that the absence of parental affection, warm physical contact, and nurturance—beyond the simple provision of physical needs—leads to deficient ability to connect and play with peers or attach to others. Id. at 9.

79. Among the factors which likely negatively affected Mr. Chappell's functioning in adult life were: 1) his mother's heavy use of heroin and alcohol during her pregnancy; 2) his mother's death when he was two or three; 3) absence of a father-figure in his life; 4) significant cognitive deficits; 5) a home environment in the neighborhood characterized as "the worst in Lansing," filled with violence, drug addiction, and prostitution; marked prostitution; 6) extreme physical abuse; 7) verbal and emotional abuse; 8) physical neglect of his childhood needs; 9) lack of love, affection, warmth, or nurturance; and 9) possible sexual abuse. Ex. 128 at 11–12. The extraordinary number of deficits, traumas and losses Mr. Chappell sustained as a child left him "needy and dependent." Id. at 10. He moved through life "in a state of confusion, never quite understanding the series of changes and transitions he

experienced." Id. Mr. Chappell simply did not have the internal or external resources to overcome the bleak childhood he suffered. Id. at 12.

4. Trial counsel were ineffective for failing to adequately prepare Dr. Etcoff

80. Dr. Etcoff was asked by Mr. Chappell's 1996 defense counsel to conduct a criminal psychological evaluation of Mr. Chappell to determine what mitigation evidence was available. Ex. 85 at ¶7. He was not asked to perform a full neuropsychological battery upon Mr. Chappell and was provided no information indicating that Mr. Chappell might suffer from brain damage. Id. at ¶7. Dr. Etcoff was provided a handful of documents to review in anticipation of his evaluation of Mr. Chappell, including a police report of the crime, a statement by one potential prosecution witness, some letters written by Mr. Chappell to the victim, and Mr. Chappell's school records. Id. Even at the time, Dr. Etcoff knew that "it was better to review as much information as possible about the client in order to conduct a proper forensic criminal mental health evaluation and to build a case," but he let defense counsel determine what documents he reviewed in preparation for his evaluation of Mr. Chappell due to his inexperience. Id. at ¶¶ 8–9. Dr. Etcoff did request to interview family members or friends of Mr. Chappell but was told by Mr. Chappell's 1996 trial counsel that only Mr. Chappell was available for interview. Id. at ¶ 10; Ex. 174 at 28.

81. After Mr. Chappell's original sentence was overturned, Mr. Chappell's second defense team contacted Dr. Etcoff to testify at the second penalty hearing. Mr. Chappell's 2007 defense team were aware of how poorly Dr. Etcoff had been prepared prior to the 1996 trial, yet they did not ask Dr. Etcoff to do anything more in preparation for his testimony than to review his prior report, the notes he took during his 1996 interview of Mr. Chappell, and his testimony at the 1996 trial. Ex. 85 at ¶12. He was not asked to do any additional psychological or neuropsychological testing of Mr. Chappell. Id. Dr. Etcoff was given no access to any witnesses who could have provided additional insight or corroborate what Mr. Chappell had self-reported to Dr.

Etcoff ten years prior. Id. He was not given the opportunity to re-interview Mr. Chappell or provided a copy of Mr. Chappell's testimony at the 1996 trial. Id. Trial counsel have admitted they had no strategic reason for failing to better prepare Dr. Etcoff for his testimony or ask him to conduct additional testing. Exs. 94 at ¶¶8–9; 108 at ¶¶7–8.

82. As a result of his superficial preparation for Mr. Chappell's second penalty phase, Dr. Etcoff was largely discredited on cross-examination. Dr. Etcoff, confronted with information he had not been provided by defense counsel, admitted that his opinions would have differed significantly had that information been available to him. Dr. Etcoff admitted that while he wanted to interview Mr. Chappell's family members and that such interviews were "possibly important," no family members had been made available to him. Ex. 174 at 84-85, 90. Dr. Etcoff admitted that he was not provided a copy of Mr. Chappell's testimony from the first trial. Id. at 92. Dr. Etcoff admitted that he had not received or read Mr. Chappell's statement to the Department of Parole and Probation following an arrest at a Kmart, in which Mr. Chappell stated that the police were to blame because they acted badly. Id. at 94. Dr. Etcoff admitted that he was unaware of statements made by others that, contrary to Mr. Chappell's assertion that his relationship with Ms. Panos suddenly deteriorated in the months preceding her death, that it had been troubled for years. Id. at 101. Dr. Etcoff admitted that he was unaware of Mr. Chappell's criminal history and that such a history would have been important to have before he formulated an opinion. Id. Dr. Etcoff admitted that he learned at the first trial, not before, that on June 1 before Ms. Panos's death, Mr. Chappell had held a knife to Ms. Panos's throat and threatened her and that this would have been important to know in assessing Mr. Chappell's free will on the date of Ms. Panos's death. Id. at 103–04. When asked if he was testifying on very limited data provided ten years before the hearing, Dr. Etcoff explained;

> [M]y report was based upon the time I spent with him, the test results about his personality functioning, intellectual functioning and what I had seen in his school records. But all of that other information that you've just pointed out, which would be relevant for a psychologist to see, wasn't available to me.

Id. at 105. Questioned further, Dr. Etcoff conceded that many of the conclusions he had reached before would have been different had he had more complete information.

83. Mr. Chappell reported one arrest for domestic violence, occurring in Tucson, to Dr. Etcoff. Ex. 174 at 96–97. Mr. Chappell did not tell Dr. Etcoff about a domestic violence arrest that occurred on June 1, 1995 in Las Vegas, but he did testify to the incident at his first trial. Id. at 98. Mr. Chappell also did not tell Dr. Etcoff about other arrests he had sustained in Tucson, including those for domestic violence. Id. at 100–01. Neither did defense counsel from either trial provide documentation of these other incidents to Dr. Etcoff. Id. at 104–05. On cross-examination at the penalty hearing, Dr. Etcoff was shown testimony and documentation of these other incidents. Id. at 98–104. When asked if the evidence presented contradicted Dr. Etcoff's opinion that the problems between Mr. Chappell and his girlfriend had begun months before her death, Dr. Etcoff admitted that problems in the relationship began years before her death. Id. at 102.

84. With regard to the day that Ms. Panos died, Dr. Etcoff had not been provided any testimony that Mr. Chappell had threatened to kill Ms. Panos the day before her death or that on the day of her death she had been at a friend's in a fetal position, shaking and crying, upon hearing that Mr. Chappell was out of custody. Ex. 174 at 106–07. When made aware of this testimony on cross-examination, Dr. Etcoff admitted that many of the facts Mr. Chappell had provided to Dr. Etcoff regarding the day of Ms. Panos death did not make sense in light of that testimony and other evidence. Id. at 107. Dr. Etcoff testified that Mr. Chappell's explanation of the sexual contact he had with Ms. Panos on the day of her death being consensual no longer made

sense to him and that Mr. Chappell's version of the events following that sex similarly no longer made sense:

> Q: Well, this whole story that he tells you about coming in and Debbie Panos welcoming him with open arms, wanting to have consensual sex with him, based upon those facts, doesn't make sense, does it?
>
> A: Yes. You're right.
>
> Q: And he told you that he didn't like having the sexual intercourse with her because he immediately thought she'd been with other men?
>
> A: He said that. That's correct.
>
> Q: And so at that point in time he said that she offered to give him sex in his favorite position, or offered to give him oral sex?
>
> A: That's what he said.
>
> Q: And did that make sense to you at the time?
>
> A: I don't recall, but given everything you've just said about what had been going on, it doesn't make sense now.
>
> 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 his 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.

Id. at 107–08. Mr. Chappell had further told Dr. Etcoff that he had found a letter when he was in the car with Ms. Panos and that the contents of the letter made him snap, leading to the events that caused her death. Id. at 108. After the State provided Dr. Etcoff photos that showed pieces of the letter found in the home, not in the car, Dr. Etcoff was asked if "this whole story about a fight over a letter being found in the car, based upon these facts, it is not making any sense, is it?" Id. at 109. To which Dr. Etcoff

replied, "It's making less sense to me." Id. Dr. Etcoff further testified, "I am definitely believing less about what he portrayed to have occurred at that house then when I had seen him. Absolutely." Id. at 116.

85. Cross-examination concluded with the State reminding Dr. Etcoff that he had agreed at the beginning of the cross that some people choose evil. Ex. 174 at 120. The State then asked Dr. Etcoff:

> Q: And the defendant chose evil here on this occasion with Debbie, didn't he?
>
> A: That's – yeah. I mean, he did something that is unjustifiable. All – as a psychologist, all I'm trying to explain is how could someone gets [sic] to a point of doing something like that when everybody else and this jury says I wouldn't do this to an animal. I mean, there is just no way – how do you explain this. And that's what I have attempted to do.
>
> Q: It is evil?
>
> A: It is.
>
> Q: And he chose it?
>
> A: He chose it with the proviso that he has limitations that made those choices occur.

Id. at 120–21.

86. Trial counsel's failure to provide Dr. Etcoff with materials readily available left him utterly unequipped to reconcile his original observations with testimony given at both trials, including that of Mr. Chappell, and other facts that he had been unaware of when he drafted his report ten years earlier. Had Dr. Etcoff been properly prepared for his testimony at the second trial, his testimony would have helped a jury to understand how Mr. Chappell's unique upbringing, intellect, and psychology made him so fearful and anxious of losing Ms. Panos that he was unable to think logically and rationally or control his emotions when he impulsively took Ms. Panos's life.

87. Had Dr. Etoff conducted a full neuropsychological battery, the results of that testing would also have greatly bolstered Dr. Etcoff's testimony. Ex. 85 at ¶14. Mr. Chappell has recently undergone a full neuropsychological battery, which has demonstrated that Mr. Chappell has problems in executive functioning including problem solving, cognitive flexibility, and working memory, which suggests possible organic brain damage. Id. at ¶15; see also Ex. 87. These neuropsychological deficits would have corroborated Dr. Etcoff's testimony that Mr. Chappell had limited free when it came to his killing of Ms. Panos and supported Dr. Etcoff's testimony that Mr. Chappell's neuropsychological problems mitigate the offense. Ex. 85 at ¶15.

88. Dr. Etcoff's lack of preparation was particularly damaging to the defense because it was pointed out directly in the State's closing argument. The State argued that psychiatrists have a role in helping people and do great things:

> 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.

Ex 176 at 63. The State implored the jurors to "not be [conned]"[32] and pointed out that Dr. Etcoff originally had testified that Mr. Chappell was not sophisticated enough to lie but that on cross-examination the jury heard "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 . . . ." Id. at 86–87. The State would further remind the jury that Dr. Etcoff heard facts in court that contradicted the version of the events that Mr. Chappell had told

[32] Transcripts of the closing arguments consistently contain a typographical error in which the word "conned" is recorded as "coned." All such typographical errors were corrected in direct quotations for the ease of the reader.

him, and that this undermined Dr. Etcoff's confidence that Mr. Chappell had been truthful with him. Id. at 73.

5. Trial counsel were ineffective for failing to investigate and present evidence that Mr. Chappell suffers from a Fetal Alcohol Spectrum Disorder

89. Due to his mother's consumption of alcohol while she was pregnant, Mr. Chappell suffers from Alcohol-Related Neurodevelopmental Disorder (ARND), which is a Fetal Alcohol Spectrum Disorder (FASD). Ex. 89 at 1, 21. This is a mental disease and defect characterized by organic brain damage. Id. at 23. Mr. Chappell's FASD condition increased his likelihood of developing a substance abuse problem; made him more vulnerable to the effects of drug use and addiction; made him hyper-reactive to stress; impaired his ability to control his emotions and impulses; and, when combined with environmental factors, made him more likely to have trouble with the law. Ex. 88 at 34, 32, 33, 30. Trial counsel had information that Mr. Chappell's mother drank and used illicit drugs while pregnant but failed to investigate, develop, and present evidence during Mr. Chappell's penalty re-trial that Mr. Chappell suffered from FASD. Exs. 94 at ¶7; 108 at ¶6.

a. Trial counsel knew Mr. Chappell's mother used drugs and alcohol during her pregnancy and should have known the dangers of this prenatal exposure

90. By 2007, the year of Mr. Chappell's penalty trial. there was a great deal of information known in the legal field and the community at large about the nature and cause of FASD, including that alcohol caused serious birth defects that affect executive control and lifelong adaptive functioning. Ex. 88 at 2, 7, 9. Specifically, in 2004, the Centers for Disease control published a detailed diagnostic manual for FAS that is used today throughout the United States. Id. at 9. In 2005, the United States Surgeon General issued its second national health advisory regarding alcohol use during pregnancy that noted that prenatal alcohol exposure could result in a spectrum of birth defects that could affect a child's growth, appearance, cognitive development,

and behavior (the first warning was issued in 1981 and warned of harm to an unborn child from only 1 ounce per day of absolute alcohol or 2 drinks). Id. at 9, 7.

91. By 2007, the legal community was utilizing FASD at both the trial and post-conviction levels. As early as 1990, the United States Supreme court in Sullivan v. Zebley, 493 U.S. 521, 533–34 n.13 (1990), described "fetal alcohol syndrome" as a "well-known childhood impairment [ ]." Ex. 88 at 9. In 2006, the Substance Abuse and Mental Health Services Administration made available on its website for criminal justice professionals information on the relevance of FASD across the legal spectrum, from competency to stand trial, to diminished capacity, testimonial capacity, and sentencing. Id. In 2012, the American Bar Association (ABA) would pass a resolution describing FASD and its relevance in the criminal justice system, supplementing the compilation of legal case law involving an FASD defense that the ABA had been publishing for years. Id.

92. It was also known in 2007 that, because of pervasive brain damage in FASD, individuals diagnosed with FASD were at high risk to commit crimes in unstructured contexts involving high stress and or unexpected events. Ex. 88 at 4.

93. Here, at the time of Mr. Chappell's 2007 penalty re-trial, counsel knew from various sources, including Mr. Chappell's grandmother, Mr. Chappell's maternal aunt, Mr. Chappell's former Lansing probation officer, Mr. Chappell's own mental health expert Dr. Etcoff, and from school and juvenile records, that Mr. Chappell's mother drank and took drugs during her pregnancy with Mr. Chappell, that Mr. Chappell suffered from some sort of learning disability/mental slowness, and that Mr. Chappell suffered from developmental disorders which stemmed from neurological origins (brain damage). Ex. 94 at ¶7; 182; Ex. 181; Ex. 88 at 10–12, 23–24.

94. Counsel also knew that, at Mr. Chappell's original trial in 1996, trial counsel had considered continuing the trial in order to investigate whether Mr. Chappell had FASD but withdrew their motion for some unknown reason. Mr.

Chappell's second trial counsel also had personal knowledge that Mr. Chappell's mother drank and used illegal drugs while she was pregnant with Mr. Chappell. Exs. 94 at ¶7; 108 at ¶6. All of this information should have alerted counsel to the need to investigate and present evidence of FASD as it related to Mr. Chappell. Ex. 88 at 23–24.

95. In 2008, Mr. Schieck himself testified at an evidentiary hearing in another case that as early as 2005 he was aware of what FASD was. Ex. 261 at 23. Specifically, he testified that he had no strategic reason for failing to investigate a Fetal Alcohol Syndrome defense in 2005 and explained that evidence concerning Fetal Alcohol Syndrome is important because:

> It impacts the case because it explains behaviors of the Defendant that the jury might not otherwise understand or have reason to exercise some mercy toward the Defendant. It's a factor that came into the Defendant's life before he was even born, based on the conduct of his mother, and oftentimes the jury will take a sympathetic view to that type of testimony.

Id. at 6, 23. Mr. Shieck further admitted that, in this case, he was aware from his representation of Mr. Chappell in initial state post-conviction proceedings that Mr. Chappell's mother drank and used illicit drugs during her pregnancy with Mr. Chappell Ex. 94 at ¶7. Mr. Schieck admitted he had no strategic justification for failing to investigate FASD. Id.

96. Despite his familiarity with FASD and his knowledge that Mr. Chappell's mother drank during pregnancy, counsel never investigated FASD and never hired experts to evaluate Mr. Chappell for FASD. If counsel had hired such experts, counsel would have discovered that Mr. Chappell suffers from FASD, specifically ARND. See Ex. 89 (Report of Dr. Julian Davies); Ex. 87 (Report of Dr. Paul Connor); Ex. 88 (Decl. of Dr. Natalie Brown). Such a diagnosis would have given counsel the opportunity to present evidence that, because of this medical condition, Mr. Chappell had a

diminished capacity to control his actions at the time of the crime, and that Mr. Chappell's prior acts of domestic violence against Ms. Panos were due in part to his FASD. Ex. 88 at 24–33.

97. Dr. Etcoff, who had testified at Mr. Chappell's original trial and was rehired by second trial counsel, was not an expert in FASD. Ex. 85 at ¶16. And while Dr. Etcoff does not remember being asked about FASD by defense counsel, if they had requested a diagnosis related to prenatal alcohol exposure he would have informed counsel that they needed to retain an expert with knowledge in this field. Id.

98. Had Mr. Chappell's trial counsel investigated, developed, and presented this crucial information, it is reasonably likely that the jury would have found additional mitigating circumstances and would have determined that the mitigating circumstances outweighed the aggravating circumstance, rendering Mr. Chappell ineligible for the death penalty or would not have chosen to impose a death sentence. Trial counsel, however, never requested a mental health professional conduct a complete neuropsychological examination of Mr. Chappell and have admitted they had no strategic reason for failing to make such a request. Exs. 94 at ¶8; 108 at ¶7. Instead, counsel relied on Dr. Etcoff's previous evaluation of Mr. Chappell to present mitigating evidence based upon his cursory review of Mr. Chappell's IQ and mental health, which failed to uncover evidence of ARND, an area in which Dr. Etcoff was not qualified to offer an opinion.

b. Additional information regarding the extent to which Mr. Chappell's mother used drugs and alcohol during her pregnancy was readily available

99. The first of four main areas a physician explores to determine whether a patient suffers from Fetal Alcohol Spectrum Disorder is the history of the patient's prenatal alcohol exposure. Ex. 89 at 21. Trial counsel were aware that Mr. Chappell's mother used drugs and alcohol during her pregnancy. Had trial counsel conducted

further investigation, they would have learned from numerous sources that Mr. Chappell's mother, Shirley, drank alcohol, smoked cigarettes, and used cocaine and heroin throughout her entire pregnancy.

100. When Shirley became pregnant with Mr. Chappell, she was sexually involved with two different men, her husband, William Richard Chappell, Sr. (Willie), and her paramour, James Wells. Ex. 74 at ¶5. Both men saw her drink while pregnant with Mr. Chappell. Willie knew Shirley to be a heavy drinker from the time they met in 1966 until her death in 1973 and often saw her intoxicated and smelled alcohol on her breath. Id. at ¶6. He saw her drink and smoke throughout her entire pregnancy with Mr. Chappell. Id. at ¶¶6–7. On one occasion, when Shirley was five to seven months pregnant with Mr. Chappell, Willie witnessed her fall down a flight of stairs while intoxicated, nearly losing the pregnancy. Id. at ¶8.

101. James Wells used heroin regularly with Shirley beginning in 1968. Ex. 60 at ¶4. He watched Shirley abuse drugs daily throughout her entire pregnancy with Mr. Chappell in 1969. Id. At the time, he and Shirley were unaware of the dangers to a developing fetus from in utero exposure to drugs. Id.

102. Rose Wells-Cannon, James Well's older sister, recalls that Shirley was the best friend of her sister Barbara Wells. Ex. 67 at ¶8. Barbara was an alcoholic and drank with a group of alcoholic friends that included Shirley. Id. Ms. Wells-Canon thought Shirley was abusing drugs and alcohol throughout her entire pregnancy with Mr. Chappell because Ms. Wells-Canon observed Shirley intoxicated on several occasions while she was pregnant with Mr. Chappell. Id. at ¶10.

103. Sharon Axam, Shirley's sister, knew that Shirley was a drug addict when she became pregnant with Mr. Chappell. Ex. 68 at ¶14. Ms. Axam believes Shirley abused heroin throughout her pregnancy with Mr. Chappell.

104. Louise Underwood, Shirley's aunt, saw Shirley "taking pills, drinking alcohol, and abusing alcohol" and knew that Shirley injected heroin. Ex. 330 at ¶20.

Ms. Underwood continued to see Shirley intoxicated and with track marks all over her arms during her pregnancy with Mr. Chappell. Id. Ms. Underwood observe Shirley drinking alcohol two to three times a week during the pregnancy, usually drinking several glasses of hard liquor and following each swig with a beer chaser. Id. at ¶21.

105. William Earl Bonds was a close friend of Shirley. Ex. 71 at ¶1. He spent a great deal of time with Shirley and James Wells at the house they shared. Id. at ¶5. Almost daily, Mr. Bonds and other friends gathered at Shirley's house to get high on heroin and cocaine, occasionally drinking alcohol as well. Id. Mr. Bonds observed Shirley abusing heroin and cocaine daily while pregnant with Mr. Chappell. Id. at ¶6. Mr. Bonds observed Shirley drinking alcohol twice a week while pregnant with Mr. Chappell, consuming several drinks of hard liquor on those days. Id.

106. Trial counsel failed to contact these or other witnesses who may have personally observed Shirley Chappell abusing alcohol and drugs while pregnant with Mr. Chappell. Because Shirley is deceased, only witnesses such as these would be able to quantify how frequently Shirley consumed alcohol and illicit drugs and in what quantity. This information was vital to the diagnosis of FASD or ARND and should have been gathered by trial counsel for use by experts.

c. A qualified and properly prepared expert would have diagnosed Mr. Chappell with ARND

(1) Neuropsychological testing of Mr. Chappell supports a diagnosis of ARND

107. In addition to prenatal alcohol exposure, one of the four main areas a physician evaluating a patient for FASD would explore is the level of brain dysfunction suffered by the patient. As explained in detail above, due to the ineffectiveness of both trial counsel, neither trial counsel ever conducted a complete neuropsychological battery on Mr. Chappell, and the sole mental health expert they retained was not qualified to diagnose FASD. Id. Had trial counsel requested a full neuropsychological

battery by a qualified expert, the results would have demonstrated more than sufficient areas of neurological dysfunction to support a diagnosis of a Fetal Alcohol Spectrum Disorder. Id. at 14.

108. Neuropsychological testing demonstrates that Mr. Chappell meets the CDC guidelines for an ARND diagnosis because he has deficits in nine domains of functioning. Id. These domains are: 1) Academic functioning, especially in arithmetic; 2) learning and memory for verbal and visual information; 3 Visuospatial construction and organization; (4) Attention functioning; (5) Processing speed; (6) Executive function, especially on tasks with low external structure; (7) Communication skills; (8) Daily living skills; (9) Socialization skills. Id.

109. In addition, Mr. Chappell demonstrates a pattern of cognitive functioning that is consistent with research on FASD. Ex. 87 at 11. For example, "Mr. Chappell demonstrates significant splits in performance between various domains of IQ testing, a pattern often seen in individuals with FASD." Id. In fact, Mr. Chappell's performance between intellectual, academic, and adaptive functioning falls into a pattern that can be described as a "hallmark" feature of individuals with FASD. Id.

110. Based upon the results of Mr. Chappell's neuropsychological workup, a diagnosis of Neurodevelopmental Disorder Associated with Prenatal Alcohol Exposure (ND-PAE) based on the current DSM-5 would be appropriate. Ex. 87 at 12. In 2007, Mr. Chappell would have been appropriately diagnosed with Cognitive Disorder, NOS under the DSM-IV. Id. Mr. Chappell's test results also support a medical diagnosis of ARND.

(2) Neuroimaging study proves that Mr. Chappell suffers from brain damage

111. Neuroimaging studies such as a brain positron emission tomography (PET) scan or a quantitative electroencephalograph (qEEG) would have demonstrated that Mr. Chappell had biological brain dysfunction as a result of prenatal exposure to

drugs and alcohol. A PET scan uses a radioactive tracer to demonstrate how the brain and its tissues are working. A qEEG reports electrical activity within the brain to show brain function. Either test would have revealed Mr. Chappell's congenital neurological deficits.

112. A qEEG was performed on Mr. Chappell on August 1, 2016 and was interpreted by Dr. Robert W. Thatcher. See Ex. 100. Dr. Thatcher determined from the test that the qEEG analyses "were deviant from normal and showed dysregulation of the bilateral frontal lobes of the paracentral lobule, medial and superior frontal gyri and cingulate gyrus." Id. at 13. Each of these various areas of the brain were compromised and functioned sub-optimally, which would indicate that Mr. Chappell would have difficulty with mood control, executive functioning, abstract thinking, social skills, learning and memory, bimanual coordination, volitional motor control, and attention control. Id. These results were consistent with neuropsychological testing, his academic record, and information reported by various individuals regarding Mr. Chappell's behavior and functioning. See generally Ex. 89 (using information from various sources, including Dr. Thatcher's qEEG report, to confirm a diagnosis of ARND).

113. Alone or in conjunction with an FASD diagnosis, this evidence of brain dysfunction could have been presented to a jury as a key mitigating factor. Counsel's failure to obtain and present neuroimaging studies was deficient.

(3) Mr. Chappell has a medical diagnosis of ARND

114. The Institute of Medicine criteria for ARND are maternal alcohol exposure coupled with: (A) evidence of Central Nervous System neurodevelopmental abnormalities; and/or (B) Evidence of a complete pattern of behavior or cognitive abnormalities that cannot be explained by familial background or environment alone. Ex. 89 at 21. Mr. Chappell meets these criteria. Id.

115. "Mr. Chappell was exposed to substantial, regular maternal alcohol intake: several hard liquor drinks per occasion several times a week, regularly witnessed to be intoxicated during this pregnancy [with Mr. Chappell]." Ex. 88 at 22. "This meets original IOM criteria for maternal alcohol exposure. Id. Even lesser levels of prenatal alcohol exposure than what was suggested by witnesses of Shirley Chappell's drinking have been shown to be harmful, as reflected in the U.S. Surgeon General warning that "No amount of alcohol consumption can be considered safe during pregnancy." Id.

116. In addition, Mr. Chappell has an abnormal qEEG. See Section 5(c)(2) above. This suggests that Mr. Chappell has measurable brain dysfunction. Ex. 89 at 23–24. This brain dysfunction has been documented by neuropsychological testing. As explained above, Mr. Chappell has demonstrated impairment in nine domains and a pattern of disability that is consistent with that seen in FASD. This satisfies the IOM criteria for "B. Evidence of a complex pattern of behavior or cognitive abnormalities that cannot be explained by familial background or environment alone." Id. at 24. Thus Mr. Chappell meets IOM criteria for ARND. Id.

117. Mr. Chappell 's ARND was present at birth and was "compounded by genetic risks, other prenatal exposures, adverse childhood experiences, possible damage from environmental contaminants, mental illness, and substance abuse. " Ex. 89 at 29. Mr. Chappell's diagnosis of ARND establishes that Mr. Chappell has a mental disease and defect that was present before the age of 18 and preceded the killing of Ms. Panos. Id.

(4) Mr. Chappell's ARND influenced his ability to control his actions at the time of the offense

118. According to neuropsychological testing, Mr. Chappell has deficits in nine domains of functioning. Examining the entire battery of testing demonstrates that Mr. Chappell has "pervasive brain damage with some relative strengths but a large number

of cognitive weaknesses that together have marked negative impact on his adaptive functioning." Ex. 88 at 26. Splits in Mr. Chappell's IQ domain scores reflect uneven braining functioning, which means that he has some strong areas of cognitive processing and some weak areas of cognitive processing. Id. at 27. In particular, Mr. Chappell shows significant weakness in Working Memory. Id. at 28. Mr. Chappell's test results, when examined both in isolation and for patterns supports a diagnosis of FASD. See Ex. 87.

119. Of particular concern are Mr. Chappell's executive function scores. Executive function has been recognized "as the central reason why those with FASD have life course difficulties." Ex. 88 at 30. This negative effect is amplified by childhood adversity and increases the likelihood that an individual with FASD will abuse substances and have trouble with the law. Id. As discussed above, Mr. Chappell was exposed to "a truly extraordinary number of deficits, traumas, and losses over the course of his childhood." Ex. 128 at 10. Executive dysfunction involves a lack of impulse control, trouble anticipating consequences, difficulty connecting cause and effect, problems empathizing, problems taking responsibility, inability to make good judgments or delay gratification, and poor emotional control and tendency to engage in explosive episodes. Ex. 88 at 31. Mr. Chappell's actions demonstrate he had difficult with all of these.

120. Significantly contributing to his executive dysfunction is Mr. Chappell's working memory impairment. Ex. 88 at 31. Working memory allows a person to "hold[] relevant neural information in mind while manipulating, synthesizing, and processing it for the purpose of completing a task." Id. "Working memory is where intentions are formed and planning occurs." Id. at 31–32. "In the legal context, working memory is equivalent to 'reflection,' 'reasoning,' and 'impulse control.'" Id. Mr. Chappell's multiple cognitive deficits left him unable to reflect, reason, or control his impulses, particularly

in stressful situations. Id. Mr. Chappell was "hard-wired" to be hyper-reactive to stress and lacked the executive functioning to control his emotional reactions. Id. at 32.

121. Mr. Chappell's own testimony demonstrates that he was under stress on August 31, 1995. He had just left jail, he was facing drug rehabilitation, he believed the person he loved most and depended upon wholly was being unfaithful and perhaps leaving him. Mr. Chappell's FASD rendered him defenseless against the tremendous stress he faced on August 31, 1995. As Dr. Etcoff testified, "all of these things are happening to him, and they are happening rapidly and he just snapped. And he snapped as bad as you can snap." Ex. 174 at 62. Mr. Chappell's ARND demonstrates a physiological explanation for why Mr. Chappell snapped, and why he was unable to control his actions on the day of the offense.

d. There is a reasonable probability of a more favorable outcome if trial counsel had presented evidence that Mr. Chappell suffers from FASD

122. Had Mr. Chappell's trial counsel investigated, developed and presented evidence of Mr. Chappell's organic brain damage and the impact it had on his behavior, it is reasonably likely that a jury would have found one or more mitigating factors that could have been alleged related to brain damage and FASD. It is also reasonably likely that a jury would have found these mitigating circumstances, alone or in conjunction with others, to outweigh the sole aggravating circumstance, thereby making Mr. Chappell ineligible for the death penalty. In the alternative, it is reasonably likely that at least one juror would have voted for a penalty other than death. Trial counsel's failure to investigate FASD, to have Mr. Chappell evaluated for brain damage, or to have a complete neuropsychological battery completed left the State's argument that Mr. Chappell acted with "free will" and with "evil" unanswered. Developing and presenting evidence from even one area that was unexplored would have provided the

jury with an alternative explanation for Mr. Chappell's behavior throughout the course of his relationship with Ms. Panos, including on the day of her death.

123. If trial counsel had performed effectively, they could have presented expert testimony that "[b]ecause Mr. Chappell's executive control over his behavior is significantly impaired due to his FASD, and because Mr. Chappell was under stress at the time of the offense, it is likely Mr. Chappell's ARND influenced his ability to control his actions at the time of the instant offense." Ex. 88 at 32. Similarly, trial counsel could have presented expert testimony that:

> For the same reasons Mr. Chappell's impaired executive control would have influenced his behavior at the time of the instant offense, his executive dysfunction similarly would have influenced his prior domestic abuse of Deborah Panos. That is, during times of intense negative emotion such as anger or rage, Mr. Chappell's executive control impairments would have limited his capacity to control his emotions and impulses.

Id. at 33. Finally, if trial counsel had performed effectively, they could have presented expert testimony that, "compared to individuals who are not exposed to alcohol in utero, Mr. Chappell's FASD condition increased his likelihood of developing a substance abuse problem. Id. at 34.

124. At the penalty hearing, the jury found as a mitigating circumstance that Mr. Chappell was born to a drug and alcohol addicted mother. Ex. 39 at 4. It is unclear, however, how much weight the jury gave this mitigator, given trial counsel's failure to explain the neurological impairments that resulted from prenatal exposure to alcohol and drugs. Furthermore, an ARND diagnosis could have led to the submission of an additional mitigating factor on top of his mother's drug addiction. The presentation of an additional mitigating factor could have shifted the balance and caused the jury to vote for a sentence less than death.

6. Trial counsel were ineffective for failing to present an expert on addiction and drug toxicity

125. Trial counsel were aware from Mr. Chappell's own testimony at the guilt phase that he had a history of drug use and abuse, which is why they alleged that Mr. Chappell suffered from substance abuse addictions as a mitigating circumstance. Ex. 137 at 21, 31–33, 36, 61, 70, 71–73; Ex. 176 at 45. Trial counsel referred to Mr. Chappell's drug abuse in their opening statement at the penalty phase, stating that Mr. Chappell had an addiction to controlled substances from the time he was in Michigan, that he developed an addition to crack cocaine while he was living in Tucson, and that he did very unpleasant and improper things in order to get money to buy drugs. Ex. 174 at 32–34.

126. Trial counsel also had expert witnesses testify to Mr. Chappell's drug use. Psychologist William Danton, an expert on domestic violence, testified on direct examination that Mr. Chappell used drugs to escape his fear of abandonment or other intense emotions. Ex. 172 at 56–57. Dr. Etcoff testified that Mr. Chappell "became dependent on cocaine as a youngster" and that regular use of crack cocaine was likely to cause a person to become "psychotic and have paranoid delusions." [33] E. 174 at 39–40. But neither expert explained Mr. Chappell's genetic predisposition to drug addiction, how drugs affect the brain, or how his addiction impaired his already impaired impulse control, thereby mitigating his behavior both prior to and at the time of the offense. Trial counsel admitted they had no strategic reason for failing to fully investigate, develop, and present evidence, through an expert on addiction, that addiction informed Mr. Chappell's behavior throughout his lifetime. Exs. 94 at ¶10; 108 at ¶9.

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[33] Dr. Etcoff is generally aware of the science of addiction but is "not an expert in drug use predisposition, vulnerability to addiction, and the effects of such on an individual." If he had been asked for a diagnosis related to Mr. Chappell's drug use, he "would have informed counsel that they needed to retain a medical expert with board certification in addiction medicine." Ex. 85 at ¶17.

127. Mr. Chappell had a genetic predisposition to abuse drugs and was raised in an environment that exposed him to drug use and fostered his abuse. See Ex. 90. He further had underlying brain function impairments which rendered him particularly vulnerable to the adverse effects of substance abuse. Id. In particular, Mr. Chappell's chronic cocaine use caused fear and paranoia that mimicked paranoid schizophrenia. Id. Layered over the framework of Mr. Chappell's underlying difficulties with regulating his emotions and fear of abandonment by the woman upon whom he was completely dependent, his drug abuse and the psychotoxicity it caused created a perfect storm that lead to the events that resulted in Ms. Panos's death. Id.

128. Reasonably competent counsel would have hired a neuropharmacologist to explain Mr. Chappell's predisposition to drug abuse and addiction, environmental factors that contributed to Mr. Chappell's development of drug dependency and addiction, impact of drug use during formative periods of the brain, psychotoxicity of cocaine, impact of drug use during adolescence on the brain's development and dysfunction, the specific impact of smoking a mixture of crack cocaine and marijuana in adolescence, effects of cocaine use and abuse on mood and perception of reality, brain damage caused by high-dose use of alcohol, and the interplay of the effects of Mr. Chappell's use of drugs and alcohol and his pre-existing mental health problems. Such an expert would have provided a jury with an understanding of Mr. Chappell's drug and alcohol use and abuse, which seriously exacerbated his underlying psychological and mental impairments, as a significant mitigating circumstance.

129. A neuropharmacology expert would have explained that Mr. Chappell's drug use and addiction and the resulting drug-seeking behaviors were shaped and amplified by multiple factors including: a genetic predisposition to drug use because both of his parents abused drugs and his mother abused alcohol, even while pregnant, Ex. 90 at 5; the witnessing and modeling of other persons using drugs during childhood, id. at 9; early childhood adversity, such as being raised by an abusive grandmother in

a depressed neighborhood where drug use by adults and children was common, id. at 9, 2; early drug use, which in Mr. Chappell's case began at age 12, id. at 9, 6. All of these factors contributed to Mr. Chappell's development of a drug addiction. Id. at 9. Early drug use and repeated use of substances led to long-lasting, potentially irreversible neuroadapative changes that resulted in tolerance, craving, and withdrawal and changed Mr. Chappell's motivation for using drugs from impulsivity and the positive reward of the drug use to compulsivity and the negative effects of the absence of drugs. Id. at 9.

130. The compulsivity, the desire to avoid the negative effects of withdrawal, and the craving for drugs was so urgent in Mr. Chappell that ultimately his entire life revolved around getting more money to smoke more crack. Ex. 55 at ¶5. Mr. Chappell's addiction to crack cocaine eradicated his control of the choice to use or not use. Ex. 90 at 14. He was powerless to overcome his need for cocaine and driven to consume the drug, regardless of the negative consequences. Id. at 14..A neuropharmacologist would have explained to the jury that it was Mr. Chappell's need to consume crack and avoid withdrawal that caused Mr. Chappell to shoplift items and to steal items from the trailer he shared with Ms. Panos—electronics, appliances, food, furniture, his children's jackets, his children's diapers—to sell for money to buy crack. Id.; Exs. 55 at ¶2; 136 at 44; 173 at 84–85; 171 at 147–48.

131. Mr. Chappell's use of crack increased to the point that even other crack users thought it unusually excessive. See Ex. 55 at ¶ 5. A neuropharmacology expert would have explained to a jury that cocaine addiction is debilitating and that the effects of the drug on the brain continue long after the drug is no longer present in a person's system. Ex. 90 at 10. Persons who use cocaine may be suspicious, paranoid, have magical thinking, or feel insecure long after use of the drug has stopped. Id. Paranoia occurs in 68% to 84% of cocaine users. Id. at 17. This would have helped a jury to understand why Mr. Chappell suspected Ms. Panos of being romantically involved with

other men and thought she was abandoning him because she did not visit him during his most recent incarceration.

