cause, and the district court conducted its own examination, observing that the juror had mentioned that her predisposition was based on information in the juror questionnaire. After explaining to the juror that any sentencing decision would have to be based on the evidence presented, the district court asked juror D if, after hearing all of the evidence, she would be able to consider all forms of punishment, to which she responded affirmatively. Neither party questioned the juror further. Because the juror agreed to consider all of the evidence and the available sentencing options, see Blake, 121 Nev. at 795, 121 P.3d at 577, the district court did not err by denying Chappell's challenge for cause.[2]

Prospective juror H

Chappell argues that the district court erred in denying his challenge for cause of prospective juror H. During voir dire, juror H expressed his reluctance to consider mitigating circumstances. Specifically, he stated that "it would be difficult" to find any mitigating circumstances other than insanity because he did not think there was any way to justify a murder. After questioning juror H, the district court denied Chappell's challenge for cause, finding that the juror had stated that he could (1) "consider all four forms of punishment," (2) "follow the instructions of the court," and (3) "consider all the evidence." We conclude

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[2]There is some dispute as to whether this potential juror served on the jury that sentenced Chappell to death. Our review of the record demonstrates that she did not. Thus, even if the district court erred in denying Chappell's challenge for cause, he fails to show prejudice. See Weber, 121 Nev. at 581, 119 P.3d at 125.

that the district court properly rehabilitated the juror, and therefore did not err in denying Chappell's challenge for cause. Moreover, Chappell cannot demonstrate prejudice because prospective juror H did not serve on the jury and he has not demonstrated that any member of the seated jury panel was not fair and impartial. See Weber, 121 Nev. at 581, 119 P.3d at 125.

Prospective juror R

Chappell argues that the district court erred in refusing to dismiss prospective juror R for cause. Juror R expressed his opinion that the death penalty was not used enough, explaining that he came from Texas and did not think that aggravating circumstances should be necessary to sentence someone convicted of murder to death. However, he also stated that he would (1) try to listen to all the information presented, (2) use that information to make what he believed to be a fair decision, and (3) apply the law that the judge gave him. Accordingly, because sufficient testimony was adduced for the district court to conclude that juror R could fulfill his "'duties as a juror in accordance with his instructions and his oath,'" Walker, 113 Nev. at 866, 944 P.2d at 770 (quoting Wainwright, 469 U.S. at 424), the district court did not err in denying this challenge for cause. Moreover, juror R did not serve on the jury and thus Chappell fails to demonstrate prejudice. See Weber, 121 Nev. at 581, 119 P.3d at 125.

Admission of hearsay evidence

Chappell asserts that the district court erred by admitting four instances of testimonial hearsay and several non-testimonial hearsay

statements.[3] He asserts that these admissions violated the Confrontation Clause of the Sixth Amendment and that this evidence was inadmissible and highly inflammatory.

This court has held that the Confrontation Clause of the Sixth Amendment does not apply in a capital sentencing hearing. Summers v. State, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006); Johnson v. State, 122 Nev. 1344, 1353, 148 P.3d 767, 773 (2006); Thomas v. State, 122 Nev. 1361, 1367, 1370, 148 P.3d 727, 732, 734 (2006). Chappell acknowledges Summers, but urges the court to overrule it. However, Chappell cites no authority that this court failed to consider when it first decided this issue three years ago. We recently declined to revisit Summers in Browning v. State, 124 Nev. ___, 188 P.3d 60 (2008), cert. denied, ___ U.S. ___, 129 S. Ct. 1625 (2009), and we decline to do so here.

Presentence investigation reports

Chappell claims that the district court erred in admitting two presentence investigation reports (PSIs): a 1995 report related to a gross misdemeanor charge and a 1996 report prepared for Chappell's first trial

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[3]Specifically, Chappell argues that he was prejudiced by the admission of: (1) testimony of a Department of Parole and Probation officer about statements the victim made before her death, (2) a detective's testimony about the results of a DNA test, (3) a police officer's testimony about statements that the victim made about Chappell's physical abuse, and (4) a detective's testimony about statements made by a man who was assaulted by Chappell. Chappell also argues that he was prejudiced by the admission of testimony from various people about their conversations with the victim.

on the instant charges. Chappell claims that not only were the reports confidential pursuant to NRS 176.156, but they included prejudicial evidence about prior arrests for which he was not convicted. He also complains that the PSIs included incorrect statements of fact and a prejudicial statement by Panos' mother. Finally, he claims that a written statement included in one PSI was obtained in violation of his Miranda rights, and was thus inadmissible. Chappell fails to demonstrate that he is entitled to relief on any of these claims.

At the penalty hearing, defense counsel stated that there was no objection to admission of the PSIs, with the exception of Chappell's handwritten statement that was included in one report. Thus, in all other respects, Chappell failed to preserve this matter for appeal and must demonstrate plain error. See, e.g., Archanian v. State, 122 Nev. 1019, 1031, 145 P.3d 1008, 1017 (2006). Because Chappell objected only to the admission of his written statement, the disclosure of the remaining contents of the PSIs is only grounds for a new penalty hearing if he can "demonstrate[ ] that the error affected his . . . substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 477 (2008) (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)).

Confidentiality of PSI reports

Chappell claims that the PSIs admitted during his penalty hearing are statutorily confidential and are thus inadmissible. NRS 176.156(5) states that except where otherwise permitted by the statute, "a report of a presentence investigation or general investigation and the

sources of information for such a report are confidential and must not be made a part of any public record." However, the statute also provides that the contents of a report must be disclosed "to a law enforcement agency of this State or a political subdivision thereof . . . for the limited purpose of performing their duties, including, without limitation, conducting hearings that are public in nature." NRS 176.156(2) (emphasis added). Thus, we conclude that the legislature contemplated circumstances in which these reports could be used in public hearings for law enforcement purposes.

Moreover, this court has held that other sections of chapter 176 do not apply in first-degree murder cases, and recognized that "NRS 175.552[4] governs the admissibility of evidence during the penalty hearing of a first degree murder case." Smith v. State, 110 Nev. 1094, 1106, 881 P.2d 649, 656 (1994). Thus, while this court has recognized NRS 176.156 in capital cases where the contents of a PSI have been disclosed to a jury, the violation of that statute has not been the basis for our decisions, which instead have focused on whether the evidence was relevant and not unfairly prejudicial. See Herman v. State, 122 Nev. 199, 208-09, 128 P.3d 469, 474-75 (2006); Guy v. State, 108 Nev. 770, 781-82, 839 P.2d 578, 585-86 (1992). Specifically, in Guy we concluded that the confidential nature

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[4]NRS 175.552(3) provides that during a penalty hearing, "evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible."

of a PSI does not render it inadmissible under NRS 175.552(3). Guy, 108 Nev. at 781-82, 839 P.2d at 585-86. We reaffirm that while PSIs are to be kept confidential and not made part of the public record, their confidential nature does not in and of itself preclude their admission at capital sentencing hearings.

Evidence of prior arrests

Chappell claims that the PSIs should not have been admitted because they included prejudicial information about prior arrests that did not result in convictions. This court has held that evidence of police investigations and uncharged crimes is admissible at a capital penalty hearing only if the evidence is not "impalpable or highly suspect." Gallego v. State, 117 Nev. 348, 369, 23 P.3d 227, 241 (2001); see also Leonard v. State, 114 Nev. 1196, 1214, 969 P.2d 288, 299 (1998); Homick v. State, 108 Nev. 127, 138, 825 P.2d 600, 607 (1992). We conclude that no error occurred here for three reasons.

First, while the admitted PSIs did include information about prior arrests, this information was minimized rather than emphasized by the prosecution.

Second, the evidence presented in the PSIs about Chappell's criminal history was presented through other means. At the time the district court admitted the redacted PSIs, the jury had already heard testimony about Chappell's numerous arrests in Michigan, Arizona, and Nevada, and his history of drug abuse, theft, and violence. Thus, even assuming error in their admission, the redacted PSIs listing Chappell's criminal history did not result in "actual prejudice or a miscarriage of justice." Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

Third, the redacted PSIs were not introduced during the State's case-in-chief but as rebuttal evidence after the defense presented its case in mitigation. The evidence in the PSIs rebutted Chappell's attempts to blame others for his actions and his requests for "another chance." The State never informed the jury of any of Chappell's prior unresolved offenses. Therefore, we conclude that Chappell fails to demonstrate plain error respecting the admission of the PSIs on this basis.

Other statements in the PSIs

Chappell claims that he was prejudiced because the PSIs incorrectly stated that Panos had a protective order in place at the time that she was murdered. Evidence adduced at trial indicated that the protective order had been vacated before Chappell killed Panos. Despite the apparent error, Chappell's substantive rights were not affected because the prosecution never commented on the error and compelling evidence showed the domestic violence Chappell inflicted on Panos before her death. Thus, he fails to demonstrate plain error.

In addition, Chappell claims that he was prejudiced by the admission of a statement of Panos' mother in the 1996 PSI that "[t]he SOB does not deserve to live." Chappell argues that the statement was inadmissible but does not explain how this statement affected his substantial rights. This statement was not brought to the jury's attention, and it is clear from the context that this statement was a mother's expression of grief and not the government's sentencing recommendation. We therefore conclude that admission of this statement was not plain error.

Chappell's written statement

Finally, Chappell argues that the district court erroneously admitted his written statement attached to one of the PSIs because it was obtained in violation of his constitutional rights. Unlike the previous claims, Chappell objected to the admission of the PSI on this ground. Therefore, the district court's decision to admit the statement is reviewed for an abuse of discretion. See Herman, 122 Nev. at 208, 128 P.3d at 474.

At a hearing on the matter, Chappell objected to the admission of his written statement because he did not receive Miranda warnings before giving it. The district court recounted the process by which PSI statements are obtained after conviction and found that the process for obtaining the statement was a voluntary one that did not give rise to a Miranda warning.

"Miranda affects the admissibility of statements made during 'in-custody interrogation.'" Hernandez v. State, 124 Nev. ___, ___, 194 P.3d 1235, 1242 (2008) (quoting Miranda v. Arizona, 384 U.S. 436, 445 (1966)). The United States Court of Appeals for the Ninth Circuit has held that even if a routine post-conviction, pre-sentence interview is technically an in-custody interrogation, it does not entail those pressures that "'the Miranda Court found so inherently coercive as to require its holding.'" Baumann v. United States, 692 F.2d 565, 577 (9th Cir. 1982) (quoting Beckwith v. United States, 425 U.S. 341, 347 (1976)), holding limited by U.S. v. Herrera-Figueroa, 918 F.2d 1430, 1433 (9th Cir. 1990) (requiring probation officers to permit defendants to have their attorneys present at presentence interviews). Thus, the Ninth Circuit has declined to require

Miranda warnings before routine presentence interviews with probation officers. Id. We conclude that this analysis logically extends to written statements submitted as part of the presentence interview process.

Moreover, NRS 175.552(3) states that a district court has discretion to admit any evidence "which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible." Thus, even if Chappell's statement was normally inadmissible due to the failure to give Miranda warnings, it was relevant and admissible evidence at the penalty hearing. We therefore conclude that the district court did not abuse its discretion in admitting Chappell's statement.

Victim impact testimony

Chappell claims that the district court erred by permitting the prosecution to introduce "excessive victim impact testimony." Specifically, Chappell argues that the district court erred in admitting (1) victim impact testimony of people who were not family members of the victim and (2) victim impact testimony that was not included in the State's notice pursuant to SCR 250(4)(f). During the penalty hearing, the district court overruled Chappell's objection to any victim impact testimony by persons outside of Panos' family. A district court's "'decision to admit particular evidence during the penalty phase is within the sound discretion of the district court and will not be disturbed absent an abuse of that discretion.'" Johnson v. State, 122 Nev. 1344, 1353, 148 P.3d 767, 774 (2006) (quoting McConnell v. State, 120 Nev. 1043, 1057, 102 P.3d 606, 616 (2004)) (quotation marks omitted). However, Chappell did not object on the grounds of insufficient notice and thus his second claim is reviewed

for plain error affecting his substantial rights. See Archanian v. State, 122 Nev. 1019, 1031, 145 P.3d 1008, 1017 (2006).

The testimony of which Chappell complains relates to both claims. In particular, several of Panos' friends testified to abuse that Chappell inflicted upon Panos prior to her death and her fear of him. At the end of their testimony, these witnesses made brief statements about how Panos' death had affected them. Chappell claims that not only was their testimony improper because they were not family members of the victim, but that he did not receive adequate notice of their potential testimony.

With respect to Chappell's claim about the victim impact testimony of non-family members, "this court has held that individuals outside the victim's family can present victim impact evidence." Wesley v. State, 112 Nev. 503, 519, 916 P.2d 793, 804 (1996). Therefore, the district court did not abuse its discretion in permitting victim impact testimony by Panos' close friends.

With respect to the notice issue, SCR 250(4)(f) requires the State to file a notice of evidence in aggravation at least 15 days before trial. SCR 250(4)(f) applies not only to evidence in support of the enumerated aggravating circumstances but to "any evidence which the State intends to introduce." Mason v. State, 118 Nev. 554, 561, 51 P.3d 521, 525 (2002). Here, each of the five witnesses named by Chappell were listed in the State's Notice of Evidence. But because these witnesses were primarily used to establish the aggravating evidence, they were listed in the section entitled "Aggravating Circumstance," rather than in the section entitled "Other Evidence." Chappell essentially claims that

because these witnesses were not listed in both sections, he did not have adequate notice of their potential victim impact testimony.

We conclude that even if the State provided inadequate notice of the challenged witnesses respecting their victim impact testimony, Chappell fails to demonstrate that he was prejudiced. Defense counsel cross-examined each of the five witnesses and the record does not reveal that counsel was caught unaware by the testimony. Furthermore, the witnesses Chappell identifies testified mainly about their observations of Chappell and his relationship with Panos and merely concluded their testimony with a brief statement of the physical or emotional affect of Panos' death. Because only two family members testified as to victim impact at the hearing, the testimony of these five witnesses did not result in the presentation of excessive victim impact evidence. Accordingly, Chappell fails to demonstrate prejudice affecting his substantial rights.

Admission of Chappell's guilt-phase testimony

Chappell claims that the district court erred in permitting the State to introduce his testimony from his first trial. Chappell objected to the admission of his prior testimony on the ground that it was the result of ineffective assistance of counsel. Normally, "a defendant's testimony at a former trial is admissible in evidence against him in later proceedings." Harrison v. United States, 392 U.S. 219, 222 (1968); Byford v. State, 116 Nev. 215, 225, 994 P.2d 700, 707 (2000). However, prior testimony is not admissible if it implicates a constitutional violation during the trial in which it was obtained. Byford, 116 Nev. at 225, 994 P.2d at 707. Although a claim of ineffective assistance of counsel implicates the Sixth

Amendment, see Strickland v. Washington, 466 U.S. 668 (1984), Chappell offered no explanation of how his trial counsel's performance was deficient or how his trial testimony was the result of that deficiency. Therefore, we conclude that the district court did not err in admitting this evidence.

Prosecutorial misconduct

Chappell asserts that the prosecution committed several instances of misconduct warranting a new penalty hearing. Chappell only objected to one instance he identifies in this appeal: the prosecutor's comment on his right to remain silent. He failed to object to all others.

Comment on Chappell's right to remain silent

Chappell argues that the prosecutor committed misconduct by introducing his prior trial testimony because the transcript included an improper comment on Chappell's right to remain silent. In particular, Chappell contends that the State's suggestion that he had a "substantial period of time" to think about what he would tell the jury about the events constituted an improper comment on his right to remain silent. This court reviews allegations of improper argument to determine whether the "'prosecutor's statements so infect[ed] the proceedings with unfairness as to make the results a denial of due process.'" Browning v. State, 124 Nev. ___, ___, 188 P.3d 60, 72 (2008) (quoting Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004)), cert. denied, ___ U.S. ___, 129 S. Ct. 1625 (2009).

Even if the State's comments can be considered an "implied" comment on Chappell's right to remain silent, this court has previously held that any error was harmless beyond a reasonable doubt. Chappell v. State, Docket No. 43493 (Order of Affirmance, April 7, 2006).

Furthermore, in light of the evidence presented at Chappell's second penalty hearing, this questioning did not "so infect[ ] the proceedings with unfairness as to make the results a denial of due process." Thomas, 120 Nev. at 47, 83 P.3d at 825.

Comparative worth

Chappell claims that the prosecutor committed misconduct by comparing the worth of Panos and himself. Chappell failed to object to the challenged comment; therefore, his claim is reviewed for plain error affecting his substantial rights. See Archanian v. State, 122 Nev. 1019, 1031, 145 P.3d 1008, 1017 (2006). We conclude that Chappell fails to demonstrate plain error.

Chappell relies on the United States Supreme Court's decision in Payne v. Tennessee, 501 U.S. 808 (1991). However, while Payne "'prohibits comparisons that suggest that there are worthy and unworthy victims'" it "'does not prohibit character comparisons between defendants and victims.'" Humphries v. Ozmint, 397 F.3d 206, 219 (4th Cir. 2005) (quoting Humphries v. State, 570 S.E.2d 160, 167-68 (S.C. 2002)). "'[C]learly established Supreme Court precedent does not prohibit victim-to-defendant comparisons; they are inevitable in any capital case in which the jury is asked to assess the persuasive force of the defendant's mitigating evidence and the victim-impact evidence.'" Hall v. Catoe, 601 S.E.2d 335, 340 n.4 (S.C. 2004) (quoting Humphries v. Ozmint, 366 F.3d 266, 288 (4th Cir. 2004) (Hamilton, J., dissenting), vacated en banc, 397 F.3d 206 (4th Cir. 2005)). Therefore, Chappell fails to demonstrate plain error.

The role of mitigating circumstances

Chappell argues that the prosecutor committed misconduct when he argued that the difficulties in Chappell's life did not justify his conduct. In particular, he argues that the prosecutor's commentary "foreclosed the jury's consideration of mitigating evidence" and thus violated his constitutional rights. Because Chappell failed to object to this argument, his claim is reviewed for plain error.

At the penalty hearing, Chappell presented mitigating evidence that (1) he suffered from substance abuse, (2) he had no father figure in his life, (3) his mother died when he was very young, (4) he was raised in an abusive household, (5) he was the victim of physical abuse as a child, (6) he was the victim of mental abuse as a child, (7) he was born to a drug and alcohol addicted mother, (8) he had a learning disability, (9) he was raised in a depressed housing area, and (10) he was involved in a racially tense relationship. Dr. Lewis Etcoff, a psychologist, testified that because of Chappell's upbringing, he had less free will than the average person.

The State is entitled to rebut evidence relating to a defendant's "character, childhood, mental impairments, etc." Thomas v. State, 122 Nev. 1361, 1368, 148 P.3d 727, 732 (2006). Therefore, the State properly argued that Chappell's personal history did not "take away his actions." Furthermore, the jury was properly instructed on the role of mitigating evidence and in fact found seven mitigating circumstances. This belies Chappell's claim that the prosecutor foreclosed the jury from considering the mitigating evidence. Accordingly, we conclude that Chappell fails to demonstrate plain error.

Argument that jury should not be "conned" by Chappell

Chappell contends that the prosecution committed misconduct when it told the jury not to be "conned" by Chappell. Because he failed to object to this comment, his claim is reviewed for plain error.

During closing argument, the prosecutor pointed out that Dr. Etcoff's testimony was based on Chappell's own statements and that Chappell had lied to Dr. Etcoff during their interview. The prosecutor also argued that Chappell was only able to kill Panos because he had "conned" the probation officer into believing that he was trying to change and could be trusted to check into a rehabilitation facility without an escort. The prosecutor told the jury not to be "conned" in the same way into believing that Chappell was going to change.

The State's argument was based on the evidence presented to the jury and was not inflammatory as Chappell suggests. Therefore, we conclude Chappell fails to demonstrate plain error.

"No mercy" argument

Chappell claims that the prosecutor committed misconduct by arguing to the jury that mercy was not an appropriate consideration. Because Chappell failed to object to the challenged comment, his claim is reviewed for plain error.

Chappell's claim is belied by the record. While the prosecutor naturally emphasized justice and punishment, he also stated, "Is there a place for mercy in murder cases? There is. There is. That's something that you need to consider." He also stated, "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." The prosecutor's argument did not direct

the jury to ignore mercy but to consider both justice and mercy, suggesting that considerations of mercy in this case did not outweigh the demands of justice. Because the prosecutor's argument was proper, Chappell fails to demonstrate plain error.

Jury instructions on weighing mitigators and aggravators

Chappell argues that the district court erred by failing to 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. Because Chappell did not object to this instruction or proffer an alternative, his claim is reviewed for plain error.

Chappell bases his argument on United States Supreme Court jurisprudence requiring any fact that operates to increase a defendant's penalty to be proven beyond a reasonable doubt. See Blakely v. Washington, 542 U.S. 296, 301-02 (2004); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). However, while the aggravating factors must be found beyond a reasonable doubt, the weighing of the aggravating and mitigating factors is not a fact to be found by the jury, but rather a subjective process. Thus, the applicable statutes do not impose the "beyond a reasonable doubt" standard on the weighing process.[5] And this

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[5]NRS 200.030(4)(a), which outlines the range of punishment for a first-degree murder conviction, provides that death can be imposed "only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances." NRS 175.554(3), which addresses jury instructions, determinations, findings and the verdict,

continued on next page . . .

court has repeatedly declined to impose such a requirement. See, e.g., DePasquale v. State, 106 Nev. 843, 852, 803 P.2d 218, 223 (1990); Gallego v. State, 101 Nev. 782, 789-91, 711 P.2d 856, 862-63 (1985); Ybarra v. State, 100 Nev. 167, 679 P.2d 797 (1984). Accordingly, we conclude that the instructions given accurately reflected Nevada law and that Chappell fails to demonstrate plain error.

Mitigating circumstances not found by the jury

Chappell asserts that the jury failed to find mitigating circumstances that were "clearly established and uncontested," requiring vacation of his sentence. Chappell fails to cite any relevant authority supporting his contention. This court has previously held that jurors are not required to find proffered mitigating circumstances simply because there is unrebutted evidence to support them. See Thomas, 122 Nev. at 1370, 148 P.3d at 733; Gallego v. State, 117 Nev. 348, 366-67, 23 P.3d 227, 240 (2001); Hollaway v. State, 116 Nev. 732, 744, 6 P.3d 987, 995-96 (2000); Thomas v. State, 114 Nev. 1127, 1149, 967 P.2d 1111, 1125 (1998). Nevada law permits the jury to decide, even if the evidence supports the factual basis for a mitigating circumstance, whether the proposed mitigator actually extenuates or reduces the defendant's moral culpability.

. . . continued

states that "[t]he jury may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found."

In this case, the jury found seven of the thirteen mitigating circumstances offered by the defense. We conclude that the failure of the jury to find all of the proffered mitigators did not deprive Chappell of his constitutional rights and that no relief is warranted on this claim.

Guilt phase jury instructions

Chappell raises two claims of error regarding jury instructions given at the guilt phase of his trial. First, Chappell argues that the premeditation instruction commonly known as the Kazalyn instruction, Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992), receded from by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000), was erroneous and prejudicial.[6] Second, he contends that the jury was not properly instructed on the elements of felony murder.

Chappell acknowledges that his present appeal is from a second penalty hearing, but he argues that he is entitled to raise claims from the guilt phase of his trial because his conviction is not yet final. See Colwell v. State, 118 Nev. 807, 820, 59 P.3d 463, 472 (2002) ("A conviction becomes final when judgment has been entered, the availability of appeal has been exhausted, and a petition for certiorari to the Supreme Court has been denied or the time for such a petition has expired."). Chappell's claim is meritless.

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[6]Chappell's challenge to the Kazalyn instruction was previously raised as a claim of ineffective assistance of trial counsel during post-conviction proceedings. This court affirmed the district court's denial of relief on that claim. Chappell v. State, Docket No. 43493 (Order of Affirmance, April 7, 2006).

This court previously affirmed Chappell's murder conviction, Chappell v. State, 114 Nev. 1403, 972 P.2d 838 (1998), and the United States Supreme Court denied certiorari, 528 U.S. 853 (1999). The relief granted to Chappell during post-conviction proceedings was expressly limited to the penalty phase. Chappell v. State, Docket No. 43493 (Order of Affirmance, April 7, 2006). Thus, the jury's determination of Chappell's guilt was final when certiorari was denied by the United States Supreme Court on October 4, 1999. See, e.g., Phillips v. Vasquez, 56 F.3d 1030, 1033 (9th Cir. 1995) (holding that under California's bifurcated death penalty process, a conviction for murder is final even when the death sentence has been reversed and is not yet final); People v. Kemp, 517 P.2d 826, 828 (Cal. 1974) (concluding retrial of penalty issue does not change fact that defendant's judgment became final when United States Supreme Court denied defendant's petition for writ of certiorari); People v. Jackson, 429 P.2d 600, 602 (Cal. 1967) (stating that an "original judgment on the issue of guilt remains final during the retrial of the penalty issue and during all appellate proceedings reviewing the trial court's decision on that issue"). We therefore decline to address these claims on the merits.

Even if this court were to consider Chappell's claim regarding the Kazalyn instruction, this court recently concluded in Nika v. State, 124 Nev. ___, 198 P.3d 839 (2008), that Byford does not apply to cases that were final when it was decided. Id. at ___, 198 P.3d at 849-50. Byford was decided on February 28, 2000; Chappell's conviction was final on October 4, 1999. Accordingly, neither our decision in Byford nor the Ninth Circuit's decision in Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), provides Chappell with grounds for relief.

Cumulative error

Chappell claims that his death sentence should be reversed as the result of cumulative error. "The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). However, a defendant is not entitled to a perfect trial, merely a fair one. Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975). Based on the foregoing discussion of Chappell's claims, we conclude that any error in this case, when considered either individually or cumulatively, does not warrant relief.

Mandatory appellate review of the death sentence

NRS 177.055(2) requires that this court review every death sentence and consider:

> (c) Whether the evidence supports the finding of an aggravating circumstance or circumstances;
>
> (d) Whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor; and
>
> (e) Whether the sentence of death is excessive, considering both the crime and the defendant.

With respect to the first question, we previously concluded that there was sufficient evidence to support the sexual assault aggravating circumstance.

With respect to the second question, although the evidence presented at Chappell's penalty hearing showed him to be a man who had physically abused his girlfriend and the mother of his children for a long period of time before he sexually assaulted and stabbed her thirteen times,

nothing in the record demonstrates that the jury's verdict was the result of passion, prejudice, or any other arbitrary factor. Despite Chappell's claims that he was subjected to an unfair penalty hearing on the grounds outlined above, any error committed did not unduly prejudice him or serve to inflame the jury.

Finally, we must consider whether the death sentence is excessive. The evidence shows that Chappell had beaten Panos and stolen from her and their children to support his drug habit for almost a decade before he was incarcerated. Immediately after being released from custody, he went to Panos' home, beat her, sexually assaulted her, and stabbed her thirteen times. Chappell's mitigating evidence highlighting his troubled upbringing and his drug addiction and expert testimony suggesting that he did not have the same level of "free will" as the average person was weakened by rebuttal evidence demonstrating that Chappell had a history of blaming others for his problems and his behavior. And in fact, while Chappell admitted to killing Panos, he continued to blame her, at least in part, for her murder at his hands. Chappell also had a lengthy criminal history that included repeated acts of domestic violence, and evidence adduced during the penalty hearing demonstrated that he had a general disregard for the well-being of others. Based on these considerations, we conclude that the jury's decision to impose the death penalty was not excessive.