132. A neuropharmacology expert could have explained the link between crack cocaine usage and domestic violence. Cocaine use impairs judgment and decision-making and facilitates the expression of violence. Ex. 90 at 16. A jury could have been told by a neuropharmacology expert that violent behavior can result from a drug-caused psychiatric illness and that crack cocaine yields more frequent and intense psychiatric symptoms than powder cocaine. Id. As many as 55% of users with cocaine-induced psychiatric symptoms engage in cocaine-related violent behaviors. Id. at 17. In particular, cocaine use has been found to increase the likelihood of physical violence against a domestic partner. Reasonably competent counsel would have used such evidence to mitigate the State's evidence regarding domestic violence. Failure to do so was especially harmful because jurors did not think drug use was an "excuse" for crime (which the State improperly argued was the function of mitigating circumstances, see Claim 16 Section F) and were particularly troubled by the fact that Mr. Chappell stole items from his children to support his drug habit. Ex. 211 at ¶¶11, 14, 17, 23.

133. At closing, the State argued that the jury should not show Mr. Chappell mercy based on his drug problem. Ex. 176 at 144. The State argued that Mr. Chappell decided to become involved in drugs and that he decided not to be treated for his drug addiction. Id. The State also argued that drugs were not to be considered because Mr. Chappell did not use drugs on the day of the offense. Id.

134. Provided expert information about how Mr. Chappell became addicted to drugs, how he came to be powerless in the face of that addiction, how it caused him to steal, how it caused him to become paranoid and violent, jurors would have understood why Mr. Chappell's drug use was a mitigating circumstance. This would have increased the likelihood that at least one juror would have voted for a penalty less than death.

7. Cumulative prejudice

135. If trial counsel had performed effectively, the jury would have heard a much more complete and compelling picture of the adversity Mr. Chappell faced throughout his life. The jury would have heard how Mr. Chappell was brain damaged at birth as a result of his mother's prenatal drinking; how his brain damage caused him to lack the skills to cope with his traumatic childhood; how the abuse and neglect Mr. Chappell suffered was severe and pervasive; how his brain damage and inability to cope with trauma caused him to turn to drugs as a coping mechanism; how the drugs then exacerbated the lack of impulse control and cognitive dysfunction, causing him to resort to stealing to support his drug habit; how his poor intellect and lack of impulse control cause him to resort to the same kinds of violence he witnessed both at home and in his neighborhood, and how crack-cocaine further induced violent behavior; how the many risk factors he faced combined with his brain damage to render him incapable of properly coping with life's challenges; and how all of these things coalesced on the day of the offense to cause Mr. Chappell to react the way he did to Ms. Panos's infidelity.

136. If trial counsel had performed effectively, the jury would have heard that Mr. Chappell did not choose to be a bad person, he was molded into a person who did bad things because he saw people doing bad things all around him and he was not intellectually, socially, or emotionally capable of acting any differently than him. When Mr. Chappell did something his grandmother did not like, she beat him. Mr. Chappell resisted behaving this way, but when his addiction to crack cocaine overrode what little executive functioning he had, he lacked the capacity to prevent himself from reacting violently to disagreements with Ms. Panos. There is a reasonable probability that if trial counsel had presented this evidence, the results of the proceeding would have been different.

C. Trial counsel were ineffective for failing to rebut the State's sole aggravating circumstance

137. The sole aggravator available to the State at Mr. Chappell's penalty hearing was that the murder was committed during the perpetration of a sexual assault. See Ex. 5 at 15. The State therefore had a burden to prove beyond a reasonable doubt that: 1) Mr. Chappell knowingly willingly and unlawfully; 2) without consent; 3) subjected Ms. Panos to sexual penetration. See Hardaway v. State, 926 P.2d 288, 289–90 (Nev. 1996); Nev. Rev. Stat. 200.366(1). The State had to further prove that the homicide occurred in the perpetration of that sexual assault.

138. Defense counsel were ineffective for failing to rebut the State's evidence in support of the sole aggravating circumstance. Specifically, counsel failed to hire an expert regarding the presence of semen, failed to prepare defense expert witness Dr. Todd Cameron Grey, failed to impeach the testimony of State's expert witness Dr. G. Sheldon Green, failed to properly prepare defense expert witness Dr. William Danton, failed to interview and prepare for the State's witnesses, and failed to request a jury instruction that reasonable belief in consent is a defense to sexual assault. Trial counsel's failures allowed the State to prove sexual assault on extremely thin evidence and emotion-evoking testimony. Had trial counsel been effective, there is a reasonable probability the jury would not have found the sexual assault aggravator and, therefore, could not have sentenced Mr. Chappell to death.

1. Trial counsel were ineffective for failing to challenge and rebut testimony that there was semen inside the victim

139. At the penalty phase, DNA evidence was not presented by an expert but was instead presented by a lay witness, James Vaccaro, a detective for the Las Vegas Metropolitan Police Department. See Ex. 175 at 80–81. That lay witness was asked if he knew whether foreign DNA was found in the vaginal swabs taken from Ms. Panos at the autopsy. Id. at 80. To which Mr. Vaccaro testified, "I do know that the results were that the DNA of James Chappell was found in the form of semen inside the vagina

of Deborah Panos." Id. As explained at Mr. Chappell's first trial by Thomas A. Wahl, a criminalist from the Las Vegas Metropolitan Police Department Forensic Laboratory, genetic material from sperm was found in a vaginal swab from Ms. Panos. Ex. 136 at 48. But semen and sperm are not synonymous. Semen, which is deposited when a man ejaculates, can contain sperm, but does not necessarily. See Peter Jaret, The Myths and Realities of a Vasectomy, N.Y. Times (June 27, 2008) available at http://www.nytimes.com/ref/health /healthguide/esn-vasectomy-expert.html. More significantly, sperm can be present without semen or ejaculation. Killick, Stephen R. et al., Sperm Content of Pre-ejaculatory Fluid, 14 Human Fertility 48 (2010) (forty-one percent of samples of pre-ejaculatory fluid tested contained sperm). This is particularly important because the State went on to ask Mr. Vaccaro, "Then the fact that it's in the form of semen would indicate that he ejaculated into her body?" to which Mr. Vaccaro answered, "Yes." Id. While the presence of semen would have indicated ejaculation, no DNA expert testified or provided in a report that semen was located in Ms. Panos's vaginal cavity, only that DNA was extracted from a vaginal swab.

140. Trial counsel were ineffective for failing to object to the testimony regarding DNA evidence being presented by a lay witness, who was not qualified as an expert and in fact had no expertise upon which to offer any scientific evidence. Further, trial counsel was ineffective for failing to object that the underlying DNA report to which Mr. Vaccaro testified was not submitted into evidence. See Ex. 255. That report would have shown that the genetic material that was analyzed came from the "vaginal swab of Panos" without any mention of semen. Ex. 256. Trial counsel was ineffective for failing to hire an expert or to explain to the jury that sperm is not indicative of ejaculation to a reasonable degree of scientific certainty.

141. Trial counsel's failure to contest the presence of semen in Ms. Panos exposed a key defense witness to impeachment. Dr. Etcoff was impeached based on his lack of knowledge about the presence of semen.

> 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 his 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.

Ex. 174 at 108.

142. Mr. Chappell was prejudiced by his counsel's failure to contest testimony regarding the presence of semen because it led the jury to question Mr. Chappell's account of the sexual contact that he had with the victim, including that it was consensual, and because it provided a means to impeach a key expert witness who presented mitigating evidence on behalf of Mr. Chappell.

2. Trial counsel failed to prepare expert witness Todd Cameron Grey to rebut the sexual assault

143. Todd Cameron Grey, M.D., was the chief medical examiner for the state of Utah and had been for nearly twenty years when he testified at Mr. Chappell's penalty hearing in 2007. Ex. 173 at 4. Mr. Chappell's defense team called him to explain to the jury that there was no physical evidence that Ms. Panos had been sexually assaulted during her killing. Id. at 7. In preparation for his testimony, Dr. Grey was provided by defense counsel the autopsy report of Deborah Panos, investigative reports from the Clark County Coroner's Office, some photos of Ms. Panos's body at the scene of death and at autopsy, a transcript of the 1996 testimony of the doctor who had performed the autopsy, and transcripts of closing arguments of both the prosecution and defense in the 1996 trial. Id.

144. Dr. Grey explained to the jury that he found no physical evidence that would support sexual assault during the course of the homicide. Ex. 173 at 9. On cross-examination, by the State, Dr. Grey gave the following answers:

> Q: You're aware that the defendant said when he testified at the prior hearing that he did not ejaculate into the victim. Were you aware of that?
>
> A: No.
>
> Q: So you don't know that he just said that it was oral sex?
>
> A: I don't know.
>
> Q: Okay. Well, in light of what you read about the findings, the DNA samples that were done, clearly this was not just oral sex if oral sex even happened. There was vaginal sex.
>
> A: There was depositing of his genetic material in her vagina. The specifics as to whether sperm was scene [sic] or not I do not know.
>
> Q: You don't know that?
>
> A: No, I did not see any report. I just saw the DNA report.
>
> Q: So you didn't read the report that talks about the presence of sperm as well-
>
> A: I did not see that.
>
> Q: But that would be conclusive that there was ejaculation?
>
> A: Yes.

Ex. 173 at 26–27. [34] Dr. Grey clarified that the depositing of genetic material did not indicate sperm was present but was told by the State that sperm was present. Had he been given a report that indicated sperm was found in the victim, Dr. Grey would have been prepared to rebut that information. First, it is possible that the report, which likely was a serology report based on analysis of the vaginal swab of Ms. Panos, does not say sperm but refers only to the presence of material that was tested for blood type.

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[34] To the extent such a report exists, on information and belief, trial counsel did not have a copy of that report. Present counsel similarly does not have a copy of that report. Some or all of the report is believed to have been included in Trial Exhibits 84 and 85, but those are no longer available due to accidental destruction.

Second, if the report does say sperm, Dr. Grey would have explained that sperm can be present without ejaculation because pre-ejaculatory fluid can contain sperm. One study found that forty-one percent of pre-ejaculatory samples contained sperm. Killick, Stephen R. et al, Sperm Content of Pre-ejaculatory Fluid, 14 Human Fertility 48 (2010). Dr. Grey's testimony would not have been impeached with the report (nor would he have been manipulated into impeaching Mr. Chappell's version of events) had he been given an opportunity to review it. Trial counsel was ineffective for failing to properly prepare Dr. Grey.

3. Trial counsel failed to impeach the testimony of Chief Medical Examiner Giles Sheldon Green

145. Dr. G. Sheldon Green was the Chief Medical Examiner in 1995 and conducted the autopsy of Deborah Ann Panos. Ex. 169 at 158, 161. Dr. Green testified at Mr. Chappell's preliminary hearing in 1995, guilt trial in 1996, and second penalty trial in 2007. Ex. 127 at 5–25; Ex. 133 at 29–60; Ex. 169 at 158–192. In his 2007 testimony, Dr. Green pinpointed, for the first time, a specific interval of time that occurred between the bruising injuries on Ms. Panos and the knife wounds which killed her. See Ex. 169 at 176.

146. At Mr. Chappell's penalty hearing, Dr. Green testified that Ms. Panos's body showed evidence of bruising and stabbing. Ex. 169 at 172, 165. According to Dr. Green, the bruising Ms. Panos sustained preceded the injuries caused by a knife to her neck, which were identified as the cause of her death. Id. at 176, 168. Dr. Green explained that you cannot bruise a dead body. Id. at 176. Because bruises take some time to develop, Dr. Green said he identified a minimum time between the bruises on the forehead and the face and the time of death as 15 to 30 minutes, possibly a little more, probably not much less. Id. at 176. The State used this to argue that Mr. Chappell's version of the events was untrue because the beatings were part of the sexual assault and occurred 15 minutes before the fatal stab wounds. Ex. 176 at 75–

76. Trial counsel were ineffective for failing to impeach Dr. Green's testimony about the time frame of the bruises.

147. At the guilt phase of trial, Dr. Green explained that bruises could be categorized as recent, intermediate, and old based upon the color changes that occur. Ex. 133 at 37. He explained that bruises turn red after a few minutes and remain red for most of the day, so a bruise which is red happened within a day of the time you look at it, which in this case meant they occurred within a day of the time of death. Id. at 36. The following day, a bruise would turn purple, which would be an intermediate bruise that might remain in that state and of that color for days or even months. Id. at 36–37. When a bruise starts to disappear, the edges turn yellow-green, and that is when a bruise can be identified as old. Id. at 37. Dr. Green further testified that all of Ms. Panos's bruises appeared to be very red and were therefore very recent. Id. Dr. Green testified that both the bruises and the abrasions appeared on Ms. Panos's body within the same day of her death. Id. at 39–40. A more specific time interval between the bruises and time of death was not identified.

148. Similarly, at Mr. Chappell's preliminary hearing, Dr. Green explained that bruises can be categorized by age into recent, intermediate, and old injuries based upon color. Ex. 127 at 10. Red bruises are less than a day old; blue, purple with no red were intermediate with no specific time frame; old bruises develop yellowish to tan or green coloration beginning from the outside of the bruise to the center. Id. Dr. Green opined that all of the bruises on Ms. Panos's body were recent. Id. at 11. Asked if he could identify how recent the bruises were in relationship to the stab wounds, Dr. Green responded:

> The best we can say is that they are on the same day. We cannot say that they were minutes or hours or anything like that. In terms of time frame, all we can say is these are recent. They happened that day, the day of death.

Id. This directly contradicts his statements in 2007 that the bruises occurred 15–30 minutes before the stab wounds, maybe a little longer, probably not much less.

149. In fact, scientists who have studied bruising agree that "One cannot reliably predict the age of a bruise by its color." Laura Mosqueda et al., The Life Cycle of Bruises in Older Adults, 53 J. of Am. Geriatrics 1532, 152 (2005); see also, e.g., 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."). The appearance of a bruise may be influenced by the severity of the force which produced it, how many blood vessels are in the underlying tissue, diseases that may affect clotting, age, possibly sex, and the color of an individual's skin. Terence Stephenson & Yvona Bialas, Estimation of the Age of Bruising, 74 Archives of Disease in Childhood. 53, 54 (1996). Gravity may even make a bruise appear in a place remote from the injury. Id. One study found that even the estimate of the age of bruises to within 24 hours of their occurrence are inaccurate, and no single characteristic or the site of a bruise correlated with accuracy in aging a bruise. S. Maguire et al., Can You Age Bruises Accurately in Children? A Systematic Review, 90 Archives of Disease in Childhood 187, 187 (2005). Trial counsel should have impeached Dr. Green's timing of Ms. Panos's bruises based upon medical science and his own previous testimony. Failure to do so fell below an objective standard of reasonableness.

150. Trial counsel were ineffective for failing to properly prepare Dr. William Danton to testify that the sex was consensual. William Danton, Ph.D., is a clinical psychologist who has worked extensively with victims and perpetrators of domestic violence. Ex. 172 at 49–50. Dr. Danton was called by the defense at Mr. Chappell's

penalty hearing in order to testify regarding why Ms. Panos would have had consensual sex with Mr. Chappell on the day of her death. In preparation for his testimony, defense counsel provided a synopsis of the facts of the case prepared by defense counsel and Dr. Etcoff's report. Id. at 53, 63. In addition, Dr. Danton interviewed Mr. Chappell for two hours the night before he testified, around 10:00 p.m. Id. at 53, 64–65, 66. This was the only time Dr. Danton spoke with Mr. Chappell, and he did not conduct any tests on Mr. Chappell or interview anyone other than Mr. Chappell. Id. at 66, 75, 65.

151. Dr. Danton's poor preparation was exposed during cross-examination. In response to questions from the State, Dr. Danton admitted that he had not read any police reports, read any witness statements, read the autopsy report, reviewed the autopsy photos, reviewed any reports of prior incidents of domestic violence, met with Mr. Chappell other than for two hours the night before, spoken with Mr. Chappell by phone, reviewed anything to determine the accuracy of Mr. Chappell's self-reporting, interviewed Ms. Panos's family members, reviewed Ms. Panos's school records or psychological reports or accounts from friends of how she viewed her relationship with Mr. Chappell. Ex. 172 at 64–65, 66, 67, 68.

152. The State was further able to elicit from Dr. Danton statements that the gaps in his knowledge left him without information that may have been important. When asked if Dr. Danton had learned from Mr. Chappell what led to a particular incident of domestic violence, Dr. Danton replied that he had not. Ex. 172 at 74. The State asked Dr. Danton if the information would "have been important in [his] analysis of the dynamics of the relationship," to which Dr. Danton responded, "Well, if I had time to get into that it might be important, but as it was I was just trying to get a summary of the domestic violence incidents that occurred." Id. Asked at another point in the cross-examination whether he would be surprised to learn that Mike Pollard testified that shortly before Ms. Panos came home that she was shaking and in a ball on Mr. Pollard's couch because she learned that Mr. Chappell was out of custody, Dr.

Danton had to respond, "Well, I hadn't heard that before." Id. This information was used by the State to demonstrate that Dr. Danton's understanding of the events would have been different if he had more complete information available.

153. Even more damaging is testimony elicited on cross-examination that Dr. Danton could have done independent testing to determine the veracity of Mr. Chappell's assertion that he did not recall stabbing Ms. Panos. Dr. Danton testified that while it was not common for an individual to black out when killing someone, it can occur and has occurred in other cases. Ex. 172 at 89. On re-cross, Dr. Danton admitted that he did not "have enough data to conclusively say [Mr. Chappell] blacked-out. There is testing that could be done that might establish that, but I haven't done it." Id. at 102.

154. Even on direct examination, Dr. Danton's testimony was damaging to the defense, indicating that counsel was not prepared for what he said to the jury. Dr. Danton provided five possible reasons why Ms. Panos would have sex with Mr. Chappell despite the fact that their relationship was abusive. Ex. 172 at 58–59. The final hypothesis Dr. Danton offered was that the sex was forced: "He forced her to have sex." Id. at 59. Dr. Danton opined further that given the information he had available, he thought that guilt and appeasement were the hypotheses which made the most sense, id., but the jury had already heard him say that sexual assault was one of five possible reasons for the sex.

155. As explained above, the jury then heard on cross-examination how little Dr. Danton had been prepared, how little material he had been provided, how little time he spent interviewing Mr. Chappell, and that his opinions regarding Mr. Chappell were therefore based upon too little information to be credible. This rendered Dr. Danton's opinion that Ms. Panos consented to sex far less unbelievable. The State argued that the jury should not believe Dr. Danton's opinion because he only met with Mr. Chappell for two hours and because he reviewed no documents related to the case

to corroborate Mr. Chappell's version of events. Ex. 176 at 130 Trial counsel was ineffective for not properly preparing or consulting Dr. Danton prior to his testimony.

4. Trial counsel were ineffective for failing to interview the State's witnesses before trial

156. Trial counsel were aware from the State's witness list and from transcripts of Mr. Chappell's guilt phase that the State would be calling friends of Ms. Panos to testify. At the first trial, these witnesses offered testimony that conflicted with Mr. Chappell's testimony, making him appear less credible and leading the jury to ultimately determine that the sexual contact Mr. Chappell said was consensual was actually sexual assault. Reasonable trial counsel would have interviewed these witnesses in order to prepare questions for cross-examination, to obtain impeachment information, and to locate and prepare rebuttal witnesses.

a. Clare McGuire

157. Clare McGuire was a friend of Ms. Panos in Arizona and moved to Las Vegas to live with Ms. Panos in 1995. Ex. 105 at ¶¶1, 9. Ms. McGuire testified at each of Mr. Chappell's trials. Id. at ¶1. Her testimony at the first trial put second trial counsel on notice that she might testify at the second penalty hearing and the nature of the testimony she would offer. As such, trial counsel should have interviewed Ms. McGuire before her testimony at the 2007 penalty re-trial. Had trial counsel interviewed Ms. McGuire, they would have learned and subsequently been able to elicit on cross-examination facts that would have corroborated Mr. Chappell's testimony from the first trial and helped the jury to understand why Mr. Chappell believed that he still resided with Ms. Panos and that the sex that he and Ms. Panos had on the day of her death was consensual.

158. Ms. McGuire knew that following arguments and altercations, Mr. Chappell would leave for a period but was always allowed to come home by Ms. Panos. Ex. 105 at ¶4. When Ms. McGuire asked Ms. Panos why she remained in a troubled

relationship with Mr. Chappell, Ms. Panos responded that she wanted to keep the father of her children in the children's lives. Id. at 3. In fact, when Ms. Panos moved to Las Vegas, she had intended to break up with Mr. Chappell but had a change of heart and brought him to be with her and their children. Id. ¶8. Had counsel interviewed Ms. McGuire, they would have been prepared to ask questions on cross-examination that would have demonstrated to the jury that Mr. Chappell understood his relationship with Ms. Panos to be one that had survived many misunderstandings and separations and always resulted in a reunification. This would have bolstered Mr. Chappell's testimony that he resided in the trailer with Ms. Panos, despite his recent incarceration, and would have made plausible the idea that Ms. Panos welcomed him home on August 31, 1995 despite the fact that she may have expressed a desire to end the relationship.

b. Dina Richardson (formerly Freeman)

159. Dina Richardson, who was formerly Dina Freeman, was a friend of Ms. Panos from Tucson, Arizona. Ex. 167 at ¶1. She testified at each of Mr. Chappell's trials. Id. Her testimony at the first trial put second trial counsel on notice that she might testify at the second penalty hearing and the nature of the testimony she would offer. As such, trial counsel should have interviewed Ms. Richardson before her testimony at the 2007 penalty re-trial. Had trial counsel interviewed Ms. Richardson, they would have been prepared to elicit testimony on cross-examination that would have portrayed Mr. Chappell in a more favorable light and would have helped to convince a jury to choose a penalty other than death.

160. If asked, Ms. Richardson would have testified that Ms. Panos was committed to Mr. Chappell and loved him completely. Ex. 167 at ¶3. She would have testified that Ms. Panos was very protective of Mr. Chappell with others and worked hard to provide a life for Mr. Chappell that was better than the difficult childhood he

had suffered. Id. at ¶¶6, 3. Ms. Richardson would have testified that Ms. Panos had a great deal of freedom in her relationship with Mr. Chappell and even took vacations with friends that did not include Mr. Chappell. Id. at ¶9. Ms. Richardson would have testified that Mr. Chappell was a very good and engaged father. Id. at ¶4. Ms. Richardson would also have testified that Ms. Panos initially had misgivings about Mr. Chappell accompanying her when she moved to Las Vegas, but that before she left Tucson for Las Vegas, Ms. Panos informed Ms. Richardson that Mr. Chappell would be moving with her. Id. at ¶10. Had the jury heard this information, they would have understood that Ms. Panos's friends saw the good in Mr. Chappell, that Mr. Chappell's explanation that he and Ms. Panos had moved to Las Vegas together was truthful—which meant that the rest of his testimony regarding his relationship with Ms. Panos and the events leading to her death was more likely also truthful,—and that Mr. Chappell had reason to believe that Ms. Panos loved him and wanted him to remain in her life.

161. Finally, Ms. Richardson, had she been asked, would have offered her opinion that Ms. Panos would have understood Mr. Chappell's actions that led to her death as a function of his bad upbringing and drug use. Id. at 12. Ms. Panos would have forgiven Mr. Chappell. Id. Ms. Panos would not have wanted Mr. Chappell to receive a sentence of death. Id. Reasonably effective trial counsel would have interviewed Ms. Richardson in preparation for her testimony and been prepared to elicit this testimony which would likely have convinced at least one juror to vote for a penalty other than death.

5. Trial counsel failed to request a mistaken belief of consent jury instruction

162. Under Nevada law, a reasonable but mistaken belief of consent is a defense to sexual assault. Honeycutt v. Nevada, 56 P.3d 362, 368 (Nev. 2002). If supporting evidence has been presented that a defendant had a reasonable mistaken

belief of consent of the victim, the court must give a jury instruction on reasonable mistaken belief of consent when defense counsel has requested such an instruction. Id., Carter v. State, 121 P.3d 592, 596 (Nev. 2005) ("Honeycutt remains valid authority insofar as it requires district courts to allow theory of the case instruction in sexual assault cases stating that an alleged perpetrator's lack of consent is an element of sexual assault and, assuming supporting evidence has been presented, that a reasonable mistaken belief as to consent is a defense to a sexual assault charge."). Trial counsel were ineffective for failing to request a jury instruction that reasonable mistaken belief is a defense to sexual assault.

163. At the guilt phase of trial, Mr. Chappell stipulated that he "engaged in sexual intercourse with Deborah Panos on August 31, 1995." Ex. 20 at 3. The State argued at Mr. Chappell's penalty hearing that this sexual intercourse was sexual assault. Defense counsel presented evidence that Mr. Chappell believed the sex was consensual. Dr. Etcoff testified that Mr. Chappell told him that on August 31, when he arrived at the trailer he shared with Ms. Panos, he climbed through the window because he did not have a key. Ex. 174 at 60. Mr. Chappell said that Ms. Panos met him at the window and helped him through the window, into the house. Id. Mr. Chappell said that then he and Ms. Panos began to have sex and that he stopped having sex with Ms. Panos because he believed she had had sex with other men. Id. Mr. Chappell then told Dr. Etcoff that Ms. Panos performed oral sex. Id. at 61. Mr. Chappell believed that Ms. Panos assisted him into the house and then had consensual sex with him. Mr. Chappell believed that he was the one who wanted to stop having sex, not Ms. Panos. Mr. Chappell believed that Ms. Panos then initiated oral sex. Mr. Chappell believed that Ms. Panos consented to sex.

164. Dr. Danton testified that there were two likely reasons why Ms. Panos may have had consensual sex with Ms. Panos: (1) she felt guilty about her relationships with other men and used sex with Mr. Chappell to apologize for those other

relationships; and/or (2) she wanted to appease Mr. Chappell and, therefore, offered sex to him. Ex. 172 at 59, 58. Dr. Danton provided at least two explanations why Mr. Chappell's belief that Ms. Panos consented to sex on August 31 was reasonable.

165. Because trial counsel offered evidence that Mr. Chappell believed Ms. Panos consented to sex and because trial counsel offered evidence that Mr. Chappell's belief that Ms. Panos consented to sex was reasonable, the court would have given an instruction to the jury that reasonable belief in consent is a defense to sexual assault if trial counsel had requested such an instruction. Failure to request a reasonable belief in consent instruction was highly prejudicial to Mr. Chappell because it is likely that, if such an instruction had been given, at least one juror considering the evidence presented would have found that Mr. Chappell had a reasonable belief that Ms. Panos consented to sex and would not have found the sexual assault aggravator. Thus, Mr. Chappell would have been ineligible for the death penalty. Competent counsel would have requested the instruction. Failure to do so fell below objective standard of reasonableness.

6. Prejudice

166. From the outset, Mr. Chappell said that he had sex with Ms. Panos. He said that Ms. Panos met him as he entered the trailer where he was a legal resident and initiated sex. Ex. 169 at 74–75. He said that he stopped having sex with her without ejaculating because he thought she had been sexually involved with other men and that Ms. Panos then initiated oral sex. Id. at 76–77. The State argued that Mr. Chappell did not tell the truth about the sexual encounter and that he sexually assaulted Ms. Panos. "We know from the DNA that he had vaginal sex with Debbie and ejaculated." Ex. 176 at 72. The State further argued:

> The defendant actually offered a version of events that contradicts completely the physical evidence in the case, because of course according to him he never even ejaculated in her. Well, that doesn't match the evidence at all. So could he be being honest. Is it possible maybe he's

> describing something that didn't occur, didn't occur how he described it?

Id. at 138. The State's assertion that Mr. Chappell necessarily ejaculated because his DNA was found in a vaginal swab taken from Ms. Panos is patently false. Had trial counsel hired an expert to explain that sperm and genetic material could be deposited without ejaculation, the State would not have been able to argue that Mr. Chappell had been lying about the sex being consensual based on the DNA evidence. The State would also not have been able to use the evidence of DNA in the vaginal swab to impeach defense expert Dr. Grey, who testified that there was no physical evidence of sexual assault. Failure to hire such an expert left the jurors with the undisputed but incorrect idea that DNA evidence necessarily meant that Mr. Chappell was lying about the sex he had with Ms. Panos.

167. Trial counsel would also have been able to corroborate other portions of Mr. Chappell's testimony through effective cross-examination of State's witnesses, if they had interviewed those witnesses before the witnesses took the stand. Through such corroboration, defense counsel could have argued that if Mr. Chappell was telling the truth about some facts, he was similarly telling the truth about the sexual contact that he had with the victim on August 31, 1995. Failure to interview these witnesses again left the jury with the impression that Mr. Chappell was untruthful in his telling of the events leading up to and on August 31. Because the jury did not believe Mr. Chappell's version, they accepted the only other version they were presented, the State's, which included sexual assault.

168. Corroboration for Dr. Danton's testimony that Ms. Panos used sex to heal the relationship when it was broken would also have been gained through effective cross-examination of State's witnesses. Furthermore, effective cross-examination of Dr. Green would have used his own prior testimony and scientific research to discredit his assertion that the blunt force injuries that Ms. Panos sustained (presumably in the

course of a sexual assault) were 15–30 minutes before the stab wounds that ended her life.

169. Finally, failure to request a jury instruction that reasonable belief in consent was a defense to sexual assault meant that the one legal mechanism most likely to require a jury to find against sexual assault was not triggered. Mr. Chappell expressed his belief that the sex he had with Ms. Panos was consensual and Dr. Danton offered testimony to show why that belief was reasonable based upon past interactions with Ms. Panos and Ms. Panos's own motives. A reasonable belief in consent instruction would likely resulted in at least one juror finding that Mr. Chappell was not guilty of sexual assault and therefore not eligible for the death penalty.

D. Trial counsel were ineffective in failing to conduct an adequate voir dire

170. Under the Sixth Amendment, a criminal defendant is guaranteed the right to an impartial jury. In order to secure this right, defense counsel must conduct a voir dire sufficient to rehabilitate death-scrupled jurors. Here, counsel were ineffective because they failed to attempt to qualify three death-scrupled jurors who were struck for cause by the court.

171. For example, prospective juror Jackson, badge number 80, indicated in several responses to questions by the State that she would not consider the death penalty as a potential punishment. Ex. 184 at 73–75. The State challenged Ms. Jackson for cause. Trial counsel did not ask Ms. Jackson a single question to attempt to demonstrate that if instructed by the court to consider all four available penalties, she could consider all four, including death. Id. at 75. This was despite the fact that the court had not attempted to rehabilitate Ms. Jackson. See id. at 73–75.

172. Similarly, trial counsel failed to ask prospective juror Stio, badge number 92, any questions following the State's challenge for cause. Ex. 184 at 128–130. Ms. Stio said, "I think I could consider any of the three [penalties], but I don't think I could

consider the fourth [death]." Id. at 129. Because she used the phrase, "I think," Ms. Stio certainly should have been questioned further about whether she could follow the law and at least consider death. The court did not attempt to rehabilitate the witness, so trial counsel's failure meant a death-scrupled juror was never asked whether they could set aside personal beliefs to consider all available penalties.

173. Immediately following Ms. Stio's voir dire, prospective juror Cohen, badge number 93, was questioned. Ex. 184 at 130–131. Ms. Cohen expressed a moral belief that the death penalty was not a punishment she could give under any circumstance. Id. The court did not attempt to ferret out whether Ms. Cohen could set aside her personal beliefs and consider the legally available punishments. When the State concluded its brief questioning, trial counsel asked if the State had passed or challenged Ms. Cohen. Id. at 131. The State challenged, and trial counsel stated there would be no questions for the juror. Id. This suggests that trial counsel was deliberately not questioning jurors being challenged for cause based upon their reluctance to impose the death penalty. See also Ex. 184 at 144 (Juror Berry, badge number 100, challenged for cause by the State, and trial counsel asked no questions.).

174. Trial counsel's failure to attempt to rehabilitate these three death-scrupled jurors resulted in all three being excluded for cause. Had trial counsel attempted to rehabilitate the jurors, it is possible that the State's challenges for cause would have been denied, forcing the State to exclude these jurors with peremptory strikes or having death-scrupled jurors seated. Trial counsel's ineffectiveness resulted in a jury that was skewed in favor of the death penalty. Mr. Chappell should be afforded a new penalty hearing.

E. Trial counsel were ineffective for failing to protect Mr. Chappell's right to a fair hearing by raising appropriate objections

1. Trial counsel failed to object to cumulative victim impact evidence

175. When victim-impact evidence becomes "so unduly prejudicial that it renders [a] trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." Payne v. Tennessee, 501 U.S. 888, 825 (1991). At Mr. Chappell's penalty re-trial, the State had several of the victim's friends testify as to the impact that her death had on them. Defense counsel objected to victim-impact evidence elicited from non-family members. See, e.g., Ex. 170 at 61, Ex. 171 at 4, Ex. 172 at 4–6. Although it permitted impact evidence to be offered by friends of the victim, the court indicated that it would stop allowing victim-impact evidence if it became "overly cumulative." Ex. 172 at 6. Yet the court did not stop cumulative victim-impact evidence, and trial counsel failed to object.

176. On the morning of October 14, 2007, the State indicated that witness Mike Pollard could not be located and proposed that Mr. Pollard's testimony from Mr. Chappell's 1996 trial be read into the record. Ex. 170 at 67–68. After Mr. Pollard's testimony was read into the record, the court recessed for lunch. Id. at 91. Immediately upon returning to the courtroom, the State indicated that Mike Pollard had called their office and was now in town. Ex. 171 at 3. The State then indicated that they would like to have Mr. Pollard to make a victim impact statement. Id. at 4. On March 19, 2007, Mike Pollard was permitted to testify, despite having already had his previous testimony read into the record. Ex. 169 at 193–197. Defense counsel did not object.

177. Other friends were also permitted to testify regarding the impact of Ms. Panos's death: Michele Mancha, Lisa Larsen, Clair McGuire, and Dina Richardson (who was also permitted to testify as to victim impact on forty additional people employed by the Tucson Police Department where Ms. Panos had once worked.) Ex. 170 at 61-62, Ex. 171 at 41-48; Ex. 172 at 39; Ex. 169 at 189-196, 201-35.

178. Immediately following Mr. Pollard's second testimony, Carol Monson, who was an aunt of Ms. Panos, offered testimony regarding the impact of Ms. Panos's death on herself, her husband, and Ms. Panos's mother. Ex. 169 at 208–211. Ms. Monson then testified that other family members were unable to travel to Las Vegas to testify, family members who lived in Michigan and likely had not seen the victim in several years. Id. at 211. Ms. Monson was permitted to read letters from those family members into the record, letters that she had also read into the record at the 1996 trial. Id. at 212–13. Following the reading of the 1996 letters, Ms. Monson read letters that had been drafted by the same family members for the 2007 trial. Id. at 215. Next, Ms. Monson read a statement she had drafted in anticipation of her testimony. Id. at 217. Finally, Ms. Monson was asked how Ms. Panos's children were doing. Ms. Monson testified to the impact of Ms. Panos's death on at least seven people other than herself. The letters and statement that she read were largely duplicative. Yet the court did not step in and stop this cumulative victim-impact evidence from being offered by a single witness, nor did trial counsel object.

179. Despite the fact that Ms. Monson had testified to the impact that Ms. Panos's death had on her sister, Norma Penfield, Ms. Penfield testified directly after Ms. Monson's testimony concluded. See Ex. 169 at 222–23. She discussed much of what Ms. Monson had presented and once again testified to the impact that Ms. Panos's death had on Ms. Panos's children. See id. at 223–34. Just like Ms. Monson, Ms. Penfield was asked to read a statement she had prepared for the 2007 trial after she had already responded to questions on direct examination. Id. at 234. This statement reiterated much of what Ms. Penfield had stated in her testimony already and what Ms. Monson had offered in response to questions asked by the State and in the many letters and statements she read into the record. Still, trial counsel did not object.

180. In addition, trial counsel failed to object to victim testimony offering their opinions of the crime and Mr. Chappell. See Claim 12. Several witnesses improperly

characterized the crime as a "tragedy," 'great tragedy," "brutal and senseless," or a "horror story." Ex. 169 at 235, 219, 220, 216. This was in direct violation of Mr. Chappell's right to due process. See Claim 12.

181. Trial counsel's failure to preserve objections on the record meant not only that the cumulative and inappropriate victim-impact evidence continued to accrue in the minds of the jury uncontested, but also that Mr. Chappell would be harmed on direct appeal. Appellate counsel claimed that the district court erred when it permitted the State to introduce "excessive victim impact testimony." Ex. 7 at 18. Appellate counsel argued that the victim impact evidence exceeded that for which notice was provided. Id. Because no objection on the grounds of insufficient notice was preserved at trial, the standard of review on direct appeal was not abuse of discretion but, the more deferential and therefore more difficult to satisfy, plain error. Id. at 18–19. Defense counsel was ineffective for failing to object in order to keep out the cumulative victim-impact evidence at trial and in order to preserve the issue for appeal.

2. Trial counsel failed to object to prosecutorial misconduct

182. During closing arguments, counsel failed to object to repeated instances of improper argument by the prosecutor. Specifically, the State improperly disparaged Mr. Chappell's character, improperly warned the jurors against being deceived by Mr. Chappell, improperly disparaged Mr. Chappell's defense, made inflammatory arguments, improperly commented on Mr. Chappell's right to remain silent, improperly stated the role of mitigating circumstances, and made improper arguments based on justice and mercy. See Claim 16. These arguments were not only improper but were intended to inflame the passions of the jury. This misconduct, both singularly and cumulatively, violated Mr. Chappell's constitutional rights.

183. Trial counsel has a duty to object to inadmissible evidence or improper argument to establish a record reflecting adverse rulings by the court. See ABA Guidelines, Guideline 10.8, cmt. ("One of the most fundamental duties of an attorney

defending a capital case at trial is the preservation of any and all conceivable errors for each stage of appellate and post-conviction review") (internal citation omitted); ABA Standards for Criminal Justice, Defense Function, 4-7.1(d) (defense counsel "has a duty to have the record reflect adverse rulings").

184. The State improperly disparaged Mr. Chappell's character and his defense without drawing objection from defense counsel. See Estelle v. McGuire, 502 U.S. 62, 75 (1991) (petitioner is entitled to relief if evidence introduced at either the guilt or penalty trial renders his trial fundamentally unfair); Payne v. Tennessee, 501 U.S. 808, 825 (1991). Here, the State argued that Mr. Chappell "chose evil." Ex. 176 at 52, 81. The State further described Mr. Chappell as "a despicable human being," Id. at 45, criticized Mr. Chappell as having "an appalling perspective" on himself and on life, Id. at 58, and labeled the crime "so treacherous and so selfish and so evil there's truly no fixing what he did." Id. at 147. The State further disparaged Mr. Chappell by invoking the Holocaust and suggesting that Mr. Chappell's circumstances were less onerous and yet he chose to be evil when Holocaust victims instead chose to be decent. Id. at 64.

185. There was no objection from trial counsel to any of the State's references to Mr. Chappell as evil, despicable, and appalling; statements that Mr. Chappell abused those around him; or comparison to Holocaust victims. The State's improper argument regarding Mr. Chappell's character rendered the penalty hearing fundamentally unfair and deprived Mr. Chappell of the reliability of a proper sentencing phase. Failure to object constituted ineffective assistance.

186. Second, trial counsel failed to object when the State improperly warned jurors not to be deceived by Mr. Chappell. The State suggested that multiple persons had been "snowed" by Mr. Chappell, including one of the defense experts, and warned jurors not to be similarly "conned" by Mr. Chappell. These comments disparaged Mr. Chappell as a liar and his witnesses as highly gullible. The State intended to inflame

the jurors' passion and the put the jurors in the impermissible position of "us" against Mr. Chappell. Trial counsel were ineffective for failing to object.

187. Third, in both opening summation and closing argument, the State drew comparisons between the victim and Mr. Chappell that implied that Mr. Chappell should be executed because the victim was an asset to society and Mr. Chappell had less worth than the victim. For example, the State argued, "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." Ex. 176 at 62. Trial counsel were ineffective for failing to object.

188. Fourth, the State improperly commented on Mr. Chappell's constitutional right to remain silent. Trial counsel did object to the State reading in Mr. Chappell's testimony from the 1996 trial because the State commented on Mr. Chappell's previous assertion of his right to remain silent, but trial counsel failed to make a similar objection to closing arguments by the State that made similar comment. Specifically, the State said Mr. Chappell "got to sit and worry about himself and formulate the best spin on events, the best version." Ex. 176 at 146. The State was referring to both Mr. Chappell's behavior on the witness stand and to his interviews with experts who testified on his behalf. Commenting on Mr. Chappell's assertion of his right to remain silent violated his due process rights, and trial counsel was ineffective for failing to protect his rights through an objection.

189. Fifth, the State misstated the role of mitigating circumstances, saying that the mitigating circumstances presented by the defense did not excuse Mr. Chappell's crime. Specifically, the state said that "the fact that [Mr. Chappell] had this troubled up-bringing and he was in an environment that apparently a lot of people were doing drugs than (sic), would make his life more difficult. But it doesn't erase what he did on August 31st." Ex. 176 at 135. This placed an improper burden on the

defense to excuse the crime with mitigating circumstances. Trial counsel should have objected to this redefinition of the standard for mitigating circumstances. Failure to do so fell below an objective standard of reasonableness.

190. Sixth, the State made improper arguments based on justice and mercy. For example, the State told the jurors that the question is not whether they were merciful but rather "is [a life sentence] truly justice for what he did over the years?" Ex. 176 at 45. The State then described the pain the victim's family had endured and suggested that there was "no fixing what he did." Id. at 147. It was misconduct for the State to argue that mercy was not an appropriate consideration; it was misconduct for the State to argue that the only way to achieve justice for Ms. Panos and her family was a sentence of death. These statements were meant to inflame the passions of the jury such that they did not consider their legal duty to impose a punishment but rather reacted with emotion. Trial counsel should have objected.

191. Trial counsel's failure to object to the many instances of misconduct by the State during closing arguments meant the jury left to deliberate based upon inflamed passion and without regard for the appropriate legal standards by which they were to determine a punishment. Had counsel objected to each instance of misconduct at the outset, they would have limited the inflammatory statements heard by the jury and could have requested curative jury instructions on the proper standards by which the jury was to consider mitigating circumstances and mercy. Had this occurred, it is likely that at least one juror would have voted for a penalty less than death.

3. Trial counsel failed to object to highly suspect and prejudicial hearsay statements

192. As discussed in greater detail in Claim XX (Trial Court Error – Second Trial), multiple hearsay statements were admitted by the court at Mr. Chappell's second penalty hearing. These included statements by law enforcement and several of Ms. Panos's friends. Several witnesses testified to statements Ms. Panos had said Mr.

Chappell had made. See, e.g., Ex.170 at 40–67, Ex. 173 at 76–108. Double-hearsay statements are inherently unreliable and, under ordinary circumstances, would require each level of hearsay to be proved an exception to rules excluding hearsay statements from being used for the truth of the matter asserted. But trial counsel failed to object to any of the hearsay statements offered, not even those that were as good as rumor in terms of trustworthiness.

193. Most prejudicial to Mr. Chappell were statements by Ms. Panos's friends and co-workers that Mr. Chappell had verbally threatened to kill Ms. Panos on the day before her death. See, e.g., Exs. 170 at 57–58; 171 at 23. Witnesses said Ms. Panos told them that the threats were made at a court hearing to determine whether Mr. Chappell would be incarcerated. Id. The statements are particularly suspect because they were not heard by or repeated to any court personnel, and Ms. Panos did not testify at the hearing to any threats made to her by Mr. Chappell. See Thomas Lacy, Snafu in System Releases Suspect, Las Vegas Sun, September 6, 1995 at 7A.

194. Trial counsel should have objected to all of the hearsay statements made in court, particularly those that called for speculation and those which were so grossly unreliable as to infect the entire proceedings with unfairness. Trial counsel's failure to object fell below and objective standard of reasonableness and constituted ineffective assistance of counsel.

4. Trial counsel failed to object when the state improperly impeached a defense witness

195. Mr. Chappell called Fred Scott Dean as a mitigation witness at his second penalty hearing. See Ex. 169 at 263–301. Mr. Dean was important to the defense mitigation case because he had known Mr. Chappell since elementary school, and knew Ms. Panos and witnessed her relationship with Mr. Chappell, and especially because two key witnesses who were also friends with Mr. Chappell, James Ford and Ivri Marrell, were forced to return to Michigan before they were able to testify. See Ex. 169

at 264–65, 278–81, Ex. 176 at 6–7. On direct examination, Mr. Dean admitted that he had been incarcerated in the past for state and federal convictions for drug trafficking and drug possession. Id. at 282–83.

On cross-examination, the State elicited the following testimony from Mr. Dean:

> Q: How long were you prison for?
>
> A: 12 years.
>
> Q: That's a long time?
>
> A: Yes, sir.
>
> Q: What kind of charges?
>
> A: Like I said drug possession and the other one was interstate drug trafficking.
>
> Q: Were there other charges that were dismissed as part of your deal there?
>
> A: There was no pretty much deal. That was just -- it was pled to the lesser charge versus the charge that I was charged with, yes.
>
> Q: So you plead to a lesser charge?
>
> A: Yes.
>
> Q: And the lesser charge was --
>
> A: 12 to 30 -- well, it was 20 to 30 the judge sentenced me to the 12 to 30.
>
> Q: And that was a drug charge?
>
> A: Yes, sir.
>
> Q: What was the more serious charge that was reduced?
>
> A: I was trying to think of how they titled it, possession of drugs over 650 grams.
>
> Q: Was this cocaine?
>
> A: Yes, sir.

> Q: 650 grams is a lot of cocaine?
>
> A: Yes, sir.
>
> Q: So this was drug trafficking quantity?
>
> A: Yes, sir.
>
> Q: And the minimum sentence would have been a lot more severe if you adn't (sic) done the deal?
>
> A: When you say deal, what do you mean by that?
>
> Q: Taken the lesser plea?
>
> A: I would have been worse, yes sir.

Ex. 169 at 286–88.

196. Courts have been clear that impeachment with a felony conviction cannot go into the facts in details of the conviction. Here, Mr. Dean freely admitted on direct examination that he had prior drug convictions. On cross-examination the prosecutor went into significant details, which was highly improper. See Jacobs v. State, 532 P.2d 1034, 1036 (Nev. 1975) (inquiry into credibility of a witness may be attacked with evidence that a witness had a prior conviction, but it was error to allow questioning concerning actual term that was imposed.); accord Houston v. Schomig, 533 F.3d 1076, 1087 (9th Cir. 2008) (Smith, J., dissenting); Gora v. Costa, 971 F.2d 1325, 1330 (7th Cir. 1992) (Fed. R. of Evid. § 690(a) permits evidence of a prior felony to be used to impeach a witness, but "all that is needed to serve the purpose of challenging the witness's veracity is the elicitation of the crime charged, the date, and the disposition. And in fact we held that it is error to elicit any further information for impeachment purposes.").

197. The prosecutor's questions exceeded what was permissible by law for impeachment purposes, but trial counsel failed to object. This failure constitutes ineffective assistance of counsel.

5. Miscellaneous failures to object

198. In addition to the deficiencies addressed above, trial counsel also failed to make the following objections: Counsel failed to object to the admission of the 1995 and 1996 PSI reports on the grounds that: (1) they were confidential pursuant to statute and should not have been admitted; (2) the reports included prejudicial evidence about Mr. Chappell's prior arrests for which he was not convicted; and (3) included incorrect statements of fact and a prejudicial statement by Panos's mother. See Claim Ten. Counsel failed to request the court instruct the jury that the State had the burden to prove beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. See Claim Five. Trial counsel failed to object to overly gruesome autopsy photographs that were presented at the penalty re-trial. See Ex. 169 at 177-85 (referencing State trial exs. 38-43, 45, 47); Exs. 77-82, 84, 86; see also Ex. 211 ¶¶3, 7, 10, 13, 16, 22. See Claim Seventeen.

F. Conclusion

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

CLAIM FOUR (SEXUAL ASSAULT AGGRAVATOR)

Mr. Chappell's sentence of death is invalid under the federal constitutional guarantees of due process, confrontation, effective counsel, equal protection, trial before an impartial jury, freedom from cruel and unusual punishment, and a reliable sentence because the sexual assault aggravator was not proven by sufficient evidence, and is invalid as applied to Mr. Chappell. U.S. Const. amends. V, VI, VIII, XIV; Nev. Const. art. 1, §§ 1, 6, 8, and art. 4 § 21.

SUPPORTING FACTS

1. Mr. Chappell was charged with first degree murder under theories of (1) premeditated and deliberate murder and (2) felony murder. Ex. 24. The State's felony murder theory was based upon underlying felony offenses of robbery and burglary. Id. at 3. When the State filed its notice of intention to seek the death penalty, it included the aggravating circumstances that the murder was committed while the person was engaged in the commission of robbery, burglary, and sexual assault. Ex. 25.

2. At the guilt phase, the State argued that Mr. Chappell was guilty of felony murder under a burglary theory if he entered the trailer with the "intentions of assault or battery or robbery or murder or any felony." Ex. 142 at 88. This was reiterated by the State when it stated that there need not be a forced entry as long as the entry "was made with a specific intent to commit larceny or assault or battery or robbery or murder." Id. at 92. The State made all of the alleged offenses—burglary, robbery, sexual assault, and murder—part of one course of conduct when it argued that any of the acts outside of the burglary could have been the basis for the intent of the burglary. The jury convicted Mr. Chappell of first degree murder without specifying upon which theory it relied. Ex. 41.

3. During the first penalty hearing, the State argued that it had proven all three felony murder aggravators—burglary, robbery, and sexual assault—as they were all part of the same course of conduct:

> I submit to you that the State has proven beyond a reasonable doubt that he not only murdered her, he raped her. He not only murdered her, he robbed her. He not only committed murder, he broke and entered and he committed burglary and the defense says it's all the same course of conduct.

Ex. 267 at 49. The jury found all three felony-murder aggravating circumstances. Ex. 30 at 3–4.[35]

4. On direct appeal, the Nevada Supreme Court found there was sufficient evidence to support all three felony-murder aggravating factors. Ex. 2 at 9. The Nevada Supreme Court's holding that "the evidence support[ed] the jury's finding of sexual assault as an aggravating circumstance", Ex 2 at 9, necessarily involved a finding that the murder was committed during the commission of a sexual assault. See Ex. 268 (instruction 9).

5. During Mr. Chappell's first state post-conviction proceeding, the State continued to argue that the sexual assault, burglary, robbery, and murder all occurred during a single course of conduct: "it was a horrific manner of death and it was coupled with a sexual assault of that same victim. And the aggravator of sexual assault was found by the jury as well as during the course of robbery and burglary." Ex. 254 at 3.

6. While Mr. Chappell's state post-conviction proceeding was pending, the Nevada Supreme Court held, in McConnell v. State, 102 P.3d 606, 624 (Nev. 2004), that it is "impermissible under the United States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony

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[35] A fourth aggravating circumstance—that the murder involved torture or depravity of mind—was also alleged and found by the jury but was struck by the Nevada Supreme Court on direct review due to insufficiency of the evidence. Ex. 2 at 5.

murder is predicated." See McConnell, 102 P.3d at 621 (distinguishing Nevada's statute from the statute found constitutional in Lowenfield v. Phelps, 484 U.S. 231, 241 (1988)). The McConnell court further held that the State was prohibited from "selecting among multiple felonies that occur during an indivisible course of conduct having one principal criminal purpose and using one to establish felony murder and another to support an aggravating circumstance." Id. at 624–25. (internal quotation marks omitted).

7. On the basis of its holding in McConnell, the Nevada Supreme Court struck the robbery and burglary aggravating circumstances in Mr. Chappell's case, but held that the sexual assault aggravator remained valid. Ex. 5 at 14. Contrary to its holding on direct appeal that there was sufficient evidence that the murder was committed in the perpetration of all three felonies—burglary, robbery, and sexual assault—the court held on post-conviction that Mr. Chappell sexually assaulted Ms. Panos "with a criminal purpose distinct from the burglary and robbery." Ex. 5 at 14. The court did not identify what that "distinct" criminal purpose was.

8. At the penalty retrial in 2007, the State argued, for the first time, that the sexual assault occurred at least fifteen to thirty minutes prior to the murder, based on the medical examiner's newly minted theory that the bruising and abrasions—which the State claimed occurred during the sexual assault—were inflicted at least fifteen to thirty minutes prior to the fatal stab wounds. Ex. 176 at 73. In response to defense counsel's argument that, if the sexual assault occurred thirty minutes prior to the fatal stab wounds, then the murder was not committed during the commission of a sexual assault, the State reaffirmed its argument that all of the events of August 31, 1995, were part of one indivisible course of action. "But of course you know that on August 31st of 1995, there was a single criminal transaction. He burglarized her house when he climbed through that window, and from then he was angry at her and the

fight was on."[36] Ex. 176 at 140. The jury found that the State had proven the sexual assault aggravator and sentenced Mr. Chappell to death. See Ex. 25 at 3.

9. On direct appeal from the second penalty hearing, the Nevada Supreme Court again held that Mr. Chappell sexually assaulted Ms. Panos "with a criminal purpose distinct from the burglary and robbery." Ex. 7 at 6. In finding sufficient evidence to support the sexual assault aggravator, the Nevada Supreme Court relied on the State's argument that "Panos was beaten approximately 15 to 30 minutes prior to being stabbed to death". Ex. 7 at 4, but it did not address the State's assertion before the jury that the sexual assault was part of "a single criminal transaction." Cf., Valerio v. Crawford, 306 F.3d 742, 759-60 (9th Cir. 2002) (en banc) (noting Nevada Supreme Court's failing to recognize that "the prosecutor disavowed any conclusion that there had been torture, or discuss the evidence (or lack thereof) supporting a conclusion that Valero intended to torture the victim."). Finding the sexual assault aggravator both supported by the evidence and valid under McConnell, the court affirmed Mr. Chappell's death sentence. Id.

10. The State of Nevada should be estopped from carrying out Mr. Chappell's death sentence because the State and the Nevada Supreme Court have relied on inconsistent theories to support the sole aggravating circumstance, and both theories are invalid. If the Nevada Supreme Court was correct that the evidence demonstrated that the murder was committed during the commission of a sexual assault, then aggravator is invalid under McConnell and Lowenfield. If the Nevada Supreme Court was correct that the sexual assault was committed with a "distinct" purpose from the burglary and robbery—although there is no evidence in the record showing such a "distinct" purpose, and the Nevada Supreme Court has never identified it—then the

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[36] Because the State was aware of both McConnell and that the sexual assault had to be considered independent of the burglary and robbery to remain valid, arguing that the events of August 31, 1995, were part of a single criminal transaction constituted prosecutorial misconduct. See Claim Sixteen.

murder was not committed during the commission of a sexual assault. Either way, Mr. Chappell's death sentence is invalid and must be reversed.

A. The evidence presented was insufficient to prove the sexual assault aggravating circumstance

11. To establish the sexual assault aggravator, the State was required to prove, beyond a reasonable doubt, that Mr. Chappell killed Ms. Panos "during the perpetration of a sexual assault." Ex. 40 at 8. Because Mr. Chappell was never convicted of sexual assault, proving the aggravator required the State to prove, for the first time during the penalty hearing, that Mr. Chappell was guilty of sexual assault. At the time, sexual assault was defined as follows:

> A person who subjects another person to sexual penetration, or who forces another person to make a sexual penetration on himself or another, or on a beast, 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, is guilty of sexual assault.

NRS 200.366(1) (1995). A reasonable mistaken belief that the victim consented is a defense to a charge of sexual assault. See Carter v. State, 121 P.3d 592, 596 (Nev. 2005) ("[K]nowledge of lack of consent is an element of sexual assault.").

12. Here, the State failed to prove either that Mr. Chappell was guilty of sexual assault, or, even if he was, that he killed Ms. Panos during the perpetration of a sexual assault.

1. The State failed to prove that Mr. Chappell sexually assaulted Ms. Panos

13. Mr. Chappell's testimony from the first trial, which was presented by the State during the penalty re-trial, was that he had consensual intercourse with Ms. Panos prior to her death on August 31, 1995. Ex. 137 at 48–50.

14. Evidence presented during the penalty phase was consistent with this testimony. Defense expert Todd Cameron Grey, M.D., who was chief medical examiner for the state of Utah testified that, upon review of the autopsy report and photographs

of Ms. Panos's body, he found no physical evidence that would support sexual assault during the course of the homicide. Ex. 173 at 9. Other injuries that would indicate someone was trying to gain access to the vagina or anus, such as scratches on the inner surfaces of the thigh or something that indicated the buttocks had been pulled apart, were also not evident on Ms. Panos. Id. Sheldon Green, M.D., who was the chief medical examiner for Clark County, Nevada in 1995 and performed the autopsy on Ms. Panos, testified that he had examined Ms. Panos's reproductive organs both externally and internally and saw no injury to those. Ex. 169 at 169.

15. Additionally, Mr. Chappell and Ms. Panos had been a couple for ten years and had three children together. In fact, Ms. Panos had been pregnant six times in the ten years, suggesting that the couple had engaged in consensual sex throughout their relationship. Ex. 172 at 95. There were times when the couple separated, such as when Ms. Panos moved from Lansing, Michigan to Tucson, Arizona in 1988, see, e.g., Ex. 169 at 48, but the couple always reunited, see id. at 50, 53–54. This reunion was often initiated by Ms. Panos. For example, at one point when Mr. Chappell had left Ms. Panos in Tucson and moved back to Lansing, Ms. Panos called him and asked him to return to Arizona and sent him money to return to her. Ex. 169 at 262–63. Testimony of at least one of Ms. Panos's friends confirmed that Mr. Chappell and Ms. Panos had reconciled following disputes. See, e.g. Ex. 171 at 13–14. Additionally, evidence was presented that Ms. Panos was aware that Mr. Chappell had been released from custody on the day of her death and that she opted to return home to her trailer alone rather than wait a few minutes to allow a friend to accompany her, suggesting that she may have wanted to reunite with Mr. Chappell unaccompanied. Ex. 171 at 86–87.

16. More importantly, the State failed to prove that Mr. Chappell knew that his sexual encounter with Ms. Panos was not consensual. Given that Mr. Chappell and Ms. Panos had been together for so long, and had reunited so many times, Mr. Chappell could have had a reasonably mistaken belief that she consented. This is particularly

true in light of Mr. Chappell's low IQ and psychological dependence upon Ms. Panos. A person with Mr. Chappell's limited cognitive abilities, and extreme fixation on the victim, could have reasonably mistaken Ms. Panos's acquiescence in the sexual contact as consent.

17. The State's decision not to charge Mr. Chappell with sexual assault suggests that the State itself did not believe it had sufficient evidence to prove Mr. Chappell guilty of sexual assault beyond a reasonable doubt. Given both the lack of physical evidence of a sexual assault and the testimony regarding Ms. Panos's behavior, the State failed to establish beyond a reasonable doubt that Ms. Panos did not consent to sexual contact with Mr. Chappell, or that Mr. Chappell knew she did not consent.

2. The State failed to prove that the killing was committed during the perpetration of a sexual assault

18. Ms. Panos died from multiple stab wounds. It was uncontested that Ms. Panos was fully dressed at the time she was stabbed. Photographs at the scene show, "She is completely clothed. She has a top on. She has her pants on." Ex. 173 at 11. Furthermore, a stab wound in the right groin area penetrated Ms. Panos's pants and underpants. The "injury to the clothing is directly over an area of stabbing injury on the body . . . indicating that the pants were worn again in the conventional fashion . . . They were present, pulled up around the waist when the stab wound was inflicted in the groin region." Id. At a minimum, Ms. Panos dressed herself after sexual contact with Mr. Chappell. It is impossible to conclude that the killing occurred during the commission of a sexual assault where the victim was fully clothed at the time of the killing and the allegations of sexual assault are based upon vaginal intercourse.

19. Testimony offered at the penalty hearing further suggests that, shortly before her death, Ms. Panos made and received phone calls to and from her children's daycare center, arranged to pick up her children, and was in fact preparing to pick up

her children when an altercation between Mr. Chappell over a love letter from another man led to her death. Ex. 171 at 96, 101; Ex. 169 at 81–82. In fact, pieces of a torn letter were found strewn around Ms. Panos's body, supporting Mr. Chappell's testimony that he snapped when he read a letter from another man and that is what lead to Ms. Panos's death, an argument the State adopted in its first post-conviction briefing. Ex. 174 at 108. Thus, it is clear that an appreciable amount of time passed between the sexual contact and the killing.

20. More importantly, the State's theory at the penalty retrial was that Mr. Chappell beat Ms. Panos in order to force her into sexual contact with him, thereby leaving bruises and abrasions on her, and that he did not kill her until a minimum of fifteen to thirty minutes later. The State argued that Ms. Panos was beaten "15 minutes or more before the fatal wounds are given to her neck. Why two episodes of physical violence against her. Because there's compulsion." Ex. 176 at 73. "If we didn't know anything else about all of the physical evidence and his lies about how the rape occurred, you'd know that this is a sexual assault that occurred here. We look at the injuries to the victim. See all of that bruising, abrasions around the head and chest area. . . . He's got time to think about this, ladies and gentlemen, before those fatal shots to her neck to take her life." Ex 176 at 77-78. The State's argument that a minimum of fifteen minutes elapsed between the sexual assault and fatal wounds completely undermines its argument that the murder occurred during the perpetration of a sexual assault.

21. On appeal from the partial grant of relief during the first state post-conviction proceeding, the State relied on Mr. Chappell's testimony that he formed the intent to kill after he had sex with Ms. Panos in order to argue that the murder was premeditated. See Ex. 247 at 29 ("[T]here was overwhelming evidence of premeditation and deliberation in this case. Defendant himself testified that after breaking into the victim's home and having sex with her, he discovered a letter written to the victim by

another man. Defendant testified that after discovering this letter in the car, he dragged the victim back into the trailer and stabbed her numerous times."). If Mr. Chappell formed the intent to kill after the sexual encounter, then the murder could not have occurred during the perpetration of a sexual assault. Cf. Nay v. State, 167 P.3d 430, 435 (Nev. 2007) (intent to commit felony that arose after homicide inconsistent with felony murder).

22. More importantly, the Nevada Supreme Court has twice expressly held that Mr. Chappell committed the sexual assault "with a criminal purpose distinct from the burglary and robbery." Ex. 5 at 14; Ex. 7 at 6. For Mr. Chappell to be guilty of felony murder, he had to have killed the victim during the perpetration of a burglary or robbery. For the sexual assault aggravator to be valid, Mr. Chappell had to have committed the murder during the perpetration of a sexual assault. If the sexual assault was committed with a distinct purpose from the burglary and robbery, then either Mr. Chappell isn't guilty of felony murder, or the sexual assault aggravator does not apply. Based on Mr. Chappell's conviction for first-degree murder, the Nevada Supreme Court's holding that the sexual assault had a distinct purpose from the felonies that could have formed the basis of the first-degree murder conviction necessarily means the murder could not have been committed in the perpetration of a sexual assault. If the murder was committed during the course of the burglary or robbery but the sexual assault was committed with a distinct criminal purpose from the burglary and robbery, then the sexual assault could not have been committed in the course of a sexual assault.

23. The State failed to prove beyond a reasonable doubt that the murder was committed during the perpetration of a sexual assault and has argued to the contrary in previous pleadings. Because there is insufficient evidence to support a finding of the sole aggravating circumstance, Mr. Chappell's death sentence must be vacated.

B. The sexual assault aggravating circumstance is invalid because it fails to perform the required narrowing function under the Eighth Amendment

24. Contrary to the Nevada Supreme Court's holding that the sexual assault was committed with a distinct purpose from the burglary and robbery, the State argued at both phases of trial that Mr. Chappell acted in a single course of conduct with one purpose. At the penalty hearing in 2007, the State argued that all of the events of August 31, 1995, were part of one indivisible course of action. "But of course you know that on August 31st of 1995, there was a single criminal transaction. He burglarized her house when he climbed through that window, and from then he was angry at her and the fight was on." Ex. 176 at 140. [37]

25. At the guilt phase in 1996, the State made all of the alleged offenses—burglary, robbery, sexual assault, and murder—part of one course of conduct when it argued that any of the acts outside of the burglary could have been the basis for the intent of the burglary. Ex. 142 at 88, 92.

26. If the sexual assault, burglary, robbery, and murder were all part of a single course of conduct, then the State cannot base Mr. Chappell's death sentence on the sexual assault under McConnell. 102 P.3d at 624–25 (prohibiting the State from "selecting among multiple felonies that occur during an indivisible course of conduct having one principle criminal purpose and using one to establish felony murder and another to support an aggravating circumstance.").

27. Because the State made the sexual assault a potential basis for the burglary, it must be excluded as an aggravating circumstance for the same reason that the burglary must be excluded. Just as the jury did not distinguish in the verdict forms whether it found Mr. Chappell guilty of first-degree murder based on a theory of

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[37] Because the State was aware of both McConnell and that the sexual assault had to be considered independent of the burglary and robbery to remain valid, arguing that the events of August 31, 1995, were part of a single criminal transaction constituted prosecutorial misconduct. See Claim Sixteen.

premeditated murder or on a theory of felony-murder, the jury did not indicate whether it found Mr. Chappell guilty of felony murder based on burglary or robbery, or whether it convicted him of burglary based upon the felonious intent to commit robbery, murder, or sexual assault. Ex. 143 at 3. The sexual assault cannot be excluded as the basis of a felony murder conviction, therefore, it is invalid under McConnell and Lowenfield.

28. Alternatively, the State's decision to proceed with the sexual assault aggravator after having obtained a first-degree murder conviction against Mr. Chappell on a possible theory that Mr. Chappell killed Ms. Panos during the course of a burglary (where one of the felonies he intended to commit when he entered the trailer was sexual assault), amounted to unconstitutional splitting of felonies under McConnell. While it is true that the State did not know what McConnell would eventually hold when it prosecuted Mr. Chappell for felony murder, it knew at the time of the penalty re-trial what it had argued at the guilt phase. Because the State argued that the sexual assault could have formed the basis of the burglary, which in turn could have formed the basis of felony murder, the State committed misconduct in proceeding with the sexual assault aggravator.

C. Conclusion

29. The State of Nevada and the Nevada Supreme Court have systematically cheated Mr. Chappell out of his Eighth Amendment rights. Even assuming a sexual assault occurred, the State's argument that it occurred 30 minutes prior to the murder, along with the Nevada Supreme Court's holding that the sexual assault had a distinct purpose from the burglary and robbery, demonstrate that the murder did not occur during the commission of a sexual assault. On the other hand, if the State was correct that the sexual assault, burglary, robbery, and murder were part of a single course of conduct, and that Mr. Chappell is guilt of a felony murder based on any of those underlying felonies, then the sexual assault aggravator failed to perform the required

narrowing function under the Eighth Amendment and must be stricken. Either way, the sexual assault aggravator is invalid.

30. The State cannot demonstrate that this error was harmless beyond a reasonable doubt. Chapman, 386 U.S. at 24.

CLAIM FIVE (PENALTY PHASE JURY INSTRUCTIONS)

Mr. Chappell's sentence of death is invalid under the federal constitutional guarantees of the right due process, confrontation, effective counsel, equal protection, trial before an impartial jury, freedom from cruel and unusual punishment, and a reliable sentence because the jury was not properly instructed at the penalty phase retrial. U.S. Const. amends. V, VI, VIII, XIV; Nev. Const. art. 1, §§ 1, 6, 8, and art. 4 § 21.

SUPPORTING FACTS

A. Requirement to find mitigating circumstances did not outweigh aggravating circumstances beyond a reasonable doubt

1. Mr. Chappell's death sentence is invalid because the jury was not instructed that it was required to find that mitigating circumstances did not outweigh aggravating circumstances beyond a reasonable doubt. Clearly established federal law holds that any fact not found in the guilt phase which operates to increase the penalty imposed above the statutory maximum must be submitted to the jury and proven beyond a reasonable doubt. See Ring v. Arizona, 536 U.S. 584, 608, n. 6 (2002).

2. Under Nevada law, a death sentence cannot be considered by a jury as a possible punishment for a capital defendant until that jury first makes two distinct eligibility determinations: (1) that one or more statutorily-defined aggravating circumstance(s) exist; and (2) that no mitigating circumstances are sufficient to outweigh the aggravating circumstances found. See Nev. Rev. Stat. 175.554, 200.030.

3. At the time of Mr. Chappell's sentencing hearing in 2007, Nevada law held that both the finding of the aggravating circumstance, and the finding that no mitigating circumstances outweighed the aggravating circumstance, were fact findings that needed to be made by the jury beyond a reasonable doubt. See, e.g., Johnson v. State, 59 P.3d 450, 460 (Nev. 2002) ("This second finding regarding mitigating circumstances is necessary to authorize the death penalty in Nevada, and we conclude

that it is in part a factual determination, not merely discretionary weighing."); Hollaway v. Nevada, 6 P.3d 987, 996 (Nev. 2000) ("Under Nevada's capital sentencing scheme, two things are necessary before a defendant is eligible for death: the jury must find unanimously and beyond a reasonable doubt that at least one enumerated aggravating circumstance exists, and each juror must individually consider the mitigating evidence and determine that any mitigating circumstances do not outweigh the aggravating.") (citing Geary v. State, 952 P.2d 431, 433 (Nev. 1988)).

4. After Mr. Chappell's penalty hearing, the Nevada Supreme Court held that "the weighing of aggravating and mitigating circumstances is not a fact-finding endeavor," and need not, therefore, be proven beyond a reasonable doubt. Nunnery v. State, 263 P.3d 235, 253 (Nev. 2011). Because Nunnery was decided after Mr. Chappell's conviction and sentence were final, it does not apply to him, and the law at the time, as described above, held that the weighing process was a factual finding. Even assuming Nunnery applied to Mr. Chappell, it is inconsistent with the U.S. Supreme Court's holding in Ring that any finding necessary to make a defendant eligible for the death sentence must be made by a jury beyond a reasonable doubt. 536 U.S. at 609; see also Hurst v. Florida, 136 S. Ct. 616, 622 (2016) (invalidating as unconstitutional Florida's death penalty scheme, which required the trial court to find "the facts ... [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.").

5. Mr. Chappell's penalty phase jury was instructed that it could "consider a sentence of death only if: (1) the jurors unanimously find at least one aggravating circumstance has been established beyond a reasonable doubt and (2) the jurors unanimously find that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." Ex. 40 at 6 (Instruction No. 6). The instructions did not tell the jury what standard it was to use in its determination that the mitigating circumstances did not outweigh the aggravating circumstance.

6. Because any fact which exposes a defendant to a greater punishment than the prescribed statutory maximum must be submitted to a jury, it must also be proved by the State and found by a jury beyond a reasonable doubt. See Apprendi v. New Jersey, 530 U.S. 466, 483 (2000); see also B. Stevenson, The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing, 54 Ala. L. Rev. 1091, 1126–27, 1129 n. 214 (2003).

7. An error related to burden of proof is structural, so Mr. Chappell's sentence must be reversed without a prejudice analysis. Sullivan v. Louisiana, 508 U.S. 275, 281–82 (1993). In the alternative, Mr. Chappell can demonstrate prejudice because the jury found seven mitigating circumstances and only one aggravating circumstance, which suggests that the State only prevailed because the jury was unaware of the State's burden to prove the aggravating circumstances were not outweighed beyond a reasonable doubt. Had the jury been properly instructed, it is reasonably likely that the jury would not have found Mr. Chappell death-eligible and would therefore have selected one of the sentences other than death.

B. The court's instruction at the penalty phase as to reasonable doubt was in error

8. The penalty phase reasonable doubt instruction (Ex. 40 at 15: Penalty Phase Instruction No. 15) is infirm for the same reason as discussed in Claim Two, subsection (F), ante.

C. The penalty phase jury instruction which required jury unanimity was unconstitutional

9. At the penalty phase of Mr. Chappell's trial, the jury was given the following jury instruction regarding the weighing of aggravating and mitigating circumstances:

> A mitigating circumstance itself need not be agreed to unanimously; that is, any juror can find a mitigating circumstance without the agreement of any other juror or jurors. The entire jury must agree unanimously, however, as to whether the aggravating circumstances outweigh the mitigating circumstances.

Ex. 40 at 6 (Penalty Phase Instruction No. 6).

10. The penalty phase jury instruction given in Mr. Chappell's trial incorrectly informed the jury that they had to be unanimous to prevent a finding that the aggravating circumstances outweighed the mitigation. A rational jury would have understood the penalty phase instruction to require not only that aggravation must outweigh mitigation, but also that the jury had to be unanimous that mitigation outweighs aggravation. The instruction therefore prevented each individual juror from giving effect to the mitigation evidence in the process of weighing it against the aggravating circumstances.

D. The court's anti-sympathy instruction was unduly prejudicial

11. The prejudice from the afore-mentioned invalid penalty phase instruction was exacerbated by the anti-sympathy instruction that was given to the jury. That instruction stated: "A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law." Ex. 40 at 20 (Penalty Phase Instruction No. 20).

12. By forbidding the sentencer from taking sympathy into account, this language on its face precluded the jury from considering evidence concerning Mr. Chappell's character and background, thus effectively negating the constitutional mandate that all mitigating evidence be considered. A reasonable likelihood accordingly exists that this instruction denied Mr. Chappell the individualized sentencing determination that the state and federal constitutions require.

13. The flaw in this instruction is that it did not preclude the jury's consideration of "mere sympathy"—that is, the sort of sympathy that would be totally divorced from the evidence adduced during the sentencing phase—but rather precluded consideration of all sympathy, including any sympathy warranted by the evidence. Because the jury in this case was told not to consider any sympathy—rather than "mere" sympathy—it is reasonably likely that the jury at Mr. Chappell's trial

understood that when making a moral judgment about his culpability, it was forbidden to take into account any evidence that evoked a sympathetic response.

14. The giving of the unconstitutional "anti-sympathy" instruction substantially and injuriously affected the process to such an extent as to render Mr. Chappell's sentence fundamentally unfair and unconstitutional.

E. Singly and cumulatively the jury instructions rendered Mr. Chappell's trial fundamentally unfair

15. The giving of the unconstitutional instructions affected the process to such an extent as to render Mr. Chappell's conviction and sentence fundamentally unfair and unconstitutional. The State cannot demonstrate that this error was harmless beyond a reasonable doubt. Chapman, 386 U.S. at 24.

CLAIM SIX (BATSON GUILT PHASE)

Mr. Chappell's conviction is invalid under federal constitutional guarantees of due process, a fair trial, a fair and impartial jury, and a jury of his peers, because the State engaged in purposeful discrimination by using peremptory strikes to remove both African-American venire members at Mr. Chappell's first trial. U.S. Const. Amends. V, VI, VIII, XIV; Nev. Const. art. 1, §§ 1, 6, 8, and art. 4 § 21.

SUPPORTING FACTS

1. From a qualified panel of thirty-six potential jurors, the State exercised peremptory challenges to strike the only two African-Americans on the basis of their race, in violation of clearly established Supreme Court authority. Comparative juror analysis reveals that the State's explanations for striking these two jurors were pretextual, and offered only to conceal the State's true, discriminatory purpose.

A. Clearly established federal law prohibits the State from exercising peremptory challenges in a discriminatory manner

2. The Fourteenth Amendment of the United States Constitution prohibits exclusion by peremptory challenge of potential jurors because of their race. Batson v. Kentucky, 476 U.S. 79, 89 (1986); Currie v. McDowell, __ F.3d __, 2016 WL 3192396, *2 (9th Cir. June 8, 2016). Under the Equal Protection Clause, a defendant has the right "to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria," Batson, 476 U.S. at 86–87, in part because discriminatory selection "undermine[s] public confidence in the fairness of our system of justice." Id. at 87.