Having considered Chappell's claims and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.[7]

_____, C.J.
Hardesty

_____, J.
Parraguirre

_____, J.
Cherry

_____, J.
Gibbons

_____, J.
Saitta

_____, J.
Pickering

cc: Hon. Douglas W. Herndon, District Judge
Special Public Defender David M. Schieck
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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[7]The Honorable Michael L. Douglas, Justice, voluntarily recused himself from participation in the decision of this matter.

CERTIFIED COPY
This document is a full, true and correct copy of the original on file and of record in my office.
DATE: June 8 2010
Supreme Court Clerk, State of Nevada
By: A. Ingram Deputy

EXHIBIT 8

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES MONTELL CHAPPELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49478

FILED

DEC 16 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DENYING REHEARING AND AMENDING ORDER

This petition for rehearing challenges an order entered by this court on October 20, 2009, affirming appellant James Chappell's sentence of death. Although we deny rehearing, Chappell justifiably complains of an error in the order of affirmance, and we therefore amend the order of affirmance to remove the challenged passage.

In the order of affirmance, this court denied Chappell's claim that a written statement made during a presentence interview with his probation officer was obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966), concluding that Miranda did not apply at that stage of the proceedings. We also stated that the Nevada statutes permitted admission of the evidence at a capital sentencing hearing even if it was obtained in violation of Miranda. That statement was erroneous. See NRS 175.552(3) ("No evidence which was secured in violation of the Constitution of the United States or the Constitution of the State of Nevada may be introduced."). However, the erroneous statement was not necessary to our disposition of the claim given our conclusion that Miranda did not apply.

Therefore, we direct the clerk of this court to strike the following language from page 18, lines 4-9, of the order of affirmance:

> Moreover, NRS 175.552(3) states that a district court has discretion to admit any evidence "which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible." Thus, even if Chappell's statement was normally inadmissible due to the failure to give Miranda warnings, it was relevant and admissible evidence at the penalty hearing.

It is so ORDERED.[1]

_____, C.J.
Hardesty

_____, J.
Parraguirre

_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

_____, J.
Pickering

[1]On November 4, 2009, this court received proper person documents from Chappell. However, Chappell is represented by counsel and we have not granted him leave to proceed in proper person. See NRAP 46(b). Accordingly, we decline to consider Chappell's proper person documents and direct the clerk of this court to return them, unfiled, to Chappell.

cc: Hon. Douglas W. Herndon, District Judge
Special Public Defender David M. Schieck
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk
James Montell Chappell

CERTIFIED COPY
This document is a full, true and correct copy of the original on file and of record in my office.
DATE: June 8 2010
Supreme Court Clerk, State of Nevada
By: A. Ingram Deputy

EXHIBIT 9

FCL
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Nevada Bar #001565
STEVEN S. OWENS
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Nevada Bar #004352
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JAMES CHAPPELL,
#1212860

Defendant.

CASE NO: 95C131341
DEPT NO: V

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: 10/19/12
TIME OF HEARING: 10:00 A.M.

This Cause having come on for hearing before the Honorable CAROLYN ELLSWORTH, District Judge, for argument on the 19th day of October, 2012, the Petitioner not being present and in custody, represented by CHRISTOPHER R. ORAM, ESQ., the Respondent being represented by STEVEN B. WOLFSON, District Attorney, by and through STEVEN S. OWENS, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, this Court now makes the following Findings Of Fact and Conclusions Of Law.

In 1996, Chappell was convicted and sentenced to death for murdering his ex-girlfriend, Deborah Panos, by entering her mobile home through a window, sexually assaulting her, and then repeatedly stabbing her with a kitchen knife. Chappell v. State, 114 Nev. 1403, 972 P.2d 838 (1998). The convictions and death sentence were affirmed on

appeal. Id. Remittitur issued on October 26, 1999. Thereafter, a timely post-conviction petition was filed and an evidentiary hearing was conducted. The district court then denied all post-conviction claims as to guilt, but granted a new penalty hearing due to ineffective assistance of counsel for failing to call certain mitigation witnesses. The decision was affirmed on appeal in an unpublished order on April 7, 2006. (SC #43493). After a new penalty hearing in 2007, the jury again returned a death sentence which was affirmed on appeal in an unpublished order on October 20, 2009. (SC # 49478). Remittitur issued on June 8, 2010. Chappell initiated the current post-conviction proceedings with a pro per petition filed on June 22, 2010.

FINDINGS OF FACT

This Court finds that all claims regarding ineffective assistance of trial counsel, first penalty hearing counsel, and first appellate counsel are procedurally barred or moot due to the granting of a new penalty hearing. The current petition was filed more than ten years after Remittitur from direct appeal issued on October 26, 1999, in excess of the one-year time bar. Chappell fails to demonstrate good cause or prejudice for this excessive delay, and a petition addressing these claims was already heard and decided by this Court and the Nevada Supreme Court, thus his claims are successive. The State also affirmatively pleads laches under NRS 34.800, and this Court agrees that NRS 34.800 bars review since well over five (5) years have elapsed between the filing of the Nevada Supreme Court's decision on direct appeal and the filing of Chappell's claims in the instant June 22, 2010 petition. In 1996, Chappell was granted a new penalty hearing and the Judgment of Conviction was vacated only insofar as the death sentence was concerned. Thus, the convictions have remained valid and final and any claims regarding ineffective assistance of trial counsel, first penalty hearing counsel, and first appellate counsel, are procedurally barred and are hereby denied.

Claims of ineffective assistance of counsel during the second penalty hearing are denied as this Court finds no deficient performance such that the outcome of the proceedings would have been different. Even though live testimony from James Ford and Ivri Marrell

was not presented, the jury heard a summary of their testimony the substance of which was also presented through other witnesses and therefore this Court finds no prejudice. Chappell fails to demonstrate what a more adequate investigation of his history in Arizona would have shown that would have achieved a better result at his penalty hearing.

This Court finds that counsel was not ineffective in failing to retain an expert in pre-ejaculation fluid in order to explain the presence of Chappell's semen in the victim despite his claim that he withdrew prior to ejaculating. Counsel called three separate expert witnesses to rebut the sexual assault aggravator by showing the sexual intercourse was consensual. A fourth expert specifically as to pre-ejaculation fluid containing sperm would not have changed the outcome in light of all the other evidence bearing on the issue of consent.

Nor was counsel ineffective in failing to obtain a P.E.T. scan or brain imaging for Fetal Alcohol Syndrome. Counsel did investigate Chappell's overall mental capabilities and presented experts who testified that Chappell had borderline personality disorder and an IQ of 80 in the low/average range. Considering that the jury found that Chappell was born to a drug and alcohol addicted mother, Chappell fails to demonstrate that obtaining a P.E.T. scan and/or brain imaging, even if these tests would have revealed that Chappell did have Fetal Alcohol Syndrome, would have led to a more favorable outcome at his penalty hearing.

Simply because the State was able to effectively cross examine Chappell's experts and impeach a lay witness with his prior inconsistent statement, does not demonstrate that defense counsel was in any way ineffective. This claim is belied by the nine witnesses called by counsel whose testimony resulted in the jury's finding of seven mitigating circumstances. Chappell fails to show a reasonable probability that the result of his penalty hearing would have been any different had the witnesses testified differently or had counsel better prepared them.

Counsel had no valid reason to object to the admission of the PSI reports, which on direct appeal were found not to have affected Chappell's substantial rights. Even if an objection might have been sustained, Chappell fails to demonstrate that the exclusion or

redaction of the PSI's would have changed the outcome of the penalty hearing.

The failure to object to lack of notice and cumulative victim impact testimony was not prejudicial. On appeal, the testimony was found not to be overly excessive and this Court finds the alleged errors would not have been found prejudicial under either a plain or harmless error analysis on appeal.

The failure to object to allegations of prosecutorial misconduct later raised on appeal did not result in any prejudice. On appeal, each of the instances of alleged improper arguments was found to not constitute error at all. Accordingly, any objection would not have been sustained and would not have resulted in any prejudice on appeal under either a plain or harmless error standard.

As to new claims of prosecutorial misconduct, an objection was made and sustained as to the first instance, therefore resulting in no reversible prejudice had the issue been raised on appeal. The other two instances of alleged misconduct actually constitute fair comment on the evidence and any objection would not have been sustained and would not have changed the outcome of the case.

Any prejudice from the failure to object to the prosecutor's impeachment of Fred Dean was minimal considering the witness was a convicted felon and the jury still found the existence of seven mitigating circumstances. Chappell has failed to demonstrate the outcome would have been different if the impeachment details had not been elicited.

Chappell's claims that the trial judge erred in admitting improper other bad act evidence, that the death penalty scheme in Nevada is unconstitutional, and that the jury was incorrectly instructed on premeditation and deliberation, were appropriate for direct appeal and are thus procedurally barred. Chappell fails to articulate good cause or prejudice to explain his procedural default and these claims must therefore be denied. Many of these claims were raised and denied on direct appeal, and thus are also barred by law of the case.

This Court finds that the cumulative prejudice of any alleged errors in counsel's performance at the second penalty hearing is insufficient to have altered the outcome of the case and therefore denies this claim.

All of Chappell's claims can be resolved without expanding the record, especially considering Chappell's claims have been either waived, are procedurally barred, or are otherwise not cognizable as bare or conclusory allegations. Even accepting all of Chappell's allegations as true, the alleged errors of counsel would not have changed the outcome of the second penalty hearing. Thus, it is not necessary to expand the record in order to resolve this petition and the request for an evidentiary hearing is denied.

Finally, Chappell's motions for discovery and for appointment of various experts and an Investigator are all denied. The discovery request is non-specific, the motions for experts and an Investigator are bare and conclusory, and this Court has determined that an evidentiary hearing and expansion of the record are unnecessary to resolve the claims in the petition. There is no demonstrable need or good cause for a P.E.T. scan or "full neurological exam" in light of a pre-existing neurological examination and mental health experts obtained by prior counsel. Even if brain imaging could reveal that Chappell suffers from Fetal Alcohol Syndrome, which has no specific or uniformly accepted diagnostic criteria, this Court has already accepted such allegations as true and found it would not have changed the outcome, especially considering the jury found as a mitigating circumstances that Chappell was born to a drug and alcohol addicted mother. Chappell fails to make any specific allegation as to what these experts and investigators would uncover that could possibly change the outcome of his case.

CONCLUSIONS OF LAW

NRS 34.726(1) states that unless good cause is shown for the delay, a petition that challenges the validity of a judgment or sentence filed more than one year after entry of the judgment of conviction, or if appeal has been taken more than one year after the Supreme Court issues its remittitur, is time-barred. Good cause for the delay exists if the petitioner demonstrates to the satisfaction of the court that the delay was not his fault and the dismissal of the petition as untimely would unduly prejudice him. Id. The one-year time bar is strictly construed. Gonzales v. State, 118 Nev. 590, 593, 590 P.3d 901, 902 (2002).

A second or successive petition may be dismissed if the judge or justice determines

that it fails to allege new or different grounds for relief and that the prior determination was on the merits. NRS 34.810(2). A defendant must also demonstrate good cause and actual prejudice to overcome the successive petition bar. Id.

NRS 34.800 creates a rebuttable presumption of prejudice to the State if a defendant allows more than five years to elapse between the filing of the Judgment of Conviction, or a decision on direct appeal from a Judgment of Conviction, and the filing of a post-conviction petition. The statute requires that the State plead laches in its motion to dismiss the petition.

A conviction qualifies as final when judgment has been entered, the availability of appeal has been exhausted, and a Petition for Certiorari to the Supreme Court has been denied or the time for the petition has expired. Colwell v. State, 118 Nev. 807, 59 P.3d 463 (2002). The 9th Circuit Court of Appeals has recognized that a conviction remains final even though a case may be sent back for re-sentencing. Phillips v. Vasquez, 56 F.3d 1030 (9th Cir. 1995). A conviction for murder is a final judgment even when the death penalty sentence has been reversed and is not yet final. People v. Jackson, 60 Cal.Rptr. 248, 250, 429 P.2d 600, 602 (1967). When a judgment is vacated only insofar as it relates to the death penalty, "the original judgment on the issue of guilt remains final during retrial of the penalty issue and during all appellate proceedings . . ." People v. Kemp, 111 Cal.Rptr. 562, 564, 517 P.2d 826, 828 (1974).

In order to assert a claim for ineffective assistance of counsel, a defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2063-64 (1984). Under this test, the defendant must show: first, that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. See Strickland, 466 U.S. at 687–688, 694. "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975), *quoting* McMann v. Richardson, 397 U.S. 759, 771 (1970).

A defendant who alleges a failure to investigate must demonstrate how a better investigation would have benefited his case and changed the outcome of the proceedings. Molina v. State, 120 Nev. 185, 87 P.3d 533 (2004). Such a defendant must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial. United States v. Porter, 924 F.2d 395, 397 (1st Cir. 1991). Furthermore, it is well established that a claim of ineffective assistance of counsel alleging a failure to properly investigate will fail where the evidence or testimony sought does not exonerate or exculpate the defendant. Ford v. State, 105 Nev. 850, 784 P.2d 951 (1989).

In Hargrove v. State, 100 Nev. 498, 686 P.2d 222, the Nevada Supreme Court held that claims asserted in a petition for post-conviction relief must be supported with specific factual allegations which, if true, would entitle the petitioner to relief. "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id.

In Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975), the Nevada Supreme Court held that where the Court decides an issue on the merits, the Court's ruling is law of the case, and the issue will not be revisited. The Court further stated that "the law of first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same." Id. at 315, 535 P.2d at 798.

If a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). NRS 34.770 provides the manner in which the district court decides a post conviction proceeding: 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent unless an evidentiary hearing is held; 2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.

The United States Supreme Court recently explained that an evidentiary hearing is not required simply because counsel's actions are challenged as being an unreasonable strategic

decision. Harrington v. Richter, 131 S.Ct. 770, 788 (2011). Although courts may not indulge post hoc rationalization for counsel's decision making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id., *citing* Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527 (2003). There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id., *citing* Yarborough v. Gentry, 540 U.S. 1, 124 S.Ct. 1 (2003). Strickland calls for an inquiry in the ***objective*** reasonableness of counsel's performance, not counsel's ***subjective*** state of mind. 466 U.S. at 688, 104 S.Ct. 2052.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied. The various motions for discovery, for appointment of experts, and for an Investigator are also denied.

DATED this _____ day of November, 2012.

DISTRICT JUDGE

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

BY
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of Findings of Fact, Conclusions of Law, and Order, was made this 14th day of November, 2012, by facsimile transmission to:

CHRISTOPHER R. ORAM, ESQ.
FAX #(702) 974-0623

Employee for the District Attorney's Office

****
*** TX REPORT ***
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TRANSMISSION OK

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OFFICE OF THE DISTRICT ATTORNEY
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FROM: Steven S. Owens

SUBJECT: James Chappell, 95C131341, Findings

DATE: November 14, 2012

****
*** TX REPORT ***
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TRANSMISSION OK

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RESULT	OK	

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FROM: Steven S. Owens

SUBJECT: James Chappell, 95C131341, Findings

DATE: November 6, 2012

Chris,
The following Findings will be submitted to Judge Ellsworth on November 13, 2012.
Sincerely,

EXHIBIT 10

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES MONTELL CHAPPELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 61967

FILED

JUN 18 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus in a death penalty case. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Appellant James Montell Chappell went to the home of Deborah Panos, his ex-girlfriend and the mother of his three children, sexually assaulted her, stabbed her to death with a kitchen knife, and left the home with some of her property. A jury convicted Chappell of burglary, robbery, and first-degree murder and sentenced him to death. This court affirmed Chappell's conviction and death sentence on direct appeal. *Chappell v. State (Chappell I)*, 114 Nev. 1403, 972 P.2d 838 (1998). Chappell sought post-conviction relief in the district court and was granted a new penalty hearing. This court affirmed the judgment of the district court. *Chappell v. State (Chappell II)*, Docket No. 43493 (Order of Affirmance, April 7, 2006). At the conclusion of the second penalty hearing, the jury again sentenced Chappell to death. This court affirmed the sentence on appeal. *Chappell v. State (Chappell III)*, Docket No. 49478 (Order of Affirmance, October 20, 2009). In this appeal from the denial of his first post-conviction petition for a writ of habeas corpus following the

second penalty hearing, Chappell argues that the district court erred in denying his claims of ineffective assistance of counsel.[1]

Ineffective assistance of counsel

Chappell argues that the district court erred by denying numerous claims of ineffective assistance of trial and appellate counsel without conducting an evidentiary hearing. "A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review," *Evans v. State*, 117 Nev. 609, 622, 28 P.3d 498, 508 (2001), but the district court's purely factual findings are entitled to

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[1]Chappell also contends that the death penalty is unconstitutional on three grounds: (1) the death penalty scheme fails to genuinely narrow death eligibility, a contention we have rejected, *see State v. Harte*, 124 Nev. 969, 972-73, 194 P.3d 1263, 1265 (2008); (2) the death penalty is cruel and unusual, an argument we have rejected, *see Gallego v. State*, 117 Nev. 348, 370, 23 P.3d 227, 242 (2001); and (3) the death penalty is unconstitutional because executive clemency is unavailable, an argument we have rejected, *see Colwell v. State*, 112 Nev. 807, 812, 919 P.2d 403, 406-07 (1996). He also contends that his conviction and sentence violate the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. As he could have raised this claim in the appeal taken from his judgment of conviction and he failed to assert cause for the failure to do so or actual prejudice, the district court did not err in denying this claim. *See* NRS 34.810(1)(b).

In addition, Chappell also contends that the district court erred in denying his claim that his conviction violates due process based on an erroneous guilt phase instruction on premeditation and deliberation and that all prior counsel were ineffective for not challenging the instruction. This claim is not properly raised because the proceeding at issue is his second penalty hearing. *See Chappell v. State (Chappell III)*, Docket No. 49478, at 27-28 (Order of Affirmance, October 20, 2009) (concerning Chappell's appeal from his second penalty hearing where this court concluded that Chappell's challenge to the premeditation murder instruction was not properly before the court).

deference. *Lara v. State*, 120 Nev. 177, 179, 87 P.3d 528, 530 (2004). Under the two-part test established by the United States Supreme Court in *Strickland v. Washington*, a defendant must show (1) that counsel's performance fell below an objective standard of reasonableness and (2) prejudice. 466 U.S. 668, 687-88, 694 (1984); *Kirksey v. State*, 112 Nev. 980, 987-88, 998, 923 P.2d 1102, 1107, 1114 (1996). To prove ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and but for counsel's errors, the omitted issue would have had a reasonable probability of success on appeal. *Kirksey*, 112 Nev. at 998, 923 P.2d at 1114. "The defendant carries the affirmative burden of establishing prejudice." *Riley v. State*, 110 Nev. 638, 646, 878 P.2d 272, 278 (1994). A court need not consider both prongs of the *Strickland* test if a defendant makes an insufficient showing on either prong. *Strickland*, 466 U.S. at 697. An evidentiary hearing is warranted only if a petitioner raises claims supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

Failure to present testimony

Chappell contends that the district court erred in denying his claim that trial counsel were ineffective for failing to introduce testimony from James Ford and Ivri Morrell. We disagree. Chappell could not demonstrate that, had he been able to introduce the testimony of Ford and Morrell, he would not have been sentenced to death, because the subject matter of Ford and Morrell's proffered testimony was substantially covered by other witnesses. In particular, Benjamin Dean, Fred Dean, and Mira King discussed the early stages of Chappell and Panos'

relationship. King even provided broader testimony than could be provided by Ford and Morrell. Further, Ford's and Morrell's proffered testimony about the beginning of the relationship was not compelling considering the trajectory that the relationship eventually followed: Chappell physically abusing, threatening, and eventually murdering Panos. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Failure to obtain an expert

Chappell argues that the district court erred in denying his claim that trial counsel were ineffective for failing to obtain an expert who could have testified that pre-ejaculatory fluid may contain sperm, which he claims would have reinforced his testimony instead of discrediting it. We conclude that although counsel were deficient, Chappell failed to demonstrate that he was prejudiced. The presence of sperm was not the only evidence that supported the sexual assault aggravating circumstance and undermined Chappell's testimony. Chappell had a history of abusing Panos, wrote hostile and threatening letters to her, and threatened her in court. Before his unexpected release from custody, Panos had planned to move somewhere Chappell could not find her. Consequently, she became terrified when she learned of Chappell's release. While Chappell was at Panos' home, she attempted to engage in subterfuge to escape. In addition, her body bore injuries indicating that she had been beaten 15 to 30 minutes before her murder. Given this evidence, Chappell did not demonstrate a reasonable probability that, but for counsel's failure to introduce expert testimony on this issue, the jury would not have found that the murder was committed during the course of a sexual assault.

Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Positron emission tomography ("P.E.T.") scan

Chappell argues that the district court erred in denying his claim that trial counsel were ineffective for failing to obtain a P.E.T. scan where there was some evidence that his mother was addicted to drugs and alcohol. He contends that a scan could have revealed indicia of Fetal Alcohol Spectrum Disorders, which could cause physical, learning, and behavioral problems. We conclude that the district court did not err in denying this claim without conducting an evidentiary hearing. At the second penalty hearing, trial counsel introduced expert testimony that Chappell had a low IQ as well as cognitive deficits, which had been supported by psychological testing and Chappell's school records. As his cognitive deficits had been extensively documented and the jury nevertheless concluded that they were not sufficiently mitigating, Chappell failed to demonstrate that counsel were deficient in not obtaining a P.E.T. scan or that he would have benefited from a more thorough investigation. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) ("Where counsel and the client in a criminal case clearly understand the evidence and the permutations of proof and outcome, counsel is not required to unnecessarily exhaust all available public or private resources."); *see also State v. Powell*, 122 Nev. 751, 759, 138 P.3d 453, 458 (2006) ("An attorney must make reasonable investigations or a reasonable decision that particular investigations are unnecessary." (citing *Strickland*, 466 U.S. at 691 (1984))).

Failure to prepare Dr. Lewis Etcoff to testify

Chappell argues that the district court erred in denying his claim that trial counsel were ineffective for failing to prepare psychologist Dr. Lewis Etcoff's testimony. He contends that Dr. Etcoff's testimony could have been more persuasive if he had not relied solely on Chappell's statements but reviewed other evidence.[2] We conclude that Chappell failed to demonstrate that had counsel better informed Dr. Etcoff the jury would not have found the sexual assault aggravator. Dr. Etcoff provided context for Chappell's abuse in his relationship with Panos and explained how his cognitive deficits contributed to the murder. Therefore, cross-examination about further abuse and problems in the relationship did not undermine his premise. Regardless of how informed the psychologist's opinion could have been, Chappell failed to show that it would have been persuasive in light of the remaining evidence contradicting Chappell's testimony. The evidence demonstrated that Panos ended her relationship with Chappell, Chappell threatened to kill her, he absconded from the parole office, snuck into her window, beat Panos, and killed her. Given this evidence, Dr. Etcoff's opinion, even if it was as informed as Chappell wanted it to be, would not have been persuasive enough to overcome the

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[2]Chappell further argues that had counsel introduced an expert to testify that pre-ejaculate could contain spermatozoa, Dr. Etcoff would not have admitted that the presence of Chappell's DNA in the victim rendered Chappell's testimony unbelievable. As Dr. Etcoff testified about Chappell's psychological condition, it was not unreasonable for counsel to have not anticipated questioning about the results of DNA evidence. Moreover, as discussed above, Chappell failed to demonstrate counsel was ineffective for failing to obtain such an expert.

great weight of evidence demonstrating that any sexual conduct that occurred on the day of the murder was not consensual.

Failure to prepare Dr. William Danton to testify

Chappell argues that better preparation could have rendered clinical psychologist Dr. William Danton's testimony more convincing. He asserts that Dr. Danton's testimony was unpersuasive because he (1) only briefly met with Chappell, (2) contradicted Dr. Etcoff's opinion on whether Chappell could remember the murder, and (3) conceded that it was possible that Chappell forced Panos to have sex. We conclude that Chappell failed to demonstrate that trial counsel performed deficiently in their preparation of Dr. Danton. Dr. Danton's testimony related to Panos and her state of mind; therefore, it was not undermined by the decision to not thoroughly evaluate Chappell. Moreover, Dr. Danton's testimony concerning whether Chappell blacked out during the murder is not inconsistent with Dr. Etcoff's assessment. In addition, Chappell cannot demonstrate that he was prejudiced by Dr. Danton's acknowledgement that Chappell could have forced Panos to have sex given the substantial evidence showing that Chappell raped Panos. Therefore, Dr. Danton's acknowledgement that rape was at least a possibility, did not leave Chappell's defense in a worse position. The district court did not err in denying this claim without conducting an evidentiary hearing.

Failure to prepare Dr. Todd Grey to testify

Chappell argues that the district court erred in denying his claim that trial counsel were ineffective for failing to prepare Dr. Todd Grey's testimony by informing him of the presence of Chappell's sperm in Panos' body and the threats and prior abuse in Chappell and Panos' relationship. We disagree. As Chappell's testimony that he had

consensual intercourse with the victim shortly before her murder but did not ejaculate was not believable in light of the other evidence introduced at trial, Dr. Grey's acknowledgment that ejaculation had occurred did not render Chappell's testimony less believable. Chappell further failed to demonstrate that he would not have been sentenced to death had Dr. Grey been aware of prior threats, abuse, Chappell's testimony, and other evidence from the scene. As a medical examiner, Dr. Grey's expertise was limited to the condition of Panos' body. Therefore, his opinion was not undermined by cross-examination about the prior threats, abuse, or Chappell's testimony. Further, even knowing about the prior reports of abuse and testimony in the case did not alter Dr. Grey's conclusion that there was no evidence of injury indicative of sexual assault. We therefore conclude the district court did not err in denying this claim without conducting an evidentiary hearing.

Failure to properly prepare a lay mitigation witness

Chappell contends that the district court erred in denying his claim that trial counsel were ineffective for not adequately preparing Benjamin Dean to testify so that his testimony was not "severely impeached" by a prior affidavit. We conclude that Chappell failed to demonstrate that had Dean been better prepared, there is a reasonable probability that he would not have been sentenced to death. The subject matter of Dean's testimony was substantially covered by other witnesses, including Mira King, Chappell's sister, and Fred Dean, Chappell's friend, who testified about Chappell's home life and the beginning of Chappell and Panos' relationship. Their testimony was not similarly impeached. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Failure to object to cumulative victim impact testimony

Chappell argues that the district court erred in denying his claim that trial counsel were ineffective for failing to challenge the adequacy of the notice of evidence in aggravation and that appellate counsel was ineffective for failing to argue that the victim-impact evidence was unfairly cumulative. We disagree.

The State's notice of evidence in aggravation was sufficient to inform the defense that the State would present evidence from Mike Pollard and Carol Monson. *See Mason v. State*, 118 Nev. 554, 561, 51 P.3d 521, 525 (2002) (noting that SCR 250(4)(f) requires the State's notice of aggravation to summarize any evidence that the State intends to introduce during the penalty hearing). Further, the notice indicated that Pollard would testify about Panos before the murder and Monson would testify about Panos' family life. Although Pollard also testified about how Panos' death affected him, the cross-examination does not indicate that Chappell was caught unaware by any of the testimony. Further, the notice also indicated that the State planned to introduce evidence from Christina Rees and Doris Wichtoski. Accordingly, Chappell could not claim he was unfairly surprised by the introduction of their letters, which Monson read.

Chappell would have further been unable to demonstrate on appeal that the trial court's decision to admit Pollard's and Monson's testimony was an abuse of discretion. *See Johnson v. State*, 122 Nev. 1344, 1353, 148 P.3d 767, 774 (2006) (noting that this court reviews a district court's decision to admit evidence for an abuse of discretion). The evidence presented by Pollard and Monson was not needlessly cumulative. *See* NRS 48.035. Pollard's prior and live testimony focused on different

aspects of the murder: his prior testimony detailed Panos' state of mind and Chappell and Panos' relationship and his live testimony focused on Panos and the effect her death had on him. Monson testified about Panos, her relationship with Panos, and the effect of Panos' death on their family. She also read several letters from family members and her own letter which provided more detail about Panos' life and death. Although the testimony and letters covered similar themes, the information contained and perspectives expressed therein were not repetitive and Monson's testimony was brief in the context of the overall length of the penalty hearing. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Failure to address prosecutorial misconduct

First, Chappell contends that the district court erred in denying his claim that trial counsel were ineffective for failing to object to several instances of prosecutorial misconduct that Chappell challenged in his direct appeal in order to have benefited from a less deferential standard of review on appeal. We disagree. We concluded on direct appeal that the challenged comments did not constitute prosecutorial misconduct, *Chappell v. State (Chappell III)*, Docket No. 49478, at 23-25 (Order of Affirmance, October 20, 2009), and therefore a less deferential standard of review on direct appeal would not have resulted in relief.

Second, Chappell contends that the prosecutor committed misconduct by stating that Chappell had been arrested 10 times in front of his children because no evidence supported the comment. We agree that the prosecutor's comment was improper. However, trial counsel objected to the comment, and the district court sustained the objection. Therefore, Chappell cannot demonstrate that counsel's performance was deficient.

Further, given the brevity of the comment, the district court's action in sustaining the objection, and the evidence produced during the penalty hearing, Chappell cannot demonstrate that appellate counsel was ineffective for not raising the issue on appeal. *See Hernandez v. State*, 118 Nev. 513, 525, 50 P.3d 1100, 1108 (2002) (recognizing that a criminal conviction will not be overturned on the basis of prosecutorial misconduct unless the misconduct "so infected the proceedings with unfairness as to make the results a denial of due process").[3]

Third, Chappell argues that the district court erred in denying his claim that trial counsel were ineffective for failing to object to the prosecutor's comments describing Chappell as "a despicable human being" who "chose evil." We disagree. Given the context of the comments, the prosecutor was not "ridicul[ing] or belittl[ing] the defendant or the case," *Earl v. State*, 111 Nev. 1304, 1311, 904 P.2d 1029, 1033 (1995), but rather was describing the defendant and his actions using terminology that "merely expressed the gravity of the crime charged," *Browning v. State*, 124 Nev. 517, 534, 188 P.3d 60, 72 (2008). As an objection would have been futile, Chappell cannot demonstrate that counsel's performance was deficient. *See Epps v. State*, 901 F.2d 1481, 1483 (8th Cir. 1990) (explaining that prosecutor's comments that were not objectionable cannot be the basis for ineffective-assistance claim based on counsel's failure to object); *Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006)

---

[3]Chappell also contends that the statement violated NRS 48.045's bar against the admission of prior bad acts. As evidence of uncharged bad acts is admissible during a capital penalty hearing, *see Nika v. State*, 124 Nev. 1272, 1296, 198 P.3d 839, 856 (2008), this argument lacks merit.

(stating that counsel cannot be deemed ineffective for failing to make a futile objection).

Failure to object to improper impeachment

Chappell argues that the district court erred in denying his claim that trial and appellate counsel were ineffective for failing to challenge the State's improper impeachment of Fred Dean regarding the facts and circumstances of his prior conviction. The State's impeachment was improper because questions about the sentence imposed and facts underlying a witness' conviction are irrelevant. *See Jacobs v. State*, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975); *Plunkett v. State*, 84 Nev. 145, 147, 437 P.2d 92, 93 (1968). Trial counsel should have objected. However, Chappell failed to demonstrate prejudice because the inquiry involved the facts of Dean's prior criminal actions, not Chappell's actions. Although Dean testified on Chappell's behalf, he was not closely associated with Chappell. Moreover, the facts of Dean's drug conviction were relatively innocuous and there is no reasonable probability of a different outcome at the penalty hearing had the information not been presented or that Chappell would have obtained relief on appeal based on this error. Therefore, no relief is warranted on this claim.

Admission of bad act evidence

Chappell contends that the district court erred in denying his claim that appellate counsel was ineffective for not arguing that Ladonna Jackson's prior testimony, in which she noted that Chappell made money by stealing, was impermissible bad act testimony that was not adequately noticed. We disagree. The State informed Chappell that it intended to introduce testimony from the guilt phase of his trial, including "prior trial and penalty hearing transcripts. . . . for the purpose of establishing the

character of the defendant for penalty purposes." This description encompassed Jackson's trial testimony. Further, such testimony was not inadmissible, as evidence of uncharged prior bad acts is admissible at the penalty hearing. *See Nika*, 124 Nev. at 1296, 198 P.3d at 856.[4] Therefore, Chappell failed to demonstrate that appellate counsel's performance was deficient. *See Ennis*, 122 Nev. at 706, 137 P.3d at 1103 (stating that counsel cannot be deemed ineffective for failing to make a futile objection).[5]

Cumulative error

Chappell argues that the district court erred in denying his claim that the cumulative errors of trial and appellate counsel warrant relief. We disagree. Chappell only demonstrated that counsel's performance was deficient in two respects: failing to introduce an expert to testify about the presence of sperm in the victim and failing to object to the improper impeachment of Fred Dean. Even assuming that counsel's deficiencies may be cumulated, *see Harris by and through Ramseyer v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995) (concluding that prejudice may result from cumulative effect of multiple counsel deficiencies); *State v.*

---

[4]Chappell suggests, in passing, that this testimony is impalpable or highly suspect. In light of the other evidence showing that Chappell stole to support his drug habit, attempted to sell belongings and rent the victim's car after her murder, was apprehended trying to shoplift, and acknowledged that he stole items for his daughter's birthday, Chappell cannot demonstrate that Jackson's testimony is impalpable or highly suspect.

[5]To the extent that Chappell contends that the district court erred in admitting prior bad act evidence, this claim should have been raised in Chappell's direct appeal. *See* NRS 34.810(1)(b).

Thiel, 665 N.W.2d 305, 322 (Wis. 2003) (concluding that multiple incidents of deficient performance may be aggregated in determining prejudice under *Strickland*), we conclude that any deficiencies in counsel's performance had no cumulative impact warranting relief.

Having considered Chappell's contentions and concluding that they lack merit, we

ORDER the judgment of the district court AFFIRMED.[6]

_____, C.J.
Hardesty

_____, J.
Parraguirre

_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

_____, J.
Pickering

---

[6]The Honorable Michael Douglas, Justice, voluntarily recused himself from participation in the decision of this matter.

cc: Hon. Carolyn Ellsworth, District Judge
Christopher R. Oram
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

CERTIFIED COPY
This document is a full, true and correct copy of the original on file and of record in my office.
DATE: November 17th, 2015
Supreme Court Clerk, State of Nevada
By _____ Deputy

EXHIBIT 11

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES MONTELL CHAPPELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 61967

FILED

OCT 2 2 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.[1]

Hardesty, C.J.

Parraguirre, J.

Cherry, J.

Saitta, J.

Gibbons, J.

Pickering, J.

[1]The Honorable Michael Douglas, Justice, voluntarily recused himself from participation in the decision of this matter.

cc: Hon. Carolyn Ellsworth, District Judge
Christopher R. Oram
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

CERTIFIED COPY
This document is a full, true and correct copy of the original on file and of record in my office.
DATE: November 17th, 2015
Supreme Court Clerk, State of Nevada
By _____ Deputy

EXHIBIT 12

JChePPell-8JDC2517

Badge # 427
I.D.# 0331669

Juror Questionnaire

Dear Prospective Juror:

You have been placed under oath. Please answer all questions truthfully and completely, as though the questions were being asked of you in open court. You may be asked additional questions in open court during the jury selection process.

Some of the questions ask your opinions. Be honest and state them. If you need more room on any question, use the margins or the next-to-last page, which has been left blank.

The purpose of this questionnaire is to help the court and the lawyers in their attempt to select a fair and impartial jury to hear this case. The answers provided by you in this document will be made available to counsel for both the state and defense. Your answers may also become part of the court's permanent record, and may, therefore, be a public document.

A summary of the case allegations and the procedure to be followed in this case are noted below. The fact that these allegations have been made does not mean they are necessarily true. The State has the burden of proving the allegations beyond a reasonable doubt.

Remember, you must fill out the questionnaire yourself, and when you are finished, please sign the oath on the last page and leave the questionnaire with a jury assistant.

Summary of Case

On August 31, 1995, Deborah Panos was found dead in her trailer at 839 North Nellis, Las Vegas. She died of multiple stab wounds. The next day, James Chappell, the father of Deborah's three children, was arrested and charged with murder with use of a deadly weapon and other charges related to the killing. The media covered the crime, and Mr. Chappell's arrest was reported.

Procedure

This is a murder case where the State is seeking the death penalty.

After the jury is empanelled, the trial will occur. The purpose of the trial is to determine, based on legally presented evidence, if the State can prove the criminal charges beyond a

reasonable doubt. Mr. Chappell is presumed innocent.

If the jury convicts Mr. Chappell of Murder in the First Degree, then the trial is followed by a Penalty hearing where the jury would hear evidence related to punishment. The jury would determine the sentence, and would choose among the following: death; a life sentence in prison with the possibility of parole; a life sentence in prison without the possibility of parole; or a fixed sentence of 50 years with the possibility of parole.

If the jury finds Mr. Chappell Not Guilty, or finds him guilty of charges other than First Degree Murder, then no penalty hearing will occur. If Mr. Chappell is found guilty of charges other than First Degree Murder, the Judge will sentence Mr. Chappell.

The parties anticipate that the trial of this case could last two weeks; a possible penalty hearing could last an additional week. All the trial and penalty proceedings in this case could last a total of three weeks.

1. Do you have any thoughts, concerns, or questions about this procedure:

No

2. Are you familiar with this case? Have you read media reports about it? Do you know Deborah Panos or James Chappell? No

Questions About You

3. Your full name Olga C Bourne Race Black

4. Age 67 Place of birth Trinidad Marital Status Sgle

5. Children 0

	Age	Sex	Education	Occupation
(a)				
(b)				
(c)				
(d)				

6. In what part of the county do you live? South eastern

7. Highest educational grade completed Master's Degree

8. Any special schooling or training? Registered Nurse, Nurse-Midwife

JCheppell-8JDC2519

9. Any courses or training in a legal field? No

10. Your occupation and relevant duties for the last ten years: Retired 1993 after 5 years with U.S Post Office - Retired from U.S Army 1980

11. What is your spouses's occupation, if you have a spouse? N/A

12. Have you ever been in business for yourself? If yes, please explain. No

13. Ever been a supervisor or boss? If yes, explain. Head Nurse

14. Ever served in the military? If yes, please provide some details. Head Nurse. Operating Room, OB-Gyn Nurse Practioner

15. Do you attend religious services? If yes, what church or service, and how often? No

16. Have you ever changed religions? If so, why? No

17. Any relatives who are judges or attorneys? If yes, what is your relationship to them and how often do you talk to them? No

18. Any relatives in law enforcement? If yes, what is your relationship, and how often do you talk to them No

19. Ever been a juror before? If yes, what did you think of the experience? I found it interesting

20. Have you or any member of your family ever had a drug or alcohol problem? No

21. Have you or any members of your family ever been arrested? If so, why? And what

happened? No

22. Do you have any bias or ill feeling toward the police or the government or prosecutors as a result of any prior experience with law enforcement? No

23. Have you or any one you know been a victim of domestic violence? No

24. Have you or any one you know been affected by domestic violence? How?
No

Opinions, Interests, & Views

25. What do you think of the criminal justice system? I never really gave it serious thought, but feel its okay

26. What are your hobbies and interests? Reading, gardening
travel

27. Do you consider yourself to be a leader or a follower? Not Sure Why?
Because in some occasions I am one or the other.
No fixed pattern

28. What do you like to read? Murder mysteries especially
British other novels usually fiction

What do you think of each of the following:

29. Defense attorneys Needed by clients to state their
case as properly + effectively as possible

30. Public Defenders The poor needs them.

31. State Prosecutors Public need them to protect us from

dangerous persons

32. Federal Prosecutors Same as above

33. Police officers Needed as first ~~line~~ level of protection between us and the lawless people

34. Judges Hopefully they are fair + just

35. The Death Penalty Should be used rarely if at all

36. The statement: "An Eye for an Eye:" I do not feel this way

37. The statement: "You Shall Not Kill:" I agree, but people are doing it all the time

38. The statement: If a prosecutor has taken the trouble of bringing someone to trial, then the person must be guilty. I do not believe this

39. The statement: A defendant in a criminal trial should be required to prove his innocence: No. I like the fact that the law must provide the proof. There is less likelihood that an innocent person will not be convicted

40. The statement: The Death Penalty is appropriate in some cases, but not in others: It's Hard for me to answer this. Each case arouses different levels of anger or repulsion as the crime itself.

41. The statement: The Death Penalty is appropriate in all cases where somebody murders somebody: I do not agree

42. The statement: A defendant's background should be considered in deciding whether or not the death penalty is an appropriate punishment: Not sure what you mean. If the background is proven to be mentally incapacitating yes. Other causes probably. Each case will tell

43. The statement: The facts surrounding a killing, and not the killer's background, should be the main consideration in determining punishment: Both should be, but

primarily the former

44. The statement: Black people cause more crime than white people: They may cause more crime but poor people cause more crime and most black people are poor

45. The statement: It's Ok for black people and white people to date each other and have children together. It is their business NOT mine. Each person must live his own life, as long as the two parties are consenting

46. The statement: It may be Ok for people of different races to date each other, but I would have a hard time dealing with my child doing it: I have no children so I really do Not know how I'd feel

47. More than anything else, what should the attorneys in this case know about you in deciding whether you should be on the jury: That I will try To be objective & impartial as possible. And that I'd try to base my decision On the facts presented in court

48. Do you want to be on the jury? Why yes or Why no? Yes — because it goes with being a good citizen. If I can do a good job as a juror I'll be helping to keep the judicial system as efficient as possible

49. If Mr. Chappell is convicted of first degree murder, and a penalty hearing is held, would you consider all four possible sentences, those being the death penalty, life without the possibility of parole, life with the possibility of parole, or a fixed term of 50 years with the possibility of parole

Yes

50. In your present state of mind, can you, if selected as a juror, consider equally all four possible forms of punishment and select the one that you feel is the most appropriate depending upon the facts and the law?

Yes

51. If you believed the evidence warranted the death penalty, could you personally vote to impose the death penalty? I don't know

JChappell-8JDC2523

52. Are you a member of any organization that advocates or opposes the imposition of the death penalty? No

Explanation Area

Feel free to supplement any of your prior answers, or ask any questions which you may have.

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * * * * * * *

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

APPELLANT'S APPENDIX

Volume 3 of 31

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

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INDEX

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:

Steve S. Owens
Chief Deputy District Attorney
motions@clarkcountyda.com
Eileen.davis@clarkcountyda.com

/s/ Sara Jelinek
An Employee of the
Federal Public Defender
District of Nevada

the instant offense. Ex. 161 at 4. The report contained an incorrect statement from a friend of Ms. Panos who "stated that she was concerned because the victim had a Protective Order stopping the defendant from coming to her house." Id. In fact, no protective order was in effect against Mr. Chappell by Ms. Panos or anyone else. However, this factual inaccuracy was utilized by the author of the presentence report in justification of a recommendation against community supervision, stating:

> [Chappell] battered this woman repeatedly for several years and when she finally attempted to make him stop by complaining to the police and obtaining [a] Protective Order, he went to her house, entered through a bedroom window, and killed her with a steak knife. Id. at 7.

22. The author of the PSI was not called as a witness and did not have any direct knowledge of the events at issue. The author's opinion was not fairly supported by the evidence, and should not have been presented to the jury, without confrontation under Crawford.

23. Finally, the remedy for the disclosure of a PSI report that contains irrelevant and unduly prejudicial evidence is a remand for resentencing. See Herman v. State, 123 P.3d 469, 474-75 (Nev. 2006) (where some of the prior arrest information was not relevant to the instant sentencing phase and only served to inflame the passions of the jury in rendering a decision, remanding for a new sentencing proceeding was warranted); Gallego v. State, 23 P.3d 227, 241 (Nev. 2001) (evidence of police investigations and uncharged crimes are inadmissible at a capital penalty hearing if the evidence is "impalpable or highly suspect"). The same should happen here as the evidence in the PSI report that was disclosed to the jurors rendered Chappell's sentencing phase fundamentally unfair. See Hicks, 447 U.S. at 356-47; Jammal, 926 F.2d at 919.

2. The PSI report was confidential and should not have been introduced

24. At the time of Mr. Chappell's case, the PSI reports were statutorily confidential and were not permitted to be made a part of the record. See Nev. Rev. Stat. §176.156(5). Here, the reports were not only read into the record, they were given to the jurors during deliberations. This error requires a new sentencing phase for Mr. Chappell.

3. Improper victim evidence

25. Moreover, information from the 1996 PSI report constituted improper victim impact evidence. The 1996 PSI included a remark made by Ms. Panos's mother to the parole officer who then recorded them in the presentence report. Ms. Panos's mother was quoted as saying that she could not forgive the court for letting Mr. Chappell out. Ex. 161 at 5. She further stated that despite Mr. Chappell's arrests for violence to Ms. Panos, "[t]he Court's (sic) just slapped his hand and told him to get counseling. He just laughed and kept on doing what he wanted to do." Id.

26. This amounted to an improper victim impact statement because: (1) it elicited an improper emotional response, and (2) there was no basis upon which Ms. Panos's mother could have speculated as to Mr. Chappell's deference to the courts who had previously adjudicated his criminal cases. As such, the statements should not have been admitted. See Payne, 501 U.S. at 836 ("Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a [jury] verdict impermissibly based on passion, not deliberation.").

27. Ms. Panos's mother also commented upon what sentence she thought appropriate for Mr. Chappell. She stated, "The SOB does not deserve to live." Ex. 161 at 5. This statement too was improper victim impact evidence because it was highly inflammatory, and was no less impermissible through its introduction as part of a presentence report. Payne, 501 U.S. at 836, especially since the report was admitted as evidence and given to the jury for review during deliberations.

4. Miranda violation

28. Finally, the 1995 PSI report contained statements Mr. Chappell made while in custody, including a written statement by Mr. Chappell dated March 30, 1995. Ex. 161 at 3, 7. In that statement, Mr. Chappell explained that the charge of possessing burglary tools was false and that the arresting officer treated him "very bad." Id. at 7. The State specifically called attention to these statements, paraphrasing them to sound as if Mr. Chappell had manipulated the criminal justice system into creating an opportunity for him to kill his girlfriend. Ex. 176 at 59–60.

29. The admission of that statement was a violation of Mr. Chappell's Miranda rights. Chappell had not been given proper warnings prior to the obtaining of the statement, Ex. 176 at 17–20, and it does not appear that Chappell's counsel from the 1996 trial was present when the statement was given. Although the court labelled the statement "voluntary," it was obtained by representatives of the State while Mr. Chappell was in custody, and the statement form itself does not indicate that the statement was voluntary, that Mr. Chappell had the right to decline to write a statement, or that Mr. Chappell had the right to consult with counsel while writing the statement. See id. at 8. Under these circumstances, Mr. Chappell's constitutional rights were violated by permitting these statements to be introduced at trial.

C. The trial court erred when it permitted the State to introduce Mr. Chappell's testimony from the first trial

30. Although state law permits the admission of prior sworn testimony in a subsequent trial, the reading in of prior testimony obtained in violation of the defendant's constitutional rights is not admissible under any circumstances. See Harrison v. U.S., 392 U.S. 219, 223–25 (1968) (defendant's testimony from former trial inadmissible at re-trial due to improperly obtained confession); U.S. v. Pelullo, 105 F3d 117, 125 (3d Cir. 1997) (when a defendant's testimony is compelled by a constitutional violation, that testimony must be excluded). Here, Mr. Chappell was not properly

prepared to testify due to the ineffective assistance of counsel. Thus, his testimony should not have been admitted at the second trial due to this constitutional violation.

31. Mr. Chappell testified in his own defense at his 1996 trial. Ex. 137 at 17–120. At his 2007 penalty re-trial, Mr. Chappell did not testify, but the State read his testimony from the 1996 trial into the record during its case-in-chief. Ex. 169 at 42–91. Mr. Chappell's counsel objected to the reading of the 1996 testimony on the basis that his previous testimony was admitted due to the ineffective assistance of Mr. Chappell's first trial counsel, in violation of his Sixth Amendment rights. Before ruling on the objection, the court should have held a hearing to determine whether Mr. Chappell's decision to testify or poor preparation for his testimony at the first trial were the result of ineffective assistance of counsel. Failure to conduct a proper inquiry was erroneous and warrants reversal of Mr. Chappell's death sentence.

32. In addition, a portion of the cross-examination from the 1996 trial included a reference to Mr. Chappell's Fifth Amendment right to remain silent. Ex. 169 at 6-7

> 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 awhile (sic), 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.

Ex. 137 at 64–65. This reference that Mr. Chappell had a period of time in which to contemplate what he was going to say impliedly referred to Mr. Chappell's right to remain silent and the fact that he had not made a statement to authorities about the information to which Mr. Chappell testified to the jury. See Doyle, 426 U.S. 610. Failure to object to that information at the original trial constituted ineffective assistance of counsel. Further, failure to exclude that portion of Mr. Chappell's 1996

testimony in 2007, regardless of whether the court properly admitted Mr. Chappell's previous testimony, was in itself error by the court. Mr. Chappell's death sentence should be vacated.

D. The trial court erred in admitting highly prejudicial gruesome photographs

33. During the testimony of Dr. Sheldon Green, the then-retired Chief Medical Officer for Clark County, the State introduced evidence depicting Ms. Panos's body at the time of the autopsy. 3/19/07 TT at 177-98 (referencing State's trial exhibits 38-47); see exs. 77-82, 84, 86.

34. 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. 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 Chappell of his right to due process and a fair and impartial trial in violation of the United States Constitution.

E. Conclusion

40. 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 EIGHTEEN (FAIR CROSS SECTION GUILT PHASE)

Mr. Chappell's conviction is invalid under state and federal constitutional guarantees of due process, equal protection, the right to an impartial jury drawn from a fair cross-section of the community, and a reliable sentence due to his trial and conviction by a jury drawn from a venire from which members of his race were systematically excluded and unrepresented. U.S. Const. amends. V, VI, VIII, XIV; Nev. Const. art. 1, §§ 1, 6, 8, and art. 4 § 21.

SUPPORTING FACTS

1. Mr. Chappell is an African-American man. In 1996 he was tried, convicted and sentenced to death by a jury consisting of eleven white members and one of Hispanic ethnicity in Clark County, Nevada.

2. Clark County venires have systematically excluded and under-represented members of Mr. Chappell's race. According to the 1990 census, African-Americans made up at least 8.3 percent of the population in Clark County, Nevada. Ex. 235 at 10-11. This percentage had grown to 9.1 percent by 2000. See Williams v. State, 125 P.3d 627, 630 & n.2 (Nev. 2005). Other minorities made up approximately 8.5 percent of the population in 1990. Id. Thus, a representative venire in 1996 would be expected to consist of at least approximately 17% minorities and 83% Caucasians. On information and belief, Mr. Chappell alleges that his first venire included seven persons of Hispanic origin and fourteen African-Americans. A prima facie case of systematic under representation is established because, by any standard, these venire compositions in a community with a minority population of at least seventeen percent, cannot be said to be reasonably representative of the community as a whole.

3. Studies of the jury process in Clark County Nevada have indicated that African-Americans are under represented on jury venires by over 25% while other racial minorities were under represented by 21.4%. Ex. 235 at 2, 13-14, 20. The

likelihood that these findings were the result of chance alone rather than other factors is less than 3 in 1000 for African-Americans and approximately 1 in 100 for other minorities. Id.

4. The jury selection process in Clark County, Nevada is susceptible to abuse and is not racially neutral. In Clark County, the jury pool is selected by use of a computer program, with the database drawn only from lists compiled by the Nevada Department of Motor Vehicles. Ex. 235 at 2, 15. Those lists contain the names of persons in Clark County who have driver's licenses, as well as persons who have obtained identification cards from the Department of Motor Vehicles, a population which by itself excludes almost ten percent of the jury-eligible population from possible service. Id. at 15, 18. Further, exclusive use of this list may have exacerbated the under-representation of racial minorities, because economic and other factors can affect their ability to obtain driver's licenses or ID cards. Id. at 18. Indeed, at the time of Mr. Chappell's trial in 1996, as well as currently, Eighth Judicial District Court Rule 6.10 required the use of the DMV list and "such other lists as may be authorized by the chief judge," and, in 2002, the Nevada Supreme Court recognized the need to use three or more source lists in selecting prospective jurors. Ex. 236 at 10, 28, 29; see also Williams, 125 P.3d at 942 n.18. Accordingly, Mr. Chappell is informed and believes, and therefore alleges, that the venire from which his jury was drawn is less inclusive and less representative than feasible. Mr. Chappell is further informed and believes, and therefore alleges, that the computer program used to select members from this sample is not randomly generated, creates a list that does not contain a fair cross section of the community, and systematically discriminates on the basis of race.

5. Once the names are selected by the computer program, the jury commissioner of the Eighth Judicial District Court mails summonses to those persons. Ex. 235 at 15. On information and belief, one-quarter of the summonses are returned as undeliverable, and more than twenty percent of the remaining summons mailed out

fail to generate any response from the individuals summoned. See id. at 19. While nearly one-half of the total available jury pool was effectively eliminated in this process, the Jury Commissioner's office did not take further steps to identify non-respondents or to ascertain correct addresses for undeliverable summonses. See id. at 19 & n.13; see also Ex. 236 at 45-47.

6. The failure to follow up on those non-responses might exacerbate exclusion of racial minorities from jury pools. For example, summons to low-income minorities, who do not have permanent addresses, are more likely to be returned as undeliverable, or poor minorities may fail to retain a jury summons from fear of any contact with the justice system or from a belief that members of minority groups would be excluded as a matter of course from participating in a system which is perceived as disproportionately involving members of their own communities as defendants.