3. An analysis of whether the State's removal of a juror is unconstitutional under Batson entails a three-step inquiry. First, "the defendant must make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." Currie, 2016 WL 3192396, at *2 (quoting Johnson v. California, 545 U.S. 162, 168 (2005)). Next, if the prima facie case is made out, "the state must offer permissible race-neutral justifications for the strike." Id. (citation and

internal quotations omitted). Finally, "the trial court must decide whether, given all of the relevant facts, the defendant has proven purposeful discrimination." Id. At the third step, the defendant "has the burden of proving purposeful discrimination by a preponderance of the evidence." Id. The defendant need not prove that "all of the prosecutor's race-neutral reasons were pretextual, or even that the racial motivation was 'determinative[,]'" id. (quoting Snyder v. Louisiana, 552 U.S. 472, 485 (2008)), but only that "'race was a substantial motivating factor' in the prosecution's use of the peremptory strike." Id. (quoting Cook v. LaMarque, 593 F.3d 810, 815 (9th Cir. 2010)).

B. Mr. Chappell's right to a fair trial was violated because the trial court permitted the State to remove all African-American prospective jurors

4. Voir dire in Mr. Chappell's first trial began on October 7, 1996, when the first venire panel of sixty-nine potential jurors was sworn in, (the potential jurors having previously filled out an eight-page questionnaire),[38] and questioning commenced. Ex. 111 at 42. The court addressed questions to the entire group, and jurors were excused for hardship, objections to the death penalty, and other reasons, or were placed at the end of the list, according to the court's discretion. Id. at 42–78; Ex. 129 at 2–22; Ex. 131 at 2–44. After this process, the panelists were questioned individually by the court, the State, and the defense. Challenges for cause were made and jurors were either removed or passed for cause. Eventually, thirty-six jurors were passed for cause.[39] Ex. 129 at 22–184; Ex. 130 at 4 – 125; Ex. 131 at 44–81].

5. Eight alternate jurors were then selected by drawing numbers out of a cup. Ex. 131 at 82–83. Next, regular jurors and alternates were struck from the panel

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[38] 136 juror questionnaires survive from this time; of the 131 potential jurors who indicated their race, 14 identified as African American (10.7%), 6 as Asian or Indian (4.6%), 7 as Hispanic (5.3%), and 104 as white (79.4%).

[39] Of these thirty-six potential jurors, only four identified as members of racial minority groups (11.1%).

using peremptory challenges, until the desired number of jurors[40] remained. Id. at 90. This portion of jury selection occurred off the record. See id. The resulting jury consisted of seven white males and five white females, with four alternates, three of whom were white and the fourth Hispanic. Id. at 95–96. The State had exercised its peremptory challenges to exclude both of the African-American members who had been part of the original thirty-six: prospective juror Bourne, #427, and prospective juror Marshall, #493. Id. at 90.

6. Defense counsel immediately requested a Batson hearing, arguing that "[t]he State has used peremptory challenges to eliminate all blacks from the jury. We are now faced with an all-white jury panel and we object to that." Ex. 131 at 90. This was sufficient to satisfy the first prong of Batson. The State argued initially that "we have had a substantial representation on the entire panel of members of the black race." Id. at 91. The court offered, on its own, that several African-American prospective jurors had been removed already, "because of their beliefs about the death penalty" and that "their removal . . . was agreed to by the defense." Id. Next, the State offered its race-neutral justifications, which were essentially the same for both jurors, that "both of these jurors were extremely equivocal regarding capital punishment." Id. The State offered more specific reasons for challenging Ms. Bourne, and afterwards the court accepted the State's proffer. Id. at 92. Next the State offered specific reasons for challenging Ms. Marshall and then the court asked for defense counsel's arguments, who stressed that Ms. Marshall had been rehabilitated. Id. at 92–94. The court then found that the peremptory challenge as to Ms. Marshall was race-neutral. Id. at 94.

7. Having determined that the State's proffered reasons were race-neutral, id. at 92, 94–95, the trial commenced without the court making a finding as to the third

[40] Sixteen—twelve regular jury members and four alternates.

of prong Batson. Mr. Chappell was eventually convicted and sentenced to death by an all-white jury. See also Ex. 134. at 4-8.

C. Comparative juror analysis reveals that the State's race-neutral justifications were pretextual

8. Purposeful discrimination at Batson's third step may be shown through comparative juror analysis, which involves comparing African-American panelists who were struck to white panelists who were acceptable to the State. "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[.]" Miller-El v. Dretke, 545 U.S. 231, 241 (2005) ("Miller-El II"); Lewis v. Lewis, 321 F.3d 824, 830–31 (9th Cir. 2003) ("[A] comparative analysis of the struck juror with empaneled jurors 'is a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination.'"). Because it is very difficult to prove intentional discrimination through direct evidence, comparative juror analysis allows a court to infer discriminatory intent from differential treatment of minority versus non-minority potential jurors. These jurors do not need to be identical in all respects for discriminatory intent to be inferred: "A per se rule that a defendant cannot win a Batson claim unless there is an exactly identical white juror would leave Batson inoperable; potential jurors are not products of a set of cookie cutters." Miller-El II, 545 U.S. at 247 n.6. Thus, jurors need only be similarly situated with respect to the State's proffered reasons for exclusion in order for juror comparative analysis to be probative. Furthermore, comparative juror analysis is not limited to comparing jurors struck by the State to those who ultimately served on the jury; instead, struck minority jurors may be compared to any qualified member of the jury panel, even if those jurors were later struck by the defense. Id. at n.4.

1. The State's proffered, pretextual justifications

9. The State exercised two of its ten peremptory challenges to exclude prospective jurors Bourne and Marshall, the only two African-Americans in the

panel.[41] During the subsequent Batson hearing, prosecutor Harmon stated that the "reason for the challenges are (sic) really the same," that is, "both of these jurors were extremely equivocal regarding capital punishment." Ex. 131 at 91.

10. Harmon stated that Bourne, in addition to being "extremely equivocal" as regards capital punishment, provided answers in her questionnaire which led him to believe that she would have a problem imposing the death penalty. Ex. 131 at 91–92. Specifically, Question 35 asked for Bourne's thoughts on the death penalty and she wrote "Should be used rarely if at all[,]" id. at 92, and in response to Question 51 which asked if she could personally vote for the death penalty, she wrote "I don't know." Id. Furthermore, Harmon stated that Bourne's answer to whether "we should have 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." Ex. 131 at 92.

11. Prospective juror Marshall was characterized as being "extremely equivocal" regarding capital punishment, in that "she simply doesn't have any opinion about the death penalty." Ex. 131 at 92. Additionally, Harmon indicated that he felt Marshall's religious views might create conflict with her duty to consider the death penalty, id. at 93, and that "she says I don't know how I really feel about the death penalty[,]" id. at 94, and as to Question 51 (could you personally vote to impose the death penalty?) she wrote "I don't know." Id. All of these reasons, according to Harmon,

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[41] 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) ("Miller-El I"). In Miller-El I, the Court found highly suspect, and thus 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 contrast, in Mr. 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) (stating that "statistical evidence that black veniremembers were disproportionately struck" can be used to prove improper exercise of a peremptory challenge).

contributed to his determination that Marshall would not be able to fairly consider the death penalty as a punishment. Id. at 92–94.

2. Neither Bourne nor Marshall was equivocal about capital punishment

12. The court asked Bourne whether she had any "moral, religious or conscientious objections to the imposition of the death penalty[,]" to which she replied "No." Ex. 129 at 152. When Harmon asked whether she could vote for whichever of the four punishments she thought was appropriate (death penalty included), Bourne said "I think so," and when Harmon asked whether she could imagine a set of circumstances in which "capital punishment would be proper," Bourne replied "Yes, sir." Id. at 155. Mere equivocation as to the death penalty is insufficient grounds for exclusion of a juror, and further, Bourne was rehabilitated during voir dire, and could hardly be considered "extremely" equivocal.[42]

13. Juror Marshall had a personal opinion about the death penalty, which is separate and apart from being able to fairly consider it as a punishment. Whatever Marshall's personal views were, when the court asked "can you keep an open mind and give fair consideration to all four forms of penalty if you're sworn in as a juror in this case?" Marshall replied "Yes." The court: "You believe you can do that?" [Marshall]: "I think I can." Ex. 131 at 53. The State questioned her but failed to clarify her views, instead focusing on other aspects of her questionnaire responses it found troubling. However, defense counsel did take the time to illuminate Marshall's views. [Brooks]: "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?" [Marshall]: "Right."

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[42] The Supreme Court has used a prosecutor's mischaracterization of a juror's statements as evidence of pretext. Miller-El II, 545 U.S. at 244–47. To state that Bourne was "extremely" equivocal regarding capital punishment is a clear mischaracterization of her testimony, because she did aver during voir dire that she had no objections to it and in fact could vote for it if she believed it was proper.

Id. at 59. The State's descriptor "extremely" with regards to Marshall's opinion is clearly an exaggeration. See fn. 35, above.

14. Comparing Bourne's and Marshall's views to those of seated juror Fitzgerald, #473 Ex. 131 at 96), it becomes obvious that the State's justifications are pretextual. In his questionnaire, Fitzgerald stated "I haven't a [sic] opinion [on the death penalty] at this time", Ex. 16 at 5, and during voir dire, when Harmon asked "If it was solely up to you, would we have capital punishment in Nevada?", Fitzgerald gave the less-than-enthusiastic reply "I guess so, yeah[,]" and followed this up with the tepid statement "Well, I don't really have a better plan." Ex. 130 at 113. These responses are far more ambivalent than those provided by Bourne and Marshall. Moreover, Harmon's questioning of Bourne on capital punishment lasted a full two pages of trial transcript, see Ex. 129 at 154–55, whereas the voir dire of Fitzgerald concerning the same subject consists of a mere four questions. See Ex. 130 at 113, 115. The disparate length of inquiry into Fitzgerald's and Bourne's views on capital punishment, in addition to their similar views with respect to it, indicates that the State was not actually concerned with whether a juror was undecided or ambivalent towards capital punishment, but instead excluded Bourne and Marshall because they were the same race as the defendant.

3. Bourne and Marshall were willing to consider all four forms of punishment

15. Bourne wrote in the questionnaire that the death penalty "[s]hould be used rarely, if at all." Ex. 12 at 5. Harmon stated this response led him to believe Bourne would have trouble at the penalty phase of the trial. Ex. 131 at 91. Marshall wrote "I don't know how I really feel about the death penalty." Ex. 13 at 5. But this does not mean she was opposed to it, or that she was in favor of it. Circumspection regarding capital punishment is insufficient grounds for removal.

16. Several other venire persons, who were eventually seated on the jury, were similarly situated to Bourne in that they evinced caution as to the death penalty, but these white prospective jurors were ultimately rehabilitated and passed for cause. Juror Taylor wrote that she could only vote for death "after careful thought," Ex. 15 at 6, and then "only as a last resort or in very extreme cases[,]" id. at 5; juror Larsen wrote that it would be a "very tough decision[,]" Ex. 112 at 5, and that he was interested in serving on the jury but hesitant because "I don't like the fact of someone's life is [sic] in my hands." Id. at 6; and juror Yates wrote, after concluding that she could vote to impose death, wrote "this was not as easy as I thought." Ex. 114 at 5.

17. Further, juror Taylor's voir dire consists of a mere five pages of transcript, only three of which are devoted to questioning by the State, which failed to address her reluctance to impose death. Ex. 129 at 136–41. Juror Larsen's voir dire was also five pages, only two of it State's questioning in which the State readily accepted his affirmative responses about being willing to impose death. Id. at 171–76. And juror Yates was questioned for only four pages, slightly more than one of which is State questioning, and which merely confirmed that she thought there should be capital punishment in Nevada. Ex. 111 at 42–46.

18. Other potential jurors likewise indicated they would find it difficult to fairly consider all forms of punishment. Spruell, #402, wrote in her questionnaire "I don't believe murderers should have parole." Ex. 122 at 5. Linkogel, #409, made statements to the same effect during voir dire: "I do have an issue with parole . . . I think some people are let out too soon and they're going and committing crimes again and again." Ex. 129 at 92. Massar, #449, stated that a life sentence "can be a more severe punishment" than death. Ex. 130 at 36. Other jurors made similar remarks in questionnaires and during voir dire, including Aquilla, #438 ("If he is convicted of first degree murder I'd have a real hard time with parole being a consideration." Ex. 129 at 164); Fryt, #480 ("[I]f the individual was found guilty of murder of [sic] the first degree,

the only way I would go is the death penalty or life in prison without the possibility of parole." Ex. 130 at 11); and Purcell, #462 ("[I]f this is there [sic] second offense or more, then the only consideration to me would be the death penalty[.]" Ex. 130 at 72). None of these potential jurors was struck by the State. Anyone unwilling to consider all four forms of punishment was rehabilitated by informing them that the law required such consideration.

19. Harmon made almost no attempt to clarify Bourne's responses during voir dire, and, whereas other jurors were informed that the court would issue instructions as to how the four forms of punishment would be applied, this information was not provided to Bourne. Moreover, the State questioned her far more extensively than the others—white jurors' answers were accepted readily, whereas the African-American juror was treated with skepticism. This disparate treatment clearly shows that Bourne was excused because of her race. Comparing Marshall to these white jurors, it is obvious that Marshall could have been rehabilitated if the State had chosen. However, the State wanted her off the panel because she was African American.

4. Bourne and Marshall were both willing and able to personally vote to impose the death penalty

20. The next reason Harmon gave for removing Bourne was that "when asked . . . if she could personally come into the courtroom and vote for the death penalty . . . her answer was I don't know." Ex. 131 at 92. During voir dire, Bourne explained that she "would have to be involved in what is happening . . . the facts in that particular case[,]" Ex. 129 at 155, meaning that whether she could impose it or not would depend not on her personal views, but on whether the situation warranted capital punishment. Harmon followed up with, "can you think of a set of circumstances where . . . capital punishment would be proper[?]" and Bourne replied "Yes, sir." Id. Circumspection with regard to a hypothetical course of action does not necessarily mean that person will have a "problem" following the court's orders as to how to apply the law. Bourne merely

voiced her concern that when imposing the death penalty, "you can always—might get the wrong man[,]" Ex. 129 at 154, but she had already informed the court that she would give fair consideration to all four forms of punishment. Furthermore, Bourne was a well-educated woman with a master's degree, Ex. 12, as Harmon himself admitted, Ex. 131 at 91, and would have been capable of setting aside her own feelings and objectively applying the law.

21. Marshall responded, unequivocally, "Yes" when asked if she could fairly consider all four forms of punishment. Ex. 131 at 53. Any reservation she might have had can be explained by her statement "Not that I'm not sure as that I don't know[,] as far as not really actually being involved in it . . . I can't elaborate on something I don't know." Id. at 55. It is clear that she was saying that she would have to hear all the facts of the case before making up her mind how to vote. This is not simply Marshall prevaricating as far as being opposed to the death penalty—rather, it is her attempt to explain that if she were going to vote for death, she would need to be convinced. Defense counsel Brooks took the trouble to clarify this issue during his examination: "[Y]our 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?" [Marshall]: "Right." Id. at 59.

22. Marshall showed a willingness to follow the court's instructions. In her questionnaire she indicated that she believed a defendant's background should not be considered when determining whether the death penalty should apply, Ex. 13 at 5, but during voir dire Brooks rehabilitated her: "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?" [Marshall]: "Yes." Ex. 131 at 58–59. There is no reason to believe that she would not be able to follow the court's instructions.

23. Compare alternate juror Lucido's (#432) voir dire, in which she stated, much as Bourne had, that her vote to impose the death penalty "depends upon what

happened, the oral presentation of the evidence in the case." Ex. 129 at 40. Juror Parr, #405, likewise, stated that her verdict "would be based on the information that is submitted to me." Id. at 49. These statements were sufficient for the State to accept these jurors, yet they are essentially the same as Bourne's and Marshall's statements.

24. Furthermore, other seated jurors offered qualified answers when responding to this question. Juror Lucido said she would vote for death "if appropriate," even though "I know it's hard," Ex. 129 at 41; Juror Parr would vote for it "if it was warranted," Ex. 115 at 6, and similar to Bourne's voir dire response, stated she "think[s] she would," Ex. 129 at 53; Juror Gritis, #406, would vote for death "if [he] really believed it," Ex. 123 at 6; Jurors Taylor, Larsen, and Yates all expressed similar qualified responses and were all selected for the jury. See Ex. 131 at 95–96.

25. There is no reason to think Bourne was any less qualified or prepared than these other, mostly white jurors, to sit on Mr. Chappell's jury, particularly given the State's follow-up questioning which should have allayed any concern. If any doubt still existed as to Bourne's willingness to impose death, the fact that Harmon ceased questioning her on the topic indicates that he was not interested in rehabilitating her, giving rise to the inference of pretext as to this proffered reason. Comparing Marshall to these other jurors who expressed concern about imposing various of the forms of punishment, it is clear that she too could have been rehabilitated.

5. Bourne supported capital punishment in Nevada

26. The final justification the State offered as to Bourne is that "[w]hen 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." Ex. 131 at 92.

27. First, this misrepresents Bourne's testimony. Though she did state that "I don't know if we should have it[,]" Ex. 129 at 154–55, her first thought was that "I'm not quite convinced," and that "I tend to say no, but then sometimes I hear some case

and I say yes, we need it." Id. at 154. Ultimately, though she was personally undecided on this particular issue, when the State inquired whether she could put her uncertainty aside and vote for the most appropriate of the four available punishments, Bourne answered "I think so" and later, when asked if she could think of circumstances in which the death penalty was appropriate, she answered "Yes, sir." Id. at 155. Harmon's purported justification at the Batson hearing made it seem as though Bourne's personal indecision regarding capital punishment would interfere with her ability to impose the punishment, when this is not what she said.

28. Second, Harmon's stated justification is revealed as pretext when other jurors' statements are assessed. Juror Fitzgerald, #473, answered the question with a lukewarm, "I guess so." Id. at 113. Harmon followed up and Fitzgerald responded that he would keep capital punishment in Nevada because "I don't really have a better plan. So, you know, the way that's laid out right now is fine by me." Id. Once again, Harmon confirmed that, though Fitzgerald did not seem totally convinced of the need for capital punishment, he could still consider imposing it. "Correct." Id. at 115. This was sufficiently persuasive for the State. These jurors, personally against capital punishment or undecided, who were passed for cause by the State, show clearly that the State's stated justification for excusing the similarly-situated Bourne is pretext for purposeful discrimination.

29. Third, Harmon expressed concern with how Bourne "thought about" his question before answering, suggesting that her hesitation before answering implied that she would be unwilling to vote for the death penalty. Ex. 131 at 92. However, seated juror Gritis, #406, likewise hesitated before answering this same question, but the State readily accepted his answer. [Silver]: "Did you hesitate at all when the Court asked you under the right circumstances could you yourself impose the death penalty . . . could you actually be involved in rendering a verdict of the death penalty?" Gritis: "Yes, I could. I was just thinking about it." [Silver]: "Sorry I read you wrong." Ex. 129

at 58–59. The State accepted the white juror's explanation without further questioning, but the African-American juror was deemed to be against capital punishment, merely because she expressed conscientiousness regarding the penalty[43] rather than unwavering support.

6. Marshall's religious views did not prevent her from considering the death penalty as a punishment

30. Harmon cited Marshall's religious beliefs as potentially conflicting with her duty as juror. "She's a religious woman . . . 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[.]" Ex. 131 at 93. He also expressed concern that when the court asked Marshall if she had any religious, moral, or conscientious objections to the death penalty, "once again this juror said that's the one I have a problem with." Id. While it is true that Marshall did indicate she might have a problem with capital punishment personally ("The reason being like I said before because religious belief," id.), there is ample indication that she would be willing to put aside those beliefs in order to be a fair and impartial juror. The judge rehabilitated her immediately after this statement, id. at 53, defense counsel clarified her views on the matter, id. at 59, and significantly, in reference to questioning about Marshall's sister who had been arrested for theft in the past, Marshall stated "Well, I feel as though she did the crime so she had to pay for what she did[.]" Id. at 54. This is the statement of one who has clearly demonstrated the ability to put personal preference aside and fairly apply the law.

31. Moreover, several other jurors indicated religious beliefs on their questionnaires, but the State failed to ask any questions at all, of any of them, about whether their religious beliefs would interfere with their duties as jurors. In her

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[43] "I would say honestly that I lean more away from it than rushing to it." Ex. 129 at 154.

questionnaire Marshall wrote that she "tried to attend church almost every Sunday." Ex. 13 at 11. There were many seated jurors who revealed religious attendance that far exceeded Marshall's: Lucido, #432 ("Catholic, about 4 to 5 times a week." Ex. 113 at 3); Ewell, #435 ("Church of Jesus Christ of Latter Day Saints. Every Sunday." Ex. 117 at 3); Taylor, #421 ("LDS weekly[.]" Ex. 15 at 3; and Yates, #455 ("2 to 3 times a week @ Calvary Foursquare Church[.]" Ex. 114 at 3). Other qualified (non-seated) jurors who indicated religious attendance at least weekly include Bennett, #479 ("Catholic church about every Sunday for 19 yrs." Ex. 124 at 3); Fryt, #480 ("Catholic, once a week[.]"Ex. 116 at 3); and Harmon, #458 ("Echoes of Faith, every Sunday[.]" Ex. 121 at 3).

32. Harmon's statement that he felt Marshall's beliefs made her an unfit candidate for the jury pool ("I'm assuming that she was being candid, that she was doing her best, but she puts us in a position of not knowing." Ex. 131 at 92–93) is belied by the numerous other jurors who most likely did have religious opposition to the death penalty but whom he utterly failed to question.

D. Conclusion

33. All of the State's proffered reasons for excluding prospective jurors Bourne and Marshall essentially amount to the same argument: these women were unsure about imposing the death penalty.[44] But as demonstrated above, neither individual

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[44] It should be noted that, at the Batson hearing, after the defense objected to the State's peremptory challenges but before the State proffered its race-neutral explanations, the court stated that a number of jurors were validly removed "because of their beliefs about the death penalty." Ex. 131 at 91. In Currie, the Ninth Circuit found it

> troubling that [the prosecutor]'s explanations for [its exercise of a peremptory strike] were largely adopted from reasons the trial judge had already suggested . . . Ordinarily, we give significant deference to a trial judge's assessment of a prosecuting attorney's credibility. But where a trial court offers reasons before the prosecutor has spoken, it undermines the court's ability to assess that credibility.

2016 WL 3192396 at *6 (emphasis added). The same happened in Mr. Chappell's case, except instead of offering some of the reasons the prosecutor relied on, the court offered the only reason.

was "extremely" equivocal regarding capital punishment. And as long as uncertainty does not prevent or substantially impair the performance of their duties, Wainwright v. Witt, 469 U.S. 412, 424 (1985), it is not a sufficient ground on which to exercise a peremptory challenge.

34. Furthermore, this proffered justification is pretext for purposeful discrimination. As shown above, other similarly situated white jurors were passed by the State for cause, while the only two African-American jurors were struck using the State's peremptory challenges. This is a clear violation of Batson.

35. This constitutional error is prejudicial per se and requires reversal of Mr. Chappell's conviction.

CLAIM SEVEN (WITT ERROR GUILT PHASE)

Mr. Chappell's conviction is invalid under federal constitutional guarantees of due process, a fair trial, and a fair and impartial jury, because the trial court erred by failing to strike biased prospective jurors for cause. U.S. Const. Amends. V, VI, XIV; Nev. Const. art. 1, §§ 1, 8, and art. 4 § 21.

SUPPORTING FACTS

1. In a racially charged case in which Mr. Chappell, an African-American man, was charged with the murder of a white woman, the two having previously been in a romantic relationship together, the seating of a juror who expressed actual bias against people of different races in such relationships constituted constitutional error.

2. Furthermore, the seating of other jurors, presumed to have been biased towards the victim and against the defendant because of those jurors' backgrounds, likewise constitutes constitutional error.

3. Because the seating of biased jurors violates the Sixth Amendment right to an impartial jury and Supreme Court and Ninth Circuit case law, Mr. Chappell's conviction and death sentence require reversal.

A. Clearly established federal law guaranteed Mr. Chappell's right to an impartial jury

4. The Sixth Amendment "right to a jury trial guarantees the criminally accused a fair trial by a panel of impartial jurors." U.S. v. Mitchell, 568 F.3d 1147, 1150 (9th Cir. 2009) (citing Dyer v. Calderon, 151 F.3d 970, 973 (9th Cir. 1998)). "Even if only one juror is unduly biased or prejudiced, the defendant is denied this constitutional guarantee." Id. (citing Dyer, 151 F.3d at 973). "The presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice." Dyer, 151 F.3d at 973 n.2; see also U.S. v. Martinez-Salazar, 528 U.S. 304, 316 ("[T]he seating of any juror who should have been dismissed for cause . . . would require reversal.").

5. The standard for determining when a prospective juror is impermissibly biased is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)). To show this, the defendant "must demonstrate, through questioning, that the potential juror lacks impartiality." Id. at 423. Juror bias may be actual, implicit, or of the so-called McDonough type. See, e.g., U.S. v. Olsen, 704 F.3d 1172, 1196–96 (9th Cir. 2013) ("This court recognizes three forms of juror bias: (1) actual bias . . . (2) implied (or presumptive) bias . . . and (3) so-called McDonough-style bias[.]") (inner quotations and citation omitted).

6. Actual bias is found "where a prospective juror states that he can not be impartial, or expresses a view adverse to one party's position and responds equivocally as to whether he could be fair and impartial despite that view." Mitchell, 568 F.3d at 1151 (quoting Gonzalez, 214 F.3d at 1112) (inner quotations omitted)).

7. Implied bias "is 'bias conclusively presumed as a matter of law[,]'" Mitchell, 568 F.3d at 1151 (quoting Gonzalez, 214 F.3d at 1112), determined by inquiring "'whether an average person in the position of the juror in controversy would be prejudiced.'" Id. (quoting Gonzalez, 214 F.3d at 1112). Bias has been 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." Id. (quoting Tinsley v. Borg, 895 F.2d 520, 527 (9th Cir. 1990)). The Ninth Circuit has cautioned that "bias should be presumed only in 'extreme' or 'extraordinary' cases." Mitchell, 569 F.3d at 1151 (quoting Smith v. Phillips, 455 U.S. 209, 222, 223 n.* (1982) (O.Connor, J., concurring)). However, "[b]ecause the implied bias standard is essentially an objective one, a court will, where the objective facts require a determination of such bias, hold that a juror must be

recused even where the juror affirmatively asserts (or even believes) that he or she can and will be impartial." Gonzalez, 214 F.3d at 1113.

B. Mr. Chappell's right to an impartial jury was denied because the trial court allowed biased jurors to be seated on Mr. Chappell's jury

8. During voir dire at Mr. Chappell's first trial, the State and defense counsel questioned potential jurors to ascertain whether any of them harbored impermissible bias or partiality. See, e.g., Ex. 130 at 59–67, 91–97, 115–23. Questions were based on potential jurors' responses in their individual questionnaires, as well as anything else elicited by the court or by attorneys during voir dire.

9. Three of these potential jurors provided answers which demonstrated impermissible bias. These jurors were Fittro, #461, Hill, #474, and Ochoa, #467. See id.; see also Ex. 119 at 6; Ex. 103 at 3; Ex. 162 at 4. Defense counsel did not request that any of them be excused for cause, nor did the defense use its peremptory strikes to exclude them. All three of these individuals eventually became seated jurors, and two of them participated in both phases of Mr. Chappell's 1996 capital murder trial. Ex. 131 at 95–96.

1. Juror Fittro was not impartial as he exhibited actual bias

10. Seated juror Fittro demonstrated actual bias both in his questionnaire responses and during voir dire. Questions 45 and 46 of the questionnaire asked what each potential juror thought about certain statements. See, e.g., Ex. 119 at 4. In response to Question 45, "It's Ok for black people and white people to date each other and have children together" Fittro wrote "No. Disagree with statement." Id. at 6. In response to Question 46, "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" Fittro wrote "Yes. A very hard time." Id.

11. These responses demonstrate a clear bias against interracial relationships, and in a case in which the defendant and victim were in such a

relationship, this potential juror should have been excused for cause if rehabilitation was not successful. But, as voir dire showed, rehabilitation was in fact not successful. Prosecutor Harmon asked whether "there might be a problem if the parties involve persons of different races?" [Fittro]: "Yeah, that's a possibility. I may have a problem." Ex. 130 at 63. [Harmon]: "I want to make sure I understand what you are saying. Are you talking about a different race than you or are you talking about the victim and the defendant being of different races?" [Fittro]: "The victim and the defendant." Id. at 64. [Harmon]: "[I]s 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?" [Fittro]: "I believe it could be." Id. This is evidence "so indicative of impermissible juror bias" that the court was obliged to strike Fittro from the panel, even though neither counsel made the request.

12. After making these express admissions of bias, Fittro became a seated juror, Ex. 131 at 96, and took part in the deliberations which ultimately resulted in Mr. Chappell's conviction. Ex. 143 at 5.[45]

2. Jurors Hill and Ochoa were not impartial as they exhibited bias

13. Seated juror Hill was a 911 operator by occupation, Ex. 130 at 118, as was the victim in Mr. Chappell's case, Deborah Panos. Hill is, therefore, presumed to have been biased towards Ms. Panos because Hill likely would have put herself in Ms. Panos's position during trial. The fact that the State questioned Hill rather extensively on the subject of her occupation demonstrates that the State was justifiably concerned about Hill's partiality. See Ex. 130 at 118–19, 120–21.[46] Because there existed a

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[45] Fittro also sentenced Mr. Chappell to death, Ex. 146 at 8, but as that sentence was overturned, it is not included in the analysis here.

[46] Juror Hill herself was surprised to be chosen as a juror (and then foreperson) based upon her occupation at Metro. Ex. 125 at ¶6; see also ¶10 (juror Yates was surprised juror Hill was allowed to sit as a juror based upon her occupation).

relationship between this juror and an aspect of the litigation such that she could not have remained impartial, bias should be presumed. Neither the State nor the defense attempted to excuse Hill for cause, Hill became a seated juror, Ex. 131 at 96, and participated in the deliberations which led to Mr. Chappell's conviction. Ex. 143 at 5.[47]

14. Alternate juror Ochoa was in a domestic abuse situation wherein her "1st spouse abused [her]" Ex. 162 at 4, and this lasted for six years. Ex. 130 at 92. Ochoa was thus situated comparably to the victim, who also had been in a domestic abuse situation for a number of years. It would have been difficult for Ochoa to refrain from feeling sympathy for the victim in Mr. Chappell's case, and thus she would have trouble remaining impartial. For this reason, Ochoa should be presumed to have been biased against Mr. Chappell. Neither the State nor the defense attempted to excuse Ochoa for cause, and Ochoa became a seated alternate juror. Ex. 131 at 84, 96.

15. The seating of three biased violated Mr. Chappell's rights under the Sixth Amendment and Supreme Court case law. This constitutional error is prejudicial per se and requires reversal of Mr. Chappell's conviction.

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[47] Hill also sentenced Mr. Chappell to death, Ex. 146 at 8, but as that sentence was overturned, it is not included in the analysis here.

CLAIM EIGHT (BATSON PENALTY PHASE)

Mr. Chappell's death sentence is invalid under federal constitutional guarantees of due process, a fair trial, and a fair and impartial jury, because the State engaged in purposeful discrimination by using peremptory strikes to remove two African-American venire members at Chappell's penalty re-trial U.S. Const. Amends. V, VI, VIII, XIV; Nev. Const. art. 1, §§ 1, 6, 8, and art. 4 § 21.

SUPPORTING FACTS

1. As explained in detail in Claim Six, the State is constitutionally prohibited from striking jurors on the basis of race. See Claim Six (Batson Guilt Phase) at Part A. During Mr. Chappell's penalty retrial, from a qualified panel of thirty-two prospective jurors, the State exercised peremptory challenges to strike two African-American venire members. Comparative juror analysis reveals that the State's purpose for challenging these jurors could only have been discriminatory. This violated Chappell's rights under the U.S. Constitution and Supreme Court case law and contributed to his unconstitutional death sentence.

2. Prospective jurors filled out questionnaires on March 7, 2007. See, e.g., Ex. 183. On March 12, 2007, the first pool of jurors was sworn in, they responded to general questions, and were excused for hardship and other reasons. Ex. 155 at 6–49]. Seventeen new prospective jurors were then brought before the court to replace those who had been excused, and were sworn in. Id. at 49–51. These new jurors were likewise questioned en masse and excused for hardship and other reasons. Id. at 54–65. Afterwards, individual questioning began. Id. at 66. First the State questioned jurors, and either passed or challenged for cause; next the defense had the opportunity to question them, and either passed or challenged for cause. Id. at 66–125. When the proceedings came to natural break points, the pool of jurors was excused while the court and attorneys discussed challenges for cause. The court asked each attorney for

arguments for or against the challenged jurors and then made its rulings on the record. Id. at 129–34. Potential jurors who were removed for cause were left in place while questioning continued. Id. at 230.

3. This process continued until thirty-two jurors remained in the jury pool; all other jurors were excused. Ex. 184. At that point, a recess was taken and the proceedings went off the record, during which time peremptory strikes were exercised by both parties. There was no explanation of how the list of jurors was narrowed from thirty-two to fourteen. See id. at 147–48. When back on the record, the fourteen remaining jurors' names were read and the jury was sworn in, instructions were given, and the jury was dismissed for the day. Id. at 148–61.

4. The State exercised two of its peremptory challenges to exclude prospective jurors Mills[48] and Theus[49]. Both were African-American. 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. See Foster v. Chatman, 136 S. Ct. 1737, 1755 (2016) ("Two peremptory strikes on the basis of race are two more than the Constitution allows.").

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

5. Mills stated during voir dire that she supported the death penalty; she would not have a problem listening to both sides present their cases and making an assessment of what the appropriate punishment would be; she would not have a problem discussing her opinion with other jurors during deliberations; she would personally be able to vote for the death penalty; and she was able to consider all four

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[48] See Ex. 155 at 117–18 (State passed for cause); id. at 120 (defense passed for cause); and Ex. 184 at 148–49 (seated jurors' names read aloud).

[49] See Ex. 155 at 193 (State passed for cause); id. at 194 (defense passed for cause); and Ex. 184 at 148–49 (seated jurors' names read aloud).

of the potential punishments, including the death penalty, with an open mind. Ex. 155 at 111–20. Mills was therefore competent to serve as a juror.

6. Comparing Mills's questionnaire statements and voir dire responses to those of other prospective jurors reveals that she was not materially different from the white jurors the State found acceptable, and comparing the manner in which the State questioned Mills to the manner in which it questioned white jurors reveals that the State's purpose in striking Mills was based solely on her race.

1. Substance abuse and domestic violence

7. Mills indicated on her questionnaire and during voir dire that her husband had had issues with substance abuse, Ex. 155 at 111, and she had "negative, angry" feelings about it, id. at 112; Ex. 188 at 5, because, as a result of her husband's substance abuse, she had been the victim of domestic violence. Ex. 155 at 112 ("I was a target. I was the one that was abused."). Additionally, the two had children at the time the abuse was happening and the children witnessed the abuse. Id. She went on to state that those issues had been resolved through "[t]ime [and] counseling[,]" id. at 114, as a result of which her husband "turned his behavior around[,]" id., and that, "during the time he was in counseling, as he got his life turned around," she had in fact "st[uck] by him[.]" Id. at 119. Mills affirmed several times that this experience would not affect her ability to be fair and impartial in Chappell's case.[50]

8. Other prospective jurors were similarly situated to Mills in that they had close family members with substance abuse issues, were close to individuals who had suffered domestic abuse, or themselves were the victims of domestic abuse. In no

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[50] See, e.g., Ex. 155 at 113 ([the State]: "[A]re you able to kind of separate your own experience and evaluate what you hear in this courtroom on its own?" [Mills]: "I can separate it." [the state]: "And the fact that you've gone through all that, would that cause you to be in favor or less fair to one side or the other?" [Mills]: "No."); id. at 119 ([defense counsel]: "Now, if you were to hear circumstances similar to yours, drug abuse, domestic violence, would that make you tend more or less to believe what somebody is saying?" [Mills]: "No.").

instance did the State question the following prospective jurors as extensively as it questioned Mills on these subjects.[51]

9. Taylor, a white juror, had an ex-wife who died from substance abuse. Ex. 155 at 83. Taylor affirmed that he was "close to" this situation, id., but stated that it would not be difficult, because of it, to sit on Chappell's jury. Id. However, when asked whether his experiences would "get in the way of being fair[,]" Taylor responded "Well, I have prejudice against drugs." Id. at 84. Whereas Mills never stated that she harbored any sort of prejudice against drugs, Taylor did, and after an unconvincing attempt to rehabilitate Taylor ([the State]: "By prejudice, what I mean is that it would interfere with your ability to be fair. Of course you can consider these things and give weight to whatever you want." [Taylor]: "I need to consider it, absolutely . . . you have to feed us information on both sides." Id.), the State moved on with its questioning. Taylor's responses indicated that he would be prejudiced against Chappell, but this white juror was selected for the jury anyway, see Ex. 184 at 148, while Mills, an African-American, was not.

10. Other white jurors similarly situated to Mills include Forbes, who, along with his mother and two sisters, was the victim of domestic violence at the hands of his step-father, Ex. 184 at 52–53; Smith, who had to raise his step-daughter's two children because of her drug use, and had no contact with her after he and his wife took responsibility for the children, Ex. 155 at 159–60; Noahr, whose parents abused alcohol and who witnessed her father abusing her mother, id. at 194, 196–97; and Morin, who had a brother and "a few other family members" as well with substance abuse

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[51] The State asked Mills twenty-two questions relating to substance abuse and domestic violence. Ex. 155 at 111–14. Compare, for example, the voir dire transcripts of Taylor, Ex. 155 at 83–84 (nine questions); Smith, Ex. 155 at 159–60 (seven questions); Forbes, Ex. 184 at 52–54 (eleven questions); Noahr, Ex. 155 at 194–95 (seven questions); Morin, Ex. 155 at 234–37 (no questions).

problems, Ex. 155 at 237–38. Forbes, Smith, Noahr, and Morin all became seated jurors at Chappell's trial. See Ex. 184 at 148–49.