7. After individuals report to the Jury Commissioner in response to the summons, the Jury Commissioner retains the absolute discretion to excuse those persons over the telephone. Ex. 235 at 16. On information and belief, over sixty percent of those persons who respond to a summons are either disqualified or excused from serving, temporarily or permanently. Id. at 20. These persons thus do not reach the stage of appearing for assignment to a venire.

8. Furthermore, Eighth Judicial District Court Rule 6.50 permits the court administrator to excuse from service potential jurors summoned by the court on the basis of "child care problems or severe economic hardship," problems which, again, fall disproportionately on African-Americans and other minorities to the extent that they comprise a less affluent segment of the community. See Ex. 235 at 20 n.14. Moreover, the courts' failure to provide adequate compensation to jurors might result in more minorities being excused based on financial hardship. At the time of Mr. Chappell's trial in 1996, the appearance fee for those summoned was $9 per day. Nev. Rev. Stat. § 6.150(1) (1991). If selected, a juror was paid $15 for the first five days of service and

$30 per day thereafter. Nev. Rev. Stat. § 6.150(2) (1991). As the Jury Improvement Commission recognized, such amounts are insufficient and inadequate. See Ex. 236 at 11, 33-41 (recommending increase of jury fee from $15 to $40).[71] The effect of providing such an inadequate amount as a jury fee would be to disproportionately exclude African-Americans and other minorities from service.

9. African-Americans and other racial minorities were under-represented in Clark County venires at and near the time of Mr. Chappell's trial. Moreover, the statistical analyses set forth in the instant claim, as well as the Eighth Judicial District Court's process for identifying potential jurors at the time of Mr. Chappell's trial, indicate that such under-representation was due to the systematic exclusion of African-Americans and other racial minorities from lists and pools of potential jurors. The trial, conviction, and sentencing to death of Mr. Chappell by way of a jury selected in a racially discriminatory manner is prejudicial per se. The use of a nearly all-white jury also exacerbated the prejudicial effect of other trial errors. The State cannot demonstrate that these errors were harmless beyond a reasonable doubt. Accordingly, Mr. Chappell's judgment of conviction and sentence of death are unconstitutional and must be vacated.

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[71] Only in 2003 did the legislature raise the jury fee to $40 a day. See Nev. Rev. Stat. 6.150(1)-(2) (2003).

CLAIM NINETEEN (IAC OF FIRST DIRECT APPEAL COUNSEL)

Mr. Chappell's sentence is invalid under the federal constitutional guarantees of due process, equal protection, effective assistance of counsel, and freedom from cruel and unusual punishment due to the ineffective assistance of appellate counsel for the first direct appeal. U. S. Const. amends. V, VI, VIII, XIV; Nev. Const. art. 1, §§ 1, 6, 8, and art. 4 § 21.

SUPPORTING FACTS

1. Mr. Chappell's direct appeal counsel were ineffective for failing to raise substantial and cognizable issues and arguments. See Evitts v. Lucey, 469 U.S. 387, 396 (1985). These issues and arguments are raised as claims in the current amended petition, and Mr. Chappell incorporates by reference the factual allegations, allegations of prejudice, and arguments in those claims as if set forth in full here.

2. Specifically, direct appeal counsel were ineffective for: failing to assert that the first-degree murder instruction given at Mr. Chappell's trial was unconstitutional because it relieved the State of its burden of proof and collapsed any meaningful distinction between first- and second-degree murder, Claim Two; failing to assert that the malice instruction was vague and ambiguous and gave the State an improper presumption of implied malice, Claim Two; failing to argue that the jury instruction on reasonable doubt was incorrect, Claim Two; failing to request the jurors be 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, Claim Two; failing to request an instruction that Mr. Chappell could not be found guilty of burglary or felony-murder under a theory of burglary if he lived in the trailer at the time of the crime, Claim Two; failing to argue that the jury instruction on equal and exact justice was improper, Claim Two; failing to raise a comprehensive comparative juror analysis regarding the State's Batson error, Claim Six; failing to challenge the

unconstitutional voir dire, Claim Seven; failing to raise a claim of prosecutorial misconduct in argument, Claim Fifteen; and failing to assert the unconstitutionality of the prosecutor's cross-examination of Mr. Chappell concerning possible punishments, Claim Fifteen.

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

CLAIM TWENTY (IAC OF SECOND DIRECT APPEAL COUNSEL)

Mr. Chappell's conviction is invalid under the federal constitutional guarantees of due process, equal protection, effective assistance of counsel, and freedom from cruel and unusual punishment due to the ineffective assistance of appellate counsel for the second direct appeal. U. S. Const. amends. V, VI, VIII, XIV.; Nev. Const. art. 1, §§ 1, 6, 8, and art. 4 § 21.

SUPPORTING FACTS

1. Mr. Chappell's direct appeal counsel were ineffective for failing to raise substantial and cognizable issues and arguments. See Evitts v. Lucey, 469 U.S. 387, 396 (1985). These issues and arguments are raised as claims in the current amended petition, and Mr. Chappell incorporates by reference the factual allegations, allegations of prejudice, and arguments in those claims as if set forth in full here.

2. Specifically, direct appeal counsel were ineffective for failing to argue that the State failed to prove that the murder was committed during the perpetration of a sexual assault, for failing to argue that the Nevada Supreme Court's holding that the sexual assault had a distinct purpose necessarily meant that the murder was not committed during the perpetration of a sexual assault, and for failing to argue that the State's use of the sexual assault aggravator was impermissible splitting where the felony murder convictions were predicated, in part, on the sexual assault, Claim Four; failing to support the argument concerning the arbitrariness of Nevada's death penalty scheme, Claim Thirteen; failing to argue that the State exercised peremptory strikes in a discriminatory manner, Claim Eight; failing to raise additional challenges to the presentation of victim impact testimony, Claim Twelve; failing to adequately challenge all of the constitutionally infirm jury instructions, Claim Five; failing to raise additional arguments concerning biased jurors, Claim Nine; failing to argue that Mr. Chappell should be categorically excluded from the death penalty based on severe

mental illness, Claim Fourteen; failing to argue that elected judges rendered the proceedings unfair, Claim Twenty-one; failing to argue that the conditions of Mr. Chappell's confinement on death row rendered his sentence cruel and unusual, Claim Twenty-two; failing to challenge the failure to record all bench conferences, Claim Twenty-four; and failure to challenge Nevada's lethal injection procedures, Claim Twenty-five.

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

CLAIM TWENTY-ONE (ELECTED JUDGES – FIRST AND SECOND TRIAL)

Mr. Chappell's conviction and sentence of death are invalid under the federal constitutional guarantees of due process of the law, equal protection of the law, and a reliable sentence, because Mr. Chappell's capital trial, sentencing and appellate review were conducted before state judicial officers whose tenure in office was not dependent on good behavior, but was rather dependent on popular election, and who failed to conduct fair and adequate appellate review. U.S. Const. art. VI, amends. VIII, XIV; Nev. Const. art. 1, §§ 1, 6, 8, and art. 4 § 21.

SUPPORTING FACTS

1. Judges and justices in Nevada's court system are popularly elected and thereby face the possibility of removal if they make a controversial or unpopular decision. This situation renders the Nevada judiciary insufficiently impartial to preside over a capital case under the federal due process clause. This impartiality is compounded by the inadequacy of the Nevada Supreme Court's review. At the time of the adoption of the Constitution, which is the benchmark for the protection afforded by the due process clause, see, e.g., Medina v. California, 505 U.S. 437, 445-46 (1992), English judges qualified to preside in capital cases had tenure during good behavior.

2. Almost a hundred years prior to the adoption of the Constitution, in 1700, a provision requiring that "Judges' Commissions be made quamdiu se bene gesserint" was considered sufficiently important to be included in the Act of Settlement, see W. Stubbs, Select Charters 531 (5th ed. 1884); and in 1760, a statute ensured judges' tenure despite the death of the sovereign, which had formerly voided their commissions. See W. Holdsworth, History of English Law 195 (7th ed., A. Goodhart and H. Hanbury rev. 1956). Blackstone quoted the view of King George III, in urging the adoption of this statute, that the independent tenure of the judges was "essential to the impartial administration of justice; as one of the best securities of the rights and

liberties of his subjects; and as most conducive to the honor of the crown." See W. Blackstone, Commentaries on the Laws of England *258 (1765). The Framers of the Constitution, who included the protection of tenure during good behavior of federal judges under Article III of the Constitution, would not likely have taken a looser view of the importance of this due process requirement than King George III. In fact, the Framers used the grievance that the king had made the colonial "judges dependent on his will alone, for the tenure of their offices" to partly justify the Revolution. The Declaration of Independence para. 11 (U.S. 1776); see Smith, An Independent Judiciary: The Colonial Background, 124 U. Pa. L. Rev. 1104, 1112-52 (1976). At the time of the Constitution's adoption, none of the states permitted judicial elections. Smith at 1153-54.

3. The absence of any such protection for Nevada judges results in a denial of federal due process in capital cases because the possibilities of removal, and, at minimum, of a financially draining campaign, are threats that "offer a possible temptation to the average [person] as a judge . . . not to hold the balance nice, clear, and true between the state and the [capitally] accused." Tumey v. Ohio, 273 U.S. 510, 532 (1927). See Legislative Comm'n Subcomm. To Study the Death Penalty and Related DNA Testing Tr., Feb. 21, 2002 (Justice Rose noting that lesson of election campaign, involving allegation that justice of Supreme Court "wanted to give relief to a murderer and rapist," was "not lost on the judges in the State of Nevada, and I have often heard it said by judges, 'a judge never lost his job by being tough on crime.'"); Beets v. State, 107 Nev. 957, 976, 821 P.2d 1044, 1057-58 (1991) (Young, J., dissenting) ("Nevada has a system of elected judges. If recent campaigns are an indication, any laxity toward a defendant in a homicide case would be a serious, if not fatal, campaign liability."); Kate Berry, How Judicial Elections Impact Criminal Cases 9–11 (New York University Law School, Brennan Center for Justice, 2015); see Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 877-88 (2008).

4. Nevada's elected scheme is also problematic due to the many members of the judiciary who are former county prosecutors. See Williams v. Pennsylvania, 136 S. Ct. 1899, 1905-06 (2016).

5. The 2006 removal of a Nevada Supreme Court Justice for participating in an unpopular decision establishes the incentive elected judges have to avoid unpopular decisions if they want to get re-elected. Voters Like the R-J's Ideas—Guess Who Hates That?, Las Vegas Rev. J., Nov. 12, 2006; Editorial, Brian Greenspun on Tuesday's Victories Amid a Judicial Warning, Las Vegas Sun, Nov. 9, 2006; Carri Geer Thevenot, Supreme Court's Becker Falls to Saitta—Douglas Retains Seat—Political Consultant Says Justice Hurt by Guinn v. Legislature Ruling in 2003, Las Vegas Rev. J., Nov. 8, 2006; Editorial, Nancy Becker Must be Removed—Supreme Court Justice Backed Guinn v. Legislature Travesty, Las Vegas Rev. J., Nov. 5, 2 has Faithfully and Honestly Interpreted the Constitution, Las Vegas Sun, Oct. 22, 2006; Jeff German, Far Right Targets Justice Becker—Supreme Court Vote on Tax Increase was Right Thing to Do, She Says, Las Vegas Sun, Oct. 15, 2006; Jon Ralston, Campaign Ad Reality Check, Las Vegas Sun, Oct 15, 2006; Jon Ralston, Jon Ralston is Impressed at the Clarity and Brevity Displayed by Lawyer-Politicians, Las Vegas Sun, Sept. 22, 2006; Michael J. Mishak, Libertarian Lawyer has More Issues Up His Sleeve—Waters' Next Targets: Campaign Funds, Real Estate Tax, Las Vegas Sun, Sept. 16, 2006; Sam Skolnik, Who Owns Whom is Supreme Theme—Becker, Saitta Race is Rife with Accusations, Las Vegas Sun, Aug. 27, 2006. State lower court judges have met the same fate. In legislative hearings on a measure to eliminate judicial elections, one opponent stated "we do not want the judiciary to be independent of the people," and another referred to a specific court which had "replaced a judge two years ago . . . who functioned very well as a judge, but did not reflect the values of our community." Nev. Legislature, 75th Sess., Senate Committee on Judiciary, Minutes at 12-13 (February 23, 2009) (SJR 2).

6. This issue is particularly salient in Mr. Chappell's case because the guilt phase trial judge, the Honorable William Maupin, was running for a seat on the Nevada Supreme Court at the time he oversaw Mr. Chappell's trial. Judge Maupin had a direct motivation to appear tough on crime and rule in favor of the State in Mr. Chappell's trial to help his election bid. In particular, Judge Maupin may not have granted the State's motion to present prior bad act evidence at the guilt phase of trial if he were not running for election at the time.

7. Because Nevada judges are elected, they cannot conduct a fair proceeding in capital cases, as required by the due process clause of the Constitution

8. The unfairness inherent in selecting judge via popular election was compounded by the lack of standards guiding their review of death sentences. See Claim Thirteen, ante.

9. The use of judges at trial and justices on appeal, who were subject to popular election and therefore could not be impartial, was prejudicial per se. In the alternative, the State cannot demonstrate that these errors were harmless beyond a reasonable doubt. Chapman, 386 U.S. at 24.

CLAIM TWENTY-TWO (LENGTH OF TIME ON DEATH ROW)

Mr. Chappell's sentence of death is invalid under the federal constitutional guarantees of the right due process, equal protection and freedom from cruel and unusual punishment due to the conditions of his confinement on death row. U.S. Const. amends. V, VI, VIII, XIV; Nev. Const. art. 1, §§ 1, 6, 8, and art. 4 § 21.

SUPPORTING FACTS

1. Mr. Chappell has been incarcerated in single-occupancy confinement on the Nevada Department of Corrections' death row since 1996. During those twenty years, he has been allowed only two hours of recreation and social contact for every thirty-six hour period. During periods he has been locked down in disciplinary or administrative segregation, he has been allowed no recreation or social contact.

2. The principal social purposes of retribution and deterrence sought through the death penalty have lost their compelling purpose in this case by the passage of time. The acceptable state interest of retribution has been satisfied by the severe punishment already inflicted by forcing Mr. Chappell to live in spartan circumstances, cut off from normal social interaction to the point of making him a recluse.

3. The United States Supreme Court has recognized the "painful character" of holding a prisoner in solitary confinement for only four weeks while awaiting execution. In re Medley, 134 U.S. 160, 171-72 (1890). This is due, not only to the isolating nature of solitary confinement, but also to the "horrible feeling" the prisoner must feel due to the knowledge he is to be executed and the "uncertainty" as to when. Id. As Justice Kennedy so aptly recognized in his recent concurrence in Davis v. Ayala, 135 S. Ct. 2187, 2210 (2015), "[y]ears on end of near-total isolation exact a terrible price." And as Justice Breyer rightly pointed out in his recent dissent in Glossip v. Gross, 135 S. Ct. 2726, 2765 (2015), "a lengthy delay in and of itself is especially cruel

because it subjects death row inmates to decades of especially severe, dehumanizing conditions of confinement," and "undermines the death penalty's penological rationale." (internal quotations omitted).

4. Moreover, the deterrent value of any punishment is directly related to the promptness with which it is inflicted. Thus, the deterrent value of carrying out an execution more than 20 years after conviction is minimal, at best. See Jeffrey Fagan, Columbia Law School, "Deterrence and the Death Penalty: A Critical Review of New Evidence." In fact, carrying out an execution at such a removed date may have no deterrent value over and above the deterrent value of simply incarcerating the defendant for the years between conviction and execution.

5. The delay from Mr. Chappell's conviction to present is attributable to the ineffective assistance of Mr. Chappell's trial, appellate, and post-conviction counsel. Trial, appellate, and post-conviction counsel have failed to investigate and present many legitimate claims to the state court and to this Court. Mr. Chappell cannot be held responsible for delays caused by his counsels' ineffectiveness.

6. Inflicting the punishment of death upon Mr. Chappell, after the state has inflicted the torturous punishment of holding him in near-solitary confinement for twenty years, would push his total punishment beyond what our evolving standards of decency can tolerate. See, e.g., Trop v. Dulles, 356 U.S. 86, 100 (1957). Accordingly, Mr. Chappell's death sentence must be vacated.

CLAIM TWENTY-THREE (TRIAL COURT ERROR IN NOT STRIKING THE STATE'S NOTICE OF INTENT TO SEEK DEATH PENALTY—FIRST TRIAL)

Mr. Chappell's conviction and sentence are invalid under the federal constitutional guarantees of due process, equal protection, and a trial before an impartial jury because the trial court erred in denying Mr. Chappell's motion to strike the State's notice of intent to seek the death penalty. U.S. Const. amends. V, VI, VIII, XIV; Nev. Const. art. 1, §§ 1, 6, 8, and art. 4 § 21.

SUPPORTING FACTS

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

2. The purpose of requiring a probable cause finding is to ensure that a defendant has the benefit of a pretrial review of the sufficiency of the evidence before having to confront the same charges at an actual trial. The probable cause hearing process has been characterized as a "shielding function" whereby individuals are protected from vindictive prosecution by private enemies, political partisans, or vindictive governmental officials. Hurtado, 110 U.S. at 555 (Harlan, J., dissenting).

3. In this case, on September 8, 1995, the State filed a Criminal Complaint alleging Mr. Chappell committed certain crimes. Ex. 141. After the October, 1995 preliminary hearing, Ex. 127, an information was filed holding Chappell to answer on the charges of burglary, robbery with use of a deadly weapon, and murder with the use of a deadly weapon. Ex. 24. No aggravating circumstances were alleged in the justice court and, therefore, the State did not produce any evidence to support the existence of aggravating circumstances, nor did the State request the justice court make any finding that probable cause supported the existence of any aggravating factors.

4. After Mr. Chappell appeared in district court, the State filed a Notice of Intent to Seek the Death Penalty. Ex. 25. The notice alleged four factors: (1) the murder was committed while the person was engaged in the commission of or in an attempt to commit a robbery; (2) the murder was committed while the person was engaged in the commission of or in an attempt to commit any burglary and/or home invasion; (3) the murder was committed while the person was engaged in the commission of or in an attempt to commit any sexual assault; and (4) the murder involved torture or depravity of mind. The defense filed a motion to strike the notice of intent to seek the death penalty, which was denied. Exs. 26-27.

5. The notice of intent to seek death was, in fact, an amendment of the Information. The aggravating factors in the notice are "essential facts" or allegations constituting the offense changed, see Apprendi v. New Jersey, 530 U.S. 466, 480-81 (2000); Jones v. United States, 526 U.S. 227, 243 n.6 (1999)) ("under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment. . . ") and must be proven beyond a reasonable doubt for a death sentence to be sustained. The procedure here allowed the State to unilaterally amend the charging document, thereby bypassing an essential and complete description of the charges in the original Information.

6. Since the allegation of aggravating factors requires the same procedural protections as the allegation of essential elements of a crime (i.e., proof beyond a reasonable doubt), the rules that allow the State to file the notice of intent to seek death without a probable cause hearing violate a defendant's due process rights and deny him the same protections accorded other criminal defendants.

7. By allowing the State to unilaterally file a notice of intent to seek death penalty without a probable cause showing, the Information or Indictment can be

amended at any time by the State, thereby allowing the charging document to become the Information or Indictment, not of the justice court or grand jury.

8. The Supreme Court has reversed criminal convictions where a charging document alleges facts or theories beyond that which the probable cause hearing found supported by the preliminary evidence. See Russell v. United States, 369 U.S. 749, 760-61 (1962). The process used in Nevada, allowing the State to file the notice of intent to seek the death penalty, is unconstitutional because it violates both the state and federal constitutions rights to due process and equal protection. The State cannot demonstrate that these errors were harmless beyond a reasonable doubt. Chapman, 386 U.S. at 24.

CLAIM TWENTY-FOUR (UNRECORDED BENCH CONFERENCES)

Mr. Chappell's conviction and sentence of death are invalid under the federal constitutional guarantees of due process, equal protection, a fair trial, and the effective assistance of counsel, because trial counsel at both trials failed to preserve the record of objections and court rulings for Mr. Chappell's appeal and post-conviction litigation. U.S. Const. amends. V, VI, VIII, XIV; Nev. Const. art. 1, §§ 1, 6, 8, and art. 4 § 21.

SUPPORTING FACTS

1. The clarity and integrity of the trial record is vital to preserving the possibility of meaningful appellate review. Nevada law itself recognizes the defendant's right to record all proceedings in capital cases. Nev. Sup. Ct. Rule 250(5)(a); see also Nevada Indigent Defense Performance Standards, standard 2-10(b)(2). In the absence of defense counsel's consent not to record, which was not given here, the trial court is obligated to ensure that all proceedings are recorded. Id.

2. Throughout the guilt phase of Mr. Chappell's trial, numerous objections and/or requests to approach the bench were made followed by bench conferences where the bases for the objections and/or the discussions by the parties and the court were not recorded or preserved. This happened repeatedly, even during pre-trial proceedings, including voir dire. During all of these unrecorded conferences, the court rulings and/or discussions were never preserved. See Ex. 111 at 5; Ex. 129 at 72; Ex. 129 at 10, 83; Ex. 131 at 96; Ex. 132 at 38; Ex. 133 at 112; Ex. 134 at 12; Ex. 135 at 4; Ex. 137 at 78; Ex. 142 at 13, 109.

3. The same occurred at Chappell's penalty re-trial, including voir dire proceedings and during the testimony portion of the penalty-phase. During these unrecorded proceedings, discussion between the parties and the court, and actual court rulings were not preserved. See Ex. 155 at 65, 74, 263; Ex. 170 at 66; Ex. 172 at 45,

47, 102; Ex. 173 at 70-71, 107-08; Ex. 174 at 135; Ex. 175 at 116; Ex. 169 at 42, 237, 299, 348; Ex. 176 at 13.

4. That potentially important substantive discussions were held is clear from reviewing the conferences discussions of some of these instances. Such conduct insulates both the jury selection procedures and counsel's performance during jury selection from post-conviction review.

5. Recordings of bench conferences must either be requested by one or both parties before or during trial, or the litigants must later state what was discussed on the record.

6. If counsel does not request the recording of the bench conferences, or later make those discussions part of the record, the appellate court cannot or will not consider issues for which no record exists. Failure to object or to state the basis for an objection often results in the denial of appellate relief.

7. Here, Mr. Chappell's counsel failed to object to this practice, simultaneously creating significant gaps in the trial transcript and failing to preserve the record for appeal.

8. Taken all together, a review of the transcript of Mr. Chappell's voir dire, pre-trial, and trial proceedings shows that numerous instances of off-the-record discussions were allowed to take place by defense counsel. Many of the instances cannot be presumed to be insubstantial. For example, neither at the 1996 trial nor the 2007 penalty re-trial did counsel put on the record the peremptory challenges used by the parties to select the final jurors, an extremely important part of the trial proceedings. See Ex. 131 at 94-99; Ex. 184 at 145-49.

9. Because defense counsel failed to properly object to these occurrences (and, in fact, actively sought them on occasions), Mr. Chappell has been denied the opportunity for effective post-conviction review of his conviction and sentence.

10. In the absence of a clear and complete record, it is difficult to determine what took place during trial. As stated, many of the instances of off-the-record discussions contain no guidance in the surrounding transcript to explain what was being discussed during trial. Because of the difficulty this has created, Mr. Chappell should not be required to show specific prejudice from counsel's error in failing to preserve the record.

11. It is reasonably probable that had counsel not been ineffective, the results of the proceedings would have been different. In the alternative, the State cannot demonstrate that these errors were harmless beyond a reasonable doubt.

CLAIM TWENTY-FIVE (LETHAL INJECTION)

Mr. Chappell's death sentence is invalid under the federal constitutional guarantees of due process, equal protection, a reliable sentence, and against cruel and unusual punishment because his execution by lethal injection violates the constitutional prohibition against cruel and unusual punishments and his rights under the First and Fourteenth Amendments. U.S. Const. amends. I, V, VI, VIII, & XIV; International Covenant on Civil and Political Rights, art. 7; Nev. Const. art. 1, §§ 1, 6, 8, 9 and art. 4 § 21.

SUPPORTING FACTS

1. Nevada law requires that execution be inflicted by an injection of a lethal drug. See Nev. Rev. Stat. § 176.355(1).

A. Lethal injection is unconstitutional in all circumstances

2. Mr. Chappell alleges execution by lethal injection is unconstitutional in all circumstances, where "evolving standards of decency that mark the progress of a maturing society," and an ever-expanding list of botched executions, compels the conclusion that lethal injection as a means of execution can never satisfy the demands of the Eighth Amendment. See Trop v. Dulles, 356 U.S. 86, 101 (1958). He acknowledges Supreme Court authority to the contrary, see, e.g., Glossip v. Gross, 135 S. Ct. 2726, 2739 (2015); Baze v. Rees, 553 U.S. 35 (2008), while noting that those cases resulted in sharply divided opinions, and were decided without the benefit of factual development by the district court regarding the numerous executions in recent years, using various drug combinations, that resulted in prolonged pain and suffering of the condemned inmates.

3. Those instances of botched lethal injections include the following:

- Charles Brooks, Jr. (December 7, 1982, Texas): The executioner had a difficult time finding a suitable vein. The injection took seven

minutes to kill. Witnesses stated that Brooks "had not died easily." See Deborah W. Denno, Getting to Death: Are Executions Unconstitutional?, 82 Iowa L. Rev. 319, 428-29 (1997) [hereinafter "Denno II"]; Denno I, supra, at 139.

- James Autry (March 14, 1984, Texas): Autry took ten minutes to die, complaining of pain throughout. Officials suggested that faulty equipment or inexperienced personnel were to blame. See Denno II, supra, at 429; Denno I, supra, at 139.

- Thomas Barefoot (October 30, 1984, Texas): A witness stated that after emitting a "terrible gasp," Barefoot's heart was still beating after the prison medical examiner had declared him dead. See Denno II, supra, at 430; Denno I, supra, at 139.

- Stephen Morin (March 13, 1985, Texas): It took almost 45 minutes for technicians to find a suitable vein, while they punctured him repeatedly, and another eleven minutes for him to die. See Denno II, supra, at 430; Denno I, supra, at 139; Michael L. Radelet, Post-Furman Botched Executions, Death Penalty Information Center [hereinafter "Radelet"], available at http://www.deathpenaltyinfo.org.

- Randy Wools (August 20, 1986, Texas): Wools had to assist execution technicians in finding an adequate vein for insertion. He died seventeen minutes after technicians inserted the needle. See Denno II, supra, at 431; Denno I, supra, at 139; Radelet, supra; Killer Lends

a Hand to Find a Vein for Execution, L.A. Times, Aug. 20, 1986, at 2.[72]

- Elliot Johnson (June 24, 1987, Texas): Johnson's execution was plagued by repetitive needle punctures and took executioners thirty-five minutes to find a vein. See Denno II, supra, at 431; Denno I, supra, at 139; Radelet, supra; Addict Is Executed in Texas for Slaying of 2 in Robbery, N.Y. Times, June 25, 1987, at A24.[73]

- Raymond Landry (December 13, 1988, Texas): Executioners "repeatedly probed" his veins with syringes for forty minutes. Then, two minutes after the injection process began, the syringe came out of Landry's vein, "spewing deadly chemicals toward startled witnesses." A plastic curtain was pulled so that witnesses could not see the execution team reinsert the catheter into Landry's vein. "After 14 minutes, and after witnesses heard the sound of doors opening and closing, murmurs and at least one groan, the curtain was opened and Landry appeared motionless and unconscious." Landry was pronounced dead twenty-four minutes after the drugs were initially injected. See Denno II, supra, at 431-32; Denno I, supra, at 139; Radelet, supra.