11. Prospective white jurors similar to Mills and desirable to the State, but who did not become seated at Chappell's trial, include Brady, whose "father hit [his] mother[,]" Ex. 185, who was "not tolerant at all" of domestic violence, id., found it "disgusting & not tolerable[,]" id., "possibly" would be unable to remain impartial if the case involved domestic violence, Ex. 155 at 71, and found domestic violence "[u]nacceptable[,]" id. at 72; Hibbard, whose son was involved with substance abuse, Ex. 155 at 93, which left him "disappointed[,]" Ex. 186 at 5; Bailey, who indicated that it was "painful to be involved" with someone who abused substances, Ex. 187 at 5; Martino, who was "five or six" when her father started beating her brother, sister, and mother, Ex. 155 at 199; Smith, whose "child was an (sic) meth addict[,]" Ex. 189 at 5; Templeton, whose "sister uses, and I don't like it when she's on controlled substances. She's different. I hate the stuff[,]" Ex. 184 at 64–65,; Schechter, whose "mother re-married and occasionally her second husband hit her[,]" Ex. 190; and Kitchen, whose son had substance abuse issues and felt that "Drugs are BAD!!" Ex. 191 at 5.

2. Views on criminal justice system

12. Mills wrote on the questionnaire, in regard to her opinions and feelings about how the criminal justice system works, "my 22 yrs old son was a victim on (sic) medical malpractice. No justice was done for me & my family." Ex. 188. She stated 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." Ex. 155 at 116. However, when the State asked Mills to "explain that a little[,]" Mills spontaneously rehabilitated herself when she stated that "I want[] to see the facts and see how strong [the case] is and how it happened." Id. at 117. She confirmed that she was able to set aside her feelings and judge 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, id. at 116–17.

13. Mills was not alone in evincing a cynical opinion of the justice system. Forbes felt that his brother "got railroaded" by the public defender's office, 184 at 54, harbored "some bitterness about that[,]" id., and "felt guilty because if [he] had had the money at the time, [he] could have . . . hired an attorney and [the brother] never would have went to prison." Id. Forbes tellingly responded that he felt the police treated his brother fairly—the unfairness he felt bitter about came "once he [Forbes's brother] got into the [judicial] system." Id. at 55. Bundren described feelings similar to Forbes's about how the justice system works: "It all depends on who can afford the best attorney." Ex. 197 at 6. She was not questioned at all on this questionnaire statement. See Ex. 155 at 206–18. Morin wrote that the system has "lot of loopholes[,]" Ex. 192 at 6, explaining that when "cases get dismissed over the slightest things, it just doesn't seem fair." Ex. 155 at 238. Similarly, Kaleikini-Johnson indicated her belief that the system "can be a little to (sic) lenient." Ex. 193 at 5. Each of these white jurors was selected for Chappell's jury; only two of them, Forbes and Morin, received questioning during voir dire about their cynical views of the criminal justice system.

14. Other prospective jurors who revealed similar opinions include Ramirez, who felt that "our system is too soft on criminals" and "we need tougher penalties[,]" Ex. 194 at 6; Martino, who wrote that the system "seems to work better for wealthy people[,]" Ex. 195 at 6; Smith, who wrote "I think we are too easy on criminals[,]" Ex. 189 at 6; Rius, who believed the system "[s]hould be stricter. If the consequences are severe then less people would commit the crimes[,]" Ex. 196 at 6; Schechter, who wrote "[t]he system is slow & imperfect at best. No longer can be relied on to tell the truth . . . Jurors are, as a whole, uninformed[,]" Ex. 190 at 6; and Kitchen, who wrote that it is a "[g]ood system made imperfect by att[orneys] & judges[,]" Ex. 191 at 6, and stated during voir dire that when "[y]ou throw the human factor in, everyone has their own

personal opinions and interpretations, and I think it's twisted . . . Probably [by] the attorneys." 184 at 135. The State found all of these jurors acceptable.

3. Do not want to serve on the jury

15. Mills indicated at the end of her questionnaire that she did not want to serve on the jury because "I don't like to talk much take me longer to comprehend question." Ex. 188 at 9. When the State asked Mills whether she would have a problem expressing her opinion with other jury members, Mills responded "No." Ex. 155 at 115. Again the State asked "No problem with that?" to which she again replied "No." Id. The defense took a more direct approach: "[Y]ou said you don't like to talk much . . . because of that, do you think that you don't have a voice on the jury if you were picked?" [Mills]: "Most likely not." Id. at 118. Two questions later, the defense reinforced that Mills would speak up during deliberations. [Defense]: "If you have something important to say, you'd make sure they heard it?" Mills: "Yes, absolutely." Id. Neither side questioned Mills as to the second reason she gave for not wishing to serve; however, this voir dire questioning revealed that Mills, by her questionnaire answers, merely sought to avoid jury service.

16. Other jurors expressed similar reluctance to serve, including Kaleikini-Johnson ("No—my reasons are work related[.]" Ex. 193 at 9; Bundren, ("I don't have either the time or desire." Ex. 197 at 9; Morin ("Time from work. Pay sucks.") Ex. 192 at 9; White ("No because I would like to be at work.") Ex. 198 at 9; and Forbes ("Too much responsibility would be too worried about my job sorry." Ex. 199 at 9. None of these jurors was questioned about their unwillingness to serve; all were seated on Chappell's jury. See 184 at 148–49.

17. Prospective jurors the State found acceptable, but who did not end up serving on the jury, include Brady ("No—challenge w/ work. Since this guy is a

murderer if he didn't get the death pen[alty] I wouldn't feel justice was served."[52] Ex. 185 at 9; Bailey ("I can't afford to. I need the money from my job to pay bills.") Ex. 187 at 9; Martino ("No—I'm too set in my beliefs about killers[.]") Ex. 195 at 9; Smith ("I cannot be impartial.") Ex. 189 at 9; Templeton ("I would have a difficult time living w[ith] that decision of life in prison or death penalty.") Ex. 200 at 9; Rius ("Because of the race of defendant I already have opinions about them based on appearance and it's not fair to the defendant.")[53] Ex. 196 at 9; Button ("I'm not open minded enough to think there is an excuse.")[54] Ex. 201 at 9; Larsen ("I don't think I could give my full attention to this proceeding . . . I would rather be [working] than being here. And I'd rather be doing anything then (sic) looking at pictures of anything. I really would.") 184 at 124; and Kitchen ("24 y[ear] vet[eran] of law enforcement in so[uthern] Nevada. I know a large % of inmates in so[uthern] Nevada." Ex. 191 at 9. "I don't believe that practicing law enforcement people should sit on juries, especially criminal. It's probably an appeal waiting to happen[.]" 184 at 132.

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[52] Neither side questioned Brady on this specific statement, but he did express it in other ways throughout voir dire. See, e.g., Ex. 155 at 72–73 ("Knowing that he is convicted of murder, [the death penalty] would be the route that I would choose to go, unequivocally."). Because he was not able to be rehabilitated, Brady was excused for cause, id. at 132, unlike Mills, who would also likely have been excused for cause if she had not been rehabilitated.

[53] The State asked a mere four questions pertinent to this statement; none of them addressed Rius's obvious bias directly, while two questions were plainly leading. See Ex. 155 at 137–138.

[54] Defense counsel followed up on this statement, after Button admitted that she would, based solely on the statement of facts in the questionnaire, automatically pick the death penalty. Button stated: "I'm very narrow minded about that[,]" her mind was "pretty much" made up, and there was "not much chance" she would change her mind. Ex. 184 at 115. The State had already finished its questioning at this time: it had passed for cause, evidently satisfied that this juror was qualified to sit on Chappell's jury. See id. at 114.

4. Question 36: ability to be fair and impartial if victim and defendant are of different races

18. Question 36 of the questionnaire asked whether the prospective jurors' ability to be fair and impartial would be affected if the defendant and victim were of different races. See, e.g., Ex. 188 at 7. Mills responded "Probably so" to this question. Id. Defense counsel asked Mills about this during voir dire (the State had chosen not to inquire about Mills's response to this question).

> PATRICK [defense counsel]: 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.
> MILLS: I don't recall that.
> PATRICK: So if the victim was of a different racial background than Mr. Chappell, you wouldn't have a problem with that?
> MILLS: No.
> PATRICK: It wouldn't make you automatically think that he was more or less guilty than he actually is?
> MILLS: No.

Ex. 155 at 120. Mills was thus rehabilitated and competent to sit as a juror. Comparing her to other prospective jurors reveals that Mills was similarly situated to many of them, yet unlike many, she admitted that her questionnaire response was made in error. The fact that the State accepted all of the following jurors but chose to strike Mills shows that the State's motive was discriminatory.

19. Forbes responded "Yes possibly" to Question 36, Ex. 199 at 7, and in response to 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?), provided only an enigmatic "No comment." Id. Questioned only as to the latter response, Forbes replied, "It's so irrelevant. It makes no difference to me if Mr. Chappell is African-American, Hispanic, Asian. I don't care. No difference . . . I can't

acknowledge that question." 184 at 59. This was not the unequivocal "No" that Mills had provided, but it did serve to rehabilitate Forbes as to the specific question. However, as to the possibility that Forbes might not be able to remain fair and impartial, there was no questioning or rehabilitation. See id. at 52–61. Feuerhammer's response to Question 36 was "It would depend on the evidence." Ex. 202 at 7. Neither the State nor defense followed up on this response, see id. at 47–52, but it suggests that Feuerhammer may have been unable to remain fair and impartial, since the victim and defendant were in fact of different races. Both Forbes and Feuerhammer provided answers that were strikingly similar to Mills's answer, yet Forbes and Feuerhammer, white prospective jurors, were eventually seated on Chappell's jury. See 184 at 149.

20. Other prospective jurors who were similarly situated to Mills include Brady, whose response to Question 35, "My experience in retail management—most of our thiefs (sic) are typically African American or hispanic [sic]," Ex. 185 at 6, revealed intense bias; Bailey, who left Question 35 blank, Ex. 184 at 6, responded "Possibly" to Question 36, Ex. 187 at 7, and, when questioned, stated that "I thought maybe [race] could be a possibility, Ex. 155 at 108–09; Martino, whose response to Question 35 was "Yes—programmed from childhood," Ex. 195 at 6, to Question 36 responded "Maybe," Ex. 195 at 7, and when questioned responded "I come from a very small town in Ohio. I was born quite some time ago and things were different then[,]" Ex. 155 at 204; and Rius, whose response to Question 35 was "I work in retail. And 90-95% of the time they are shoplifter. I have been in retail for over 10 years and plainly do not trust them[,]" Ex. 196 at 6, who, though Rius stated she could be fair and impartial and that racial bias would not be a problem, see Ex. 155 at 137–38, 141, nevertheless reaffirmed her distrust of and bias against African-Americans and Hispanics later on. "Where I work I have to deal with a lot of different ethnic people and a specific race tends to either

come in and try to do some kind of a con or some shoplifting or threaten in some way . . . African-American or Hispanic mainly." Id. at 142–43.[55]

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

21. Theus was competent to serve as a juror for the following reasons. She stated during voir dire that she would be able to impose the death penalty if she thought it appropriate, considering all the surrounding facts and circumstances; she would want to hear all the evidence before making a decision; and she would follow the law and the instructions. Ex. 155 at 182–94. These statements qualified her to sit as juror in Chappell's trial.

22. Furthermore, comparing Theus's questionnaire statements and voir dire responses to those of other prospective jurors reveals that she was not materially different from the white jurors the State found acceptable, and comparing the manner in which the State questioned Theus to the manner in which it questioned white jurors reveals that the State's purpose in striking Theus was based solely on her race.

1. Religious & moral opposition

23. Theus provided several seemingly contradictory responses on her questionnaire. As to her feelings about the death penalty, she wrote "Thou should not kill is the law, man or jury!!" Ex. 203 at 7 (emphasis in original); and regarding her feelings about the statement "an eye for an eye, a tooth for a tooth" she wrote "Let go let God." Ex. 203 at 8. Yet, later she indicated that she would consider the death penalty in certain circumstances "[d]epend[ing] on [the] crime and circumstances." Id. Asked whether she held any strong moral or religious views about the death penalty, she wrote "No. But is it right to say anybody should take life from another person." Id. And asked whether she would consider all four forms of punishment in a capital case, she

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[55] See also Ex. 155 at 144: [defense counsel]: "You don't trust them, and you believe they are going to steal?" [Rius]: "Yes."

wrote "Yes. I would have to hear it first." Id. Voir dire questioning by the State revealed the following.

> OWENS [the State]: There's people that are sort of conscientious objectors of the death penalty. They don't think it's appropriate under any circumstances. Seems from what you're writing that you're one of those kinds of people. That you're opposed to the death penalty.
>
> THEUS: 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.

Ex. 155 at 182. Theus stated that her opposition to the death penalty was based on religious and moral beliefs, id. at 183, but also that "if you do the crime you should do the time." Id.

> OWENS: When you say that thou shalt not kill, man or jury. You're saying juries should not be able to impose the death penalty?
>
> THEUS: Once again, 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.

Id. at 184. Theus went on to affirm that, though she was opposed to the death penalty, she would be able to impose it "if that's what the law says[.]" Id. at 184.

> OWENS: 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?
>
> THEUS: I would be, yes.
>
> OWENS: So even though religiously you feel like the death penalty shouldn't be allowed, you feel that that's something you could still do?
>
> THEUS: Correct.

Id. at 186. Theus thus confirmed that she was able to put her personal opinions aside and follow the law. Defense counsel reaffirmed when it asked this: "And you feel after hearing all the facts and circumstances in the case[,] if you thought that the death [penalty] was the right punishment that that's something you could do?" To which Theus replied "Yeah. I know I could. I can." Id. at 193. Theus was not alone in harboring skepticism regarding a form of punishment, nor was she alone in holding religious and/or moral views which run counter to the imposition of a punishment, but which she was able to set aside in order to fairly apply the law.

24. Feuerhammer "[a]gree[d] with the death penalty," Ex. 202 at 7, but did not agree with the principle of "an eye for an eye," writing that "it is up to God to make that determination." Ex. 202 at 8. He explained this apparent inconsistency by stating that "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." Ex. 184 at 52. Furthermore, he stated that he would have trouble considering one particular punishment. "I might have a problem with . . . 40 years with the opportunity of parole[.]" Id. at 49. Yet the State found Feuerhammer to be acceptable. See id. at 50.

25. Scott was a member of the Catholic Church, see Ex. 204 at 6, which "does not support the death penalty." Ex. 204 at 8. Yet he also indicated that the death penalty "is a necessary evil." Ex. 204 at 7. "I just think it's an acceptable punishment in some situations." Ex. 184 at 67–68. He explained the contradiction in his questionnaire by stating that "I think you can be affiliated with groups and disagree with certain rules . . . I don't personally agree with [the Church's] stance on [the death penalty]." Ex. 184 at 68–69.[56] Scott also believed that he needed to hear all the information before deciding, "weighing the circumstances and things that are

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[56] See also Ex. 184 at 69: [the State]: "You're able to separate yourself from the church's view and make your own decision in a case like this?" "[Scott]: You have to. I think you have to develop your own opinions . . . in some certain circumstances it's an acceptable punishment."

involved." Ex. 184 at 68. Staley stated that she was "a very religious person[,]" Ex. 184 at 122–23, who "[found] it hard to take a life[,]" Ex. 205 at 7, and "[did] not believe in vengeance[,]" Ex. 205 at 8, but who, nevertheless, could pick "which punishment is the appropriate punishment for what was done[,]" including the death penalty. Ex. 184 at 123. Staley also preferred to wait until hearing all the evidence before making a decision. "I don't have the full facts. I can't make a decision. Especially of this magnitude without having the full facts." Id. at 120. Noahr's feeling about the death penalty were: "I don't believe in a life for a life[,]" Ex. 210 at 7, and her feelings about "an eye for an eye" were: "I don't agree with this." Ex. 210 at 8. However, she then indicated that she would consider the death penalty in certain circumstances. Id.; see also Ex. 155 at 195–96.

26. Feuerhammer, Scott, Staley, and Noahr were all selected for the jury. See Ex. 184 at 148–49. It is telling that the State questioned Theus on the subject of her religion for four pages and twenty-three questions, see Ex. 155 at 182–85, while touching only fleetingly on this subject with other jurors. Disparate questioning on a subject raises the inference of a Batson violation.

27. Other prospective jurors who were not selected, but who evinced bias for or against a form of punishment and were acceptable to the State include Ramirez, who found it "hard to say" that he would not automatically vote for the death penalty, Ex. 155 at 174, found it "[h]ard to say" whether he would hold the State to its burden, id. at 176, and refused to commit to following the judge's instructions and considering any punishment other than the death penalty,[57] see id. at 174–77; Martino, whose opinion about Chappell's case, as early as the questionnaire stage, was that "[h]e should be put

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[57] [the State]: "I know it's hard to say what [your] feelings are now, but we sort of need you to commit up front that you'll follow the law." [Ramirez]: "I'll try to. [the State]: "Can you convince us more than that that you will follow the law?" [Ramirez]: "Well, I'm just giving you my opinion." [the State]: "Sure." [Ramirez]: "I can say that I can try to." Ex. 155 at 176.

to death the same way he killed his girlfriend[,]" Ex. 195 at 5, who indicated that she would automatically vote for the death penalty regardless of the evidence presented, Ex. 195 at 7, stated that she "lean[ed] toward the death penalty, Ex. 155 at 201, and held fast to her belief that Chappell "should be put to death the same way he killed his girlfriend . . . [n]o questions asked[,]" id. at 204; Smith, whose opinion about the case what that "if he killed somebody death penalty[,]" Ex. 189 at 5, indicated that she would automatically vote for the death penalty, Ex. 189 at 8, believed that "first degree murder should be the death penalty[,]" Ex. 155 at 222, and generally insisted that she would automatically vote for the death penalty no matter the evidence or the law, id. at 222–23; and Salak, who replied to the question whether he held any strong moral or religious views about the death penalty "I am a Catholic[,]" Ex. 206 at 8, felt the death penalty should only be used "in severe cases[,]" Ex. 206 at 7, and had "reservations" about the case, 184 at 247, and about passing judgment, id. at 248;

28. Theus and the above-mentioned prospective jurors were not alone in wishing to hear all of the facts and circumstances surrounding the crime before making a decision. Kaleikini-Johnson wrote that the death penalty might fit "depending on the crime & the circumstances[,]" Ex. 193 at 7; Taylor felt he had "to hear everything first [before coming to a conclusion,]" Ex. 155 at 87, and "it would have to be shown that the person was basically a hundred percent guilty[,]" before imposing the death penalty, id.; Henck wrote that "[e]very person deserves [a] fair trial where evidence can be presented so a proper verdict can be made[,]" Ex. 207 at 8; Smith wrote that punishment "all depends on the circumstances of the case[,]" Ex. 208 at 8, and he wanted to serve "so I can hear the facts and decide his level of punishment based on those facts[,]" Ex. 208 at 9; Cardillo believed that "you need all the information on the case to decide the appropriate punishment[,]" Ex. 208 at 8; and Morin "would want to hear information before [making] a decision." Ex. 155 at 236–37. Kaleikini-Johnson,

Taylor, Henck, Smith, Cardillo, and Morin were all selected for Chappell's jury. See Ex. 184 at 148.

2. Family in judicial system

29. Theus indicated on her questionnaire and during voir dire that she had some close family members who had been involved in the judicial system. Ex. 203 at 6. They were her brother, nephew, husband, a son, and "[i]f I keep thinking, there might be more than that. In-laws . . . cousins, nephews." Ex. 155 at 186–87. They were all in Las Vegas, and all had gone to trial with the exception of her son, who was then awaiting trial for domestic assault. Id. at 187–88. Her husband was "[i]n and out of jail more than half his life—burglary, robbery[,]" id. at 188, but had been out of prison since 1998. Id. at 189. Her nephew was currently in prison on robbery charges. Id. at 189–90. Her brother went to prison "because we was affiliate[d] at the time with gang members, so that's what happen[ed] to him." Id. at 190. Theus had been to court, but for moral support, not to testify. Id. at 191–92. Theus confirmed that the prosecutions against her family members happened in the same building the current voir dire was taking place in, the prosecutors were from the same D.A.'s office, and that neither prosecutor then conducting voir dire, Weckerly or Owens, was involved. Id. at 192.

30. Several white prospective jurors indicated that either they themselves had been involved in the judicial system, or, like Theus, had close family members who had.

31. White himself had been arrested for domestic violence. Ex. 155 at 29, 251–52. Henck had two cousins, to whom he was close, who were convicted "for selling drugs in school zones." Id. at 121. Smith indicated that his grandson had issues because of drugs and theft and his step-daughter was in the court system for the same. Ex. 208 at 6. He further suggested that his step-daughter was charged with negligence in some capacity and as a result, he and his wife had had to raise his step-daughter's children. Ex. 155 at 159–60. Morin had a brother in prison on attempted murder charges. Ex.

155 at 234–35. Forbes had a brother who was "railroaded" by "the public defender's office" seemingly on solicitation charges ("He was picked up by a street walker[,]") Ex. 184 at 54, about which he felt "bitterness" and guilt Ex. 184 at 54. Scott "had interaction with the court system" for "disorderly conduct." Ex. 184 at 70. All of these jurors were seated. Henck and Smith stated that their judicial system involvement had occurred outside Nevada. Ex. 155 at 121, 160. Morin stated that his brother's conviction had occurred in Las Vegas but, unlike Theus, the State did not inquire as to which building it had happened in, or which specific prosecutors had prosecuted his brother. See Ex. 155 at 234. Forbes and Scott were not even asked where their respective situations had occurred. See Ex. 184 at 54–56, 70.

32. Button had been arrested for "[buying] something from someone I shouldn't have. He was an undercover police [officer]. So I went through the system." Ex. 184 at 110. Button was briefly questioned about this but was not asked about the location of this incident. She did not go on to become a seated juror. Id. at 110–11.

33. Still other prospective jurors indicated involvement with the judicial system but were never questioned on that topic. Seated jurors Christine Bundren, Ex. 197 at 6, and Blayne White, Ex. 198 at 6, both checked "yes" for Question 32 (Have you or any family member or close friend ever been arrested and/or charged with a crime?) but without any follow up, it is impossible to know what the circumstances were of that judicial system involvement. Both Bundren and White became seated jurors. Kitchen also checked "yes" as to Question 32, but unlike Bundren and White, Kitchen indicated that the person was not treated fairly by the system. Ex. 191 at 6.

C. Conclusion

34. As the above comparative juror analysis reveals, Mills and Theus were removed by the State for no reason other than they were the same race as the defendant. The exclusion of a person on the venire via peremptory challenge based on

discriminatory action by the prosecution is prejudicial per se and requires the automatic reversal of Chappell's death sentence.

CLAIM NINE (WITT ERROR PENALTY PHASE)

Mr. Chappell's death sentence is invalid under federal constitutional guarantees of due process, a fair trial, and a fair and impartial jury, because the trial court erred by failing to strike biased prospective jurors for cause. U.S. Const. Amends. V, VI, XIV; Nev. Const. art. 1, §§ 1, 8, and art. 4 § 21.

SUPPORTING FACTS

1. In a racially charged case in which Mr. Chappell, an African American man, was charged with the murder of a white woman, the two having previously been in a romantic relationship together, the seating of a juror who expressed actual bias against people of different races in such relationships constituted constitutional error. Furthermore, the seating of other jurors, actually biased or presumed to be biased against the defendant, likewise constitutes constitutional error. Because the seating of biased jurors violates the Sixth Amendment right to an impartial jury and clearly established federal law, Mr. Chappell's conviction and death sentence require reversal.[58]

A. Clearly established federal law guaranteed Mr. Chappell's right to an impartial jury

2. As explained in detail in Claim Seven, the Sixth Amendment guarantees a criminal defendant a right to an impartial jury, and juror bias may be actual, implicit, or of the so-called McDonough type. McDonough bias occurs when "a juror fail[s] to answer honestly a material question on voir dire," and it can be shown that "a correct response would have provided a valid basis for a challenge for cause." McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 556 (1984); see also Olsen, 704 F.3d at 1195–96. A juror who merely provides mistaken answers, forgets incidents, misunderstands a question, or "bend[s] the truth a bit to avoid embarrassment [,]"

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[58] The legal standard for the trial court's error in failing to strike biased prospective jurors can be found in Claim Seven, ante, and will not be repeated here.

Dyer, 151 F.3d at 973, is not unconstitutionally biased. See McDonough at 555 ("To invalidate the result of a three-week trial because of a juror's mistaken, though honest response to a question, is to insist on something closer to perfection than our judicial system can be expected to give."). "Even an intentionally dishonest answer is not fatal, so long as the falsehood does not bespeak a lack of impartiality." Dyer, 151 F.3d at 973. Whether a juror was dishonest during voir dire "is a question of fact," Fields v. Brown, 503 F.3d 755, 767 (9th Cir. 2007), to be determined by the reviewing court. "Accordingly, we must determine whether [the juror's] answers were dishonest and, if so, whether this undermined the impartiality of [the defendant's] jury." Dyer, 151 F.3d at 973.

B. Mr. Chappell's right to an impartial jury was violated by the seating of jurors who were impermissibly biased

1. Several jurors who sat on Mr. Chappell's jury demonstrated actual bias

3. Prospective juror Taylor demonstrated prejudice against people with substance abuse issues. During voir dire he stated that his ex-wife died because of substance abuse, Ex. 155 at 83, and that he was "close to these situations[.]" Id. He later stated outright: "I have prejudice against drugs." Id. at 84. Because Mr. Chappell had a history of substance abuse which would be introduced as mitigating evidence, it is clear that Taylor's prejudice against drugs and substance abuse would prevent him from remaining fair and impartial regarding this evidence. Taylor became a seated juror at Mr. Chappell's trial. Ex. 184 at 148.

4. Prospective juror Smith also demonstrated prejudice against substance abuse. He indicated in his questionnaire that his step-daughter had a history of substance abuse, and that it was a "very bad situation." Ex. 208 at 5. During voir dire he stated that "as a result of her drug use, we ended up raising her two children," Ex. 155 at 159, and that he "ha[d] not seen her since." Id. Given the likely resentment Smith felt towards his step-daughter because of her substance abuse issues, defense

counsel inquired whether, "if it's shown that drugs are part of this case, would [he] give more or less weight to somebody's testimony regarding that because of the drug use?" To which Smith responded "Possibly." Id. at 164. Again, because substance abuse would be presented as mitigating evidence, it is likely that Smith's history regarding family members with substance abuse issues would prevent him from remaining impartial during the presentation of this evidence. Smith became a seated juror at Mr. Chappell's trial. Ex. 184 at 148.

5. Prospective juror Bundren demonstrated prejudice against persons who engage in domestic violence. On her questionnaire, in response to question 19 which asked her feelings regarding domestic violence, Bundren wrote "Zero tolerance for towards anyone who hits, strikes or abuses a human[.]" Ex. 197 at 5. Because Mr. Chappell and Panos had a history of domestic abuse, and this history was going to be presented at trial, it is likely that Bundren would be unable to remain impartial towards Mr. Chappell due to her "zero tolerance" principles.[59] Bundren became a seated juror at Mr. Chappell's trial. Ex. 184 at 148.

6. Prospective juror Forbes indicated that he might be prejudiced for racial reasons. On question 36 of the questionnaire, which inquired whether, if the victim and defendant were of different races, his ability to be fair and impartial would be affected, Forbes wrote "Yes possibly." Ex. 199 at 7. The victim and defendant in this case were in fact of different races, and because Forbes evidently had an issue with this, it is quite likely that his ability to remain fair and impartial was impaired.[60] Forbes became a seated juror at Mr. Chappell's trial. Ex. 184 at 149.

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[59] Bundren was not asked about this questionnaire response during voir dire.

[60] Forbes, like Bundren, was not asked about this questionnaire response during voir dire.

2. Several jurors who sat on Mr. Chappell's jury demonstrated implied bias

a. Jurors with domestic violence experience were impermissibly biased

7. Juror Bundren related an incident from her life which shows that she could not have remained impartial in Mr. Chappell's case. She wrote in her questionnaire: "My uncle was found guilty of first degree murder and I was the only family member who believed he should have received the death penalty." Ex. 197 at 7. At voir dire she elaborated: "My uncle murdered my aunt." Ex. 155 at 206. Bundren recounted how she chose not to participate in the trial because, unlike the rest of her family who testified that the uncle should not receive the death penalty, Bundren favored capital punishment for him. Id. at 207–08. She found it "baffling" that her educated family chose not to "look at the facts and kind of string all of the pearls together" to support the death penalty. Id. at 209. She also stopped going to visit her uncle in prison because he continued to "indicate[] that he's not guilty of the charges"—that is, he had not "accepted responsibility . . . for having committed the homicide. Id. at 217. It is clear that Bundren still carried this experience with her, and it is quite possible that her decision to vote for death in Mr. Chappell's case was the result of her feeling that justice was not served in her uncle's case. A person in Bundren's situation could not have remained impartial in Mr. Chappell's case, particularly where the murder was committed in a similar domestic situation, i.e., boyfriend-girlfriend or husband-wife.

8. The issue of domestic violence showed up with other jurors. Seated juror Noahr wrote that her "mother and sperm donor father" had an abusive relationship "when [she] was 10 years old,"[61] she "never had a close relationship with him" and in fact she "feared him." Ex. 210 at 5. Noahr stated that she remembered the abuse,

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[61] Noahr stated during voir dire that her parents divorced when she was eight years old. Ex. 155 at 194.

witnessed it, and also that she acted as protector to two younger siblings. Ex. 155 at 194. Seated juror Forbes similarly had domestic violence in his past but, unlike Noahr, was himself the victim of abuse. Forbes responded "Yes" to question 19 (Have you, or someone close to you, as a child or as an adult, been the victim or witness of acts of domestic violence?) and explained "Step dad beatings 12–16." Ex. 199 at 5. As to his feelings about this: "Locked away." Id. During voir dire Forbes stated it was not only himself who was the victim, but also his mother and two sisters, Ex. 184 at 52–53, and that it lasted "6 or 7 years." Id. Even though Forbes said he would keep an open mind, and that the situation was "30 years ago," the fact that he indicated on the questionnaire that he keeps this situation "locked away" shows that it was still an issue with which he struggled. Both Noahr and Forbes had backgrounds which were too similar to the facts of Mr. Chappell's case for them to have remained impartial.

b. Jurors with relatives in law enforcement were impermissibly biased

9. Several seated jurors had relatives who worked in law enforcement. In this case seven law enforcement personnel testified for the prosecution[62]—not including parole officers, 911 operators, and private security officers—and it is likely that these jurors were inclined to give greater weight to police testimony because of their close ties to law enforcement. Juror Taylor's son worked as a police officer. Ex. 241 at 6 ("My son is a retired police officer from the Santa Monica, Calif. P.D"). Taylor affirmed during voir dire that he and his son talked a lot about his son's job. Ex. 155 at 85. Other jurors similarly situated to Taylor included juror Noahr (son was a corrections officer with NLVPD, ex-husband was a captain with NLVPD, Ex. 210 at 6);

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[62] Russell Lee, LVMPD, Ex. 171 at 76; Paul Osuch, LVMPD, Ex. 172 at 7; Paul Weidener, Lansing PD, Ex. 173 at 109; James Vaccaro, LVMPD, Ex. 175 at 31; Jeri Earnst, Tucson PD, Ex. 169 at 12; Dan Geirsdorf, LVMPD, id. at 28; and Allen Williams, LVMPD, id. at 38. There were four other witnesses in law-enforcement-related positions, bring the total number of such witnesses to eleven, or nearly fifty percent of total witnesses for the State.

juror Morin (cousin-in-law was a SWAT member in San Bernardino, Ex. 192 at 6; Ex. 155 at 238–39); and juror White (uncle was a police officer in Long Beach, CA, Ex. 198 at 6). All of these jurors stated that their relationship to a member of law enforcement would not affect their ability to remain impartial; however, this is an objective determination, to be made by the reviewing court without regard to whether the jurors stated or believed they could maintain impartiality.

10. Closely linked to the issue of jurors with relatives in law enforcement is the problem of jurors who actually worked in law-enforcement-related fields. Seated juror Smith indicated on his questionnaire that he had had basic law enforcement training in the past, Ex. 208 at 4, having worked for the Flagstaff police department while in college, Ex. 155 at 163; had trained with the Metro police department in 2006, Ex. 208 at 4; and that, at the time of the trial, he worked at Searchlight Justice Court and volunteered with Metro police at the Laughlin sub-station. Id.at 6; see also Ex. 155 at 161–63. Juror Washington stated that she worked as a pretrial officer for the City of Las Vegas, a position she had held for twenty-four years, Ex. 184 at 23, that she knew quite a few people in law enforcement as a result of her occupation, and had contact with police officers "all the time." Id. Both of these jurors stated that their relationship to law enforcement would not affect their impartiality, but it is likely that they were biased towards police testimony based on their long histories and close association with law enforcement personnel.

c. Jurors with relatives in prison were impermissibly biased

11. Juror Forbes indicated that his younger brother was not treated fairly by the judicial system because he was "railroaded [by the] P[ublic] defender." Ex. 199 at 6. At voir dire he stated again that his brother "got railroaded" by "the public defender's office." Ex. 184 at 54. Forbes said he "had some bitterness about it" and "felt guilty" as well, because "if I had had the money at the time, we could have went and hired an

attorney and he never would have went to prison." Id. This juror's bitterness towards public defenders and guilty feelings likely caused him to view with suspicion all evidence introduced by Mr. Chappell's attorneys, who were public defenders, causing him in turn to favor the prosecution's side of the case. Forbes's personal history therefore caused him to be unconstitutionally biased in Mr. Chappell's case.

d. Jurors with substance abuse experience were impermissibly biased

12. Juror Morin indicated that he had a brother and other family members with substance abuse histories. Ex. 192 at 5; Ex. 155 at 237–38. He further stated during a post-conviction interview that he did not have the time nor sympathy to deal with substance abusers, and did not believe it was an acceptable excuse for murder (i.e., not proper mitigating evidence). See Ex. 211 at ¶6. Morin felt the same way about those person who engaged in domestic violence. Id. This implies that he did not consider all of the evidence at Mr. Chappell's trial. Any evidence pertaining to Mr. Chappell's mental state offered in mitigation Morin would have disregarded or ignored. This bias against substance abuse indicates that Morin could not have remained impartial during Mr. Chappell's trial.

e. Jurors who would not consider all four possible sentences were impermissibly biased

13. Juror Feuerhammer stated during voir dire that he had a problem with a "term of years" sentence with the possibility of parole. "If you give him 40 years with the opportunity for parole, and ten years is already served, leave thirty, I have a problem with that." Ex. 184 at 49. The State told Feuerhammer that eligibility and time served were matters for the judge, out of the jury's hands—"you don't know anything about that[.]" Id. "It's not something that [the jury will] get information on anyway." Id. Though Feuerhammer expressed concern about the outcome of a sentence he might impose, the State did not satisfactorily address this concern, which leads to

the conclusion that Feuerhammer held on to his bias against a term of years sentence, and did not consider all four possible sentences.

3. A juror who potentially lied during questioning may have been impermissibly biased according to McDonough

14. Juror Forbes suggested on his questionnaire that he would have a problem remaining fair and impartial if the victim and defendant were of different races. Ex. 199 at 7. See ante at Part C.1. He also responded "No comment" to 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?"). Ex. 199 at 6. But during voir dire, Forbes stated that the defendant's race was "so irrelevant" that it "ma[de] no difference . . . if Mr. Chappell is African-American . . . I don't care." Ex. 184 at 59. The possibility exists that Forbes was dishonest during voir dire, concealing his racial prejudice. Whatever his motivations might have been, if Forbes was in fact racially biased, then this would have provided valid grounds for a challenge for cause. A hearing should be held to determine whether Forbes was dishonest during voir dire and consequently, whether Mr. Chappell's jury was unconstitutionally biased.

15. Because the court failed to strike these biased individuals for cause, all became seated jurors at Mr. Chappell's second trial. Ex. 184 at 148–49. The presence of even one biased juror offends the Constitution, such that reversal is required. Here, nine biased jurors[63] sat in judgment of Mr. Chappell. Accordingly, Mr. Chappell's rights under the Sixth Amendment and clearly established federal law were violated. This constitutional error is prejudicial per se and requires reversal of Mr. Chappell's conviction.

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[63] Taylor, Smith, Bundren, Forbes, Ann Noahr, Morin, White, Washington, and Feuerhammer.

C. Failure to remove prospective jurors who were challenged but not stricken constituted prejudicial error by the trial court

17. Mr. Chappell was prejudiced by the trial court's failure to remove prospective jurors Hibbard, Ramirez, and Button from the jury panel because Mr. Chappell had to use his peremptory challenges against these prospective jurors. Had they been removed for cause he could have used those challenges against other prospective jurors, such as Juror Bundren, see ante.

18. Prospective juror Hibbard was unwilling to consider mitigating circumstances other than insanity:

> MR. PATRICK [defense counsel]: Just because somebody was on drugs, would you still be able to keep an open mind about things they had to say?
>
> PROSPECTIVE JUROR: If you're asking if it mitigates what they do, no it doesn't. They have to control their actions and make decisions. They've got to be accountable for those decisions.
>
> MR. PATRICK: In your questionnaire when they asked you what your feelings were about the death penalty, you put, good.
>
> PROSPECTIVE JUROR: If the penalty meets the crime. That's what I'm trying to say, the penalty should fit the crime.
>
> MR. PATRICK: Again, on the mitigation, you were asked there's mitigating circumstances and aggravating circumstances. You wrote that you could somewhat listen to both sides of that?
>
> PROSPECTIVE JUROR: Yeah. Mitigation seems to be a broad spectrum now a days to justify a lot of things. I don't believe that mitigating circumstances for death penalty murder. I would have a hard time accepting mitigating circumstances for murder.
>
> MR. PATRICK: So anything in a person's background or any drug activity, doesn't make any difference to you?
>
> PROSPECTIVE JUROR: No.
>
> MR. PATRICK: At all?

PROSPECTIVE JUROR: Not at all.

MR. PATRICK: Would you say you'd vote automatically for the death penalty?

PROSPECTIVE JUROR: I would have to hear the facts. Murder is a pretty severe action. Unless there's insanity at the time of committing it, I don't know how you justify that.

MR. PATRICK: So besides insanity, you wouldn't be able to find any mitigating circumstances?

PROSPECTIVE JUROR: It would be difficult.

. . .

MR. PATRICK: I'll challenge at this time.

THE COURT: Let me ask you a question, Mr. Hibbard. The question isn't so much whether you think there are mitigating circumstances for the murder that justify a crime. The question here is sentence, punishment. Are there things out their (sic) in your mind that you would be able to consider that you think would be appropriate consideration as to mitigate what sentence somebody receives?

PROSPECTIVE JUROR: I think pretty hard about the victim, not so much the person. The victim doesn't have a lot of choices left.

THE COURT: I understand. But the question in terms of how he gets punished, both sides might be able to present evidence that they think --

PROSPECTIVE JUROR: The victim didn't choose his or her punishment.

THE COURT: I realize that. Would you be able to consider things that the defense brings up that they argue in mitigation of what sentence somebody should receive, or are you saying you wouldn't consider those at all?

PROSPECTIVE JUROR: I'm saying that I think that bringing up a cover for justifying committing murder is very difficult for me to understand.

THE COURT: All right. Thank you.

Ex. 155 at 99-102. The court denied the challenge for cause. Id. at 133. It was clear from the record, however, that prospective juror Hibbard was unwilling to consider mitigating evidence and that he was therefore not eligible to serve on the jury.

19. The district court also erred in failing to grant a defense challenge for cause of potential juror Ramirez. Ramirez expressed his belief that the death penalty was not enforced enough; that he was from Texas and the concept that certain factors would have to be considered before a sentence of death could be imposed was news to him; that it was difficult for him to say whether he would be able to follow the judge's instructions and hold the State to its burden; that he believed in an eye for an eye; that he agreed with the system in Texas where jurors did not have four choices as to the punishment, but only two choices, one being death; and he doubted that if he were in Mr. Chappell's position that he would want twelve people like him sitting on the jury. Ex. 155 at 174-82. Despite his strong convictions and the clear message that he would impose the death penalty, the district court denied the defense challenge for cause. Id. at 229. The district court erred in doing so.

20. The district court further erred in failing to grant a defense challenge for cause of potential juror Button.[64] Button stated that she could not see how a penalty "could go any other way except the death penalty"; that she would not be able to follow the judge's instructions as to the legal requirements that must be met before death could be imposed; that she would automatically pick death without hearing the information introduced at trial; that there was no way she could consider all four punishments; and that her mind was already made up and there was not much chance she would change it. Ex. 184 at 112–16. The court denied the challenge for cause, id. at 146, despite clear evidence that Button would be unable to fairly consider all four forms

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[64] Button is misidentified as "Bundren" in the transcript. See Ex, 184 at 109, 114, 146. At pages 109 and 146, "sic" is used to indicate the error, and at 146 the badge number used, 088, indicates which potential juror is actually being discussed: prospective juror Button. See Ex. 201.

of punishment, and instead would almost assuredly vote for death. The district erred in doing so.

D. Conclusion

21. The seating of impartial jurors is prejudicial per se and requires the automatic reversal of Chappell's death sentence.

CLAIM TEN (TRIAL COURT ERROR GUILT PHASE)

Mr. Chappell's conviction is invalid under the federal constitutional guarantees of due process, equal protection, and trial before an impartial jury due to trial court error in the introduction of inadmissible evidence. U.S. Const. amends. V, VI, VIII, XIV; Nev. Const. art. 1, §§ 1, 6, 8, and art. 4 § 21.

SUPPORTING FACTS

A. The trial court violated Mr. Chappell's due process rights by permitting the State to introduce irrelevant prior bad act evidence at Chappell's guilt-phase trial

1. Under Nevada law, the State may only present prior bad act evidence at trial after demonstrating to the trial court, by "clear and convincing" evidence, that the defendant committed the alleged prior bad acts, that the evidence satisfies one of the exceptions to the exclusion of such evidence enumerated in Nev. Rev. Stat.48.045, and that the probative value of the evidence outweighs its prejudicial nature. Petrocelli v. State, 692 P.2d 503, 507 (Nev. 1985). Mr. Chappell's right to this state procedure is protected by federal due process principles. See Hicks v. Oklahoma, 447 U.S. 343, 346-47 (1980).

2. Prior to the commencement of Mr. Chappell's trial, the State filed motions seeking to admit prior bad act evidence at the guilt phase, including evidence that Mr. Chappell committed prior domestic batteries against Ms. Panos. See Exs. 17,18; Ex. 109 at 8. The State claimed this evidence demonstrated Mr. Chappell's state of mind, motive, and intent. See Nev. Rev. Stat. 48.045.

3. Defense counsel filed an opposition to the State's motions arguing: (1) that because Mr. Chappell had stipulated that he killed Ms. Panos, the killing was not accidental, and he was extremely jealous of Ms. Panos's attention to or from other men, the State's evidence was not relevant to any facts at issue; (2) that even if evidence of prior domestic batteries was relevant, it was highly prejudicial—so prejudicial that their probative value was outweighed by its inflammatory nature; and (3) with regard

to Ms. Panos's statements to police and others describing the batteries, the evidence lacked foundation and constituted hearsay. Exs. 19, 20-22; Ex. 111 at 39, 119-22.

4. Defense counsel further requested a hearing to hold the State to its burden under Petrocelli of demonstrating by clear and convincing evidence that Mr. Chappell committed the prior bad acts. Ex. 22. However, rather than presenting live witnesses, the State merely recited an offer of proof of the evidence it intended to present. Ex. 111 at 18-20, 30-31. The defense objected to this process, but the trial court accepted the State's offer of proof. Id. at 20, 22-23, 30-31.

5. Following the State's proffer at the Petrocelli hearing, the trial court permitted the introduction of the following evidence: episodes of domestic violence that occurred in February 1994 in Tucson, December 1994 in Las Vegas, January 1995 in Las Vegas, and June 1995 in Las Vegas; threats from Chappell a witness heard during various telephone calls in February, September, and November 1994; and evidence of the temporary protective order requested by Panos against Chappell in January 1995. This evidence included witness testimony from Lisa Duran. Dina Freeman, City of Tucson Police Officer Jeri Earnst, Metro Police Officer Daniel Giersdorf, and Metro Police Officer Allen Williams. Ex. 111 at 18, 31-33. The court also admitted Ms. Panos's statements to police and friends as excited utterances, an exception to the hearsay rule. Id. at 66.

6. For the reasons explained below, the trial court erred in accepting the State's proffer and admitting the evidence of prior bad acts, and the error was not harmless.

1. The trial court erred in finding the prior bad act evidence relevant, and in failing to weigh its probative value against its prejudicial effect

7. At the guilt phase of trial, the trial court allowed the State to present the following evidence of prior batteries committed by Mr. Chappell against Ms. Panos:

- Duran testified she saw Chappell slap Panos in December 1994. Ex. 132 at 58-60;
- Duran testified Panos suffered a broken nose sometime after Christmas 1994. Ex. 132 at 61;
- Officer Daniel Giersdorf testified that Panos told him on January 9, 1995 that she was hit by Chappell. Ex. 133 at 88;
- Freeman testified that Panos arrived at work several times in 1994 with bruises and injuries on her face or arms. Ex. 135 at 38;
- Freeman also testified that Chappell told Panos that he was going "to do an OJ Simpson on her." Id. at 49;
- Officer Geri Earnst described a 1994 conversation with Panos in which she claimed a battery had been committed upon her by Chappell. Ex. 135 at 66-67; and
- Officer Allen Williams stated that on June 1, 1995, Panos told him that Chappell had battered her. Ex. 135 at 108.

8. The State's argument that this evidence was admissible because it was relevant and qualified as an exception to the general prohibition against character evidence was incorrect because the prior domestic battery evidence was only relevant if Mr. Chappell had denied killing Ms. Panos or if he had claimed he killed her in self-defense or accidentally. Ex. 111 at 2-30. In this case, however, the parties stipulated that Mr. Chappell killed Ms. Panos, it was not accidental, and that Ms. Chappell was extremely jealous about other men paying attention to Ms. Panos. Ex. 21; Ex. 135 at 121-22. By entering into the stipulation, the issue before the jury was narrowed, rendering the prior domestic acts committed by Mr. Chappell irrelevant. Ex. 109 at 8; see United States v. Mohel, 604 F.2d 748, 753 (2nd Cir. 1979) (reversing conviction ruling that "an unequivocal offer of a stipulation or concession serves to remove intent

and knowledge as issues in this case"). Because a stipulation was entered into here, Ex. 135 at 121-22, the prior bad act evidence should have been excluded.

9. Moreover, the prior acts were not relevant to the question of Mr. Chappell's intent on August 31, 1995. None of the prior battery evidence indicated that Mr. Chappell had ever caused anything close to a life threatening injury to Ms. Panos. The fact that Mr. Chappell had previous slapped, hit, or broken Ms. Panos's nose in no way demonstrated, or even suggested, that he had an intent to kill her when he entered their trailer on the day of the offense. The alleged comment by Mr. Chappell that he would "do an OJ Simpson on her" was made, according to Ms. Freeman, in the fall of 1994, almost a year before the instant offense. Ex. 111 16-17. Most of the instances of domestic abuse presented by the State were committed after the alleged OJ threat, yet none of the injuries inflicted by Mr. Chappell during any of those instances were life threatening. Mr. Chappell certainly had the opportunity to follow through on the alleged OJ threat for almost a year after it was made, yet he never did anything close to killing her during that time. A comment made by Mr. Chappell in the fall of 1994, after which Mr. Chappell had ample opportunity to take Ms. Panos's life if that is what he intended, is not relevant to Mr. Chappell's intent on August 31, 1995. When all of the prior bad acts are viewed together, it is clear that they do nothing to prove that Mr. Chappell intended to kill Ms. Panos.

10. Not only did the trial court err in finding this evidence relevant, it failed to conduct the required weighing of the "probative value of the proffered evidence against its prejudicial effect." Petrocelli, 692 P. 2d at 507-08. The trial court's failure to follow the required procedure under state law for determining the admissibility of this evidence arbitrarily deprived Mr. Chappell of his due process liberty interest. See Hicks, 447 U.S. at 346-47.

11. Had the court balanced the necessary considerations, and taken into account the facts of the defense stipulations regarding the killing, the court would have

determined that the probative value of the proposed evidence was clearly outweighed by the overwhelming prejudicial effect of the evidence. As explained above, the evidence was not relevant in light of the stipulations. At best, the evidence was of minimal relevance. The prejudicial impact, however, was huge. The State's prior bad act evidence portrayed Mr. Chappell as a bad person—a man with a history of abusing his girlfriend and selling his children's belongings to buy drugs. The evidence made the jury want to convict Mr. Chappell not because it tended to prove that he was guilty of killing Ms. Panos, but because it tended to prove that Mr. Chappell was a jerk. This is precisely what Nev. Rev. Stat. 48.045 was intended to prevent.

12. Because the evidence of Mr. Chappell's prior bad acts was not relevant, and because its probative value was outweighed by its prejudicial impact, the trial court erred in admitting it.

2. The trial court erred in permitting the State to merely proffer evidence at the Petrocelli hearing because it deprived Mr. Chappell of due process and resulted in a lack of adequate notice to Mr. Chappell of the evidence the State would ultimately present at trial

13. The purpose of a Petrocelli hearing is for the State to demonstrate the prior bad act evidence is relevant, and to show that clear and convincing evidence supports the allegation that the defendant committed the prior acts. Petrocelli, 692 P.2d 503, 508. But here, the State was only required to present a bare bones summary to the court of what it expected to present at trial. The failure of the trial court to hold the State to the required burden of proof, violated Chappell's due process rights and denied the defense the notice it was due to defend against the charges.

14. As shown below, the State also presented evidence that was never mentioned at the Petrocelli hearing and evidence that was inconsistent with the offer of proof made before trial.

a. Dina Freeman

15. Dina Freeman was Ms. Panos's co-worker and friend. Freeman knew both Chappell and Panos while living in Tucson. Ms. Freeman's trial testimony consisted of statements about three phone calls Panos made to Freeman and observations made by Freeman of bruises on Panos's face and arms during that same time period. Much of this evidence was not proffered by the State at the Petrocelli hearing.

(1) State's proffer at the Petrocelli hearing (bruises on Panos)

16. For a six month period between February 1994 and September 1994 (when Panos left for Las Vegas), Panos was often seen at work with bruises on her face, eyes, and arms. Panos would cover up these bruises with makeup, but Freeman still observed them. Ex. 111 at 17.

(2) Inconsistencies introduced at trial

17. At trial, Freeman stated that she observed bruises during the time she and Panos worked together, from an unspecified time in 1990 until September 1994. Ex. 135 at 39. Instead of six months of incidents—which the State proffered at the hearing, Freeman's trial testimony suggested four years of such incidents. Also at trial, the State asked Freeman whether she and Panos ever had discussions about how Panos received the bruises, and whether Freeman and Panos ever discussed Panos's relationship with Chappell, both of which Freeman responded to in the affirmative. Id. at 38–39. The State was careful not to inquire whether Chappell caused the bruises, but this is strongly implied from the nature of the questions, as well as their timing: that Chappell caused them by physically abusing Panos. This was not part of the State's proffer at the Petrocelli hearing.

b. Officer Geri Earnst, Tucson, Arizona

18. Officer Geri Earnst offered testimony about an incident on February 23, 1994, in which she arrested Mr. Chappell for domestic violence. Much of this testimony was not proffered at the Petrocelli hearing.

(1) State's proffer at the Petrocelli hearing

19. Officer Earnst was on duty February 23, 1994. At about 9:30 p.m., she was dispatched by an off-duty officer to a grocery store. The off-duty-officer gave Earnst some preliminary information, and based on that information, Earnst came into contact with Ms. Panos. Earnst took Panos aside and asked her what happened. Ex. 111 at 2–3. Earnst observed that Panos was upset and crying. Panos stated that within the last thirty minutes she had become a victim of domestic violence at the hands of Chappell. Id. at 3.

20. According to Ms. Panos, she and Mr. Chappell were at home when Panos learned that Chappell had sold the children's furniture. She became upset and was crying, and they began to argue. Chappell pushed her to the ground and as she tried to get up, he started to kick her in her lower body and extremities. At some point, she was able to get out of the trailer with the children and drive to a grocery store where she contacted the off-duty officer and she immediately told him what had happened. Ex. 111 at 3–4.

(2) Inconsistencies introduced at trial

21. At trial, Officer Earnst added much to the story which had not been heard nor admitted by the court. Earnst stated that she spoke with Panos outside of the grocery store for up to twenty-five minutes, Ex. 135 at 64, but the State had not mentioned this time frame at the hearing.

22. Additionally, the State's proffer ended at the point in the incident where Panos related what had happened at the trailer, but at trial, Earnst went on to recount

her actions and interaction with Chappell subsequent to Panos's account outside the grocery store. None of the following was mentioned at the hearing:

- Panos "identified the name of her boyfriend" who had "committed the acts of violence upon her," id. at 68;
- Earnst learned where they lived and responded to their home, id.;
- Earnst left Panos with the off-duty officer because Panos "did not want to go near the trailer while he [Chappell] was still there" because she was "afraid of the boyfriend" and "would not get in the car," saying "that she would not go back over there," id. at 69;
- at Panos and Chappell's trailer Earnst observed Chappell watching TV, "and we knocked a couple of times" before he responded until "finally [he] said just come in," not "ever get[ting] up from the couch to come out and let us in," id. at 70;
- Chappell seemed to be upset, but only because of "the arrival of the police," id. at 70–71;
- Chappell was taken into custody for domestic battery, and also because "he had two warrants," id. at 71;
- Chappell's demeanor at arrest was "extremely cocky," "like, all right, you're here, what do you got to do, you know, let's get it done and go away. No, it didn't seem there was any type of surprise that we were there. It was just like he didn't even care enough to get off the couch and let us in," id. at 71–72; and
- Earnst "advised [Panos] that if she felt like she needed to talk she could call," Earnst gave Panos her pager number "if she didn't want to call 911," Earnst "would see if there was something [Earnst] could do to help her out or get her into a shelter away from the situation," id. at 72–73.

c. **Lisa Duran**

23. Lisa Duran, a co-worker of Ms. Panos testified on three subjects at trial: observing Mr. Chappell slap Ms. Panos, observing Panos with a broken nose, and phone conversations she had with Chappell. The latter two areas were not proffered at the Petrocelli hearing.

(1) State's proffer at the Petrocelli hearing

24. The State characterized the incident in December 1994 as "the defendant beating Deborah Panos in the face while yelling at her[.]" Ex. 111 at 7. Duran and Panos were co-workers. They were working together on the day of the incident. Duran looked outside the window of her work and could see Panos and Chappell in a vehicle. Duran noticed Panos was crying, and Panos and Chappell appeared to be arguing. Chappell took his open hand and slapped Panos across the face. Panos then exited the vehicle and went into work. Id. at 7–8. "Nothing was ever said about it. [Duran] just observed this battery[.]" Id.

(2) Inconsistencies introduced at trial

25. At trial, Duran stated that she had in fact spoken to Panos about the incident, directly contradicting the State's proffer. Ex. 132 at 60–61.

26. Duran also testified about other incidents not proffered at the hearing including that Panos suffered a broken nose from the incident and that Chappell had made threatening phone calls. Id. at 61, 66.

(a) **Broken nose**

27. Duran testified at trial that sometime around Christmas in 1994, she became aware that Panos suffered a broken nose. Duran saw Panos's nose bandaged when Panos came into work. Id. at 61–62. At the Petrocelli hearing, the State proffered that the testimony of the broken nose would come in through the doctor who treated Panos, which did not occur. Ex. 111 at 8–9.

(b) Threatening phone calls

28. At trial, Duran testified that she first met Chappell during Memorial Day weekend in 1995. Duran did not speak to Chappell then but heard him talk to Panos, and remembered his voice. After that weekend, Duran spoke with Chappell on the phone a number of times over a two month period, and she recognized his voice every time. Ex. 132 at 62–64.

29. Sometimes Chappell would telephone Panos at home and ask to speak to Panos. On a couple of occasions he called Duran's apartment looking for Panos. Duran spoke to Chappell over the phone five times and he left messages on two other occasions. Ex. 132 at 64.

30. During one particular conversation, Chappell asked where Panos was and Duran told him she had gone out. According to Duran, Chappell wanted to know "what other nigger she was laying up underneath" and told Duran, "Well, you tell Debbie that I called and that when I get out of here [he was in custody at the time], she's not going to have any friends, she's not going to have any life, and that includes you." This was "about a month before she died." Ex. 132 at 65–66.

31. Duran also testified that there were other conversations where Chappell used threatening words. "[H]e would talk about how he was upset that [Panos] hadn't been answering his phone calls and she hadn't been writing him and he was upset that she hadn't brought the children to see him[]" in jail. Ex. 132 at 67. "He told [Duran] he was angry and that when he got out, [Panos] wasn't going to have any friends and that if he couldn't have her, nobody could." Id. at 66–67. None of this evidence was proffered by the State at the Petrocelli hearing.

d. Officer Daniel Giersdorf, Las Vegas Metro

32. Officer Giersdorf offered trial testimony regarding a domestic violence arrest which occurred in Las Vegas on January 9, 1995. This was not proffered by the State at the Petrocelli hearing.

(1) State's proffer at the Petrocelli hearing

33. Around midnight, Officer Giersdorf was dispatched to the Ballerina Mobile Home Park. Ex. 111 at 9. When he arrived at the location he noticed Panos. She had already been in the ambulance, she had blood covering her face, ears, hair, and her nose was bleeding profusely. Panos was upset and in pain. Id. Panos told Giersdorf that Chappell had beaten her in the face. Id. at 9–10. Giersdorf then went into the residence and contacted Chappell to ask his side of the story. Chappell admitted to hitting Panos in the face with a plastic cup and at that point Giersdorf arrested Chappell. Id. at 10.

(2) Inconsistencies introduced at trial

34. Officer Giersdorf's testimony differed from the State's proffer in that it added additional, and more prejudicial detail. He noted that the 911 call "came in from a female requesting medical and police." Ex. 135 at 85. When he arrived at the scene he had an initial conversation with the ambulance technicians, id., and after that brief conversation he went into the ambulance and viewed a female "laid out on a stretcher mostly covered up by sheets." Id. at 86. He described Panos's nose, which the State had left out of its proffer at the hearing: "[H]er nose was very big. It was about half the size of my hand . . . My fist. About that big." Id.

35. Later, Giersdorf added more: descriptions of Panos's state of mind which the State had not proffered at the hearing. "She was upset crying and rather hysterical, irrational." Ex. 135 at 87. He also added his observation of Chappell's demeanor upon finding Chappell "sitting in his living room in an easy chair watching TV[]": "He was

real lethargic, real [quiet], just sat there." Prosecutor Silver: "Did he seem concerned for this woman?" Giersdorf: "No, ma'am. He had like no emotion at all when I contacted him." Giersdorf testified that Chappell did not seem sad or remorseful, and that he was not crying. Id. at 88–89. None of this was proffered by the State at the Petrocelli hearing.

e. Officer Allen Williams, Las Vegas Metro

36. Officer Williams offered trial testimony about an incident on June 1, 1995, in which he arrested Mr. Chappell for domestic violence.

(1) State's proffer at the Petrocelli hearing

37. Officer Williams was dispatched to a domestic violence call on June 1, 1995 to Ballerina Mobile Home Trailer Park. Ex. 111 at 11. There, Williams observed Panos's demeanor, she was crying and upset. Panos told Williams that Chappell began to argue with her about five to ten minutes prior to Williams's arrival. As a result of the argument, Chappell threw Panos down on the bed, became violent with her, jumped on top of her, placed his knees over her arms, pulled out a knife and threatened her with that knife until, ultimately, a friend named Clair knocked on the door, and then the police arrived. Id. at 13–14.

(2) Inconsistencies introduced at trial

38. At trial, Williams added facts that were not proffered at the hearing. Mainly that Panos told him, in addition to them getting into an argument, that Chappell became angry and began yelling at her, and that when Chappell threatened Panos with the knife, that he "held it to her throat" when he did so. Williams also stated that he came into contact with the boyfriend whose name was James Chappell. Ex. 135 at 108–09.

f. Mr. Chappell could not prepare an adequate defense based on the lack of notice of evidence that was actually presented at trial

39. Because the State was not required to do anything more than offer a bare bones summary of the evidence it was going to present at trial, defense counsel was less prepared for the evidence that the State ultimately did present, which was neither relevant nor admissible and highly prejudicial. Mr. Chappell's due process were violated based upon the faulty Petrocelli hearing, and the defense was denied proper notice of the evidence it was to defend against. See generally In re Oliver, 333 U.S. 257, 273-74 (1948); Matthews v. Eldridge, 424 U.S. 319, 332 (1976).

40. That the lack of notice of the State's case prejudiced Mr. Chappell is demonstrated by trial counsel's testimony at the post-conviction evidentiary hearing that he was blind-sided by the State's witnesses at trial based upon the "bare bones summary" presented by the State at the Petrocelli hearing. Ex. 109 at 11-12. According to counsel, he was "stunned" that the State's case was about the prior bad acts committed by Mr. Chappell.[65] Id. at 13. Because he did not have adequate notice about the evidence that was going to be admitted against him, the defense failed to adequately cross-examine the witnesses to the prior bad acts, or to rebut their testimony in any way. Id. at 43-44. Therefore, the trial court's failure to require the State to present the witnesses testimony regarding the prior bad acts at the Petrocelli hearing had a substantial and injurious effect on the outcome of the proceeding.

3. The trial court erred in admitting the prior bad act evidence as excited utterances

41. At trial, the court permitted various officers to testify and repeat statements allegedly made by Ms. Panos in which she said Mr. Chappell battered her.

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[65] To the extent defense counsel failed to interview any of the proffered witnesses from the Petrocelli hearing, counsel's performance was deficient. See Claim One, ante.

See Ex. 135 at 66-67, 87-88, 108. The court admitted the statements as excited utterances.

42. An excited utterance is an exception to the prohibition against hearsay evidence when a startling event occurs which renders normal reflective thought process inoperative and the declarant makes the statement in response to a startling event. See White v. Illinois, 502 U.S. 346, 355-56 (1992); Idaho v. Wright, 497 U.S. 805, 820 (1990); State v. Medina, 143 P.3d 471, 475 (Nev. 2006). The key question is whether the declarant had the opportunity to reflect on what was happening. See Winzer v. Hall, 494 F.3d 1192, 1197-98 (9th Cir. 2007). On the other hand, merely being upset does not meet that standard. Boyd v. City of Oakland, 458 F. Supp. 2d 1015, 1026 (N.D.Cal. 2006); State v. Machado, 127 P.3d 941, 948 (Hawaii 2006). The admission of testimonial hearsay of this sort, under an essentially meaningless exception to the hearsay rule as applied in this case, violated Chappell's sixth amendment right to confront the witnesses against him.

43. Here, Ms. Panos approached an off-duty police officer, Neidowsky, who in turn called Officer Earnst to the scene. According to Office Earnst, when she interviewed Panos, she began crying. However, Panos had ample time to reflect upon what she would tell Officer Earnst. Panos left her home, went to the location where she located an off-duty officer, told the officer what happened, and then repeated that story to another officer after that officer was called to the scene. Ex. 135 at 60-68.

44. The same problem exists with Officer Giersdorf's testimony. When Officer Giersdorf arrived at the scene, Ms. Panos had already discussed her injuries—and what had transpired earlier—with medical personnel. The officer testified that Panos was crying and upset, but that did not make her statement an excited utterance, especially in light of the fact she had time to reflect upon what she told the police officer. Ex. 135 at 83-87.

45. Similarly, Officer Williams was permitted to testify to Ms. Panos's statements regarding the June 1, 1995 battery. According to the testimony, Panos was frightened and crying when Officer Williams arrived. Ex. 135 at 107-08. The statement made by Panos to the police so long after the alleged battery, and after time for reflection, did not constitute an excited utterance. Winzer, 494 F.3d at 1198 (statement made after the opportunity to reflect or discuss the matter is not within the hearsay exception).

B. The trial court erred in admitting inadmissible hearsay evidence of Mr. Chappell's state of mind

46. Despite objections by defense counsel on grounds of inadmissible hearsay, the trial court permitted Lisa Duran and Dina Freeman to testify as to Panos's state of mind regarding Mr. Chappell.

47. Duran testified that Panos wanted out of the relationship with Chappell, Ex. 133 at 6, and that she was scared of Chappell, id. at 5, 25. Duran also testified that Panos considered Chappell her former boyfriend, Ex. 132 at 57, and that Panos liked having other friends with her because they helped her feel secure around Chappell, Ex. 133 at 25.

48. The State also introduced the testimony of Dina Freeman, who testified to the history of the rocky relationship between Panos and Chappell—a history that Freeman claimed came from discussions with Panos. See Ex. 135 at 37-56.

49. The testimony of Freeman and Duran however was not admissible because Panos's state of mind was not relevant to any issue in the case. See People v. Noguera, 842 P.2d 1160, 1171 (Cal. 1992) (victims' out-of-court statements of fear towards a defendant are not admissible unless the victims' conduct in conformity with that fear is at issue).

50. In this case, Mr. Chappell stipulated that he killed the victim and the death was not accidental. Ex. 135 at 121-22. The defense made no effort during trial

to suggest that Ms. Panos's death was anything other than a criminal act committed by Mr. Chappell (be it voluntary manslaughter or second degree murder). Yet the trial court permitted witnesses to testify without limitation regarding what Ms. Panos thought about Mr. Chappell.

51. The introduced evidence amounted to improperly admitted hearsay that impeached Mr. Chappell, who testified that he had no idea that Ms. Panos wanted out of the relationship and that nobody had told him that information. See Ex. 137 at 94. The testimony of Duran and Freeman suggested Chappell was lying.

52. The introduction of Freeman's testimony amounted to a due process violation under the conversation guarantee of the sixth amendment. See Shults v. State, 616 P.2d 388, 394 (Nev. 1980) (cannot testify to the state of mind of victim unless issues are self-defense, accident, or suicide).

C. The trial court erred in admitting inadmissible evidence of a misdemeanor arrest the day after the offense

53. The State sought to admit the testimony of three witnesses regarding Mr. Chappell's arrest for petit larceny at Lucky's the day after the killing of Ms. Panos. Ex. 134 at 49-54. The defense filed a motion in limine to exclude this evidence, Ex. 23, and the State argued the evidence was admissible as "prior" bad evidence. Ex. 134 at 49-56. The trial court ruled it was admissible because Chappell's intent to shoplift the day after the killing helped to explain his intent to enter his own trailer the day before to rob and kill Panos. According to the court, "the allegations of burglary, robbery, and felony murder all in this case are based on theories consistent with a motive or a need, if you will, to constantly steal to support himself or to obtain narcotics. . . ." Ex. 134 at 58.

54. At trial, the State introduced the following evidence. Lawrence Martinez described watching Mr. Chappell steal two bottles of liquor and a can of beer. Ex. 134 at 65-66. Kimberly Sampson described watching Chappell discard social security cards

belonging to Panos. Ex. 134 at 79-81. And Paul Osuch described Chappell giving a false name following his arrest. Id. at 88-89.

55. However, the shoplifting incident was irrelevant to the killing, as it happened after the fact, and had no relevance to the State's case. Because a verdict may not be based upon the ground that the defendant, having committed other crimes, must have committed this one, McKinney, 993 F.3d at 1380-81, the introduction of the evidence was erroneous and it strengthened the State's attack on Mr. Chappell's character and veracity. This amounted to a due process violation. See McKinney, 993 F.3d at 1380; Hicks, 447 U.S. at 346-47.

D. The trial court erred in admitting inadmissible bad character evidence

56. The State improperly introduced evidence of Mr. Chappell's bad character through witnesses LaDonna Jackson and Deborah Turner. Further, the court did this without the benefit of a Petrocelli hearing (even an inadequate hearing like the one discussed in Section A, ante). Both errors denied Mr. Chappell his right to due process and a fair trial under the sixth and fourteenth amendment. See McKinney, 993 F.3d at 1380; Hicks, 447 U.S. at 346-47.

57. Deborah Turner testified, over defense objection, that Chappell did not have a job and he spent virtually every day hanging out at the Vera Johnson housing projects. Ex. 134 at 15-16.

58. LaDonna Jackson testified, over defense objection, that Chappell did not have a job, he hung out at the projects all the time, and he was known as the "Regulator"—meaning he was a chronic thief who could steal anything anybody wanted. Ex. 134 at 30, 44-45. Jackson further testified, over defense objection, that Chappell would steal his own children's diapers and sell them for money to support his cocaine addiction. Id. at 46-47.

59. The fact that Mr. Chappell allegedly could not hold down a job had no bearing on any relevant fact other than his bad character. The court not only permitted two witnesses to testify that Mr. Chappell did not have a job, but that he also spent most of his time hanging around the housing project taking drugs. This evidence was meant as an attack on Mr. Chappell's character, and was not relevant to prove motive, opportunity, preparation, or planning.

60. Further, Jackson's testimony that Chappell was a "Regulator," a person who could steal anything anybody wanted, constituted pure character evidence without any pretense that the evidence could be admissible as prior bad act evidence. McKinney, 993 F.3d at 1380.

61. The State elicited this testimony:

> Q: What were the other ways he made his money?
>
> A: Stealing.

The Defense's objection was overruled and the prosecutor continued:

> Q: And what do you mean by that? What was his other name in the complex?
>
> A: Regulator.
>
> Q: What does that mean, The Regulator?
>
> A: That when you call on the regulators around there, that means they can go to the store and get anything you want. Anything.

Ex. 134 at 44.

62. This inadmissible character evidence was introduced by the State through the use of improper questions. Jackson's testimony that Chappell sold his daughter's diapers, which Jackson believed he probably stole from the store as well, merely reinforced the State's improper attack on Chappell's character.

E. The trial court erred in admitting highly prejudicial gruesome photographs

63. During the testimony of Dr. Sheldon Green, the Chief Medical Officer for Clark County, the State introduced evidence depicting Ms. Panos's body at the time of the autopsy. Ex. 133 at 40-43 (referencing State's trial exhibits 37-48). While counsel did not object to the testimony Dr. Green was giving regarding the state of Panos's body, counsel did object to the introduction of the actual photographs as unduly prejudicial, which the trial court overruled. Id. at 43.

64. Soon after, the State called Michael Perkins, a crime scene analyst supervisor, to testify. During Perkins's testimony, the State sought to admit a photograph of Panos taken at the crime scene (State's trial exhibit 25). Ex. 133 at 101-03. The defense objected to the photograph as overly prejudicial. Id. at 103. The trial court overruled the objection.

65. As counsel stated, the defense was not objecting to the testimony, but only to the photographs. See Exs. 75-82, 84, 86. The photographs were inflammatory and highly prejudicial ensuring that the jury would be unable to purge that memory while deliberating on each and every element of the crimes charged. See Ex. 125 at ¶4. These photographs were introduced solely to inflame the passions of the jury with gruesome details to distract them from the actual legal issues before them. The admission of this evidence deprived Mr. Chappell of his right to due process and a fair and impartial trial in violation of the United States Constitution.

F. Conclusion

66. The State cannot prove that the cumulative impact of the trial court's many errors in admitting irrelevant, erroneous, and prejudicial evidence in this case was harmless beyond a reasonable doubt. Chapman, 386 U.S. at 24.

CLAIM ELEVEN (INSUFFICIENCY OF THE EVIDENCE)

Mr. Chappell's conviction is invalid under the federal constitutional guarantees of due process, equal protection, and a trial before an impartial jury because the State failed to prove beyond a reasonable doubt the charges of burglary, robbery, and first degree murder. U.S. Const. amends. V, VI, VIII, XIV; Nev. Const. art. 1, §§ 1, 6, 8, and art. 4 § 21.

SUPPORTING FACTS

1. The standard of review for sufficiency of the evidence is whether, after viewing evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979); accord Cavazos v. Smith, 132 S. Ct. 2, 6 (2011); Kyzar v. Ryan, 780 F.3d 940, 948-49 (9th Cir. 2015). Under that standard, the State in Mr. Chappell's case did not prove the charges of burglary, robbery, and first degree murder. As to the murder conviction, the jury returned a general verdict, and thus it cannot be determined on what theory any or all of the jurors convicted him, premeditated or felon-murder, and if felony-murder, which alleged felony was the basis of the individual jurors' decision. Under these circumstances, a prejudicial constitutional error as to any theory–such as the invalidity of the burglary conviction and felony-murder theory under White v. State—requests reversal of the murder conviction as well. See Hedgepeth v. Pulido,555 U.S. 57, 58 (2008); Stromberg v. California, 283 U.S. 359, 368 (1931); see Claim Two, cc and cd.

A. The State failed to prove the charge of burglary

2. Nev. Rev. Stat. 205.060 provides: "A person who, by day or night, enters any . . . semi-trailer or house trailer . . . with the intent to commit grand or petit larceny, assault or battery on any person or any felony, is guilty of burglary." Under Nevada law, a person cannot be guilty of burglarizing their own home. State v. White, 330 P.3d

482, 485-86 (Nev. 2014). The State failed to prove either that Mr. Chappell had intent to commit a felony when he entered or that he did not live in the trailer with Ms. Panos—his girlfriend of ten years and mother of his three children.

3. The evidence was undisputed that Mr. Chappell entered his home through a window. On the other hand, the State introduced no evidence that the entry was made in any sort of criminal or surreptitious manner. In fact, the entry occurred in the middle of the day on the street side of the trailer that was most exposed to the neighborhood. Ex. 132 at 77-78, 83-84; Ex. 135 at 121-22 [stipulation]; Ex. 83 (photo of window). The State offered no evidence in this case that Chappell entered the trailer with any intent other than to enter his own home that he shared with Panos and their three children.[66]

4. The State asked the jury to take the entry by the window and assume every conceivable fact that flowed from that entry in a way most unfavorable to Chappell. See Ex. 142 at 88, 91-92, 97, 99, 153-54. However, Chappell testified regarding his intent when he entered the trailer. According to Chappell, he had lost the key to the house so he climbed in through the bedroom window. Chappell also testified that he had "been through the window through many of our residences in Arizona, in Michigan and I didn't figure nothing was wrong with that." See Ex. 137 at 46-47, 98-99 (he lost his key before going to jail so he climbed through the window as he had done many times before).

5. The State failed to show any evidence that Chappell entered that trailer with any intent other than to go home and see his girlfriend. In closing argument, the State only offered speculation about why Chappell entered the home, but no real evidence. Ex. 142 at 87-92. Chappell entered through the window because he did not

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[66] During the penalty phase, which is not at issue here, the State presented evidence that Mr. Chappell commonly entered the trailer through the master bedroom window. Ex. 138 at 58.

have a key, and he believed his girlfriend was at work and not home. Ex. 137 at 46, 98.

6. Nothing arises from the mere entry of a person into his own home, no matter what his intent is. White, 330 P.3d at 485-86. As the trial court's instructions provided, the offense of burglary is the unlawful entry with criminal intent. Ex. 62 (Jury Instruction No. 8). Here, there simply was no unlawful entry.

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

B. The State failed to prove the charge of robbery

8. The crime of robbery in Nevada is defined as:

> The 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 . . . a taking is by means of force or fear if force is used to:
>
> a. obtain or retain possession of the property;
>
> b. prevent or overcome resistance to the taking;
>
> c. facilitate escape . . . .

Nev. Rev. Stat. 200.380.

9. Here, Mr. Chappell testified that he stabbed Ms. Panos in a fit of rage after learning of her infidelity which was made apparent by a letter found in Panos's vehicle. Ex. 137 at 55-59. Chappell then went into the master bedroom and rifled through the documents in that room, looking for his own letters. He threw his letters on the floor, took Panos's car, and left. Id. at 59-60.

10. The State produced no evidence that Mr. Chappell entered the trailer with any intent other than to go home. The State produced no evidence that Chappell used force on Panos with the intent to take anything from her.

11. There is nothing in the record to contradict Chappell's testimony that he took the car as an afterthought because he did not know what else to do. See Id. at 56-60. 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 Ex. 62 (Jury Instruction No. 11); see Phillips v. Woodford, 267 F.3d 966, 982 (9th Cir. 2001) (with reference to California's statute on robbery).