- Stephen McCoy (May 24, 1989, Texas): In a violent reaction to the drugs, McCoy "choked and heaved" during his execution. A reporter

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[72] Available at http://tinyurl.com/z7nylnm.

[73] Available at http://tinyurl.com/jkjlslj.

witnessing the scene fainted. See Denno II, supra, at 432; Denno I, supra, at 139; Radelet, supra.

- George Mercer (January 6, 1990, Missouri): A medical doctor was required to perform a surgical "cut down" procedure on Mercer's groin. See Denno II, supra, at 432; Denno I, supra, at 139.

- George Gilmore (August 31, 1990, Missouri): Force was used to stick the needle into Gilmore's arm. See Denno II, supra, at 433; Denno I, supra, at 139.

- Charles Coleman (September 10, 1990, Oklahoma): Technicians had difficulty finding a vein, delaying the execution for ten minutes. See Denno II, supra, at 433; Denno I, supra, at 139.

- Charles Walker (September 12, 1990, Illinois): There was a kink in the IV line, and the needle was inserted improperly so that the chemicals flowed toward his fingertips instead of his heart. As a result, Walker's execution took eleven minutes rather than the three or four contemplated by the state's protocols, and the sedative chemical may have worn off too quickly, causing excruciating pain. When these problems arose, prison officials closed the blinds so that witnesses could not observe the process. See Denno II, supra, at 431; Denno I, supra, at 139; Radelet, supra; Niles Group Questions Execution Procedure, United Press International, Nov. 8, 1992 (Lexis/Nexis file).

- Maurice Byrd (August 23, 1991, Missouri): The machine used to inject the lethal dosage malfunctioned. See Denno II, supra, at 434; Denno I, supra, at 140.

- Ricky Rector (January 24, 1992, Arkansas): It took almost an hour for a team of eight to find a suitable vein. Witnesses were separated from the injection team by a curtain, but could hear repeated, loud moans from Rector. See Denno II, supra, at 434-35; Denno I, supra, at 140; Joe Farmer, Rector's Time Came, Painfully Late, Ark. Democrat-Gazette, Jan. 26, 1992, at 1B; Marshall Fray, Death in Arkansas, The New Yorker, Feb. 22, 1993, at 105.

- Robyn Parks (March 10, 1992, Oklahoma): Parks violently gagged, jerked, spasmed and bucked in his chair after the drugs were administered. A news reporter witness said his death looked "painful and inhumane." See Denno II, supra, at 435; Denno I, supra, at 140; Radelet, supra.

- Billy White (April 23, 1992, Texas): White's death required forty-seven minutes because executioners had difficulty finding a vein that was not severely damaged from years of heroin abuse. See Denno II, supra, at 435-36; Denno I, supra, at 140; Radelet, supra.

- Justin May (May 7, 1992, Texas): May groaned, gasped and reared against his restraints during his nine-minute death. See Denno II, supra, at 436; Denno I, supra, at 140; Radelet, supra; Robert Wernsman, Convicted Killer May Dies, The Huntsville Item, May 7,

1992, at 1; Michael Graczyk, Convicted Killer Gets Lethal Injection, Denison Herald, May 8, 1992.

- John Gacy (May 10, 1994, Illinois): The lethal injection chemicals solidified, blocking the IV tube. The blinds were closed for ten minutes, preventing witnesses from watching, while the execution team replaced the tubing. See Denno II, supra, at 435; Denno I, supra, at 140; Radelet, supra; Scott Fornek & Alex Rodriguez, Gacy Lawyers Blast Method: Lethal Injections Under Fire After Equipment Malfunction, Chi. Sun-Times, May 11, 1994, at 5; Lou Ortiz & Scott Fornek, Witnesses Describe Killer's 'Macabre' Final Few Minutes, Chi. Sun-Times, May 11,1994, at 5; Rob Karwath & Susan Kuczka, Gacy Execution Delay Blamed on Clogged IV Tube, Chi. Trib., May 11, 1994, at 1.

- Emmitt Foster (May 3, 1995, Missouri): Seven minutes after the lethal chemicals began to flow into Foster's arm, the execution was halted when the chemicals stopped circulating. With Foster gasping and convulsing, blinds were drawn so witnesses could not view the scene. Death was pronounced thirty minutes after the execution began, and three minutes later the blinds were reopened so the witnesses could view the corpse. According to the coroner, the problem was caused by the tightness of the leather straps that bound Foster to the execution gurney. Foster did not die until several minutes after a prison worker finally loosened the straps. See Denno II, supra, at 437; Denno I, supra, at 140; Radelet, supra; Editorial, Witnesses to a Botched Execution, St. Louis Post-Dispatch, May 8,

1995, at 6B; Tim O'Neil, Too-Tight Strap Hampered Execution, St. Louis Post-Dispatch, May 5, 1995, at 1B; Jim Salter, Execution Procedure Questioned, Kansas City (Mo.) Star, May 4, 1995, at C8.

- Ronald Allridge (June 8, 1995, Texas): Allridge's execution was conducted with only one needle, rather than the two required by the protocol, because a suitable vein could not be found in his left arm. See Denno II, supra, at 437; Denno I, supra, at 140.

- Richard Townes (January 23, 1996, Virginia): It took twenty-two minutes for medical personnel to find a vein. After repeated unsuccessful attempts to insert the needle through the arms, the needle was finally inserted through the top of Townes's right foot. See Denno II, supra, at 437; Denno I, supra, at 140; Radelet, supra.

- Tommie Smith (July 18, I996, Indiana): It took one hour and nine minutes for Smith to be pronounced dead after the execution team began sticking needles into his body. For sixteen minutes, the team failed to find adequate veins, and then a physician was called. Smith was given a local anesthetic and the physician twice attempted to insert the tube in Smith's neck. When that failed, an angio-catheter was inserted in Smith's foot. Only then were witnesses permitted to view the process. The lethal drugs were finally injected into Smith forty-nine minutes after the first attempts, and it took another twenty minutes before death was pronounced. See Denno II, supra, at 437; Denno I, supra, at 140; Radelet, supra.

- Luis Mata (August 22, 1996, Arizona): Mata remained strapped to a gurney with the needle in his arm for one hour and ten minutes while his attorneys argued his case. When injected, his head jerked, his face contorted, and his chest and stomach sharply heaved. See Denno II, supra, at 438; Denno I, supra, at 140.

- Scott Carpenter (May 8, 1997, Oklahoma): Carpenter gasped, made guttural sounds, and shook for three minutes following the injection. He was pronounced dead eight minutes later. See Denno I, supra, at 140; Radelet, supra; Michael Overall & Michael Smith, 22-Year-Old Killer Gets Early Execution, Tulsa World, May 8, 1997, at A1.

- Michael Elkins (June 13, 1997, South Carolina): Liver and spleen problems had caused Elkins's body to swell, requiring executioners to search almost an hour – and seek assistance from Elkins – to find a suitable vein. See Denno I, supra, at 140; Radelet, supra; Killer Helps Officials Find a Vein at His Execution, Chattanooga Free Press, June 13, 1997, at A7.

- Joseph Cannon (April 23, 1998, Texas): It took two attempts to complete the execution. Cannon's vein collapsed and the needle popped out after the first injection. He then made a second final statement and was injected a second time behind a closed curtain. See Denno I, supra, at 141; Radelet, supra; 1st Try Fails to Execute Texas Death Row Inmate, Orlando Sent., Apr. 23, 1998, at A16; Michael Graczyk, Texas Executes Man Who Killed San Antonio Attorney at Age 17, Austin Am.-Statesman, Apr. 23, 1998, at B5.

- Genaro Camacho (August 26, 1998, Texas): Camacho's execution was delayed approximately two hours when executioners could not find suitable veins in his arms. See Denno I, supra, at 141; Radelet, supra.

- Roderick Abeyta (October 5, 1998, Nevada): The execution team took twenty-five minutes to find a vein suitable for the lethal injection. See Denno I, supra, at 141; Radelet, supra; Sean Whaley, Nevada Executes Killer, L.V. Rev-J., Oct. 5, 1998, at 1A.

- Christina Riggs (May 3, 2000, Arkansas): The execution was delayed for eighteen minutes when prison staff could not find a vein. See Radelet, supra.

- Bennie Demps (June 8, 2000, Florida): It took the execution team thirty-three minutes to find suitable veins for the execution. "They butchered me back there," said Demps in his final statement. "I was in a lot of pain. They cut me in the groin; they cut me in the leg. I was bleeding profusely. This is not an execution, it is murder." The executioners had no unusual problems finding one vein, but because the Florida protocol requires a second alternate intravenous drip, they continued to work to insert another needle, finally abandoning the effort after their prolonged failures. See Denno I, supra, at 141; Radelet, supra; Rick Bragg, Florida Inmate Claimed Abuse in Execution, N.Y. Times, June 9, 2000, at A14;[74] Phil Long & Steve Brousquet, Execution of Slayer Goes Wrong: Delay, Bitter Tirade Precede His Death, Miami Herald, June 8, 2000.

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[74] Available at http://tinyurl.com/z9k66yn.

- Bert Hunter (June 28, 2000, Missouri): In a violent reaction to the drugs, Hunter's body convulsed against his restraints during what one witness called "a violent and agonizing death." See Denno I, supra, at 141; Radelet, supra; David Scott, Missouri Executes Convicted Killer, Associated Press, June 28, 2000.

- Claude Jones (December 7, 2000, Texas): Jones's execution was delayed 30 minutes while the execution team struggled to insert an IV. One member of the execution team commented, "They had to stick him about five times. They finally put it in his leg." See Radelet, supra.

- Joseph High (November 7, 2001, Georgia): For twenty minutes, technicians tried unsuccessfully to locate a vein in High's arms. Eventually, they inserted a needle in his chest, after a doctor cut an incision there, while they inserted the other needle in one of his hands. High was pronounced dead one hour and nine minutes after the procedure began. See Denno I, supra, at 141; Radelet, supra.

- Sebastian Bridges (April 21, 2001, Nevada): Mr. Bridges spent between twenty and twenty-five minutes on the execution bed, with the intravenous line inserted, continuously agitated, asserting his innocence, the injustice of executing him, and the injustice of requiring him to sign a habeas corpus petition, and to suffer prolonged delay, in order to have the unconstitutionality of his conviction recognized by the court system. He remained agitated

after the execution process began, so the sedative drugs appeared not to take effect and he died while apparently still conscious and shouting about the injustice of his execution.

- Joseph L. Clark (May 2, 2006, Ohio): It initially took executioners twenty-two minutes to find a suitable vein in Mr. Clark's left arm for insertion of the catheter. As the injection began, the vein collapsed. After an additional thirty minutes, the execution team succeeded in placing a catheter in Mr. Clark's right arm. However, the team again tried to inject the drugs into the left arm, where the vein had already collapsed. These difficulties prompted Mr. Clark to sit up, tell the executioners that "It don't work," and to ask "Can you just give me something by mouth to end this?" Mr. Clark was finally pronounced dead ninety minutes after the execution began. See Radelet, supra; Andrew Welsh-Huggins, Botched Execution Leads to Ohio Review, Associated Press (May 12, 2006).

- Angel Diaz (December 13, 2006, Florida): After the initial injection, Mr. Diaz grimaced, face contorted, gasping for air for at least ten to twelve minutes. Prison officials administered a second injection, and thirty-four minutes passed before they declared Mr. Diaz dead. Shortly thereafter, Governor Jeb Bush halted all executions and selected a committee "to consider the humanity and constitutionality of lethal injections." See Radelet; Terry Aguayo, Florida Death Row Inmate Dies Only After Second Chemical Dose, N.Y. Times, Dec. 15, 2006; Adam Liptak & Terry Aguayo, After Problem Execution, Governor Bush Suspends the Death Penalty in Florida, N.Y. Times,

Dec. 16, 2006; Ellen Kreitzberg & David Richter, But Can it be Fixed? A Look at Constitutional Challenges to Lethal Injection Executions, 47 Santa Clara L. Rev. 445, 445-46 (2007).

- Christopher Newton (May 24, 2007, Ohio): Executioners stuck Mr. Newton at least ten times before getting the shunts in place and injecting the needles. It then took over two hours for Mr. Newton to die. Officials blamed the delay on Newton's weight – 265 pounds. See Radelet; Ohio Lethal Injection Takes 2 Hours, 10 Tries, Associated Press, May 24, 2007.

- John Hightower (June 26, 2007, Georgia): It took prison officials almost an hour to complete Mr. Hightower's execution, forty minutes of which they spent trying to locate a usable vein. See Radelet; Lateef Mungin, Triple Murderer Executed After 40-Minute Search for Vein, Atlanta J.- Const., June 27, 2007.

- Curtis Osborne (June 4, 2008, Georgia): Executioners took thirty-five minutes to find a suitable vein. After they administered the drugs, it took an additional fourteen minutes before the in-chamber doctors pronounced Mr. Osborne's death. See Radelet; Rhonda Cook, Executioners Had Trouble Putting Murderer to Death: For 35 Minutes, They Couldn't Find Good Vein for Lethal Injection, Atlanta J.-Const., June 27, 2007.

- Rommell Broom (Sept. 15, 2009, Ohio): After two hours, executioners terminated their efforts to find a suitable vein in Mr. Broom's arms and legs despite his attempts to assist them in finding a good vein.

"Broom said he was stuck with needles at least [eighteen] times, the pain so intense he cried and screamed out." Upon ordering the execution to stop, Governor Ted Strickland announced that he would seek physicians' advice on "how the man could be killed more efficiently." Executioners blamed Mr. Broom's extensive use of intravenous drugs for their difficulties. See Radelet.

- Brandon Joseph Rhode (Sept. 27, 2010. Georgia): After the Supreme Court rejected his appeals, "[m]edics . . . tried for about 30 minutes to find a vein to inject the three-drug concoction." It then took 14 minutes for the lethal drugs to kill him. Greg Bluestein, Georgia Executes Inmate Who Had Attempted Suicide, Atlanta J.-Constitution, Sept. 27, 2010.

- Dennis McGuire (January 16, 2014, Ohio): Ohio used a "new, untested cocktail of drugs," midazolam and hydromorphone, in this execution. "A reporter for the Columbus Dispatch, one of the witnesses at the execution, described Mr. McGuire as struggling, gasping loudly, snorting and making choking noises for nearly 10 minutes before falling silent and being declared dead a few minutes later." Rick Lyman, Ohio Execution Using Untested Drug Cocktail Renews the Debate Over Lethal Injections, N.Y. Times, January 16, 2014.

- Jose Villegas (April 16, 2014, Texas): After Villegas was denied a stay of his execution based on mental retardation, he was executed using compounded phenobarbital. Mr. Villegas was reported to state, "It

does kind of burn. Goodbye." Linda Greenhouse, Still Tinkering, N.Y. Times, May 14, 2014.

- Clayton Lockett (April 30, 2014, Oklahoma): After a doctor in attendance pronounced Lockett unconscious, "things went visibly wrong." Lockett twitched, mumbled, attempted to lift his head and shoulders, and appeared to be in pain. The Warden announced there was a "vein failure" and ordered the execution aborted. Approximately forty-three minutes after the execution began, "Mr. Lockett died of a 'massive heart attack.'" Radelet, supra; Erik Eckholm & John Schwartz, Oklahoma Vows Review of Botched Execution, N.Y. Times, April 30, 2014. Following Lockett's execution, a grand jury was convened to study executions in Oklahoma, resulting in a May 2016 report that sharply criticized the state's oversight and implementation of its protocol. See (Interim Report 14, In the Matter of Multicounty Grand Jury, Case No. SCAD-2012-61 (Okla. May 19, 2016), available at http://tinyurl.com/htk6l2c).

- Joseph Wood (July 23, 2014, Arizona): After the chemicals were injected, Mr. Wood repeatedly gasped for one hour and 40 minutes before death was pronounced. Radelet, supra. Senator John McCain of Arizona described Wood's execution as tantamount to "torture." See Ben Brumfield & Mariano Castillo, McCain: Prolonged Execution Was Torture, cnn.com, Sept. 8, 2014.

- Brian Terrell (Dec. 9, 2015. Georgia. Brian Keith Terrell. "[I]t took an hour for the nurse assigned to the execution to get IVs inserted

into both of the condemned man's arms. She eventually had to put one into Terrell's right hand. Terrell winced several times, apparently in pain." See Radelet, supra.

- Brandon Jones (Feb. 3, 2016, Georgia). Executioners spent twenty-four minutes trying to insert an IV into Jones's left arm, another eight minutes into his right, and tried again, unsuccessfully, to insert it into his left arm. A physician was called to assist, in violation of several codes of medical ethics, and he or she spent another thirteen minutes inserting and stitching the IV near Jones's groin. Six minutes later, Jones's eyes popped open. See Radelet, supra.

4. In short, far from providing "a safe, reliable, effective and humane" method of execution consistent with Eighth Amendment, lethal injection, by one comprehensive study, has shown to be far less reliable than methods that preceded it. See Austin Sarat, Gruesome Spectacles: Botched Executions and America's Death Penalty (2014); cf. Wood v. Ryan, 759 F.3d 1076, 1102-03 (9th Cir. 2014) (Kozinski, J., dissenting from the denial of rehearing en banc) (suggesting that, "[i]f a state wishes to continue carrying out executions," it should return to earlier, "more . . . foolproof," methods).

B. Lethal injection in Nevada is unconstitutional

5. Mr. Chappell further alleges that lethal injection, as administered in the State of Nevada, violates the Cruel and Unusual Punishment Clause. Mr. Chappell does not concede that lethal injection in Nevada can be administered in a constitutional manner. Cf. Hill v. McDonough, 547 U.S. 573, 580 (2006). However, as explained in greater detail below, he is without sufficient information to fully and fairly plead this claim, where the State consistently has refused to disclose its protocols and procedures on the grounds of alleged "privilege" or "confidentiality," or to even to confirm whether

or not it has any such protocols and procedures that are current, final, and able to be carried out by the State.

6. Without this information, it impossible to determine, at this point, whether any protocol that it may have adopted contains protections of the type the Supreme Court found necessary to uphold the protocols at issue in Baze, or to demonstrate that NDOC's selection of drugs "is sure or very likely to result in needless suffering," see Glossip, 135 S. Ct. at 2739.

7. It also follows that, without a knowledge of the means by which the State intends to execute him, Mr. Chappell cannot plead "a known and available alternative method of execution that would entail a significantly less severe risk" of pain over an as-yet-unknown procedure. See Glossip, 135 S. Ct. at 2737.

8. The State's refusal to provide Mr. Chappell sufficient information regarding the means by which it intends to execute him independently violates his federal constitutional rights, by denying him access to the courts. See, e.g., Lewis v. Casey, 518 U.S. 343, 356 (1996) (prisoners must have a "reasonably adequate to opportunity to file nonfrivolous legal claims challenging their convictions or conditions of confinement").

9. The only purportedly final protocol available to Mr. Chappell, bearing a revision date of February 2004, was produced by the Nevada Department of Corrections in April 2006. See Ex. 257 ([Redacted] Confidential Execution Manual: Procedures for Executing the Death Penalty, Nevada State Prison (rev. Feb. 2004). For reasons explained below, there is every reason to believe that this is not the current protocol.

10. However, it is apparent that this protocol – or any substantially similar protocol or procedures – would violate the Eighth Amendment. The 2004 Protocol specifies that execution by lethal injection will be carried out using five grams of sodium thiopental, a barbiturate typically used by anesthesiologists to induce

temporary anesthesia; 20 milligrams of Pavulon, a paralytic agent; and 160 milliequivalents of potassium chloride, a salt solution that induces cardiac arrest. Ex. 257.[75]

11. Competent physicians cannot administer the lethal injection because the ethical standards of the American Medical Association prohibit physicians from participating in an execution other than to certify that a death has occurred. See Ex. 258. Thus, lethal injection in Nevada is not administered by competent medical personnel.

12. Moreover, competent physicians are precluded from administering the drugs sodium thiopental, pancuronium bromide, and potassium chloride in lethal injection procedures because these substances are not approved by the Food and Drug Administration as a safe and effective means for administering executions in human beings. For example, sodium thiopental is not approved in any manner for administration on human beings. Rather, federal law restricts injection of sodium thiopental to anesthetic uses on dogs and cats only "by or on the order of a licensed veterinarian." See 21 C.F.R. §§ 522.2444a(c)(1), (3), 522.2444b(c)(l), (3). The Department of Corrections' use of these drugs in violation of the Food and Drug Act allows state prison officials to make unapproved use of drugs distributed in interstate commerce.

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[75] In or about October 2007, shortly before the scheduled execution of William Castillo, NDOC announced that "it was revising its drug protocol to double the dosages of all three drugs used in the lethal injection." See Petitioners' Opening Brief in Support of a Writ of Mandamus at 10, American Civil Liberties Union of Nevada v. Skolnik, Case No. 50354 (Nev. filed Nov. 7, 2007). To date, undersigned counsel has been unable to obtain any lethal injection protocol reflecting this change, whether this change was made in accordance with state law, or information as to how NDOC concluded this change was likely to result in a lawful execution. On its face, however, this late disclosure suggests the sort of ad hoc and medically uninformed decision-making that assumes, wrongly, that more is always better. Cf. Glossip, 135 S. Ct. at 2782-86 (Sotomayor, Ginsburg, Breyer, and Kagan, JJ, dissenting) (explaining the "ceiling effect").

13. Lethal injection conducted by untrained personnel using the three drugs specified by Nevada's protocol creates an unnecessary risk of undue pain and suffering because Nevada's procedures for inducing and maintaining anesthesia fall below the medical standard of care for the use of anesthesia prior to conducting painful procedures. See Ex. 233 at ¶¶14-15, 18 (Decl. of Mark J.S. Heath). The humaneness of execution by lethal injection is dependent upon the proper administration of the anesthetic agent, sodium thiopental. In the surgical arena, general anesthesia can be administered only by physicians trained in anesthesiology or nurses who have completed the necessary training to be Certified Registered Nurse Anesthetists (CRNAs). Id. at ¶23. Nevada's execution manual does not specify what, if any, training in anesthesiology the person(s) administering the lethal injection must have. If the untrained executioner fails to successfully deliver a quantity of sodium thiopental sufficient to achieve adequate anesthetic depth, the inmate will feel the excruciating pain of the subsequent injections of pancuronium bromide and potassium chloride. Id. at ¶17. According to Dr. Mark Heath, a board-certified anesthesiologist who reviewed the 2004 Protocol:

> [i]f an inmate does not receive the full dose of sodium thiopental because of errors or problems in administering the drug, the inmate might not be rendered unconscious and unable to feel pain, or alternatively might, because of the short-acting nature of sodium thiopental, regain consciousness during the execution.

See Ex. 233 at ¶21. Moreover, according to Dr. Heath:

> [i]f sodium thiopental is not properly administered in a dose sufficient to cause the loss of consciousness for the duration of the execution procedure, then it is my opinion held to a reasonable degree of medical certainty that the use of pancuronium places the condemned inmate at risk for consciously experiencing paralysis, suffocation and the excruciating pain of the intravenous injection of high dose potassium chloride.

Id. at ¶39.

14. The 2004 Protocol is vulnerable to many potential errors in administration that would result in a failure to administer a quantity of sodium thiopental sufficient to induce the necessary anesthetic depth. The risk of error is compounded by Nevada's use of inadequately trained personnel. Ex. 233 at ¶¶21-22. The potential errors include: errors in preparing the sodium thiopental solution (because sodium thiopental has a relatively short shelf-life in liquid form, it is distributed as a powder and must be mixed into a liquid solution prior to the execution, id. at ¶19, errors in labeling the syringes, errors in selecting the syringes during the execution, errors in correctly injecting the drugs into the IV, leaks in the IV line, incorrect insertion of the catheter, migration of the catheter, perforation, rupture, or leakage of the vein, excessive pressure on the syringe plunger, errors in securing the catheter, and failure to properly flush the IV line between drugs, id. at ¶22.

15. The 2004 Protocol further falls below the standard of care for administering anesthesia because it prevents any type of effective monitoring of the inmate's condition or whether he is anesthetized or unconscious. Ex. 233 at ¶26. In Nevada, during the injection of the three drugs, the executioner is in a room separate from the inmate and has no visual surveillance of the inmate.

16. Accepted medical practice dictates that trained personnel monitor the lines and the flow of anesthesia into the veins through visual and tactile observation and examination. The lack of any qualified personnel present in the chamber during the execution thwarts the execution personnel from taking the standard and necessary measures to reasonably ensure that the sodium thiopental is properly flowing in to the inmate and that he is properly anesthetized prior to the administration of the pancuronium and potassium. Ex. 233 at ¶26. The American Society of Anesthesiologists requires that "[q]ualified anesthesia personnel . . . be present in the room throughout the conduct of all general anesthetics" due to the "rapid changes in patient status during anesthesia." Id.

17. The 2004 Protocol fails to account for the foreseeable circumstance that the executioner(s) will be unable to obtain intravenous access by a needle piercing the skin and entering a superficial vein suitable for the reliable delivery of drugs. See Ex. 233 at ¶33. Inability to access a suitable vein is often associated with past intravenous drug use by the inmate. Medical conditions such as diabetes or obesity, individual characteristics such as heavily pigmented skin or muscularity, and the nervousness caused by impending death can impede peripheral IV access. See Deborah W. Denno, When Legislatures Delegate Death: the Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What it Says About Us, 63 Ohio St. L.J. 63, 109-10 (2002) [hereinafter "Denno I"]. Typically, when the executioner is unable to find a suitable vein, the executioner resorts to a "cut down," a surgical procedure used to gain access to a functioning vein. When performed by a non-physician, the risks are great. When deep incisions are made there is a risk of rupturing large blood vessels causing a hemorrhage, and if the procedure is performed on the neck, there is a risk of cardiac dysrhythmia (irregular electrical activity in the heart) and pneumothorax (which induces the sensation of suffocation). In addition, a cut-down causes severe physical pain and obvious emotional stress. This procedure should take place only in a hospital or other appropriate medical setting and should be performed only by a qualified physician with specialized training in that area. The 2004 protocol recognizes that a "sterile cut-down tray" may be required equipment "if necessary," see Ex. 257 at 7, but does not specify who determines when a cut down is necessary, how that determination is made, or the training or qualifications of the personnel who would perform such a cut down.

18. If the inmate is not adequately anesthetized by the successful administration of sodium thiopental, he will suffer the pain of the remaining two injections. The choice of "potassium chloride to cause cardiac arrest needlessly increases the risk that a prisoner will experience excruciating pain prior to execution"

because the "[i]ntravenous injection of concentrated potassium chloride solution causes excruciating pain." See Ex. 233 at ¶12. The inmate would be consciously aware and feel the pain of the potassium-induced fatal heart attack. Id.