12. The State did not prove the charge of robbery beyond a reasonable doubt. This convictions for robbery and murder should be reversed. See p.266, above.

C. The State failed to prove first degree murder beyond a reasonable doubt

13. Nev. Rev. Stat. 200.030 defines first degree murder as that which is:

> (a) perpetrated by means of poison, lying in wait, torture of child abuse, or by any other kind of willful, deliberate and premeditated killing;
>
> (b) committed in the perpetration or attempted perpetration of sexual assault, kidnaping, arson, robbery, burglary, invasion of the home, sexual abuse of a child or sexual molestation of a child under the age of fourteen years . . . .

14. The State proceeded on two theories: the murder was either a deliberate and premeditated killing pursuant to Nev. Rev. Stat. 200.030 (l)(a), or it was a felony murder pursuant to Nev. Rev. Stat. 200.030 (1)(b). Ex. 24; Ex. 62 (Instruction No. 21).

15. To show first degree murder, the State had to prove one of the following circumstances: (1) the murder was premeditated and deliberate; or (2) the murder was committed during the course of a felony. Ex. 62 (Instruction No. 21).

16. As discussed above, the State did not prove either the crime of burglary or robbery beyond a reasonable doubt. Before going to jail, Mr. Chappell had lost his key. In order to get into his own home, Mr. Chappell climbed through the bedroom window, something he had done numerous times before. Ex. 132 at 77-78, 83-84; Ex.

135 at 121-22 [stipulation]; Ex. 137 at 46-47, 98-99; Ex. 83. This did not constitute a burglary. Furthermore, Chappell did not use force upon Panos to take property from her, which would constitute a robbery. Hence, this is not a felony murder situation. See Leslie v. Warden, 59 P.3d 440, 445-46 (Nev. 2002).

17. Further, the murder was not premeditated and deliberate. As shown above, the jury instruction on premeditation and deliberation failed to accuratelydefine the elements of the offense, in violation of due process and the right to a fair trial; or, in the alternative, the instruction erased any rational distinction between first and second degree murder, in violation of due process, equal protection, the right to a reliable sentence under the eighth amendment and the right to a fair trial under the sixth amendment. Further, Mr. Chappell entered into a stipulation that he was extremely jealous of Ms. Panos. Ex. 21; Ex. 133 at 121-22. Dr. Etcoff testified Chappell was the type of person who, because of his sense of nothingness, would attach himself to another person and become very dependent on that person. According to Dr. Etcoff, Chappell's greatest fear was abandonment. Ex. 142 at 25.

18. It is also undisputed that while Mr. Chappell was in jail, other people were in and out of the trailer. Chappell testified he would call home to speak to his children, and find himself talking on the telephone to strange men. Ex. 137 at 41-42. Chappell's version of the August 31, 1995 events is supported by the letter which Chappell read in Panos's car, and which he tore up inside the trailer. Parts of that letter were found outside the trailer, and parts were found inside. Ex. 133 at 122-23.

19. That letter, (State trial exhibits 69-75), contained the following language: "You really teased me bad that night before I flew back to Jersey. When I come back, we're going to spend hours so I can do it right. Those . . . pants I love to see you in. I'm saving up for my trip to Las Vegas." Ex. 142 at 133.

20. The history of the long relationship between Mr. Chappell and Ms. Panos, the psychological makeup of Chappell, the fact the couple stayed together under

extremely difficult conditions for ten years (breaking up and making up routinely), and the evidence of letter being found by Chappell, demonstrate the killing was not a premeditated, deliberate killing. It was an act of rage by a jealous man who loved Panos so much that he did not know what he would do without her. Under these facts it is impossible to conclude that the State proved beyond a reasonable doubt that Chappell killed the victim in a manner that constituted first degree murder.

21. As the killing was not in the first degree, it could either have been second degree murder or voluntary manslaughter.

22. Nev. Rev. Stat.200.030 defines second degree murder as all other kinds of murder that do not qualify as first degree murder. Thus, if this was an unlawful killing that was not provoked, and it was not premeditated or deliberate, it was a second degree murder. See Ex. 62 (Jury Instruction No. 28). At most, the evidence here showed that Mr. Chappell's killing of Ms. Panos constituted second degree.

23. The killing also could have been construed as voluntary manslaughter: a "provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person." Nev. Rev. Stat. 200.050; see Ex. 62 (Jury Instruction No. 32).

24. These considerations and distinctions among first degree murder, second degree murder, and voluntary manslaughter were swept away by the overwhelming prejudicial and improperly admitted character evidence which inevitably inflamed the jury and prevented the jury from carefully considering the distinctions necessary to fairly judge the case. See Claim Ten, ante. The State did not prove the charge of first degree murder beyond a reasonable doubt.

D. The State failed to prove felony murder under either a theory of burglary or robbery

23. As previously mentioned, the State proceeded on an alternative theory that Mr. Chappell committed felony-murder under a theory of robbery or burglary. See Ex. 24 (information). There was insufficient evidence to support either theory.

24. First, it was impossible for Mr. Chappell to commit felony murder based upon an underlying predicate of burglary because, as mentioned above, Chappell was a resident of the trailer he shared with Ms. Panos—thus no burglary occurred. See White, 330 P.3d at 485-86.

25. Second, at most the robbery was an after-thought, Ex. 137 at 56-60, and thus cannot support a conviction for felony murder. See Nay v. State, 167 P.3d 430, 435 (Nev. 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.").

26. Because the state did not prove robbery or burglary, Chappell could not have been convicted of felony-murder.

CLAIM TWELVE (IMPROPER VICTIM IMPACT EVIDENCE—PENALTY TRIAL)

Mr. Chappell's death sentence is invalid under federal constitutional guarantees of due process, a fair trial, and a fair and impartial jury, because the trial court allowed impermissible and cumulative victim-impact evidence. U.S. Const. Amends. V, VI, VIII, XIV; Nev. Const. art. 1, §§ 1, 6, 8, and art. 4 § 21.

SUPPORTING FACTS

1. Under Payne v. Tennessee, 501 U.S. 808 (1991), the State's presentation of victim impact evidence is limited to a "quick glimpse" of the victim's life and "the impact of the murder on the victim's family." 501 U.S. at 822, 827. The State may not present a victim's family members' characterization or opinion about the crime, the defendant, or the appropriate sentence. Payne, 501 U.S. at 830 n.2 (citing Booth v. Maryland, 482 U.S. 496 (1987)). The Supreme Court in Payne also disapproved of comparisons of the relative worth of one victim versus another, finding that as a general matter, "victim impact evidence is not to encourage comparative judgments." Payne, 501 U.S. at 823; accord Humphries v. Ozmint, 397 F.3d 206, 224 n.8 (4th Cir. 2005); Erin McCampbell, Tipping the Scales: Seeking Death Through Comparative Value Arguments, 63 Wash. & Lee Rev. 379 (2006). Admission of victim impact evidence is unconstitutional under the due process clause if it is so unduly prejudicial that it renders the sentence fundamentally unfair. Id.; Allen v. Woodford, 366 F.3d 823 (9th Cir. 2004).

2. Here, the State was allowed to present extensive improper victim impact testimony which rendered Mr. Chappell's sentence fundamentally unfair.

A. **Impermissible opinions and characterizations of the crime**

3. The state admitted two letters—one written by Christina Reese (the victim's cousin) and one written by Doris Waskowski (the victim's aunt). The State also presented the testimony of Norma Penfield (the victim's grandmother) and

Caroline Monson (the victim's grand-aunt). These letters and testimony included improper victim-impact evidence of the witnesses' opinions concerning the crime and Mr. Chappell.

4. Norma Penfield testified that the crime was a "tragedy" and that she prayed to God for help to endure this "great tragedy." She also described the victim's death as "brutal and senseless." Ex. 169 at 235. Caroline Monson testified that the events of the crime were a "tragedy" and a "horror story." She testified that the victim was "brutally killed" and that crime was "senseless." Id. at 219, 220. A joint letter from Reese and Waskowski described the crime as a "tragedy" that occurred under "senseless circumstances." Id. at 216, 217. A letter authored solely by Reese included this sentence: "She is at peace now, no more beatings from him." Id. at 215. The letters from Reese and Waskowski also referenced family gatherings at birthdays and holidays. Id. at 213-15.

5. The repeated characterizations of the crime as a tragedy, senseless, and brutal by numerous witnesses was a clear violation of Booth and Payne that rendered Mr. Chappell's sentence fundamentally unfair.

B. Impermissible victim to victim comparisons

6. The State presented a lot of testimony emphasizing the fact that the victim was her parent's only child. Ex. 169 at 204, 220. The evidence also focused on the victim's youth. See Ex. 169 at 209 ("It was very sad, of course, because she's so young"); Id. at 215 ("She was only 26 years young when her life was taken from her"); Id. at 218 (victim was "a fine young lady"); Id. at 235 ("[victim] was so young and her death was brutal and senseless"). By repeatedly emphasizing the victim's youth and status as an only child, the testimony encouraged the jury to punish Mr. Chappell more severely than if the victim was not an only child or not young. It was improper for the State to encourage the jury to sentence Mr. Chappell to death based on an implication that the victim's life was more valuable than another victim's life might have been.

C. **Unnecessary cumulative victim impact testimony**

7. The court also violated Mr. Chappell's rights by admitting excessive victim-impact testimony. Payne, 501 U.S. at 830 (allowing victim-impact evidence to show "a quick glimpse" of the victim's life); 814-15 (victim-impact evidence consisted of just one paragraph in response to one question).

8. The victim-impact evidence here came from multiple individuals: the victim's mother, aunt, cousin, and five friends all testified. Ms. Panos's friend Michelle Mancha testified about her feelings at the time she learned that Panos had been killed, informing the jury that she was a wreck for days after, and that even ten years later it was still awful and that she missed her friend every day. Ex. 170 at 62. Mike Pollard testified that upon learning of Panos's death, he was saddened for her and especially sad for her children because they had to grow up without a mother. He also told the jury that he quit his job because he could no longer concentrate when he looked over and saw Panos's empty desk. Ex. 173 at 98. Pollard also testified that he moved out of Nevada, still thought of Panos, and was still angry over the fact that if she had waited for him he might have been able to save her life. Id.

9. Lisa Duran Larsen, another co-worker of Ms. Panos, testified she shut down after her friend's death, went to therapy, and learned information about domestic violence because she felt guilty that she did not help her friend after Panos told Larsen that Chappell was going to get her. Ex. 171 at 43. Larsen also told the jurors she could not be at work any longer because she was reminded of Panos. Larsen also stated that she was afraid Chappell would get out of custody and come for her, so she started seeing a therapist and began taking medication. Larsen admitted to still having anger issues about Panos's death. Id. at 44.

10. Not only was this evidence outside that contemplated in Payne, much of the evidence was also duplicative. For example, the victim's mother, Norma Penfield, testified as to the crime's effect on the victim's aunt, Caroline Monson, and the victim's

aunt testified as to the crime's impact on the victim's mother. Compare Ex. 169 at 228 with Ex. 169 at 220. Both Monson and Penfield testified as to the crime's impact on the children. See Ex. 169 at 221 and Ex. 169 at 228.

11. The State's admission of this duplicative and excessive victim-impact testimony served no purpose other than to repeatedly inflame the jury by appealing to emotion. Having demonstrated the victim's uniqueness, the additional victim-impact evidence had no apparent purpose besides unfairly prejudicing the jury. The weight of the unnecessarily cumulative victim-impact testimony must have had a substantial and injurious effect in creating the jury's recommendation of death.

12. Not only was victim impact evidence improperly admitted (see above), the State's closing argument built an entire theme around this evidence as it argued that Ms. Panos was a worthwhile person and Mr. Chappell was not. Ex. 176 at 50 et seq. The evidence here went far beyond briefly portraying Panos's character to the jury and informing the jury of the impact of her loss. Rather, this evidence became a primary focus of the penalty hearing.

D. Conclusion

13. The State cannot demonstrate that these errors were harmless beyond a reasonable doubt. Chapman, 386 U.S. at 24.

CLAIM THIRTEEN (DEATH PENALTY IS UNCONSTITUTIONAL)

Mr. Chappell's sentence of death is invalid under the federal constitutional guarantees of the right due process, confrontation, effective counsel, equal protection, trial before an impartial jury, freedom from cruel and unusual punishment, and a reliable sentence because the death penalty is unconstitutional as imposed and administered in Nevada. U.S. Const. amends. V, VI, VIII, XIV; Nev. Const. art. 1, §§ 1, 6, 8, and art. 4 § 21.

SUPPORTING FACTS

A. Nevada's death penalty scheme results in the arbitrary and capricious infliction of the death penalty

1. Under contemporary standards of decency, death is not an appropriate punishment for a substantial portion of convicted first-degree murderers. Woodson v. North Carolina, 428 U.S. 280, 296 (1976). 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 v. Stephens, 462 U.S. 862, 877 (1983); McConnell v. State, 102 P.3d 606, 620-21 (Nev. 2004).

1. Nevada's death penalty scheme fails to genuinely narrow the class of death eligible defendants

2. Despite the Supreme Court's requirement for restrictive use of the death sentence, Nevada law permits broad imposition of the death penalty for virtually all first-degree murderers. See Nev. Rev. Stat. 200.033. A defendant can be sentenced to death where his crime was committed "at random and without apparent motive," but also where there was any of a plethora of motives, including robbery, sexual assault, arson, burglary, kidnapping, torture, escape, money, and avoiding arrest. Id. In addition, a defendant can become death eligible where he was under sentence of imprisonment at the time, has been previously convicted of a violent felony, knowingly created a great risk of death to more than one person, killed a police officer, killed a child, killed an elderly person, killed a person due to their race, religion, or sexual

orientation, or killed a person on school grounds. Id. Accordingly, the death penalty is an available punishment for practically every murder committed in the state.

3. The failure to narrow the class of death eligible defendants is compounded by the first-degree murder instructions, which eviscerated the distinction between first degree murder (for which death is an available punishment) and second-degree murder (for which death is not an available punishment), thereby allowing conviction of first degree murder based on a showing of mere intent.

4. Nevada's death penalty scheme also results in the arbitrary infliction of the death penalty because the state has complete discretion to decide when to seek the death penalty. The arbitrariness of the State's decision of when to seek the death penalty is demonstrated in Mr. Chappell's case. The State normally sends cases to a death review committee to determine whether to seek the death penalty. In Mr. Chappell's case, after the Nevada Supreme Court struck three aggravating factors (leaving one valid aggravator) and remanded the case for a new penalty hearing, the State failed to present the case to the death review committee.

5. The State has opted not to seek the death penalty against much more egregious cases than Mr. Chappell's. See State v. Evans, Clark County Case No. C-116071, Sentencing Agreement, February 4, 2003 (state's agreement to sentences of life without possibility of parole for four murders, following reversal of the death sentence for new penalty hearing), Ex. 26; State v. Strohmeyer, No. C-144577, Court Minutes, September 8, 1998 (minutes of change of plea to guilty in return for withdrawal of notice of intent to seek death sentence and imposition of four consecutive sentences of life without possibility of parole, in case involving kidnaping, sexual assault, and strangulation murder of seven-year-old girl), Ex. 49.

6. The jury also has complete discretion to decide whether to impose the death penalty even when it is available. That Nevada's death penalty scheme operates in an arbitrary and capricious manner is demonstrated by the seemingly arbitrary

imposition of the death penalty against people like Mr. Chappell, for whom the State only proved one aggravating circumstance and the jury has found seven mitigating circumstances, while defendants with multiple aggravating circumstances are spared the death sentence.[67]

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[67] See State v. Bai, Clark County Case No. 09C259754-2, verdict, December 3, 2012 (jury verdict of life without the possibility of parole for murder with five aggravating factors and five mitigating factors), Ex. 213; State v. Cruz-Garcia, Clark County Case No. 240509, verdicts, July 24, 2012 (jury verdict of life without the possibility of parole for one murder despite two aggravating circumstances), Ex 214; State v. Washington, Clark County Case No. C-11-275618, verdicts, March 30, 2012 (jury verdict of life without the possibility of parole despite two aggravating circumstances), Ex. 215; State v. Nelson, Clark County Case No. C255413, verdicts, May 11, 2011 (jury verdict life without the possibility of parole with five aggravating factors and ten mitigating factors), Ex. 216; State v. Castillo-Sanchez, Clark County Case No. C217791, verdicts, July 2, 2010 (jury verdict of life without the possibility of parole for one murder despite four aggravating circumstances), Ex. 217; State v. Nunnery, Clark County Case No. C227487, verdicts, May 11, 2010 (jury verdict of life without the possibility of parole for one murder despite fifteen aggravating circumstances, where two of those aggravating circumstances were murder convictions), Ex. 218; State v. Crawley, Clark County Case No. C233433, verdicts, December 9, 2008 (jury verdict of life without the possibility of parole for one murder despite six aggravating circumstances), Ex. 219; State v. Colon, Clark County Case No. C220720, verdicts, October 10, 2008 (jury verdict of life without the possibility of parole for one murder despite two aggravating circumstances), Ex. 220; State v. Beatty, Clark County Case No. C230652, verdicts, February 13, 2008 (jury verdict of life without the possibility of parole for one murder despite three aggravating circumstances), Ex. 221; State v. Chartier, Clark County Case No. C212954, verdicts, June 16, 2006 (jury verdict of life without the possibility of parole for two murders despite two aggravating circumstances), Ex. 222; State v. Wilcox, Clark County Case No. C212954, verdicts, June 16, 2006 (jury verdict of life without the possibility of parole for two murders despite two aggravating circumstances), Ex. 223; State v. Scholl, Clark County Case No. C204775, verdicts, February 17, 2006 (jury verdict of life without the possibility of parole for one murder despite finding two aggravating circumstances of robbery and torture), Ex. 224; State v. Prentice, Clark County Case No. C187941, verdicts, March 3, 2004 (jury verdict of life without the possibility of parole for one murder despite finding two aggravating circumstances of torture and a person under sentence of imprisonment), Ex. 225; State v. Lozano, Clark County Case No. C188067, verdicts, November 3, 2003 (jury verdict of life with the possibility of parole for one murder despite three aggravating circumstances), Ex. 226; State v. Carter, Clark County Case No. C154836, verdicts, April 25, 2003 (jury verdict of life without the possibility of parole for one murder despite two aggravating circumstances), Ex. 227; State v. Mason, Clark County Case No. C161426, verdicts, March 6, 2001 (jury verdict of life without the possibility of parole for one murder despite two aggravating circumstances), Ex. 228; State v. Powell, Clark County Case No. C-148936, verdicts, November 15, 2000 (jury verdicts for life without possibility of parole for four murders with three aggravating factors as to each murder and no mitigating factors cited), Ex. 229 State v. Maxey, Clark County Case No. C151122, verdicts, February 8, 2000 (jury verdict of

7. The expansive aggravating factors, combined with the unfettered discretion given to the State in seeking death and the juries in imposing death, have resulted in a death penalty scheme that is "cruel and unusual in the same way that being struck by lightning is cruel and unusual." Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).

2. The statutory scheme grants the Nevada Supreme Court unfettered discretion

8. Just as the state has essentially unfettered discretion in seeking the death penalty and the jury has essentially unfettered discretion to impose it, so, too, does the Nevada Supreme Court have unfettered discretion to set aside death sentences and impose life sentences, or to remand for a new penalty hearing. Nev. Rev. Stat. 177.055(3) Nev. Rev. Stat. 177.055(3) grants the Nevada Supreme Court two options upon finding constitutional error in a capital case. It may remand a case for a new penalty hearing or set aside the death sentence and impose a sentence of life without the possibility of parole. This remand procedure provided the state High Court with complete and unfettered discretion to re-sentence Mr. Chappell to life imprisonment or to subject him to the risk of another death sentence after remand.

9. Under Furman v. Georgia, 408 U.S. 238 (1972), a sentencing scheme in a capital case must channel the discretion of the sentencing body, comport with contemporary standards of decency and allow the sentencer to make an individualized

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life without the possibility of parole for two murders despite finding three aggravating circumstances of burglary, robbery, and a great risk of death), Ex. 230; Ducksworth v. State, 113 Nev. 780, 942 P.2d 157 (1997) (jury verdicts of life without possibility of parole for two defendants, based on two murders with total of thirteen aggravating factors, including robbery, sexual assault, and torture or mutilation), Ex. 231; State v. Rodriguez, Clark County Case No. C-130763, verdicts, May 7, 1996 (jury verdicts of life without possibility of parole for two murders, each with four aggravating factors where the only mitigating factor cited by the jury was "mercy"), Ex. 232; and State v. Martin, Clark County Case No. C108501, verdicts, October 28, 1993 (jury verdict of life without the possibility of parole for two murders despite twelve aggravating circumstances), Ex. 234.

sentencing determination. Lewis v. Jeffers, 497 U.S. 764, 774 (1990); Barclay v. Florida, 463 U.S. 939, 960 (1983). The sentencing scheme of Nev. Rev. Stat.177.055(3) fails to comport with any of Furman's constitutional principles: it does not supply any standards to channel the Nevada Supreme Court's discretion when it acts as sentencer; its arbitrariness is offensive to contemporary standards of decency; and there are no criteria to allow the court to arrive at an individualized sentence by considering mitigators. The absence of standards and the absence of any rational narrowing of death eligibility in the statute renders Nev. Rev. Stat. 177.055(3) unconstitutional.

10. The absence of any standards to guide the court's discretion is exacerbated by the inherent limitations on an appellate court's ability to weigh the mitigators presented to the jury. Caldwell v. Mississippi, 472 U.S. 320,330 (1985); Cabana v. Bullock, 474 U.S. 376, 388 n.5 (1986). This procedure also violates the Eighth Amendment's requirement of meaningful appellate review of death sentences. Clemons v. Mississippi, 494 U.S. 738, 749 (1990); Zant v. Stephens, 462 U.S. 862 875-76, 890 (1983).

11. Nev. Rev. Stat. 177.055(3) is also unconstitutional because it allows the Nevada Supreme Court to act as a sentencer. See Hurst v. Florida, 136 S. Ct. 616 (2016); Sochor v. Florida, 504 U.S. 527, 539 (1992).

12. Nevada's mandatory review statute similarly grants the Nevada Supreme Court unfettered discretion. The Nevada Revised Statutes require the Nevada Supreme Court to review each death sentence to determine whether the evidence supports the finding of aggravating circumstances and whether the sentence was imposed under the influence of passion and prejudice. Nev. Rev. Stat. § 177.055(2). The Eighth Amendment requirement of reliability likewise mandates such a review. U.S. Const. amend. VIII; see Gregg v. Georgia, 428 U.S. 153, 195 (1976). The Nevada Supreme Court has never enunciated the standards it applies in conducting its review

under this statute. The complete absence of standards renders the purported review unconstitutional under federal due process standards.

13. That the lack of standards guiding the Nevada Supreme Court's review of death sentences causes the state's death penalty system to operate in an arbitrary and capricious is demonstrated by its reversal of death sentences in cases more egregious than Mr. Chappell's. See Evans v. State, 28 P.3d 498 (Nev. 2001) (four murders where original jury found three aggravating circumstances, including torture or mutilation, and sentenced Evans to death).

14. Mr. Chappell's case is itself an example of the arbitrary operation of Nevada's death penalty scheme. Mr. Chappell was sentenced to death by the first jury. Ex. 146 at 5. On direct appeal the Nevada Supreme Court struck the torture or depravity of mind aggravator, reweighed the aggravators, and determined that the "death sentence was proper." Chappell, 972 P.2d 838. On appeal from the partial grant and partial denial of his post-conviction petition for a writ of habeas corpus, the Nevada Supreme Court struck two more aggravating factors and chose to remand for resentencing without reweighing the remaining aggravators against the mitigators, rather than setting aside Mr. Chappell's death sentence and imposing a sentence of imprisonment for life without parole, as it could have pursuant to Nev. Rev. Stat. 177.055(3) ("The Supreme Court, when reviewing a death sentence may: (c) Set aside the sentence of death and impose the sentence of imprisonment for life without possibility of parole."). Mr. Chappell's sentence of death is unconstitutional because Nev. Rev. Stat. 177.055(3) is invalid on its face and as applied under the facts of this case.

15. Even if Nev. Rev. Stat. 177.055(3) was not the basis on which Mr. Chappell was granted a new penalty hearing (see Chappell v. State, 281 P.3d 1160, *3 (2009)), Mr. Chappell's constitutional rights were still violated because the statute permitted the Nevada Supreme Court, on direct appeal, to impose a sentence of less

than death upon a finding of a constitutional violation but did not allow that Court to impose such a sentence on appeal of an order in post-conviction proceedings. Simply stated, it should not matter whether the finding of error was in post-conviction proceedings, the Nevada Supreme Court should be mandated to follow the same remedy. See Ross v. Moffitt, 417 U.S. 600, 609 (1974) ("equal protection" emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable).

B. Nevada has no real mechanism to provide for clemency in capital cases

16. Executive clemency is an essential safeguard in a state's decision to deprive an individual of life, as indicated by the fact that each of the thirty-eight states that has the death penalty also has clemency procedures. Ohio Adult parole Authority v. Woodward, 523 U.S. 272, 282 n. 4 (1998) (Stevens, J., concurring in part, dissenting in part). Having established clemency as a safeguard, these states must also ensure that their clemency proceedings comport with due process. Evitts v. Lucey, 469 U.S. 387, 401 (1985).

17. Nevada law provides that prisoners sentenced to death may apply for clemency to the State Board of Pardons Commissioners. See Nev. Rev. Stat. 213.010. As a practical matter, however, 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 on the basis that the defendant was intellectually disabled and no longer eligible for execution under the Constitution. As a practical matter, clemency is unavailable in Nevada.

18. Furthermore, Nevada's clemency statutes, Nev. Rev. Stat. 213.005-213.100, do not ensure that death penalty inmates receive procedural due process. See Mathews v. Eldrige, 424 U.S. 319, 335 (1976).

19. The failure to have a functioning clemency procedure makes Nevada's death penalty scheme unconstitutional, requiring the vacation of Mr. Chappell's sentence.

C. The death penalty is cruel and unusual punishment under any circumstances

20. Consistent with the dissent's rationale in Glossip, under the federal constitution, the death penalty is cruel and unusual in all circumstances. See Gregg v. Georgia, 428 U.S. 153, 227 (1976) (Brennan, J., dissenting); id. at 231 (Marshall, J., dissenting); Kennedy v. Louisiana, 554 U.S. 407, 441 (2008) ("[C]apital punishment is excessive when it is grossly out of proportion to the crime or it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes."); see also Glossip v. Gross, 135 S. Ct. 2726, 2755-80 (2015) (Breyer, J., dissenting). They are bedrock principles of the Constitution's promise to not permit the infliction of cruel and unusual punishment by the State.

21. The death penalty is also invalid under the Nevada Constitution, which prohibits the imposition of "cruel or unusual" punishments. Nev. Const. Art. 1 § 6. See Mickle v. Henrichs, 262 F. 687, 688 (D. Nev. 1918). While the infliction of the death penalty may not have been considered "cruel" at the time of the adoption of the constitution in 1864, "the evolving standards of decency" that make the progress of a maturing society, Trop v. Dulles, 356 U.S. 86, 101 (1958), have led to the recognition even by the staunchest advocates of its permissibility in the abstract, that killing as a means of punishment is always cruel. See Furman v. Georgia, 408 U.S. 238, 312 (White, J., concurring); Walton v. Arizona, 497 U.S. 639, 669-70 (1990) (Scalia, J., concurring). Accordingly, under the disjunctive language of the Nevada Constitution, the death penalty cannot be upheld.

D. Conclusion

22. The State cannot demonstrate that these errors were harmless beyond a reasonable doubt. Chapman, 386 U.S. at 24.

CLAIM FOURTEEN (CHAPPELL'S SEVERE MENTAL ILLNESS RENDERS HIM INELIGIBLE FOR THE DEATH PENALTY)

Mr. Chappell's death sentence is invalid under federal constitutional guarantees of due process, a fair trial, and a fair and impartial jury, because his severe mental health impairments render him ineligible for the death penalty. U.S. Const. Amends. V, VI, XIV; Nev. Const. art. 1, §§ 1, 6, 8, and art. 4 § 21.

SUPPORTING FACTS

1. Despite the "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse," Penry v. Lynaugh, 492 U.S. 302, 319 (1989), individuals with significant mental and psychological impairments remain overrepresented among defendants sentenced to death and executed.

2. The Eighth Amendment mandates that a death sentence be limited to those offenders with "a consciousness materially more depraved" than that of the typical person who commits a murder. See Godfrey v. Georgia, 446 U.S. 420, 433 (1980). Thus, the execution of a person with insufficient culpability serves no retributive purpose, "violat[ing] his or her inherent dignity as a human being." Hall v. Florida, 134 S. Ct. 1986, 1992 (2014).

3. In part because of their reduced moral culpability, the Supreme Court has categorically prohibited the execution of juveniles and those with intellectual disability. See Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, 536 U.S. 304 (2002). However, in many ways, a severely mentally ill defendant is arguably even more debilitated than an intellectually disabled or juvenile defendant. See John D. King, Candor, Zeal, and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant, 58 Am. U. L. Rev. 207 (2008).

4. The concern over retributive excess extends beyond juvenile status and intellectual disability to include offenders with severe mental illness, traumatic brain injuries and other functional deficits that have a tendency to degrade the quality of thought processes. See, e.g., Porter v. McCollum, 558 U.S. 30, 43-44 (2009) (per curiam) (recognizing mitigating value of a defendant's "brain abnormality and cognitive deficits," as well as "the intense stress and mental and emotional toll" that army service can have on an individual); Panetti v. Quarterman, 551 U.S. 930, 958-59 (2007) (questioning "whether retribution is served" where "[t]he potential for a prisoner's recognition of the severity of the offense and the objective of community vindication are called in question" when the "prisoner's mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole.").

5. The execution of Mr. Chappell would further violate the logic pronounced in both Atkins and Roper due to his debilitating neuropsychiatric and psychological mental illness including significant brain damage—which is most likely caused by his Fetal Alcohol Spectrum Disorder diagnosis—and his other mental illnesses. See Exs. 87 (Dr. Connor); 88 (Dr. Brown); 89 (Dr. Davies); 85 (Dr. Etcoff); 90 (Dr. Lipman); 128 (Dr. Mendel). These impairments render him less culpable than his mentally well peers. See 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) (making the case for categorical exclusion from death those with severe mental illness).

6. Mr. Chappell's mental illness and the accompanying neuropsychological impairments affect his ability to process information, reason independently and rationally, form relationships with others, problem solve, and restrain impulses. Mr. Chappell has also, at all relevant times, suffered from psychological disorders (like addiction and attachment disorder), likely the product of genetic lineage, compounded

and enhanced by a variety of damaging environmental factors during key periods of cognitive, social, and practical development.

7. Mr. Chappell's litany of deficits caused by his mental illness, resulting from both his mother's pre-natal drinking as well as his repeated and prolonged exposure to trauma, including his failure to develop and maintain healthy relationships and cope with or respond to traumatic or complex situations, are impairments akin to those identified in Roper, 543 U.S. 551 and Atkins, 536 U.S. at 318, 320-21, as grounds for excluding both juveniles and the intellectually disabled, respectively, from eligibility for the death penalty.

8. Mr. Chappell's capital sentence is disproportionate to his personal moral culpability because individuals like Chappell with such debilitating impairments caused by mental illness and neuropsychological impairment are so lacking in moral blameworthiness as to be ineligible for the death penalty. Further, neither deterrence nor retribution, the two permissible public policy aims of the death penalty, are served by Mr. Chappell's death.

9. The capital prosecution of Mr. Chappell, who suffered throughout the time of the crime from mental illness and neuropsychological damage, which impaired his cognition and rational thought processes, carries a heightened risk of unjustified execution.

10. Both the legal and mental health communities recognize that the imposition of the death penalty on an individual who demonstrates severe mental illness or disorders is in violation of the evolving standards of decency that underpin civilized standards and the progress of a maturing society. American Bar Association, Report of the Task Force on Mental Disability and the Death Penalty 2-7 (2006); American Psychiatric Association, Position Statement on Diminished Responsibility in Capital Sentencing, http://www.psychiatry.org/File%20Library/Learn/Archives/Position-2014-Capital-Sentencing-Diminished-Responsibility.pdf.

11. The American Bar Association's report noted the particular impropriety of executing an individual like Mr. Chappell. American Bar Association, Report of the Task Force on Mental Disability and the Death Penalty 3-4 (2006).

12. The American Psychological Association, the American Psychiatric Association, and the National Alliance on Mental Illness have adopted the recommendation of the American Bar Association, concurring with the finding that individuals with severe mental illness are less morally culpable and less able to participate in their own trial, appeal, and post-conviction proceedings. American Psychological Association, Associations Concur on Mental Disability and Death Penalty Policy, 38 Monitor on Psychol. 14 (2007).

13. Atkins and its progeny recognize that the clinical consensus for identification of those individuals who "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others," is a critical inquiry in the process of identifying those individuals with lesser culpability who should be exempted from the most severe punishment in accordance with the Eighth Amendment. Atkins, 536 U.S. at 318; Hall, 134 S. Ct. at 1999.

14. Mr. Chappell's death sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. Consequently, his sentence of death must be vacated.

CLAIM FIFTEEN (PROSECUTORIAL MISCONDUCT GUILT PHASE)

Mr. Chappell's conviction is invalid under federal constitutional guarantees of due process, a fair trial, equal protection, and trial before an impartial jury due to the prosecutor's misconduct during the guilt phase of the trial. U.S. Const. amends. V, VI, VII, XIV; Nev. Const. art. 1, §§ 1, 6, 8, and art. 4 § 21.

SUPPORTING FACTS

1. At the guilt phase of Mr. Chappell's trial, the prosecutor committed numerous acts of misconduct. The prosecutor improperly" argued in opening statement that the State would answer the question "why people stay in abusive relationships," disparaged Chappell to the jury, commented on Chappell's post-arrest silence, misstated the law on the presumption of innocence and burden of proof, and misstated the record while arguing before the Nevada Supreme Court on direct appeal. The State's misconduct violated Mr. Chappell's due process rights.

2. The State's "interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935). Prosecutors are "subject to constraints and responsibilities that don't apply to other lawyers." United States v. Kojayan, 8 F.3d 1315, 1323 (9th Cir. 1993). To serve justice, the prosecutor must play fairly, "staying well within the rules." Id.

3. Because of the esteem in which a prosecutor is held and the power that a prosecutor wields, breaking the rules is misconduct that, if sufficiently pervasive, renders a trial fundamentally unfair in violation of the Constitution. See Darden v. Wainwright, 477 U.S. 168, 181 (1986) ("The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'") (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)). Because the inquiry looks at the pervasiveness of the prosecutor's

misconduct, individual incidents of misconduct must be accumulated and their prejudicial impact assessed as a whole. See Darden, 477 U.S. at 181.

A. The prosecutor committed misconduct by asking the jury to answer the question of why people stay with abusive partners

4. During opening statement, the prosecutor told the jurors that "this case will answer the question to all of you, why victims in domestic violence stay with a person who is continually violent to them." Ex. 132 at 19. Mr. Chappell objected to this statement, and the objection was overruled. Ex. 132 at 19. The prosecutor then followed this statement by saying "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." Ex. 132 at 19-20.

5. This statement constituted misconduct for two reasons. First, the prosecutor wrongly stated that it could answer a question on behalf of society—something the State could not do and certainly was not in a position to do. U.S. v. Weatherspoon, 410 F.3d 1142, 1149 (9th Cir. 2005); accord Trillo v. Biter, 769 F.3d 995, 1001 (9th Cir. 2014); United States v. Koon, 34 F.3d 1416, 1443 (9th Cir. 1994). And second, the statement amounted to misconduct because it asked the jury to put themselves in the victim's position.

6. The prosecutorial tactic of asking the jury to put themselves in the victim's place is called the "Golden Rule," and is widely condemned:

> There is a tactic of advocacy, universally condemned across the nation, commonly known as "The Golden Rule" argument. In its criminal variation, a prosecutor invites the jury to put itself in the victim's position and imagine what the victim experienced. This is misconduct, because it is a blatant appeal to the jury's natural sympathy for the victim."

People v. Vance, 116 Cal. Rptr. 3d 98, 102 (Cal. App. 2010). "The condemnation of Golden Rule arguments in both civil and criminal cases, by both state and federal

courts, is so widespread that it is characterized as "universal." Id. at 1198; see also McGuire v. State, 677 P.2d 1060, 1064 (Nev. 1984) (holding that the prosecutor improperly argued jurors should place themselves in the position of the victim or the victim's family); Kelly v. Stone, 514 F.2d 18, 19 (9th Cir. 1975) (holding that it was improper for a prosecutor to say "maybe the next time it won't be a little black girl from the other side of the tracks; maybe it will be somebody that you know").

7. Further, the prosecutor's argument improperly appealed to the jury's natural sympathy for the victim—depriving Mr. Chappell of a fair trial. See Bains v. Cambra, 204 F.3d 964, 974-75 (9th Cir. 2000).

B. The prosecutor improperly commented on Mr. Chappell's post-arrest silence and improperly cross-examined Chappell regarding punishment

8. As previously discussed, the defense filed an offer to stipulate to certain facts regarding the crimes. Ex. 20; Ex. 2 at 2. The State accepted that stipulation and the stipulation was read to the jury in the State's case-in-chief. Ex. 135 at 121-22.

9. Nevertheless, the State improperly argued during closing argument the following:

> This stipulation wasn't entered into until the beginning of trial, not of the beginning when he was arrested for this case, ladies and gentlemen, and the fact remains that this defendant has no other alternative but to claim heat of passion, rage.

Ex. 142 at 156 (emphasis added). The prosecutor continued:

> So, what else is he going to tell you? Well, he's got to make up some convenient facts to fit this case and you heard, ladies and gentlemen, wasn't it interesting the property report that was testified to with the RFLP from Cellmark came back in March of 1996. It wasn't until June 1996 when this defendant made his trip to Dr. Etcoff's office for that rage defense. Isn't that interesting? The defense would have you believe that he, from the very beginning, never contested that this defendant did this that we are supposed to know.

Id. at 157 (emphasis added).

10. It is error for the prosecution to refer directly or indirectly to an arrestee's post arrest silence. Doyle v. Ohio, 426 U.S. 610, 619 (1976). Here, although Mr. Chappell did not dispute who committed the homicide, the degree of the homicide was the sole issue at trial. Accordingly, the prosecutor's comments regarding Mr. Chappell's credibility cannot be considered harmless—rather, the prosecutor's comment so infected the trial with unfairness as to make the resulting conviction a denial of due process. See Greer v. Miller, 483 U.S. 756, 765-66 (1987).

11. The prosecution also asked Mr. Chappell a series of improper questions during cross-examination concerning the punishment he wanted to receive and whether he wanted a death sentence. Ex. 137 at 64-67. At the guilt phase the subject of punishment is not relevant. See Zant v. Stephens, 462 U.S. 862, 911 n.5 (1983) (discussing the exclusion from the guilt phase information that is only relevant to punishment). The State's questions constituted misconduct.

12. During this same cross-examination, the prosecution also violated Mr. Chappell's Fifth Amendment right to remain silent. The State's questioning implied that Mr. Chappell made up his testimony after hearing all the evidence:

> Q: You've had a substantial period of time to think about today, haven't you?
>
> A: Yes, sir.
>
> Q: You've known for quite a while haven't you that at some point you would take the witness stand and give the jury your version of what happened?
>
> A: Yes, sir.
>
> Q: And once you had made that decision, whenever it was, you've given a lot of attention to what you would tell the jury?
>
> A: I didn't make up anything, sir.
>
> Q: I didn't say you made up anything, Mr. Chappell. Have you thought a lot about what you would tell the jury?
>
> A: No.

> Q: Have you thought a lot about how you would act on the witness stand?
>
> A: No, sir.

Ex. 137 at 64-65. The questioning by the prosecutor violated Mr. Chappell's right to remain silent. See Doyle, 426 U .S. at 611; Hurd v. Terhune, 619 F.3d 1080, 1085 (9th Cir. 2010); Alo v. Olim, 477 F. Supp. 133, 135-39 (D.Hawaii 1979).

C. The State improperly disparaged Mr. Chappell in front of the jury

13. During the guilt phase, the State referred to Mr. Chappell as "evil." In fact, the prosecution's opening statement began as follows:

> 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 that inmate released from custody.
>
> All evil required with sturdy legs and resolute strides from an opposite Main Street and Bonanza down 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.

Ex. 142 at 80.

14. The disparaging remarks in this case are similar to the comments in Darden, where the court disapproved of prosecutorial comments referring to the defendant as an "animal," 477 U.S. at 180 n.11, and said "I wish I could see [the defendant] with no face, blown away by a shotgun," id., at 180 n.12; see Comer v. Schriro, 480 F.3d 960, 988 (9th Cir. 2007) (per curiam)(en banc) (holding that prosecutor's references to defendant as "monster," "filth," and a "reincarnation of the

devil," were improper) (Paez, J., concurring); Kellogg v. Skon, 176 F.3d 447, 451-52 (8th Cir. 1999) (prosecutor's reference to defendant as a "monster," "sexual deviant," and "a liar" were "improper personal expression[s] of the defendant's culpability"). The comments were improper and violated Mr. Chappell's right to a fair trial.

D. The prosecution improperly misstated the presumption of innocence

15. There is a presumption that a criminal defendant is innocent of the charges against him, unless the prosecution proves the defendant is guilty beyond a reasonable doubt. 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 Pagano v. Allard, 218 F. Supp. 2d 26, 33 (D. Mass. 2002) ("The presumption of innocence, which is afforded to every criminal defendant brought to trial in this country, does not 'come off' during the prosecutor's closing argument, but remains with the defendant until the jury determines that the government has proven each and every element of the charge beyond a reasonable doubt."); see also Cool v. United States, 409 U.S. 100, 104 (1972) (referencing the "constitutionally rooted presumption of innocence").

16. Here, the prosecution misstated that presumption:

> Ladies and gentlemen, when this defendant walked into this courtroom, he was presumed innocent, but with every piece of innocence 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.

Ex. 142 at 163.

17. This legal misstatement was clearly erroneous. Under the constitution, no mountain of evidence could have lifted a layer away from the presumption of

innocence. The prosecutor's statement, however, lifted that presumption and rendered Mr. Chappell's trial fundamentally unfair.

E. The State improperly quantified reasonable doubt

18. The prosecution improperly quantified reasonable doubt. The prosecutor argued the following:

> 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?

Exs. 142 163-64, internal quotation marks omitted.

19. It is improper for a prosecutor to equate decisions in "everyday life" to constitutional standards applicable to criminal cases. See Quillen v. State, 929 P.2d 893, 902 (Nev. 1996) (finding error with state's explanation comparing reasonable doubt to affairs like buying a house, changing jobs or other major life decision). The State should refrain from rephrasing such an important instruction because when they do, they venture into troubled waters. See Howard v. State, 800 P.2d 175, 180 (Nev. 1990); Wesley v. State, 916 P.2d 793, 801 (Nev. 1996). The prosecutor committed misconduct here in his argument.

F. The State misrepresented the record on appeal to the Nevada Supreme Court

20. Prosecutorial misconduct also deprived Mr. Chappell of due process at the direct appeal stage. During oral argument at the Nevada Supreme Court, the

prosecutor made three misrepresentations. First, the prosecutor wrongly stated that Chappell had stipulated only to killing the victim. Ex. 96 at 14. This was a material misrepresentation. Chappell entered a stipulation with four parts: that he killed the victim, the killing was not an accident, that he had sex with the victim, and that he was jealous of the victim seeing other men. Ex. 21; Ex. 135 at 121-22.

21. Next, the prosecutor misled the court by asserting that the State needed to admit Mr. Chappell's prior bad acts because there was no stipulation at the start of the trial. Ex. 96 at 17. This was untrue. Chappell offered his stipulation in September 1996, before the start of the trial. Ex. 109 at 8-9.

22. Lastly, the prosecution incorrectly stated at oral argument that it played no role in admitting certain evidence regarding Mr. Chappell. At oral argument, the Court asked why the State felt the need to admit evidence that Chappell shoplifted after the killing, allegations that Chappell was a thief, evidence that Chappell was called "the regulator," and that Chappell was unemployed. The prosecutor replied "We didn't. We didn't. The defense brought that in ... The only thing we asked to come in as the domestic violence." Ex. 96 at 18. This statement was incorrect as the record clearly shows that it was the State that admitted all this evidence. See Ex. 134 at 30-31, 44, 46-47, 61-66; Ex. 135 at 38-39, 66-67.

23. These statements constituted misconduct, and the State deprived Mr. Chappell of due process when they misrepresented their arguments before the Nevada Supreme Court.

24. Chappell brought these comments to the attention of the Nevada Supreme Court as part of a petition for rehearing, Ex. 180, but the Nevada Supreme Court refused to elaborate on the comments or grant a rehearing. This was clearly contrary to federal law, which holds that prosecutorial misconduct is a violation of due process.

G. The prosecution failed to turn over exculpatory evidence concerning Deborah Turner's 1996 felony conviction

25. 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 and possibly received a benefit for her testimony. See Claim One, ante.

26. Turner was arrested for robbery with a deadly weapon on August 30, 1996. Turner was charged with conspiracy to commit robbery and attempted robbery. Ex. 310. Turner pled guilty to the charges on September 16, 1996. Ex. 311. Turner then testified against Mr. Chappell on October 10, 1996.

27. Turner was not sentenced until April 30, 1997. Exs. 314, 312; Ex. 286. While Turner faced a maximum sentence of six years for the conspiracy charge and ten years for the attempted robbery charge, Ex. 311, Turner was sentenced to only twelve to thirty-six months for the conspiracy charge and twelve to forty-eight months for the attempt robbery charge, to run concurrently. Exs. 314, 312.

28. The State never turned over any of this information to the defense. The State's actions amounted to misconduct. Brady v. Maryland, 373 U.S. 83, 87 (1963); accord Banks v. Dretke, 540 U.S. 668, 691 (2004); Comstock v. Humphries, 786 F.3d 701, 707 (9th Cir. 2015); see United States v. Bagley, 473 U.S.667, 682 (1985).

29. Turner testified at trial that she was not a snitch: "I'm not no snitch or nothing . . . I don't really like to snitch on nobody or nothing like that . . . ." Ex. 134 at 23. However, that is exactly what Turner did: she "snitched" on Mr. Chappell in turn for a more lenient sentence.

30. And her testimony was material to Mr. Chappell's case. Turner testified that on the evening after the killing, Mr. Chappell was "dancing and just doing his thing," and was acting the "normal way," "happy and goofing around." Turner also stated that Chappell was not sad nor upset. Ex. 134 at 16-20. Turner's testimony

however impeached Chappell's own testimony that he killed Panos in a fit of jealousy and was in deep remorse after the incident. See Ex. 137 at 60-61. The fact that Turner had charges pending over her head gave her a reason to testify favorably for the State to ensure that she received a favorable sentence. If she believed that she was receiving a benefit for her testimony, that fact would have further impeached Turner's testimony.

31. That Turner's testimony was material is demonstrated by the extent to which the prosecutor relied on it in closing arguments:

> And if [Chappell] really loved [Panos], he wouldn't make her work two jobs as he went over to the projects and hung out all day Hip Hopping and smoking crack and going over to Bridget's house and leaving his shoes over at Sue's apartment. If he really loved her, he wouldn't have done that. If he really loved her, he wouldn't have made her or forced her to put her children, their children into day care because he would be too busy hanging out being the Regulator and being Hip Hop and not providing for his girlfriend and his three children.

Ex. 142 at 137-38.

> Where was the remorse? If he loved her so much and I ask you was he remorseful or was he the cold, calculated murderer and the cold calculated person that he always was the day he drove over to the projects after he murdered her? Were there tears? We asked all the witnesses, Deborah Turner, Ladonna Jackson, was he crying? No. Did he seem sad? No. Did he seem upset? No. Did he seem like anything in the world was wrong? No. He seemed like James. Why? Because violence was a part of James' life. Doing these types of things to Debbie was part of his life.

Ex. 142 at 141.

> How remorseful was he and when he gave Deborah Turner this deal, $15 for the shrimp, for the car rental, for the pie and he tells her, "Make sure to park the car behind the complex," how remorseful was he or is that consciousness of guilt because he knows that what he did was wrong? That's called consciousness of guilt, ladies and gentlemen. That's called a cold, calculated murderer.

Ex. 142 at 143.

32. The State even used Turner's testimony in arguing that Chappell was guilty of felony murder under a theory of burglary

> [A]t some point that night, he is selling shrimp and pie and he sold that and rented Debbie Pano's car, his homicide victim, to Johnson and Turner, the two young black ladies for 15 bucks, the car, and the pie, and the shrimp because he needed money. Now doesn't that reflect back on what his intention was when he went in to this mobile home?

Ex. 142 at 91.

33. If Turner had been impeached, the State would not have been able to make such prejudicial arguments, and the jury would not have considered them. See also Ex. 125 at ¶9 (juror Taylor viewed Chappell's actions after the murder—taking the victim's car and shoplifting—to be callous).

34. There is a reasonable probability that had Turner's pending charges and possible deal with the State been disclosed, the result of the proceeding would have been different. United States v. Bagley, 473 U.S. 667, 682 (1985).

35. Not only did the State fail to turn over this material, exculpatory evidence, the State knowingly presented Turner's testimony where she claimed not to have a deal. The State's knowing use of perjured testimony mandate that Mr. Chappell's conviction be overturned. See Strickler v. Greene, 527 U.S. 263, 281-82 (1999); Napue v. Illinois, 360 U.S. 264, 269 (1959).

H. Conclusion

36. Considered either individually or cumulatively, the State cannot demonstrate that these errors were harmless beyond a reasonable doubt. Chapman, 386 U.S. at 24.

CLAIM SIXTEEN (PROSECUTORIAL MISCONDUCT PENALTY PHASE)

Mr. Chappell's death sentence is invalid under federal constitutional guarantees of due process, a fair trial, a fair and impartial jury, and a reliable sentence due to prosecutorial misconduct in the opening statement and closing argument. U.S. Const. Amends. V, VI, VIII, XIV; Nev. Const. art. 1, §§ 1, 6, 8, and art. 4 § 21.

SUPPORTING FACTS

1. The prosecution's summation constituted prosecutorial misconduct in several ways, including: disparaging Mr. Chappell and his defense; improperly appealing to the passions and prejudices of the jurors; improperly commenting on Mr. Chappell's right to remain silent; improperly stating the role of mitigating circumstances; and improperly arguing that the jury should impose justice on Chappell instead of mercy.[68]

A. The prosecution improperly disparaged Chappell's character

2. In Darden v. Wainwright, 477 U.S. 168, 106 S. Ct. 2464 (1986), the court analyzed prosecutorial misconduct in a capital case, In particular, the Court criticized the prosecutor for referring to the defendant as an "animal," id., at 180, n. 11, and for the statement, "I wish I could see [the defendant] with no face, blown away by a shotgun," id., at 180, n. 12. See Comer v. Schriro, 480 F.3d 960 (9th Cir. 2007) (holding that prosecutor's references to defendant as "monster," "filth," and a "reincarnation of the devil," did not render trial fundamentally unfair because prosecutors did not misstate or manipulate evidence and there was strong evidence of guilt); Kellogg v. Skon, 176 F.3d 447 (8th Cir. 1999) (prosecutor's reference to defendant as a "monster," "sexual deviant," and "a liar" were "improper personal expression[s] of the defendant's culpability" and created inflammatory prejudice, but did not render trial fundamentally unfair where there was strong evidence of guilt).

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[68] The legal standard for prosecutorial misconduct can be found in Claim Fifteen, post, and will not be repeated here.

3. In this case, the prosecutor argued that Mr. Chappell "chose evil." Ex. 176 at 52, 81. The prosecutor also described Chappell as "a despicable human being," id. at 56, criticized Chappell for "an appalling perspective he has on himself and on life," id. at 58, and stated that the crime was "so treacherous and so selfish and so evil there's truly no fixing what he did." Id. at 147.

4. Another statement, indirectly disparaging Mr. Chappell, involved the prosecutor's statement invoking the Holocaust:

> Even in concentration camps, you can have people that choose to be decent and people that chose to be not decent people, to be evil people, basically. We had Dr. Etcoff talking about [how] he [Chappell] has less free will than the rest of us. You know, is there anybody that has less free will than somebody who was in one of the fascist[']s concentration camps, where there was psychological torture, physical torture, death, losing loved ones[?]

Ex. 176 at 64.

5. The State's reference to Mr. Chappell as evil, despicable, and appalling; his statement that Chappell abused those around him; and his comparison of Mr. Chappell to a Nazi working in a concentration camp necessarily rendered the trial fundamentally unfair and deprived Mr. Chappell of the reliability of a proper sentencing phase.

B. The prosecutor improperly warned the jurors against being deceived by Mr. Chappell

6. The State improperly warned the jurors that they were being "conned" by Mr. Chappell and that the jurors would be taking the path of least resistance if they imposed a sentence of less than death:

> 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.

Ex. 176 at 86-87. 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." Id. at 142.

7. These comments improperly characterized Mr. Chappell as either a liar and/or his witnesses as highly gullible. While the prosecution can point out inconsistencies in testimony, the prosecution cannot warn the jury about being "conned" or "snowed" by a witness. See Cristy v. Horn, 28 F. Supp. 2d 307, 318-19 (W. D. Pa. 1998) (holding that an argument that labeled the defendant as "the Great Manipulator," to whom prison was just a "revolving door," only served to inflame the jurors). This argument was also improper and prejudicial because it was meant to inflame the jurors' passion against Mr. Chappell and also put the jurors in the untenable position of "them" against Chappell. See Bains v. Cambra, 204 F.3d 964, 974-75 (9th Cir. 2000).

C. The State improperly disparaged Mr. Chappell's case

8. The prosecution also improperly disparaged Mr. Chappell's legal arguments, and thus indirectly attacked the character of Mr. Chappell's defense counsel.

9. Here, several of the prosecutor's statements only make sense as sarcasm. In addressing Chappell's witness who said the victim was controlling and abusing, the prosecutor responded in closing argument "My goodness, just incredible." Ex. 176 at 60. Similarly, in response to Chappell's witnesses testifying that Chappell had been abused, the prosecutor responded, "And we hear, my goodness, physical abuse." Id. 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. at 61. When addressing whether Chappell was remorseful, the prosecutor also stated a personal opinion disparaging Chappell's argument: "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." Id. at 127 (emphases added).

10. The State's sarcastic responses and disparaging opinion of Mr. Chappell's defense most probably influenced the jury's decision to disregard Mr. Chappell's case for a sentence of less than death.

D. The prosecutor made inflammatory arguments

11. In opening summation and closing argument, the State described the victim in ways that implicitly compared her with Mr. Chappell. These comparisons had the two effects of implying that (1) Chappell should be punished because he was worth less than the victim, and (2) Chappell should be punished because the victim was an asset to society.

12. 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 portraying her as a "nice young mother." Ex. 176 at 50-53, 60.

13. This comparison was juxtaposed against the prosecutor contrasting Panos and Chappell:

> She was even a giving person with respect to the defendant, Mr. Chappell, the person that killed her, the person that took her life.

Ex. 176 at 52.

> 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.

Id. at 62.

14. These comments were improper attempts to inflame the passions of the jury. Valdez v. State, 196 P.3d 465, 478 (Nev. 2008) ("A prosecutor may not 'blatantly attempt to inflame a jury.'"); see United States v. Weatherspoon, 410 F.3d 1142, 1149 (9th Cir. 2005) ("We have consistently cautioned against prosecutorial statements designed to appeal to the passions, fears and vulnerabilities of the jury . . . .").

E. The prosecutor improperly commented on Mr. Chappell's right to remain silent

15. A prosecutor is not permitted to comment on a defendant's post-arrest silence after the defendant has been given Miranda warnings.[69] Here, the prosecutor clearly commented on Mr. Chappell's right to remain silent.

16. On cross-examination, the prosecutor introduced Mr. Chappell's prior testimony from the 1996 trial, which included the following exchange:

> Q: "You've had a substantial time to think about today, haven't you?
> A: Yes, sir.
> Q: You've known for quite a while, haven't you, that at some point you would take the witness stand and give the jury your version of what happened?
> A: Yes, sir.
> Q: Once you had made that decision, whenever it was, you've given a lot of attention to what you would tell the jury?
> A: I didn't make up anything, sir.
> Q: Have you thought a lot about what you would tell the jury?
> A: No.
> Q: Have you thought a lot about how you would act on the witness stand?
> A: No, sir.

[69] Miranda v. Arizona, 384 U.S. 436 (1966).

Ex. 169 at 95. As discussed in Claim Fifteen, ante, the prosecutor's comments in 1996 were improper. For that same reason, the prosecution presenting this evidence in 2007 was error.

17. The prosecution in its closing argument also cast similar criticism, saying "[Chappell] got to sit and worry about himself and formulate the best spin on events, the best version." Ex. 176 at 146. This argument applied both to Mr. Chappell's interviews with the doctors as well as Chappell's behavior on the witness stand.

18. The use for impeachment purposes of a defendant's silence at the time of arrest and after receiving Miranda warnings violates the Due Process Clause of the Fourteenth Amendment. Doyle, 426 U .S. at 611; see Coleman, 895 P.2d at 657. The prosecutor here committed misconduct by introducing testimony which violated Mr. Chappell's constitutional rights.

F. The prosecutor improperly stated the role of mitigating circumstances

19. The prosecutor improperly argued that the mitigating circumstances presented by the defense did not excuse Mr. Chappell's crime. This argument was improper.

20. Mitigation evidence does not need to be connected to the crime. Tennard v. Dretke, 542 U.S. 274, 284-85 (2004); see Woodson v. N. Carolina, 428 U.S. 280, 304 (1976) (holding that North Carolina's mandatory death penalty law, which disregarded "relevant facets of the character and record of the individual offender," was impermissible for excluding mitigating factors); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (holding that a sentencer cannot be precluded from considering mitigating factors like the defendant's character or record).

21. The prosecutor here argued that the mitigating factors did not excuse the crime:

> 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.

Ex. 176 at 135. However, the mitigating evidence presented by the defense did not have to overcome this improper burden set by the State. Rather, the mitigating circumstances were offered to show, and were relevant to aspects of Mr. Chappell's character that might justify a sentence less than death. It is probable the jury returned the sentence of death based upon the prosecutor's improper argument.

G. The prosecutors made improper arguments based on justice and mercy

22. The prosecutor committed misconduct in arguing that the jury should not consider mercy and instead, extract justice against Mr. Chappell:

> But you can make some corrections now. We can't bring Debbie back, but we can see that justice is done. We're going to talk about justice in a few minutes.

Ex. 176 at 58.

> So the question for you as jurors is not really do you have it in yourselves, or are you a merciful person because as jurors you are serving a different role in this case. You don't just owe James Chappell the consideration of mercy, you owe the victims and the State of Nevada a just sentence as well. It's probably tempting in this case to give life without, that seems like a realistic sentence. You probably would feel like you are not giving him any breaks at all with a life without sentence.
>
> But you need to ask yourself, is that truly justice for what he did over the years. What punishment reflects what he did to Debbie Panos not just that day, but over time. What punishment reflects how he degraded her by calling her bitch and slut. What punishment compensates for breaking her nose. She had to go to work with that object on her nose after it was broken and tell her friends what happened. He humiliated her. What punishment compensates her for holding a knife to her in her own home so he could get information because he thought she was gone too long that day.
>
> This from the person who spent his days taking her money and going and getting high for the day. What punishment accounts for all of that. What punishment is justified for taking the life of a 26-year-old young woman,

> a mother of three. Or how about what punishment accounts for Norma Penfield's loss the (sic) day. She lost her daughter. James Chappell brutally murdered her only child that day. What compensates her.
>
> Has that changed for her over ten years. Does she still bear that loss, that burden ten years later. I mean, really the reality is it was easy for him after he got arrested on September 1st, `95. It was all done for him at that point. He didn't have to deal with the aftermath of the devastation he caused. He didn't have to look two little boys in the face and tell then (sic) their mother wasn't coming back. He didn't have to listen to an eight-year-old boy ask for sleeping pills. He didn't have to listen to any of that. He didn't have to listen to a four-year-old girl talk about -- asking her grandmother to sing like mom did. He didn't have to see any of his children's faces when they wanted their mother over the years when they missed her. He didn't have to arrange, at all, for Debbie Panos; (sic) body to be transported to Michigan. He was spared all of that. Those pieces were picked up by Norma Penfield.
>
> He got to sit and worry about himself and formulate the best spin on events, the best version. And that's all he has ever done his whole life. He got to tell the doctors about his problems and his troubled childhood. It's so typical of how he spent his whole life.
>
> He sells those children's coats and shoes, and Debbie works three jobs so she can buy more. He beat Debbie in Tucson and she decides to move to Las Vegas so they can get a fresh start. He treats Debbie badly, and she tells her own mother, well, his grandmother wasn't nice to him, she threw him out. But the problem is what he did on that day, on August 31st, is so treacherous and so selfish and so evil there ' s truly no fixing what he did.

Ex. 176 at 145-47.

23. It was misconduct for the prosecutor to argue that mercy for Mr. Chappell was not an appropriate consideration. Presnell v. Zant, 959 F.2d 1524, 1529-31 (11th Cir. 1992); Peterkin v. Horn, 176 F. Supp. 2d 342, 372-73 (E.D. Pa. 2001). Further, it was misconduct to argue that the only way to achieve justice for Ms. Panos and her family was to impose a sentence of death against Mr. Chappell. These arguments acted to inflame the emotions and passions of the jury. United States v. Young, 470 U.S. 1, 9 n.7 (1985). The prosecutor's comments here did nothing to aid the jury in determining

whether the death penalty was an appropriate sentence, but instead urged the jurors to return a sentence of death as vindication, which was based upon the inflamed passions of the jury. Viereck v. U.S., 318 U.S. 236, 247-48 (1943).

H. Conclusion

24. Considered either individually or cumulatively, the State cannot demonstrate that these errors were harmless beyond a reasonable doubt. Chapman, 386 U.S. at 24.

CLAIM SEVENTEEN (TRIAL COURT ERROR PENALTY TRIAL)

Mr. Chappell's death sentence is invalid under federal constitutional guarantees of due process, confrontation, effective counsel, equal protection, trial before an impartial jury, freedom from cruel and unusual punishment, and a reliable sentence because the trial court improperly admitted unreliable hearsay statements to support the aggravating circumstance, two presentence investigation reports, and Mr. Chappell's testimony from the first trial during the second penalty phase of the proceedings. U.S. Const. Amends. V, VI, VIII, XIV; Nev. Const. art. 1, §§ 1, 6, 8, and art. 4 § 21.

SUPPORTING FACTS

1. At Mr. Chappell's penalty hearing, the trial court admitted multiple pieces of evidence in violation of Mr. Chappell's constitutional rights. In support of the alleged aggravating circumstance that the homicide occurred in the commission or attempt to commit a sexual assault, the State presented numerous hearsay statements, and the trial court permitted these to be admitted in violation of Mr. Chappell's right to be confronted with the witnesses against him. The State also introduced presentence reports for a previous misdemeanor proceeding and for the 1996 trial for the instant case in violation of Mr. Chappell's due process rights. Finally, the trial court erroneously allowed Mr. Chappell's testimony at his first trial to be read into the record, despite the fact that Mr. Chappell's testimony was procured due to ineffective assistance of counsel in violation of the Sixth Amendment.

A. The trial court erred when it admitted unreliable hearsay statements in support of the alleged aggravating circumstance

2. The Sixth Amendment to the United States Constitution provides in relevant part: "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The United States Supreme Court has repeatedly recognized that a defendant's Sixth Amendment right to confront his

accusers "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." Crawford v. Washington, 541 U.S. 36, 54 (2004); see also Salinger v. U.S., 272 U.S. 542, 548 (1926); U.S. v. Reid, 53 U.S. 361, 364–65 (1851) (overruled on other grounds by Rosen v. U.S., 245 U.S. 467, 470 (1918)).

3. A defendant's right to confront and cross-examine the witnesses against him is a central procedural safeguard whose "very mission [is] to advance the accuracy of the truth determining process in criminal trials." Tennessee v. Street, 471 U.S. 409, 415 (1985) (citing Dutton v. Evans, 400 U.S. 74, 89 (1970)). It is "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Pointer v. Texas, 380 U.S. 400, 405 (1965).

4. The Supreme Court has held that states may not disregard a defendant's Sixth Amendment rights when proving aggravating factors where such aggravating factors are a necessary prerequisite to the imposition of the death penalty. See Ring v. Arizona, 536 U.S. 584, 606 (2002) ("The notion 'that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence ... is without precedent in our constitutional jurisprudence.'" (quoting Apprendi v. New Jersey, 530 U.S. 466, 539 (2000) (Connor, J., dissenting)).

5. The Sixth Amendment right to a jury trial, which the Supreme Court in Ring held entitled a capital defendant to a finding by a jury that an aggravating factor had been proven beyond a reasonable doubt, is no more fundamental than the Sixth Amendment right to confront witnesses. Accordingly, under the rationale of Ring, a capital defendant is similarly entitled to confront witnesses against him where those witnesses' testimony may be relied upon by the jury to find the existence of the aggravating factors.

6. Throughout Mr. Chappell's second penalty hearing, hearsay statements of questionable reliability were admitted by multiple witnesses in support of the sole aggravating factor alleged by the State, in violation of Mr. Chappell's Sixth Amendment right to confrontation. The Nevada Supreme Court held that the evidence supporting the sexual assault aggravating factor included: the victim, Deborah Panos, was curled up in the fetal position, fearful, and crying when she found out that Chappell was at large; (2) Panos had told Chappell that their relationship was over; (3) Panos was in the process of moving where Chappell could not find her; (4) Panos was beaten approximately 15 to 30 minutes prior to being stabbed to death; and (5) despite Chappell's assertions that he did not ejaculate into Panos during their sexual encounter, semen matching his DNA was recovered from her vagina. Ex. 7 at 3.

7. The Nevada Supreme Court held that "the jury could reasonably infer from the evidence presented 'that either Panos would not have consented to sexual intercourse under these circumstances or was mentally or emotionally incapable of resisting Chappell's advances, and that Chappell therefore committed sexual assault.'" Id. citing Chappell, 972 P.2d 838, 842 (Nev. 1998). Mr. Chappell had the right to confront any witnesses whose statements tended to establish any of the facts supporting the sexual assault aggravator.

1. Hearsay offered by law enforcement

8. Charmaine Smith was assigned to be Mr. Chappell's probation officer on April 27, 1995. She testified to statements made by Ms. Panos. Ex. 173 at 50–53. These statements included a statement by Mr. Chappell that he did not intend to report to his probation officer (which would be double hearsay), that Mr. Chappell had previously held a knife to her, and that she was afraid of Mr. Chappell. Ms. Smith also testified that she and her supervisor recommended to Ms. Panos that she relocate, perhaps to Arizona. Id. at 50, 52–53, 51–52, 52. None of these statements were substantiated or even evaluated by the court for reliability prior to be admitted, nor

were they within an established exception to the hearsay rule. See Crawford v. Washington, 541 U.S. 36, 60-62 (2004).

2. Hearsay offered by Michelle Mancha

9. Michelle Mancha, who had been a co-worker of Deborah Panos at G.E. Capital in Las Vegas testified that Ms. Panos told her that Mr. Chappell had broken her nose. Ex. 170 at 44. She testified that Ms. Panos told her that Mr. Chappell took items from the house. Id. at 45. She testified that Ms. Panos told her that she did not want Mr. Chappell to have a key to the house, so he climbed through the window to enter. Id. She testified that Ms. Panos told her about times when Mr. Chappell was violent toward Ms. Panos. Id. at 50, 52–53. She testified that Ms. Panos had a restraining order against Mr. Chappell at the time of her death, which was not true. Id. at 56. Most egregious was Ms. Mancha's testimony regarding statements that Ms. Panos allegedly told her Mr. Chappell had spoken in court on the day before Ms. Panos's death, August 30, 1995. Id. at 58. As third-hand statements and double hearsay, these statements were tantamount to rumor and should not have been permitted by the court because they were highly prejudicial. Over the objection of counsel, the court even allowed speculation by Ms. Mancha about how Mr. Chappell was able to make statements directly to Ms. Panos in court on August 30, 1995. Id. at 58.

3. Hearsay offered by Mike Pollard

10. Mike Pollard was a co-worker of Deborah Panos at G.E. Capital in Las Vegas at the time of her death. When he could not be located for Mr. Chappell's 2007 penalty rehearing, his testimony from the 1996 trial was read into the record.[70] Ex. 170 at 68–91. He testified that Ms. Panos told him Mr. Chappell took her purse; Ms. Panos told him that Mr. Chappell threatened to have Ms. Panos fired from her job if she did

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[70] Immediately following the reading of his 1996 testimony, Mike Pollard was located, see Ex. 171 at 3–4, and the court permitted him to testify a second time, see Ex. 169 at 192–99.

not give him money; Ms. Panos told him that she received a call from child protective services because Mr. Chappell had left their children unattended; Ms. Panos told him that Mr. Chappell took shoes she had purchased for her children and returned them to the store; Ms. Panos told him that buying a ticket for Mr. Chappell to Michigan was not going to work to eliminate him from her life; and that Ms. Panos told him on the day of her death that she had received a voicemail from Mr. Chappell. Id. at 73, 74–75, 76–77, 79, 82, 86. These unsubstantiated hearsay statements were unduly prejudicial to Mr. Chappell because they suggested prior bad acts for which Mr. Chappell was not arrested or charged and painted a picture of the relationship he had with Ms. Panos in an unfavorable light.

4. Hearsay offered by Latrona Smith

11. Latrona (Sherry) Smith was a supervisor at the day care facility where Ms. Panos took her children. Ex. 171 at 93–111. Ms. Smith's testimony centered around two phone calls she had received from Ms. Panos on the day of her death. Ms. Smith testified that in the first of those phone calls Ms. Panos asked her to call back to provide Ms. Panos with an excuse to leave the house because she was scared. Id. at 98. Ms. Smith further testified that Ms. Panos said that she did not have any money, but that this comment did not seem directed at Ms. Smith. Id. at 99. Ms. Smith was then asked to speculate about Ms. Panos's motive for saying that she did not have any money, and she did speculate as to that motive. Id. This hearsay testimony was improper and the speculation for the motive for hearsay statements should not have been elicited by the State or permitted by the trial court.

5. Hearsay offered by Lisa (Duran) Larsen

12. Lisa Larsen, whose last name was Duran in 1995, was a co-worker of Ms. Panos at GE Capital in Las Vegas. Ex. 171 at 7–75. Ms. Larsen testified that Ms. Panos told her about times when Mr. Chappell injured her and that Ms. Panos told her she

had told Mr. Chappell that their relationship was over while at a court hearing for Mr. Chappell on August 30, 1995. Id. at 13, 23.

6. Hearsay offered by Clair McGuire

13. Clair McGuire, who worked with Ms. Panos in Tucson, Arizona, testified at Mr. Chappell's 2007 penalty re-trial. Ex. 173 at 76–108. During her testimony, Ms. McGuire offered many hearsay statements attributed to Ms. Panos. Ms. McGuire testified that Ms. Panos told her that Mr. Chappell had taken the furniture from her trailer and jackets she had purchased for the children; that Ms. Panos told her that Mr. Chappell had threatened to rape Ms. McGuire and burn the house down if Ms. Panos was not home when he got there; that Ms. Panos told her Mr. Chappell had held a knife up against her throat; Id. at 84–85, 90–91, 96. These statements were elicited by the State in order to inflame the passions of the jury.

7. Prejudice to Mr. Chappell due to the improper admission of hearsay

14. Mr. Chappell was prejudiced by the highly inflammatory and inadmissible hearsay evidence offered by multiple witnesses at his penalty hearing. Mr. Chappell was not able to challenge this damaging evidence through cross-examination of the persons making the statements. Furthermore, the hearsay statements that were introduced were unreliable and rose to the level of highly suspect and impalpable evidence, which cannot be admitted in a capital case in Nevada. See Gallego v. State, 23 P.3d 227, 241 (Nev. 2001); see also Hicks v. Oklahoma, 447 U.S. 343, 356-47 (1980) (federal due process violation may be caused by depriving a person of a liberty interest under state law).

15. Particularly prejudicial to Mr. Chappell were the repeated statements by Ms. Panos's friends and co-workers that Mr. Chappell threatened to kill her the day before she was murdered when Ms. Panos told Chappell that their relationship was over. Ex. 170 at 57–58 (Mancha); Ex. 171 at 23 (Larsen). According to the witnesses,

this threat was made at a court hearing for Mr. Chappell on August 30, 1995. The witnesses testifying to threats made by Mr. Chappell on that day, however, were not present at the hearing when these statements were allegedly made by Mr. Chappell. That made the statements double-hearsay and therefore all the more unreliable. The statements are even more suspect because Ms. Panos did not report Mr. Chappell's statements to his probation officer, with whom she had communicated on several occasions, the prosecutor in the case, the bailiff, or the judge, at a time when the court and its officers were agreeing that Mr. Chappell should be sent to a drug rehabilitation program rather than prison or jail. Had Mr. Chappell actually threatened to kill Ms. Panos in this context, it is probable that she would have told one of these people about his threat or at a minimum testified at the hearing and urged the court to keep Mr. Chappell in custody. According to the judge who presided over Mr. Chappell's hearing, "[Ms. Panos] did not talk to me in any way, nor did she testify at his appearance." Thomas Lacy, Snafu in System Released Suspect, Las Vegas Sun, September 6, 1995 at 7A. Likewise, it is the general policy of courts that a criminal defendant in custody is not allowed to converse with anyone other than his counsel during court proceedings, and it is therefore unlikely that such a conversation actually took place between Ms. Chappell and Ms. Panos.

16. The State pointed to this courtroom hearsay evidence during closing arguments to argue that Ms. Panos would not have had consensual sex with Mr. Chappell to convince the jury that the State had proven the sexual assault aggravator. See, e.g., Ex. 176 at 77. In Nevada, the finding of an aggravating circumstance is part of the determination of eligibility for the death penalty, making hearsay evidence in support of an aggravating circumstance unconstitutional. Crawford, 541 U.S. at 60-62.

B. The trial court erred when it allowed the introduction of presentence investigation reports

17. In rebuttal at Mr. Chappell's 2007 penalty hearing, the State introduced into evidence two presentence investigation reports (PSIs). One report was drafted on April 18, 1995, for sentencing for a prior gross misdemeanor, Ex. 148; the other was drafted December 5, 1996 for Mr. Chappell's 1196 capital trial, Ex. 161. The court admitted both PSIs into evidence. Ex. 176 at 17–20.

1. Prejudicial nature of the PSI reports

18. First, the admission of the PSIs violated Mr. Chappell's federal due process rights as their admission "so fatally infected the proceeding as to render it fundamentally unfair." See Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991).

19. The 1995 report included arrests for incidents for which Chappell was not prosecuted, including possession of narcotics, possession of marijuana, criminal trespass, possession of narcotics for sale, being under the influence of a controlled substance, and failure to use a seatbelt. Ex. 148 at 2–3. The report totaled Mr. Chappell's arrests at eleven including five misdemeanor convictions. Id. at 5. The 1995 report also mentioned outstanding warrants for charges such as domestic violence, driving without a license, operating an unregistered vehicle, and driving without proof of insurance. Id. at 2.

20. Similarly, the 1996 report stated that "Mr. Chappell [had] been arrested at least 17 times in the past, sustaining at least 6 misdemeanor convictions." Ex. 161 at 7. Arrests for charges that were not prosecuted or in which the charges were dismissed were also listed on the 1996 report, including charges for possession of narcotics, paraphernalia, and narcotics for sale; several failures to appear to face other charges; and domestic violence. Id. at 3.

21. The 1996 report included a synopsis of the Las Vegas Metropolitan Police Department and Clark County District Attorney's Office records pertaining to facts of