19. Pancuronium bromide, the second drug in the lethal injection process, is a paralytic agent that paralyzes all voluntary muscles. This includes paralysis of the diaphragm and other respiratory muscles, which causes the inmate to cease breathing. Pancuronium "does not affect sensation, consciousness, cognition, or the ability to feel pain or suffocation." See Ex. 233 at ¶37. If the inmate is not adequately anesthetized prior to the pancuronium injection, the pancuronium will cause the inmate to consciously experience a "torturous suffocation" lasting "at least several minutes." Id. at ¶¶39-40.

20. Pancuronium is "unnecessary" and "serves no legitimate purpose" in the execution process because both sodium thiopental and potassium chloride, if properly administered in the doses specified in the execution manual, are adequate to cause death. See Ex. 233 at ¶¶37, 44. Pancuronium "compounds the risk that an inmate may suffer excruciating pain during his execution" because it masks any physical manifestations of pain that an inadequately anesthetized inmate would feel during pancuronium-induced suffocation and potassium-induced cardiac arrest. Id. at ¶¶37, 42. "[U]sing barbiturates [such as sodium thiopental] and paralytics [such as pancuronium] to execute human beings poses a serious risk of cruel, protracted death" because "[e]ven a slight error in dosage or administration can leave a prisoner conscious but paralyzed while dying, a sentient witness of his or her own slow, lingering asphyxiation." Chaney v. Heckler, 718 F.2d 1174, 1191 (D.C. Cir. 1984) (citing Royal Commission on Capital Punishment 1949-1953 Report (1953)), rev'd on other grounds, 470 U.S. 84 (1985). By paralyzing the inmate and preventing physical manifestations of pain, pancuronium places a "chemical veil" on the lethal injection process that precludes observers from knowing whether the prisoner is experiencing great pain. See

Ex. 233 at ¶44; Adam Liptak, Critics Say Execution Drug May Hide Suffering, N.Y. Times, Oct. 7, 2003, at A18.[76]

21. The 2004 Protocol falls below the standard of care for euthanizing animals. The American Veterinary Medical Association (AVMA) allows euthanasia by potassium chloride, but mandates that animals be under a surgical plane of anesthesia prior to the administration of potassium. See Ex. Ex. 233 Attachment B (American Veterinary Medical Association, 2000 Report of the American Veterinary Medical Association Panel on Euthanasia 680-81 (2001)). "It is of utmost importance that personnel performing this technique are trained and knowledgeable in anesthetic techniques, and are competent in assessing anesthetic depth appropriate for administration of potassium chloride intravenously." Id. at 681. "A combination of pentobarbital [a barbiturate similar to, but longer acting than, sodium thiopental] with a neuromuscular blocking agent is not an acceptable euthanasia agent." Id. at 680. Nevada is one of at least 30 states that prohibit the use of neuromuscular blocking agents in euthanizing animals, either expressly or by mandating the use of a specific euthanasia agent such as pentobarbital. See Ala. Code § 34-29-131; Alaska Stat. § 08.02.050; Ariz. Rev. Stat. Ann. § 11-1021; Cal. Bus. & Prof. Code § 4827; Colo. Rev. Stat. § 18-9-201; Conn. Gen. Stat. § 22-344a; Del. Code Ann. tit. 3, § 8001; Fla. Stat. § 828.058; Ga. Code Ann. § 4-11-5.1; 510 Ill. Comp. Stat. 70/2.09; Kan. Stat. Ann. § 47-1718(a); La. Rev. Stat. Ann. § 3:2465; Me. Rev. Stat. Ann. tit. 17, § 1044; Md. Code Ann., Crim. Law, § 10-611; Mass. Gen. Laws ch. 140, § 151A; Mich. Comp. Laws § 333.7333; Mo. Rev. Stat. § 578.005(7); Neb. Rev. Stat. § 54-2503; Nev. Rev. Stat. Ann. § 638.005; N.J. Stat. Ann. § 4:22-19.3; N.Y. Agric. & Mkts. Law § 374; Ohio Rev. Code Ann. § 4729.532; Okla. Stat. tit. 4, § 501; Ore. Rev. Stat. § 686.040(6); R.I. Gen. Laws § 4-1-34; S.C. Code Ann. § 47-3-420; Tenn. Code Ann. § 44-17-303; Tex. Health & Safety

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[76] Available at http://tinyurl.com/zljta3f.

Code Ann. § 821.052(a); W. Va. Code § 30-10A-8; Wyo. Stat. Ann. § 33-30-216. Nevada's lethal injection statute would violate state law if applied to a dog. The consistent trend in professional norms and statutory regulation of animal euthanasia, places the method currently practiced by Nevada outside the bounds of evolving standards of decency.

22. The 2004 Protocol is similar to the lethal injection protocol employed in California prior to the litigation in Morales v. Hickman, 415 F. Supp. 2d 1037 (N.D. Cal. 2006), aff'd, 438 F.3d 926 (9th Cir. 2006). See Ex. 233 at ¶7. The use of sodium thiopental, pancuronium bromide, and potassium chloride without the protections imposed in Morales to ensure adequate administration of anesthesia poses an unreasonable risk of inflicting unnecessary suffering.

23. The United States Supreme Court has held that lethal injection protocols which present a substantial risk of serious harm are forbidden by the Eighth Amendment's prohibition on cruel and unusual punishments. Baze v. Rees, 553 U.S. 35, 49-50 (2008). Where a state's lethal injection protocols fail to sufficiently sedate an individual prior to execution, the state has engaged in the deliberate infliction of "pain for the sake of pain." Id.; see also Wilkerson v. Utah, 99 U.S. 130, 136 (1879). While Baze upheld the validity of the Kentucky lethal injection protocol, it did so because of the protections provided by that protocol which ensure that the inmate has been completely anaesthetized before subsequent drugs are injected. Baze, 553 U.S. at 55. The 2004 Protocol does not contain any of those safeguards, and the Nevada protocol thus cannot be upheld under Baze. Here, this Court must prevent the infliction of unnecessary suffering in Mr. Chappell's execution by vacating his sentence.

24. Aside from the numerous deficiencies in 2004 Protocol, the State of Nevada is also unable to conduct a constitutionally valid execution because of gross deficiencies in the facility in which executions are required to be conducted. By legal and practical necessity, executions in Nevada must occur, if at all, at the execution

chamber at the 150-year-old Nevada State Prison (NSP) in Carson City, see Nev. Rev. Stat. § 176.355(3), a facility decommissioned in May 2012. Even at that time, this ancient facility was plagued by a host of various code violations, plumbing problems, and non-working utilities. See, e.g., Ed Vogel, Nevada State Prison Starts Shutting Down, Las Vegas Rev.-J., Sept. 3, 2011; Geoff Dornan, The End of an Era: Last Inmates Leave Nevada State Prison, Nev. Appeal, Jan. 10, 2012. Regarding the execution chamber specifically, state officials repeatedly have suggested that the execution chamber at NSP "is unusable and the state could not carry out a death penalty" there. See Cy Ryan, State Official: Nevada Execution Chamber Unusable, Las Vegas Sun, Mar. 8, 2011; see also, e.g., Sean Whaley, Death Chamber Plan Questioned, Las Vegas Rev.-J., Mar. 20, 2013 (acknowledgment by prison director that death chamber could be subject to legal challenge based on condition of facility and non-compliance with the Americans with Disabilities Act). It is highly improbable that any of the myriad problems associated with the facility generally, and the chamber specifically, will ever be adequately addressed.

25. For its part, the Nevada Attorney General has suggested, but does not admit, that the execution chamber at NSP may not be available to conduct executions. Ex. 259 at 21 ("[T]he location of the execution could change before Sherman's execution is scheduled.").

26. Such concerns go beyond any specific lethal injection protocol and demonstrate that the State of Nevada cannot carry out a death sentence at all against Mr. Chappell, regardless of the content of any revised protocols in the state's possession to which Mr. Walker has no access.

C. Statement regarding the ripeness of Mr. Chappell's challenge to Nevada's lethal injection scheme

27. Mr. Chappell acknowledges the Ninth Circuit authority where the court, rather than reach the merits of the petitioners' habeas claims challenging the

constitutionality of California's lethal injection scheme, dismissed the claim as unripe because California did not have a protocol in place. See Andrews v. Davis, 798 F.3d 759, 785 (9th Cir. 2015); Payton v. Cullen, 658 F.3d 890, 893 (9th Cir. 2011). According to Andrews, "[i]t is premature to rule on the constitutionality of a state's lethal injection protocol if the state does not have one in place." See 798 F.3d at 785.

28. So holding, the Ninth Circuit did not reach the more difficult question of whether the petitioners' claims, when ripe, "should be by way of habeas relief or through an action under 42 U.S.C. § 1983." Payton, 658 F.3d at 893 n.2.

29. Mr. Chappell does not concede that the ripeness of a claim challenging the constitutionality of a lethal injection scheme is measured at the time a state has a lethal injection protocol in place. In light of the prevailing Ninth Circuit authority, however, he acknowledges the possibility that the Court may seek to rule on that basis.

30. Mr. Chappell, however, is without basis for determining whether his claim, or any portion of it, is ripe under this standard, as explained below.

31. The Nevada Department of Corrections (NDOC) historically, and to the present day, has refused to disclose the lethal injection protocol by which it intends to execute condemned inmates.

32. NDOC did not publicly disclose its protocol in conjunction with the first eleven lethal injection executions, occurring between 1985 and 2004. See, e.g., Martha Belisle, Family Receives Closure, Reno Gazette-J., Apr. 27, 2006 (reporting that April 2006 execution of Daryl Mack was "the first time . . . documents detailing the drugs used . . . were open to the public").

33. Leading up to the state's most recent execution, of Daryl Mack in April 2006, NDOC again stated that it would not disclose its protocol. See, e.g., Human Rights Watch, So Long as They Die: Lethal Injections in the United States, Apr. 2006,

at 21 n.82 (reporting March 31, 2006, statement by NDOC spokesperson Fritz Schlomatter that NDOC would not publicly reveal its drug protocol).[77]

34. In response, the Reno Gazette-Journal filed a lawsuit to compel the disclosure of the protocol by which NDOC intended to execute Mr. Mack. See also, e.g., Martha Belisle, Mack Execution More Open Than Previous Deaths, Reno Gazette-J., Apr. 26, 2006 [hereinafter "Mack Execution"].

35. Shortly thereafter, NDOC released a redacted version of its protocol, in which it "blocked out some portions that detailed 'internal institutional and operational security,'" while claiming that it had a legal defense to any disclosure of the protocol that it chose not to pursue. See Mack Execution, supra.

36. As explained above, the 2004 protocol specified that an execution would be carried out using five grams of sodium thiopental, a barbiturate typically used by anesthesiologists to induce temporary anesthesia; 20 milligrams of Pavulon, a paralytic agent; and 160 milliequivalents of potassium chloride, a salt solution that induces cardiac arrest. The protocol also specified, in various ways, that the execution would take place at the Nevada State Prison in Carson City, Nevada. See generally Ex. 257.

37. This document does not bear an Administrative Regulation number or any other indication that it approved and adopted according to the requirements of state law. See id.

38. Since the filing of this earlier petition, it has become apparent that an execution cannot proceed under this protocol, for at least two reasons:

39. First, the drugs specified therein are no longer available. As early as 2011, the State acknowledged that it had no supply of sodium thiopental and its former supplier would no longer provide it. See Martha Belisle, Nevada No Longer Able to Acquire Key Drug Used in Lethal Injections, Reno Gazette-J., Feb. 7, 2011. By 2015,

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[77] Available at http://tinyurl.com/hnppgjm.

NDOC announced would seek to carry out executions with different drugs not specified in the previous protocol: a two-drug combination of midazolam and hydromorphone, in unknown dosages. See, e.g., Sandra Chereb, Nevada Pursues Death Chamber, Controversial Drug, Las Vegas Rev.-J., July 13, 2015 [hereinafter "Nevada Pursues Death Chamber"].[78]

40. Second, the Nevada State Prison, specified throughout the 2004 Protocol as the location of the execution, was decommissioned in May 2012. Even at that time, this ancient facility was plagued by a host of various code violations, plumbing problems, and non-working utilities, such that all remaining inmates were transferred to other facilities by January 2012. See, e.g., Ed Vogel, Nevada State Prison Starts Shutting Down, Las Vegas Rev.-J., Sept. 3, 2011; Geoff Dornan, The End of an Era: Last Inmates Leave Nevada State Prison, Nev. Appeal, Jan. 10, 2012. Regarding the execution chamber specifically, state officials repeatedly have suggested that the execution chamber at NSP "is unusable and the state could not carry out a death penalty" there. See Cy Ryan, State Official: Nevada Execution Chamber Unusable, Las Vegas Sun, Mar. 8, 2011; see also, e.g., Sean Whaley, Death Chamber Plan Questioned, Las Vegas Rev.-J., Mar. 20, 2013 (acknowledgment by prison director that death chamber could be subject to legal challenge based on condition of facility and non-compliance with the Americans with Disabilities Act).

41. Numerous representatives of the State – including from the Nevada Office of the Attorney General, counsel for Respondents in this action – have acknowledged that the 2004 Protocol is under revision. See Ex. 260 (representation by defense counsel

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[78] As explained below, this specific two-drug cocktail has been used in only two executions in the United States: that of Dennis McGuire in Ohio in January 2014, and of Joseph Wood in Arizona in July 2014. Both executions were prolonged brutal, with Senator John McCain of Arizona describing Wood's execution as tantamount to "torture." See, e.g., Ben Brumfield & Mariano Castillo, McCain: Prolonged Execution Was Torture, cnn.com, Sept. 8, 2014, at http://www.cnn.com/2014/07/25/justice/arizona-execution-controversy/.

Norman Reed that, approximately six months prior, that "the Attorney General's Office had indicated to us that . . . there were no injection protocols in place"); Ex. 259 ("The protocols used by the [Nevada Department of Corrections], the individuals responsible, even the location of the execution could change before [petitioner's] execution is scheduled."); Oral Argument at 20:58, Snow v. McDaniel, Case No. 10-16951 (9th Cir. held Oct. 13, 2011) (representation by Deputy Attorney General Clark G. Leslie that "[i]n Nevada, we currently have a moratorium" on the death penalty as the State tries "to work out the three-drug cocktail and other issues").[79]

42. From the preceding, it is apparent that Mr. Chappell will be unable to fully and fairly litigate the ripeness issue under the Ninth Circuit's approach in Andrews and Payton without obtaining – with this Court's assistance, as necessary – information about the State's intentions with respect to executions in Nevada.

D. Statement regarding cognizability of Mr. Chappell's challenge to Nevada's lethal injection scheme

43. Following the Ninth Circuit's approach in Andrews and Payton, Mr. Chappell also acknowledges that this Court may also need to decide whether, and to what extent, a petitioner like Mr. Chappell may raise constitutional challenges to a state's proposed lethal injection in a federal habeas proceeding, as opposed to an action arising under 42 U.S. Section 1983. See Payton, 658 F.3d at 893 n.2.

44. This issue has not been firmly decided by the Supreme Court. Though three recent challenges to lethal injection heard by the Supreme Court have arisen in the context of a Section 1983 action, see, e.g., Nelson v. Campbell, 541 U.S. 637, 639 (2004); Hill v. McDonough, 547 U.S. 573, 576 (2006); Glossip v. Gross, 135 S. Ct. 2726, 2731 (2015), those cases are not dispositive of the issue.

45. The earliest decided case, Nelson, acknowledged, but did not resolve, "the difficult question of how to categorize method-of-execution claims generally," while

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[79] Available at http://tinyurl.com/jhetaz8.

noting circumstances where such challenges might fall within the purview of habeas corpus. See 541 U.S. at 644-45.[80] Two years later, the court in Hill held that the petitioner could proceed in a Section 1983 action, where his complaint alleged theories that "would not necessarily prevent the State from executing him by lethal injection" and were therefore more akin to a "challenge to the circumstances of his confinement [which] may be brought under § 1983." See 547 U.S. at 579-80 (emphasis added).

46. The Ninth Circuit has provided no additional guidance on this issue. As noted above, the court was presented with a habeas claim alleging that California's lethal injection protocol was unconstitutional; both times the court dismissed the claim as unripe because California did not have a protocol in place, see Andrews, 798 F.3d at 785; Payton, 658 F.3d at 893, with the Payton court expressly reserving the question of whether any renewed challenge "should be by way of habeas relief or through an action under 42 U.S.C. § 1983," id. at 893 n.2.[81]

47. In Adams v. Bradshaw, 644 F.3d 481 (6th Cir. 2011) (per curiam) [hereinafter "Adams I"], the Sixth Circuit addressed and answered the question of whether a lethal injection challenge could be raised in a habeas petition based on then-existing Supreme Court authority and found that some such challenges could be raised in a habeas proceeding:

> Nowhere in Hill or Nelson does the Supreme Court state that a method-of-execution challenge is not cognizable in habeas or that a federal court "lacks jurisdiction" to adjudicate such a claim in a habeas action. Whereas it is true that certain claims that can be raised in a federal habeas petition cannot be raised in a § 1983 action, it does not necessarily follow that any claim that can be raised in a § 1983 action cannot be raised in a habeas petition. Moreover, Hill can be distinguished from this case on the basis that Adams has not conceded the existence of an acceptable alternative

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[80] Although Mr. Chappell occasionally quotes court opinions using the term "method-of-execution," he does not use this term himself, for reasons explained infra.

[81] At least one sitting judge in this district, the Honorable Robert C. Jones, has issued a Certificate of Appealability over the extent to which challenges to lethal injection in habeas proceedings. See Riley v. McDaniel, Case No. 3:01-CV-0096, 2010 U.S. LEXIS 108257, granted a certificate of Appealability.

> procedure. See 547 U.S. at 580. Thus, Adams's lethal-injection claim, if successful, could render his death sentence effectively invalid. Further, Nelson's statement that "method-of-execution challenges[] fall at the margins of habeas," 541 U.S. at 646, strongly suggests that claims such as Adams's can be brought in habeas.

Adams, 644 F.3d at 483 (internal citations omitted; alteration in original). On this basis, the court denied the state's motion to dismiss the petitioner's habeas claim and remanded for factual development of his lethal injection claim. See id.

48. Subsequent to Adams I, the Supreme Court decided Glossip, in which a bare majority of the court upheld the district court's denial of preliminary injunction enjoining the use of Oklahoma's then-existing lethal injection protocol in an action brought under Section 1983. See generally Glossip, 135 S. Ct. at 2738-46. Along the way, the Glossip majority interpreted Hill as holding "that a method-of-execution claim must be brought under § 1983 because such a claim does not attack the validity of the prisoner's conviction or death sentence." Glossip, 135 S. Ct. at 2738 (citing Hill, 547 U.S. at 579-80).

49. This statement is, however, is not dispositive on the issue of whether and under what circumstances a petitioner may bring a lethal-injection challenge in habeas. Addressing the effect of Glossip on its prior decision in Adams I, the Sixth Circuit adhered to its prior holding that some claims challenging lethal injection are cognizable in habeas:

> Notwithstanding the warden's assertion that a method-of-execution challenge can only be brought in a § 1983 action under Hill . . . , Adams can bring this claim in a § 2254 proceeding. As the warden submits, Glossip stated that Hill "held that a method-of-execution claim must be brought under § 1983 because such a claim does not attack the validity of the prisoner's conviction or death sentence." Glossip, 135 S. Ct. at 2738. As we observed in [Adams I], however, Adams's case is distinguishable from that presented in Hill because at least some of Adams's claims, if successful, would bar his execution, and Adams does not concede that lethal injection can be administered in a constitutional manner. Cf. Hill, 547 U.S. at 580.

See Adams v. Bradshaw, 817 F.3d 284 (6th Cir. 2016).

E. Conclusion

50. Mr. Chappell's averments demonstrate that Nevada's methods and protocols in conducting lethal injections violates the Eighth and Fourteenth Amendments. Similarly, the DOC's policy of withholding its manual and materials regarding the implementation of the death penalty violate Mr. Chappell's federal constitutional rights as defined. For the reasons described above, Mr. Chappell is entitled to relief.

CLAIM TWENTY-SIX (CUMULATIVE ERROR)

Mr. Chappell's conviction and death sentence are invalid under the federal constitutional guarantees of due process, equal protection, the effective assistance of counsel, a fair tribunal, an impartial jury, and a reliable sentence due to the cumulative errors in the admission of evidence and instructions, gross misconduct by state officials and witnesses, and the systematic deprivation of Mr.Chappell's right to the effective assistance of counsel. U.S. Const. Amends. V, VI, VIII, XIV; Nev. Const. art. 1, §§ 1, 6, 8, and art. 4 § 21.

SUPPORTING FACTS

1. Mr. Chappell is entitled to relief based upon the cumulative errors in his trial, appeal and state post-conviction proceedings. See Parle v. Runnels, 505 F.3d 922, 927-28 (9th Cir. 2007); Mak v. Blodgett, 970 F.2d 614, 619 (9th Cir. 1992). Each of the claims specified in this Petition requires vacation of the conviction or death sentence. Mr. Chappell incorporates each and every factual allegation contained in this Petition as if fully set forth herein.

2. Mr. Chappell received a patently unfair trial before a biased and partial jury. Mr. Chappell was represented at the guilt phase of trial by lawyers who, because of their inexperience in trying capital cases, failed to interview any of the State's witnesses or subject the State's case to any meaningful adversarial testing, including failing to even hold the State to its burden of proof. The trial court allowed the State to admit mountains of irrelevant and highly prejudicial evidence concerning prior bad acts by Mr. Chappell. The prosecutors committed blatant misconduct throughout the guilt phase, including failing to disclose the existence of impeachment evidence against one of its witnesses, and in making improper argument at both the guilt and penalty phases of trial. The jury then convicted Mr. Chappell of first degree murder on the basis of constitutionally inadequate instructions that relieved the State of its burden of proof, leaving no valid basis for the first degree murder conviction.

3. After remand for a new penalty hearing, counsel failed to conduct a constitutionally adequate investigation and, therefore, failed to present a compelling case in mitigation. The trial court again empaneled a biased jury, and allowed admission of inadmissible and prejudicial evidence. The State again committed misconduct throughout the proceedings. Mr. Chappell was sentenced to death by a jury that was improperly instructed as to the standard of proof for death-eligibility, based on a single aggravating factor that is unconstitutional and that the State failed to prove by sufficient evidence. Mr. Chappell now awaits execution for a crime he maintains he committed in the heat of passion, and for a conviction that was obtained in violation of every right a criminal defendant has under state and federal constitutional law.

4. The cumulative effect of the errors demonstrated in this Amended Petition was to deprive the proceedings against Mr. Chappell of fundamental fairness and to result in a constitutionally unreliable sentence. Whether or not any individual error requires the vacation of the judgment or sentence, the totality of these multiple errors and omissions resulted in substantial prejudice to Mr. Chappell. The State cannot demonstrate that these errors were harmless beyond a reasonable doubt. Chapman, 386 U.S. at 24.

PRAYER FOR RELIEF

For the reasons stated above, this Court should issue a writ of habeas corpus and vacate Mr. Chappell's conviction and sentence, and grant him a new trial and sentencing hearing.

DATED this 16th day of November 2016.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender
District of Nevada

/s/ Brad D. Levenson
BRAD D. LEVENSON
Assistant Federal Public Defender

/s/ Sandi Y. Ciel
SANDI Y. CIEL
Assistant Federal Public Defender

VERIFICATION

Under penalty of perjury, the undersigned declare that they are counsel for the Petitioner James Montell Chappell named in the foregoing petition and know the contents thereof; that the pleading is true of their own knowledge except as to those matters stated on information and belief and as to such matters they believe them to be true. Petitioner personally authorized undersigned counsel to commence this action.

Dated this 16th day of November, 2016.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender
District of Nevada

/s/ Brad D. Levenson
BRAD D. LEVENSON
Assistant Federal Public Defender

/s/ Sandi Y. Ciel
SANDI Y. CIEL
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

In accordance with the Rules of Civil Procedure, the undersigned hereby certifies that on this 16th day of November, 2016, a true and correct copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)** was filed electronically with the Eighth Judicial District Court.

I have mailed the foregoing documents by First-Class Mail, postage pre-paid to the following:

Matthew S. Johnson
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100 North Carson Street
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Timothy Filson
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Attorneys for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

JAMES MONTELL CHAPPELL,

Petitioner,

v.

TIMOTHY FILSON, Warden, Ely State Prison; ADAM LAXALT, Attorney General,
State of Nevada,

Defendant

Case No. C131341

Dept. No. 5

EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

(POST CONVICTION)

Exhibits 1 through 34

1. Judgment of Conviction, State v. Chappell, Eighth Judicial District Court Case No. 95-C13141, December 31, 1996

2. Opinion, Chappell v. State, Nevada Supreme Court Case No. 29884, December 30, 1998

3. Order Denying Rehearing, Chappell v. State, Nevada Supreme Court Case No. 29884, March 17, 1999

4. Findings of Fact, Conclusions of Law, and Order, Chappell v. State, Eighth Judicial District Court Case No. 95-C13141, June 3, 2004

5. Order of Affirmance, Chappell v. State, Nevada Supreme Court Case No. 43493, April 7, 2006

6. Judgment of Conviction, State v. Chappell, Eighth Judicial District Court Case No. 95-C13141, May 10, 2007

7. Order of Affirmance, Chappell v. State, Nevada Supreme Court Case No. 49478, October 20, 2009

8. Order Denying Rehearing and Amended Order, Chappell v. State, Nevada Supreme Court Case No. 49478, December 16, 2009

9. Findings of Fact, Conclusions of Law and Order, State v. Chappell, Eighth Judicial District Court Case No. 95-C131341, November 16, 2012

10. Order of Affirmance, Chappell v. State, Nevada Supreme Court Case No. 61967, June 18, 2015

11. Order Denying Rehearing, Chappell v. State, Nevada Supreme Court Case No. 61967, October 22, 2015

12. Juror Questionnaire, Olga C. Bourne (Badge #427), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 2, 1996

13. Juror Questionnaire, Adriane D. Marshall (Badge #493), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 2, 1996

14. Juror Questionnaire, Jim Blake Tripp (Badge #412), State v. Chappell, Eight Judicial District Court, Case No. 95-C131341, October 2, 1996

15. Juror Questionnaire, Kellyanne Bentley Taylor (Badge #421), State v. Chappell, Eighth Judicial District Court, October 2, 1996

16. Juror Questionnaire, Kenneth R. Fitzgerald, (Badge #473), State v. Chappell, Eighth Judicial District Court, October 2, 1996

17. Motion to Admit Evidence of Other Crimes, Wrongs or Bad Acts, State v. Chappell, Eighth Judicial District Court, May 9, 1996

18. Supplemental Motion to Admit Evidence of Other Crimes, Wrongs or Bad Acts, State v. Chappell, Eighth Judicial District Court, August 29, 1996

19. Defendant's Opposition to State's Motion to Admit Evidence of Other Crimes, Wrong or Bad Acts, State v. Chappell, Eighth Judicial District Court, September 10, 1996

20. Defendant's Offer to Stipulate to Certain Facts, State v. Chappell, Eighth Judicial District Court, September 10, 1996

21. Stipulation to Certain Facts, State v. Chappell, Eighth Judicial District Court, October 10, 1996

22. Defendant's Motion to Compel Petrocelli Hearing Regarding Allegations of Prior Bad Acts, State v. Chappell, Eighth Judicial District Court, September 10, 1996

23. Defendant's Motion in Limine Regarding Events Related to Defendant's Arrest for Shoplifting on September 1, 1995, State v. Chappell, Eighth Judicial District Court, October 4, 1996

24. Information, State v. Chappell, Eighth Judicial District Court, October 11, 1995

25. Notice of Intent to Seek the Death Penalty, State v. Chappell, Eighth Judicial District Court, November 8, 1995

26. Defendant's Motion to Strike State's Notice of Intent to Seek Death Penalty, Because the Procedure in this Case is Unconstitutional, State v. Chappell, Eighth Judicial District Court, July 23, 1996

27. Criminal Court Minutes, State v. Chappell, Eighth Judicial District Court, September 30, 1996

28. Affidavits in Support of Petition for Writ of Habeas Corpus (Post-Conviction), State v. Chappell, Eighth Judicial District Court, March 7, 2003

29. Affidavits in Support of Petition for Writ of Habeas Corpus (Post-Conviction), State v. Chappell, Eighth Judicial District Court, March 10, 2003

30. Verdict, October 24, 1996; Special Verdicts, October 24, 1996

31. Motion to Remand for Consideration by the Clark County District Attorney's Death Review Committee
September 20, 2006

32. State's Opposition to Defendants Motion to Remand for Consideration by the Clark County District Attorney's Death Review Committee, September 29, 2006

33. Order Denying Defendant's Motion to Remand for Consideration by the Clark County District Attorney's Death Review Committee, January 29, 2007

34. Reporter's Transcript of Hearing re: Penalty Phase Motions, January 11, 2007 (filed February 20, 2007)

CERTIFICATE OF SERVICE

In accordance with the Rules of Civil Procedure, the undersigned hereby certifies that on this 16th day of November, 2016, a true and correct copy of the foregoing **EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS** was filed electronically with the Eighth Judicial District Court.

I have mailed the foregoing documents by First-Class Mail, postage pre-paid to the following:

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

JAMES MONTELL CHAPPELL, Petitioner, v. TIMOTHY FILSON, Warden, Ely State Prison; ADAM LAXALT, Attorney General, State of Nevada, Defendant	Case No. C131341 Dept. No. 5 **EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS** **(POST CONVICTION)** **Exhibits 35 through 47**

35. Reporter's Transcript of Penalty Motions, January 11, 2007 (filed April 9, 2007)

36. Jury List, March 13, 2007

37. Pre-Sentence Investigation Report, 1995

38. Pre-Sentence Investigation Report, December 5, 1996

39. Special Verdicts March 21, 2007

40. Instructions to the Jury, March 21, 2007

41. Verdict Forms Counts I, II, III, October 16, 1996

42. Motion to Strike Sexual Assault Aggravator of the State's Notice of Intent to Seek the Death Penalty or in the Alternative, Motion in Limine to Allow Defendant to Introduce Evidence in Defense of Sexual Assault, September 20, 2006

43. Supplemental Brief in Support of Defendant's Writ of Habeas Corpus, February 15, 2012

44. Motion for Authorization to Obtain an Investigator and for Payment of Fees Incurred Herein, February 15, 2012

45. Recorder's Transcript re: Evidentiary Hearing Argument held on October 19, 2012, October 29, 2012.

46. Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), April 30, 2002

47. Instructions to the Jury, October 16, 1996

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

JAMES MONTELL CHAPPELL, Petitioner, v. TIMOTHY FILSON, Warden, Ely State Prison; ADAM LAXALT, Attorney General, State of Nevada, Defendant	Case No. C131341 Dept. No. 5 **EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS** **(POST CONVICTION)** **Exhibits 48 through 87**

48. Reporter's Transcript of Penalty Motions, January 11, 2007 (filed April 9, 2007)

49. Jury List, March 13, 2007

50. Pre-Sentence Investigation Report, 1995

51. Pre-Sentence Investigation Report, December 5, 1996

52. Special Verdicts March 21, 2007

53. Instructions to the Jury, March 21, 2007

54. Verdict Forms Counts I, II, III, October 16, 1996

55. Motion to Strike Sexual Assault Aggravator of the State's Notice of Intent to Seek the Death Penalty or in the Alternative, Motion in Limine to Allow Defendant to Introduce Evidence in Defense of Sexual Assault, September 20, 2006

43. Supplemental Brief in Support of Defendant's Writ of Habeas Corpus, February 15, 2012

44. Motion for Authorization to Obtain an Investigator and for Payment of Fees Incurred Herein, February 15, 2012

45. Recorder's Transcript re: Evidentiary Hearing Argument held on October 19, 2012, October 29, 2012.

46. Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), April 30, 2002

47. Instructions to the Jury, October 16, 1996

48. State of Nevada v. Richard Edward Powell, Case No. C148936, Eighth Judicial District Court, Verdict Forms, November 15, 2000

49. State of Nevada v. Jeremy Strohmeyer, Case No. 97-C-144577, Eighth Judicial District Court, District Court Minutes, September 8, 1998

50. State of Nevada v. Fernando Padron Rodriguez, Case No. C130763, Eighth Judicial District Court, Verdict Forms, May 7, 1996

51. State of Nevada v. Jonathan Cornelius Daniels, Case No. C126201, Eighth Judicial district Court, Verdict Forms, November 1, 1995

52. Declaration of Benjamin Dean, April 7, 2016[1]

53. Declaration of Carla Chappell, April 23, 2016

54. Declaration of Charles Dean, April 19, 2016

55. Declaration of Ernestine 'Sue' Harvey, July 2, 2016

56. Declaration of Fred Dean, June 11, 2016

57. Declaration of Georgette Sneed, May 14, 2016

58. Declaration of Harold Kuder, April 17, 2016

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59. Declaration of James Ford, May 19, 2016

60. Declaration of James Wells, January 22, 2016

61. Declaration of Joetta Ford, May 18, 2016

62. Criminal Court Minutes, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 18, 1995

63. Declaration of Michael Chappell, May 14, 2016

64. Declaration of Myra Chappell-King, April 20, 2016

65. Declaration of Phillip Underwood, April 17, 2016

66. Declaration of Rodney Axam, April 16, 2016

67. Declaration of Rose Wells-Canon, April 16, 2016

68. Declaration of Sharon Axam, April 18, 2016

69. Declaration of Sheron Barkley, April 16, 2016

70. Declaration of Terrance Wallace, May 17, 2016

71. Declaration of William Earl Bonds, May 13, 2016

72. Declaration of William Roger Moore, April 17, 2016

73. Declaration of Willie Richard Chappell, Jr., May 16, 2016

74. Declaration of Willie Richard Chappell, Sr., April 16, 2016

75. State's Exhibit No. 25, Autopsy Photo of Deborah Panos, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 10, 1996

76. State's Exhibit No. 37, Autopsy Photo of Deborah Panos, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 10, 1996

77. State's Exhibit No. 38, Autopsy Photo of Deborah Panos, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 10, 1996

78. State's Exhibit No. 39, Autopsy Photo of Deborah Panos, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 10, 1996

79. State's Exhibit No. 40, Autopsy Photo of Deborah Panos, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 10, 1996

80. State's Exhibit No. 41, Autopsy Photo of Deborah Panos, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 10, 1996

81. State's Exhibit No. 42, Autopsy Photo of Deborah Panos, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 10, 1996

82. State's Exhibit No. 43, Autopsy Photo of Deborah Panos, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 10, 1996

83. State's Exhibit No. 1, Photo of front window at crime scene, State v. Chappell, Eighth Judicial, District Court, Case No. 95-C131341, October 10, 1996

84. State's Exhibit No. 45, Autopsy Photo of Deborah Panos, State v. Chappell, Eighth Judicial, District Court, Case No. 95-C131341, October 10, 1996

85. Declaration of Dr. Lewis Etcoff, July 11, 2016

86. State's Exhibit No. 47, Autopsy Photo of Deborah Panos, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 10, 1996

87. Neuropsychological Report, Dr. Paul D. Connor, July 15, 2016

CERTIFICATE OF SERVICE

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I have mailed the foregoing documents by First-Class Mail, postage pre-paid to the following:

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

JAMES MONTELL CHAPPELL, Petitioner, v. TIMOTHY FILSON, Warden, Ely State Prison; ADAM LAXALT, Attorney General, State of Nevada, Defendant	Case No. C131341 Dept. No. 5 **EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS** **(POST CONVICTION)** **Exhibits 88 through 108**

88. Functional and Behavioral Assessment Report, Dr. Natalie Novick-Brown, August 3, 2016

89. Medical Expert Report, Dr. Julian Davies, August 5, 2016

90. Report of Neuropharmacology Opinion, Dr. Jonathan Lipman August 12, 2016

91. Juror Selection List, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, March 13, 2007

92. Juror Selection List, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 7, 1996

93. Declaration of Wilfred Gloster, Jr., July 25, 2016

94. Declaration of David M. Schieck, August 2, 2016

95. Client Interview Statement, September 8, 1995

96. Reporter's Transcript of Oral Argument, Chappell v. State of Nevada, Supreme Court of Nevada, Case No. 29884, November 12, 1997 p.m.

97. Motion for Authorization to Obtain a Sexual Assault Expert and for Payment of Fees Incurred Herein, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, February 15, 2012

98. Order To Endorse Names on Information, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, July 15, 1996

99. Order To Endorse Names on Information, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, August 22, 1996

100. Quantitative Analyses Report, Dr. Robert Thatcher, August 1, 2016

101. Order To Endorse Names on Information, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, September 4, 1996

102. Criminal Court Minutes, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, September 16, 1996

103. Juror Questionnaire, Hill, (Badge #474), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 2, 1996

104. Declaration of Lila Godard, August 5, 2016

105. Declaration of Clare McGuire, August 6, 2016

106. Motion and Notice of Motion To Endorse Names on Information, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 14, 1996

107. Psychological Evaluation, Dr. Lewis Etcoff, June 13, 1996

108. Declaration of Clark W. Patrick, August 4, 2016

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CLARK COUNTY, NEVADA

* * * * *

JAMES MONTELL CHAPPELL,

Petitioner,

v.

TIMOTHY FILSON, Warden, Ely State Prison; ADAM LAXALT, Attorney General,
State of Nevada,

Defendant

Case No. C131341

Dept. No. 5

EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

(POST CONVICTION)

Exhibits 109 through 116

109. Reporter's Transcript of Proceedings of Evidentiary Hearing, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, September 13, 2002

110. Appellant's Opening Brief, Chappell v. State of Nevada, Supreme Court of Nevada, Case No. 29884, June 13, 1997

111. Reporter's Transcript of Proceedings, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 7, 1996 a.m.

112. Juror Questionnaire, Larsen (Badge #442), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 2, 1996

113. Juror Questionnaire, Lucido (Badge #432), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 2, 1996

114. Juror Questionnaire, Terry (Badge #455), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 2, 1996

115. Juror Questionnaire, Parr (Badge #405), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 2, 1996

116. Juror Questionnaire, Fryt (Badge #480), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 2, 1996

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CLARK COUNTY, NEVADA

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TIMOTHY FILSON, Warden, Ely State Prison; ADAM LAXALT, Attorney General,
State of Nevada,

Defendant

Case No. C131341

Dept. No. 5

EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

(POST CONVICTION)

Exhibits 117 through 128

117. Juror Questionnaire, Ewell (Badge #435), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 2, 1996

118. Declaration of Howard Brooks, August 4, 2016

119. Juror Questionnaire, Fittro (Badge #461), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 2, 1996

120. Declaration of Willard Ewing, August 5, 2016

121. Juror Questionnaire, Harmon (Badge #458), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 2, 1996

122. Juror Questionnaire, Sprell (Badge #402), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 2, 1996

123. Juror Questionnaire, Gritis (Badge #406), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 2, 1996

124. Juror Questionnaire, Bennett (Badge #479), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 2, 1996

125. Declaration of Tammy R. Smith, August 11, 2016

126. Motion and Notice of Motion To Endorse Names on Information, State v. Chappell, Eighth Judicial District Court Case No. 95-C131341, July 9, 1996

127. Preliminary Hearing Reporter's Transcript of Proceedings, State v. Chappell, Justice Court of Las Vegas Township, Case No. 95-F08114X, October 3, 1995

128. Report of Matthew Mendel, Ph.D., P.C., June 27, 2016

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CLARK COUNTY, NEVADA

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JAMES MONTELL CHAPPELL, Petitioner, v. TIMOTHY FILSON, Warden, Ely State Prison; ADAM LAXALT, Attorney General, State of Nevada, Defendant	Case No. C131341 Dept. No. 5 **EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS** **(POST CONVICTION)** **Exhibits 129 through 130**

129. Reporter's Transcript of Proceedings, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 7, 1996 p.m.

130. Reporter's Transcript of Proceedings, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 8, 1996 a.m.

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JAMES MONTELL CHAPPELL, Petitioner, v. TIMOTHY FILSON, Warden, Ely State Prison; ADAM LAXALT, Attorney General, State of Nevada, Defendant	Case No. C131341 Dept. No. 5 **EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS** **(POST CONVICTION)** **Exhibits 131 through 133**

131. Reporter's Transcript of Proceedings, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 8, 1996 p.m.

132. Reporter's Transcript of Proceedings, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 10, 1996 a.m.

133. Reporter's Transcript of Proceedings, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 10, 1996 p.m.

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CLARK COUNTY, NEVADA

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JAMES MONTELL CHAPPELL, Petitioner, v. TIMOTHY FILSON, Warden, Ely State Prison; ADAM LAXALT, Attorney General, State of Nevada, Defendant	Case No. C131341 Dept. No. 5 **EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS** **(POST CONVICTION)** **Exhibits 134 through 136**

134. Reporter's Transcript of Proceedings, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 11, 1996 a.m.

135. Reporter's Transcript of Proceedings, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 11, 1996 p.m.

136. Reporter's Transcript of Proceedings, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 14, 1996 a.m.

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JAMES MONTELL CHAPPELL, Petitioner, v. TIMOTHY FILSON, Warden, Ely State Prison; ADAM LAXALT, Attorney General, State of Nevada, Defendant	Case No. C131341 Dept. No. 5 **EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS** **(POST CONVICTION)** **Exhibits 137 through 139**

137. Reporter's Transcript of Proceedings, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 14, 1996 p.m.

138. Reporter's Transcript of Proceedings, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341 (Penalty Phase), October 21, 1996 a.m.

139. Reporter's Transcript of Proceedings, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341 (Penalty Phase), October 21, 1996 p.m.

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State of Nevada,

Defendant

Case No. C131341

Dept. No. 5

EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

(POST CONVICTION)

Exhibits 140 through 143

140. Reporter's Transcript of Proceedings, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341 (Penalty Phase), October 22, 1996 a.m.

141. Criminal Complaint, State v. Chappell, Justice Court of Las Vegas Township, Case No. 95F08114X, September 8, 1995

142. Reporter's Transcript of Proceedings, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 15, 1996

143. Reporter's Transcript of Proceedings, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 16, 1996

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JAMES MONTELL CHAPPELL, Petitioner, v. TIMOTHY FILSON, Warden, Ely State Prison; ADAM LAXALT, Attorney General, State of Nevada, Defendant	Case No. C131341 Dept. No. 5 **EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS** **(POST CONVICTION)** **Exhibits 144 through 162**

144. City of Las Vegas, Municipal Court, Notice of Court Dates for for James Montel Chappell, Case Nos. 0264625 A/B, 0267095A

145. Motion for Authorization to Obtain Expert Services and for Payment of Fees Incurred Herein, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, February 15, 2012

146. Reporter's Transcript of Proceedings, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341 October 24, 1996

147. Notice of Appeal, State v. Chappell, Eighth Judicial District

Court, Case No. 95-C131341, January 17, 1997

148. Presentence Report, Division of Parole and Probation, April 18, 1995

149. Notice of Filing of Petition for Writ of Certiorari, Chappell v. State, Supreme Court of Nevada, Case No. 49478, March 1, 2010

150. Order re: Staying the Issuance of the Remittitur, Chappell v. State, Supreme Court of Nevada, Case No. 29884 October 26, 1999

151. Notice of Denial of Petition for Writ of Certiorari, Chappell v. State, United State Supreme Court, Case No. 09-9418, May 11, 2010

152. Notice of Appeal, State v. Chappell, Eighth Judicial District Court, Case No. C131341, June 6, 2007

153. Notice of Appeal, State v. Chappell, Eighth Judicial District Court, Case No. C131341, June 18, 2004

154. Order Scheduling Oral Argument, Chappell v. State, Supreme Court of Nevada, December 22, 2005

155. Reporter's Transcript of Proceedings, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341 Penalty Hearing, March 12, 2007

156. Appellant's Opening Brief, Chappell v. State of Nevada, Supreme Court of Nevada, Case No. 49478, June 9, 2008

157. Petition for Rehearing, Chappell v. State, Supreme Court of Nevada, Case No. 49478, October 28, 2009

158. Notice of Filing of Petition for a Writ of Certiorari, Chappell v. State, Supreme Court of Nevada, Case No. 49478, March 1, 2010

159. Remittitur, Chappell v. State, Supreme Court of Nevada, Case No. 49478, June 8, 2010

160. Petition for Writ of Habeas Corpus, Chappell v. State, Eighth Judicial District Court, Case No. 95-C131341, June 22, 2010

161. Presentence Report, Division of Parole and Probation, James M. Chappell, May 2, 2007

162. Juror Questionnaire, Ochoa (Badge #467), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 2, 1996

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CLARK COUNTY, NEVADA

* * * * *

JAMES MONTELL CHAPPELL, Petitioner, v. TIMOTHY FILSON, Warden, Ely State Prison; ADAM LAXALT, Attorney General, State of Nevada, Defendant	Case No. C131341 Dept. No. 5 **EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS** **(POST CONVICTION)** **Exhibits 163 through 170**

163. Appellant's Opening Brief, Chappell v. State, Supreme Court of Nevada, Case No. 61967, January 8, 2014

164. Petition for Rehearing, Chappell v. State, Supreme Court of Nevada, Case No. 61967, July 6, 2015

165. Remittitur, Chappell v. State, Supreme Court of Nevada, Case No. 61967, November 17, 2015

166. Declaration of Rosemary Pacheco, August 9, 2016

167. Declaration of Dina Richardson, August 9, 2016

168. Declaration of Angela Mitchell, August 9, 2016

169. Reporter's Transcript of Proceedings, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, March 19, 2007

170. Reporter's Transcript of Proceedings, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341 March 14, 2007, a.m.

CERTIFICATE OF SERVICE

In accordance with the Rules of Civil Procedure, the undersigned hereby certifies that on this 16th day of November, 2016, a true and correct copy of the foregoing **EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS** was filed electronically with the Eighth Judicial District Court.

I have mailed the foregoing documents by First-Class Mail, postage pre-paid to the following:

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CLARK COUNTY, NEVADA

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JAMES MONTELL CHAPPELL, Petitioner, v. TIMOTHY FILSON, Warden, Ely State Prison; ADAM LAXALT, Attorney General, State of Nevada, Defendant	Case No. C131341 Dept. No. 5 **EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS** **(POST CONVICTION)** **Exhibits 171 through 173**

171. Reporter's Transcript of Proceedings, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341 March 14, 2007, p.m.

172. Reporter's Transcript of Proceedings, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341 March 15, 2007, a.m.

173. Reporter's Transcript of Proceedings, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341 March 15, 2007, p.m.

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174. Reporter's Transcript of Proceedings, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341 March 16, 2007, a.m.

175. Reporter's Transcript of Proceedings, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, March 16, 2007, p.m.

176. Reporter's Transcript of Proceedings, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, March 20, 2007

177. Defendant's Offer to Stipulate to Certain Facts, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, September 10, 1996

178. Supplemental Psychological Evaluation, Dr. Lewis Etcoff, September 28, 1996

179. Order to Transport, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, April 26, 1996

180. Petition for Rehearing, Chappell v. State, Supreme Court of Nevada, Case No. 29884, January 20, 1999

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JAMES MONTELL CHAPPELL, Petitioner, v. TIMOTHY FILSON, Warden, Ely State Prison; ADAM LAXALT, Attorney General, State of Nevada, Defendant	Case No. C131341 Dept. No. 5 **EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS** **(POST CONVICTION)** **Exhibits 181 through 198**

181. Juvenile Records, State of Michigan, James M. Chappell

182. School Records, Lansing School District, James M. Chappell

183. Juror Questionnaire, Perez (Badge #50001), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, March 7, 2007

184. Reporter's Transcript of Proceedings, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, March 20, 2007

185. Juror Questionnaire, Brady (Badge #5004), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, March 7, 2007

186. Juror Questionnaire, Hibbard (Badge #50015), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, March 7, 2007

187. Juror Questionnaire, Bailey (Badge #50015), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, March 7, 2007

188. Juror Questionnaire, Mills (Badge #50016), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341 March 7, 2007

189. Juror Questionnaire, Smith (Badge #50045), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, March 7, 2007

190. Juror Questionnaire, Schechter (Badge #50087), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, March 7, 2007

191. Juror Questionnaire, Kitchen (Badge #50096), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, March 7, 2007

192. Juror Questionnaire, Morin (Badge #50050), State v. Chappell, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, March 7, 2007

193. Juror Questionnaire, Kaleikini-Johnson (Badge #50007), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, March 7, 2007

194. Juror Questionnaire, Ramirez (Badge #50034), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, March 7, 2007

195. Juror Questionnaire, Martino (Badge #50038), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, March 7, 2007

196. Juror Questionnaire, Rius (Badge #50081), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, March 7, 2007

197. Juror Questionnaire, Bundren (Badge #50039), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, March 7, 2007

198. Juror Questionnaire, White (Badge #50088), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, March 7, 2007

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JAMES MONTELL CHAPPELL, Petitioner, v. TIMOTHY FILSON, Warden, Ely State Prison; ADAM LAXALT, Attorney General, State of Nevada, Defendant	Case No. C131341 Dept. No. 5 **EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS** **(POST CONVICTION)** **Exhibit 199 through 232**

199. Juror Questionnaire, Forbes (Badge #50074), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, March 7, 2007

200. Juror Questionnaire, Templeton (Badge #50077), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, March 7, 2007

201. Juror Questionnaire, Button (Badge #50088), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, March 7, 2007

202. Juror Questionnaire, Feuerhammer (Badge #50073), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, March 7, 2007

203. Juror Questionnaire, Theus (Badge #50035), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, March 7, 2007

204. Juror Questionnaire, Scott (Badge #50078), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, March 7, 2007

205. Juror Questionnaire, Staley (Badge #50089), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, March 7, 2007

206. Juror Questionnaire, Salak (Badge #50055), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, March 7, 2007

207. Juror Questionnaire, Henck (Badge #50020), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, March 7, 2007

208. Juror Questionnaire, Smith (Badge #50022), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, March 7, 2007

209. Juror Questionnaire, Cardillo (Badge #50026), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, March 7, 2007

210. Juror Questionnaire, Noahr (Badge #50036), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, March 7, 2007

211. Declaration of Christopher Milan, August 12, 2016

212. Juror Questionnaire, Yates (Badge #455), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 2, 1996

213. Special Verdict, State v. Xiao Ye Bai, Eighth Judicial District Court, Case No. 09C259754-2, December 3, 2012

214. Special Verdict, State v. Victor Orlando Cruz-Garcia, Eighth

Judicial District Court, Case No. 08C240509, June 24, 2012

215. Special Verdict, State v. Marcus Washington, Eighth Judicial District Court, Case No. C-11-275618, March 30, 2012

216. Special Verdict, State v. Lashana Monique Haywood and Charles Pilgrim Nelson, Eighth Judicial District Court, Case No. C255413, May 11, 2011

217. Verdict and Special Verdict, State v. Rafael Castillo-Sanchez, Eighth Judicial District Court, Case No. C217791, July 2, 2010

218. Verdict and Special Verdict, State v. Eugene Hollis Nunnery. Eighth Judicial District Court, Case No. C227587, May 11, 2010

219. Verdict and Special Verdict, State v. Bryan Wayne Crawley, Eighth Judicial District Court, Case No. C233433, December 9, 2008

220. Verdict and Special Verdict, State v. Marc Anthony Colon, Eighth Judicial District Court, Case No. C220720, October 10, 2008

221. Verdict and Special Verdict, State v. Sterling Beatty, Eighth Judicial District Court, Case No. C230625, February 12, 2008

222. Verdict and Special Verdict, State v. John Douglas Chartier, Eighth Judicial District Court, Case No. C212954, June 20, 2006

223. Verdict and Special Verdict, State v. David Lee Wilcox, Eighth Judicial District Court, Case No. C212954, June 20, 2006

224. Verdict and Special Verdict, State v. James A. Scholl, Eighth Judicial District Court, Case No. C204775, February 17, 2006

225. Verdict and Special Verdict, State v. Anthony Dwayne Prentice, Eighth Judicial District Court, Case No. C187947, March 3, 2004

226. Verdict and Special Verdict, State v. Pascual Lozano, Eighth Judicial District Court, Case No. 188067, September 15, 2006

227. Verdict and Special Verdict, State v. Robert Lee Carter, Eighth Judicial District Court, Case No. C154836, April 25, 2003

228. Verdict and Special Verdict, State v. Mack C. Mason, Eighth Judicial District Court, Case No. C161426, March 6, 2001

229. Verdict and Special Verdict, State v. Richard Edward Powell,

Eighth Judicial District Court, Case No. C148936, November 15, 2000

230. Verdict and Special Verdict, State v. Kenshawn James Maxey, Eighth Judicial District Court, Case No. C151122, February 8, 2000

231. Verdict and Special Verdict, State v. Ronald Ducksworth, Jr., Eighth Judicial District Court, Case No. C108501, October 28, 1993

232. Verdict and Special Verdict, State v. Fernando Padron Rodriguez, Eighth Judicial District Court, Case No. C130763, May 7, 1996

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JAMES MONTELL CHAPPELL, Petitioner, v. TIMOTHY FILSON, Warden, Ely State Prison; ADAM LAXALT, Attorney General, State of Nevada, Defendant	Case No. C131341 Dept. No. 5 **EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS** **(POST CONVICTION)** **Exhibits 233 through 240**

233. Declaration of Mark J.S. Heath, M.D., May 16, 2006

234. Verdict and Special Verdict, State v. Carl Lee Martin, Eighth Judicial District Court, Case No. C108501

235. Jury Composition Preliminary Study, Eighth Judicial District Court Clark County, Nevada

236. Report of the Supreme Court of Nevada, Jury Improvement Commission, October, 2002

237. Reporter's Transcript of Proceedings, State v. Jimenez, Eighth Judicial District Court, Case No. C77949 & C77955, April 30, 1987

238. Reporter's Transcript of Proceedings, State v. Parker Eighth Judicial District Court, Case No. C92278, February 8, 1991 a.m.

239. Reporter's Transcript of Proceedings, Penalty Phase-Three Judge Panel, State v. Riker, Eighth Judicial District Court, Case No. C107751, February 23, 1994

240. Reporter's Transcript of Proceedings on, State v. Walker, Eighth Judicial District Court, Case No. C107751, June 16, 1994

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241. Juror Questionnaire, Taylor (Badge #050009), State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, March 7, 2007

242. Excerpt of Testimony of Terry Cook, Reporter's Transcript of Proceedings State v. Bolin, Eighth Judicial District Court, Case No. C130899, May 30, 1996 p.m.

243. Handwritten Notes of Terry Cook, Las Vegas Metropolitan Police Department, Richard Allan Walker, Event No. 920414-0169, April 22, 1992

244. Memorandum from Michael O'Callaghan to Terry Cook, Las Vegas Metropolitan Police Department, Richard Allan Walker, Event No. 920414-0169, January 7, 2002

245. Excerpt of Testimony of Terry Cook, Reporter's Transcript of Proceedings, State v. Jiminez, Eighth Judicial District Court, Case No. C79955, March 2, 1988

246. Newspaper Article, "Las Vegas Police Reveal DNA Error Put Wrong Man in Prison," Las Vegas Review Journal, July 7, 2011

247. Respondent's Answering Brief on Appeal and Opening Brief on Cross-Appeal, Cross-Appeal from a Post-Conviction Order Granting A New Penalty Hearing, Chappell v. State of Nevada, Supreme Court of Nevada, Case No. 43493, June 2, 2005

248. Nevada Indigent Defense, Standards of Performance, Capital Case Representation

249. Amended Order Appointing Counsel, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, November 29, 1999

250. Ex Parte Motion for Interim Payment of Excess Attorney's Fees in Post-Conviction Proceedings, Stave v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, July 13, 2000

251. Travel Request and Authorization for Dr. William Danton, March 9, 2007

252. Billing Statement, Dr. Lewis Etcoff, March 16, 2007

253. Death certificate, Shirley Axam-Chappell, August 23, 1973

254. Reporter's Transcript of Proceedings, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, April 2, 2004

255. State's Trial Exhibit List, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, March 12, 2007

256. Report of Laboratory Examination, Cellmark Diagnostics, June 28, 1996

257. Confidential Execution Manual, Procedures for Executing the Death Penalty, Nevada State Prison, February 2004

258. The American Board of Anesthesiology, Inc., Anesthesiologists and Capital Punishment; American Medical Associations, AMA Policy E-2.06 Capital Punishment

259. Opposition to Renewed Motion for Leave to Conduct Discovery, Donald Sherman v. Rene Baker, et.al., United States District Court, District of Nevada, Case No. 2:02-cv-1349-LRH-LRL, January 26, 2012

260. Reporter's Transcript of Proceedings, State of Nevada v. Williams Eighth Judicial District Court, Case No. C124422, May 8, 2013

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261. Reporter's Transcript of Proceedings, State v. Floyd, Eighth Judicial District Court, Case No. C159897, February 22, 2008

262. Petition for Writ of Habeas Corpus (Post Conviction), James Montell Chappell v. E.K. McDaniel, Warden, Eighth Judicial Court, Case No. 95-C131341, October 19, 1999

263. Remittitur, Chappell v. State, Supreme Court of Nevada, Case No. 43493, May 2, 2006

264. Notice of Witnesses, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, February 28, 2007

265. Excerpt from Dr. Lewis Etcoff's Life History Questionnaire June 10, 1996

266. Las Vegas Metropolitan Police Department Officer's Report, James M. Chappell, Event No. 950831-1351

267. Reporters Transcript of Proceedings, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 23, 1996

268. Jury Instructions, State v. Chappell, Eighth Judicial District Court, Case No. 95-C131341, October 24, 1996

269. Order, Brown v. Williams, 2:10-cv-00407, June 18, 2011.

269. Order, Johnson v. Neven, 2:08-cv-01363, January 29, 2010.

271. Order, Snow v. McDaniel, 2:03-cv-0292, ECF No. 67, April 22, 2005

272. Order, McNelton v. McDaniel, 2:00-cv-S-00-284, ECF No. 39 September 30, 2002

273. Court Minutes, State v. Chappell, Eighth Judicial District Court, Case No. C131341, September 30, 1996

274. Declaration of Howard Brooks, July 30, 1996

275. State v. Chappell, Answer to Motion to Compel Discovery, Eighth Judicial District Court, Case No. C131341, September 11, 1996

276. Declaration of Tina L. Williams, June 7, 2016

277. Trial transcript, pp. 86-88, State v. Chappell, Eighth Judicial District Court, Case No. C131341, October 15, 1996 a.m.

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278. Trial transcript, pg. 92, State v. Chappell, Eighth Judicial District Court, Case No. C131341, October 15, 1996 a.m.

279. Trial transcript, pg. 158, State v. Chappell, Eighth Judicial District Court, Case No. C131341, October 15, 1996 a.m.

280. Trial transcript. pg. 36-38, State v. Chappell, Eighth Judicial District Court, Case No. C131341, October 23, 1996 a.m.

281. Trial transcript, pg. 45-46, State v. Chappell, Eighth Judicial District Court, Case No. C131341, October 23, 1996 a.m.

282. Trial transcript, pg. 49, State v. Chappell, Eighth Judicial District Court, Case No. C131341, October 23, 1996 a.m.

283. Las Vegas Metropolitan Police Department, Evidence Impound Report, August 31, 1995

284. Trial transcript, pp. 98-99, State v. Chappell, Eighth Judicial District Court, Case No. C131341, October 14, 1996 p.m.

285. Subpoena Duces Tecum, LVMPD Evidence Vault

286. Judgment of Conviction (Plea), State v. Turner, Eighth Judicial District Court, Case No. C138219B, May 13, 1997

287. Sentencing Minutes, State v. Turner, Eighth Judicial District Court, Case No. C138219B, April 30, 1997

288. Minutes, State v. Turner, Eighth Judicial District Court, Case No. C138219B, November 20, 1996

289. Hearing Transcript, pp. 14-16, State v. Chappell, Eighth Judicial District Court, Case No. C131341, September 13, 2002

290. Letter from Brad Levenson to Steve Owens, re: Request to view District Attorney file pertaining to James Chappell, April 6, 2016

291. Letter from Steve Owens to Brad Levenson, Denying request to view District Attorney file pertaining to James Chappell, April 8, 2016

292. Letter from Brad Levenson to Steve Owens, Request to view District Attorney file pertaining to Deborah Turner, May 24, 2016

293. Letter from Steve Owen to Brad Levenson, Denying request to view District Attorney file pertaining to Deborah Turner, May 24, 2016

294. Subpoena Duces Tecum, Clark County District Attorney, James Chappell

295. Subpoena Duces Tecum, Clark County District Attorney, Deborah Turner

296. Trial transcript, pp. 48-50, State v. Chappell, Eighth Judicial District Court, Case No. C131341, October 14, 1996 p.m.

297. Trial transcript, p. 69, State v. Chappell, Eighth Judicial District Court, Case No. C131341, March 20, 2007

298. Trial transcript, pp. 32-54, State v. Chappell, Eighth Judicial District Court, Case No. C131341, October 14, 1996 a.m.

299. Letter from Tina Williams to Cellmark Diagnostics re: Requests for records, May 3, 2016

300. Email to Tina Williams from Joan Gulliksen, Customer Liaison, Bode Cellmark Forensics, Denying request for records and requesting a subpoena from LVMPD Crime Lab, May 20, 2016

301. Records request refusals from LVMPD Criminalistics Bureau, Patrol Division, Secret Witness and Homicide Section

302. Subpoena Duces Tecum, Cellmark

303. Order, Nika v. Baker, 3:09-cv-178, ECF No. 14, May 15, 2009

304. Order, Nika v. Baker, 3:09-cv-178, ECF No. 15, August 21, 2009

305. Order, Greene v. Baker, 2:07-cv-304, ECF No. 8, April 12, 2007

306. Order, Greene v. Baker, 2:07-cv-304, ECF No. 10, August 3, 2007

307. Trial transcript, p. 23, State v. Chappell, Eighth Judicial District Court, Case No. C131341, October 11, 1996 a.m.

308. Proposed Order for Inspection of Contents of Evidence Vault, Chappell v. Baker, 2:16-cv-645

309. Amended Subpoena Duces Tecum, Clark County District Attorney, James Chappell

310. Information, State v. Turner (D.), Eighth Judicial District Court, Case No. C138219, September 13, 1996

311. Guilty Plea Agreement, State v. Turner (D.), Eighth Judicial District Court, Case No. C138219B, September 16, 1996

312. Register of Actions, State v. Turner (D.), Eighth Judicial District Court, Case No. 96C138219-2, April 30, 1997

313. Minutes, September 16, 1996, September 23, 2996, September 30, 1996, October 2, 1996, October 7, 1996, November 13, 1996, February 24, 1997, March 5, 1997, April 23, 1997, April 30, 1997, State v. Turner (D.), Eighth Judicial District Court, Case No. C138219C

314. Minutes, September 16, 1996, September 23, 1996, September 30, 1996, October 2, 1996, November 15, 1996, January 3, 1997, February 19, 1997, April 16, 1997, April 23, 1997, April 30, 1997, State v. Turner (T.), Eighth Judicial District Court, Case No. C138219C

315. Witness payment vouchers, Office of the District Attorney, Deborah Ann Turner, October 3, 1995, October 10-11, 1996

316. Trial transcript, pp. 86, 156-158, State v. Chappell, Eighth Judicial District Court, Case No. C131341, October 15, 1996 a.m.

317. Witness payment vouchers, Office of the District Attorney, LaDonna Jackson, October 3, 1995, October 9-11, 1996

318. Trial transcript, pp. 72, 136-38, State v. Chappell, Eighth Judicial District Court, Case No. C131341, March 20, 2007

319. Inmate Profile, Arizona Department of Corrections, Michael Pollard, June 16, 2016

320. Public Access Case Lookup, Supreme Court of Arizona, Michael Pollard, June 16, 2016

321. Findings of Fact, Conclusions of Law and Order, State v. Mulder, Eighth Judicial District Court, Case No. 96C138790, November 13, 2015

322. Findings of Fact, Conclusions of Law and Order, State v. Mulder, Eighth Judicial District Court, Case No. 96C138790, March 11, 2009

323. Findings of Fact, Conclusions of Law and Order, State v. Mulder, Eighth Judicial District Court, Case No. 96C138790, April 8, 2008

324. Trial transcript, pp. 54-55, State v. Chappell, Eighth Judicial District Court, Case No. C131341, October 14, 1996 p.m.

325. Trial transcript, pp. 121-23, State v. Chappell, Eighth Judicial District Court, Case No. C131341, October 10, 1996 p.m.

326. Declaration of Michael Pollard, September 14, 2016

327. Declaration of Madge Cage, September 24, 2016

328. Declaration of Helen Hosey – October 27, 2016

329. Declaration of Shirley Sorrell, September 23, 2016

330. Declaration of Louise Underwood, September 22, 2016

331. Declaration of Verlean Townsend, September 24, 2016

332. Declaration of Bret Robello, September 29, 2016

333. Declaration of Dennis Reefer, October 20, 2016

334. Declaration of Maribel Yanez, November 4, 2016

CERTIFICATE OF SERVICE

In accordance with the Rules of Civil Procedure, the undersigned hereby certifies that on this 16th day of November, 2016, a true and correct copy of the foregoing **EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS** was filed electronically with the Eighth Judicial District Court.

I have mailed the foregoing documents by First-Class Mail, postage pre-paid to the following:

Matthew S. Johnson
Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701

Timothy Filson
Warden, Ely State Prison
P.O. Box 1989
Ely, Nevada 89301

Steven S. Owens
Chief Deputy District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101

/s/ Stephanie S. Young

An Employee of the
Federal Public Defender
District of Nevada

EXHIBIT 1

52338

FILED

DEC 31 4 24 PM '96

LAURIE SIMMONS
CLERK

JOC
STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JAMES MONTELL CHAPPELL,
#1212860

Defendant.

Case No. C131341
Dept. No. VII
Docket P

JUDGMENT OF CONVICTION

WHEREAS, on the 18th day of October, 1995, Defendant, JAMES MONTELL CHAPPELL entered a plea of Not Guilty to the crimes of COUNT I - BURGLARY (Felony); COUNT II ROBBERY WITH USE OF A DEADLY WEAPON (Felony) and COUNT III - MURDER WITH USI OF A DEADLY WEAPON (Felony), NRS 205.060, 200.380, 193.165, 200.010, 200.030, 193.165; an

WHEREAS, the Defendant JAMES MONTELL CHAPPELL, was tried before a Jury and th Defendant was found guilty of the crimes of COUNT I - BURGLARY (Felony); COUNT II ROBBERY WITH USE OF A DEADLY WEAPON (Felony) and COUNT III - MURDER OF TH FIRST DEGREE WITH USE OF A DEADLY WEAPON (Felony), in violation of NRS 205.06(200.380, 193.165, 200.010, 200.030, 193.165, and the Jury verdict was returned on or about the 16t day of October, 1996. Thereafter, the same trial jury, deliberating in the penalty phase of said trial, i accordance with the provisions of NRS 175.552 and 175.554, found that there were four (4) aggravatin circumstances in connection with the commission of said crime, to-wit:

1. The murder was committed while the Defendant was engaged in the commission of or a

attempt to commit any Burglary and/or Home Invasion.

2. The murder was committed while the Defendant was engaged in the commission of or ar attempt to commit any Robbery.

3. The murder was committed while the Defendant was engaged in the commission of or ar attempt to commit any Sexual Assault.

4. The murder involved torture or depravity of mind.

That on or about the 24th day of October, 1996, the Jury unanimously found, beyond a reasonabl doubt, that there were no mitigating circumstances sufficient to outweigh the aggravating circumstanc or circumstances, and determined that the Defendant's punishment should be Death as to COUNT III MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON in the Nevada Stat Prison located at or near Carson City, State of Nevada.

WHEREAS, thereafter, on the 30th day of December, 1996, the Defendant being present in cour with his counsel, HOWARD BROOKS, Deputy Public Defender, and JOHN P. LUKENS, Chief Deput District Attorney, also being present; the above entitled Court did adjudge Defendant guilty thereof b reason of said trial and verdict and sentenced Defendant to the following:

COUNT I - a maximum term of ONE HUNDRED TWENTY (120) months and a minimum terr of FORTY-EIGHT (48) months in the Nevada Department of Prisons for BURGLARY;

COUNT II - a maximum term of ONE HUNDRED EIGHTY (180) months and a minimum ter of SEVENTY-TWO (72) months in the Nevada Department of Prisons for ROBBERY plus consecutive maximum term of ONE HUNDRED EIGHTY (180) months and a minimum term c SEVENTY-TWO (72) months in the Nevada Department of Prisons for USE OF A DEADL WEAPON, said sentence to run consecutive to Count I;

COUNT III - DEATH for MURDER OF THE FIRST DEGREE WITH USE OF A DEADL WEAPON, said sentence to run consecutive to Counts I and II.

Credit for time served 192 days. $25.00 Administrative Assessment Fee.

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THEREFORE, the Clerk of the above entitled Court is hereby directed to enter this Judgmen of Conviction as part of the record in the above entitled matter.

DATED this 31 day of December, 1996, in the City of Las Vegas, County of Clark, State o Nevada.

DISTRICT JUDGE

DA#95-131341X/kjh
LVMPD DR#9508311351
1° MURDER W/WPN - F

EXHIBIT 2

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES MONTELL CHAPPELL,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 29884

FILED

DEC 30 1998

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

Appeal from a judgment of conviction pursuant to a jury verdict of one count each of burglary, robbery with the use of a deadly weapon, and first-degree murder with the use of a deadly weapon, and from a sentence of death. Eighth Judicial District Court, Clark County; A. William Maupin, Judge.

Affirmed.

Morgan D. Harris, Public Defender, Michael L. Miller, Deputy Public Defender, Howard S. Brooks, Deputy Public Defender, Clark County,
for Appellant.

Frankie Sue Del Papa, Attorney General, Carson City; Stewart L. Bell, District Attorney, James Tufteland, Chief Deputy District Attorney, Abbi Silver, Deputy District Attorney, Clark County,
for Respondent.

O P I N I O N

PER CURIAM:

On the morning of August 31, 1995, James Montell Chappell was mistakenly released from prison in Las Vegas where he had been serving time since June 1995 for domestic battery. Upon his release, Chappell went to the Ballerina Mobile Home Park in Las Vegas where his ex-girlfriend, Deborah Panos, lived with their three children. Chappell entered Panos' trailer by climbing through the window. Panos was home alone, and she and Chappell engaged in sexual intercourse. Sometime later that morning, Chappell repeatedly stabbed Panos with a kitchen knife, killing her. Chappell then left the

trailer park in Panos' car and drove to a nearby housing complex.

The State filed an information on October 11, 1995, charging Chappell with one count of burglary, one count of robbery with the use of a deadly weapon, and one count of murder with the use of a deadly weapon. On November 8, 1995, the State filed a notice of intent to seek the death penalty. The notice listed four aggravating circumstances: (1) the murder was committed during the commission of or an attempt to commit any robbery; (2) the murder was committed during the commission of or an attempt to commit any burglary and/or home invasion; (3) the murder was committed during the commission of or an attempt to commit any sexual assault; and (4) the murder involved torture or depravity of mind.

Prior to trial, Chappell offered to stipulate that he (1) entered Panos' trailer home through a window, (2) engaged in sexual intercourse with Panos, (3) caused Panos' death by stabbing her with a kitchen knife, and (4) was jealous of Panos giving and receiving attention from other men. The State accepted the stipulations, and the case proceeded to trial on October 7, 1996.

Chappell took the witness stand on his own behalf and testified that he considered the trailer to be his home and that he had entered through the trailer's window because he had lost his key and did not know that Panos was at home. He testified that Panos greeted him as he entered the trailer and that they had consensual sexual intercourse. Chappell testified that he left with Panos to pick up their children from day care and discovered in the car a love letter addressed to Panos. Chappell, enraged, dragged Panos back into the trailer where he stabbed her to death. Chappell argued that his actions were the result of a jealous rage.

The jury convicted Chappell of all charges. Following a penalty hearing, the jury returned a sentence of death on the murder charge, finding two mitigating circumstances -- murder committed while Chappell was under the influence of extreme mental or emotional disturbance and "any other mitigating circumstances" -- and all four alleged aggravating circumstances. The district court sentenced Chappell to a minimum of forty-eight months and a maximum of 120 months for the burglary; a minimum of seventy-two months and a maximum of 180 months for robbery, plus an equal and consecutive sentence for the use of a deadly weapon; and death for the count of murder in the first degree with the use of a deadly weapon. The district court ordered all counts to run consecutively. Chappell timely appealed his conviction and sentence of death.

DISCUSSION

Admission of evidence of prior bad acts

Chappell contends that the district court abused its discretion by admitting evidence of prior acts of theft without holding a Petrocelli[1] hearing. During the State's case-in-chief, LaDonna Jackson testified that Chappell was known as a "regulator"[2] and that, on one occasion, he sold his children's diapers for drug money.

Ordinarily, in order for this court to review a district court's decision to admit evidence of prior bad acts, a Petrocelli hearing must have been conducted on the record. Armstrong v. State, 110 Nev. 1322, 1324, 885 P.2d 600, 600-01

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[1]See Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

[2]Jackson testified that a "regulator" is a person who steals items from a store and then resells those items for money or drugs.

(1994). However, where the district court fails to hold a proper hearing on the record, automatic reversal is not mandated where "(1) the record is sufficient for this court to determine that the evidence is admissible under the test for admissibility of bad acts evidence . . . ; or (2) where the results would have been the same if the trial court had not admitted the evidence." Qualls v. State, 114 Nev. ____, ____, 961 P.2d 765, 767 (1998).

The district court in the instant case did not hold a Petrocelli hearing either on or off the record. Under the circumstances, we conclude that the record is not sufficient for this court to determine whether the evidence was admissible under the test for admissibility of prior bad acts evidence. In light of the overwhelming evidence of guilt in this case, however, we conclude that had the district court not admitted the evidence, the results would have been the same. See Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985) (when deciding whether an error is harmless or prejudicial, the following considerations are relevant: "whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged"); see also Bradley v. State, 109 Nev. 1090, 1093, 864 P.2d 1272, 1274 (1993). Accordingly, we hold that the district court's failure to conduct a Petrocelli hearing before admitting this evidence amounted to harmless error, and does not, therefore, require reversal.

Issues arising out of alleged aggravating circumstances

Chappell argues that insufficient evidence exists to support the jury's finding of the four alleged aggravating circumstances. The first three aggravating circumstances depend on whether Chappell killed Panos during the commission

of or an attempt to commit robbery, burglary and/or home invasion, and sexual assault. Chappell's challenge to each of these aggravators comes down to a challenge of the sufficiency of the evidence supporting each of the "aggravating" offenses.

On appeal, the standard of review for sufficiency of the evidence is "whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt." Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992). Where there is sufficient evidence in the record to support the verdict, it will not be overturned on appeal. Id. We conclude that there is sufficient evidence to support the aggravating circumstances for robbery, burglary and sexual assault. We further conclude that the evidence does not support the aggravating circumstance of torture or depravity of mind.

Robbery

Chappell contends that the evidence shows that he took Panos' car as an afterthought and, therefore, cannot be guilty of robbery. The State argues that a rational trier of fact could find that Chappell took Panos' social security card and car through the use of actual violence or the threat of violence. Under Nevada's criminal law, robbery 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 or fear is used to:
>
> (a) Obtain or retain possession of the property;
>
> (b) Prevent or overcome resistance to the taking; or
>
> (c) Facilitate escape.
>
> The degree of force used is immaterial if it is used to compel acquiescence to the taking of or escaping with the property. A taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of

> the person from whom taken, such knowledge was prevented by the use of force or fear.

The statute does not require that the force or violence be committed with the specific intent to commit robbery.

This court has held that in robbery cases it is irrelevant when the intent to steal the property is formed. In Norman v. Sheriff, 92 Nev. 695, 697, 558 P.2d 541, 542 (1976), this court stated:

> [A]lthough the acts of violence and intimidation preceded the actual taking of the property and may have been primarily intended for another purpose, it is enough, to support the charges in the indictment, that appellants, taking advantage of the terrifying situation they created, fled with [the victim's] property.

This position was affirmed in Sheriff v. Jefferson, 98 Nev. 392, 394, 649 P.2d 1365, 1366-67 (1982), and Patterson v. Sheriff, 93 Nev. 238, 239, 562 P.2d 1134, 1135 (1977). See also State v. Myers, 640 P.2d 1245 (Kan. 1982) (holding that where aggravated robbery requires taking by force or threat of force while armed, it is sufficient that defendant shot victim and then returned three hours later to take victim's wallet, as there was a continuous chain of events and the prior force made it possible to take the property without resistance); State v. Mason, 403 So. 2d 701 (La. 1981) (holding that acts of violence need not be for the purpose of taking property and that it is sufficient that the taking of a purse was accomplished as a result of earlier acts of pushing victim onto bed and pulling her clothes).

Accordingly, we hold that there is sufficient evidence to support the conviction of robbery and the finding of robbery as an aggravating circumstance.

Burglary

Chappell argues that the State adduced insufficient evidence to prove that he committed a burglary. We disagree. NRS 205.060(1) provides that a person is guilty of burglary when he "by day or night, enters any . . . semitrailer or house trailer . . . with the intent to commit grand or petit larceny, assault or battery on any person or any felony." At trial, the State introduced evidence that Panos wanted to end her relationship with Chappell, that Chappell had threatened and abused Panos in the past, and that Panos did not communicate with Chappell while he was in jail. Moreover, there was testimony that the trailer appeared ransacked, and that Panos' social security card and car keys were found in Chappell's possession. Accordingly, we conclude that there is sufficient evidence to support the conviction of burglary and the finding by the jury of burglary as an aggravator.

Sexual assault

Chappell argues that the State failed to prove beyond a reasonable doubt that the sexual encounter between Chappell and Panos was nonconsensual. We do not agree. The jury was instructed to find sexual assault if Chappell engaged in sexual intercourse with Panos "against [her] will" or under conditions in which Chappell knew or should have known that Panos was "mentally and emotionally incapable of resisting." The evidence at trial and during the penalty hearing showed that Panos and Chappell had an abusive relationship, that Panos had ended her relationship with Chappell, that Chappell was extremely jealous of Panos' relationships with other men, and that Panos was involved with another man at the time of the killing. We conclude that a rational trier of fact could have concluded 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. Consequently, the evidence supports the jury's finding of sexual assault as an aggravating circumstance.

Torture or depravity of mind

Chappell argues that the circumstances of Panos' death do not rise to the level necessary to establish torture or depravity of mind. We agree. The depravity of mind aggravator applies in capital cases if "torture, mutilation or other serious and depraved physical abuse beyond the act of killing itself" is shown. Robins v. State, 106 Nev. 611, 629, 798 P.2d 558, 570 (1990); NRS 200.033(8).[3] In the present case, the jury was instructed that the elements of murder by torture are that "(1) the act or acts which caused the death must involve a high degree of probability of death, and (2) the defendant must commit such act or acts with the intent to cause cruel pain and suffering for the purpose of revenge, persuasion or for any other sadistic purpose.[4] Panos died as a result of multiple stab wounds; thus, the first element is satisfied. The second element is not as easily met under the facts of this case.

The State argues that evidence of torture may be found in the following: Panos was severely beaten by

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[3]NRS 200.033(8) was amended in 1995 deleting the language of "depravity of mind." 1995 Nev. Stat., ch. 467, §§ 1-3, at 1490-91. In the present case, the murder was committed before October 1, 1995, thus, the previous version of NRS 200.033(8) applies. Id.

[4]These instructions were approved by this court in Deutscher v. State, 95 Nev. 669, 677 n.5, 601 P.2d 407, 413 n.5 (1979); see NRS 200.030(1)(a) (defining first-degree murder by torture as murder "[p]erpetrated by means of . . . torture").

Chappell, there were numerous bruises and abrasions on Panos' face, Panos was stabbed in the groin area and chest, Panos was stabbed thirteen times, and four of the stabs were of such force as to have penetrated the spinal cord in Panos' neck. We conclude that there is no evidence that Chappell stabbed Panos with any intention other than to deprive her of life. No evidence exists that Chappell intended to cause Panos cruel suffering for the purposes of revenge, persuasion, or other sadistic pleasure. Nor does Chappell's act of stabbing Panos thirteen times rise to the level of torture. Accordingly, we hold that the record does not contain sufficient evidence to support the aggravating circumstance of depravity of mind and torture.

Invalidating an aggravating circumstance

Invalidating an aggravating circumstance does not automatically require this court to vacate a death sentence and remand for new proceedings before a jury. See Witter v. State, 112 Nev. 908, 929, 921 P.2d 886, 900 (1996); see also Canape v. State, 109 Nev. 864, 881-83, 859 P.2d 1023, 1034-35 (1993). Where at least one other aggravating circumstance exists, this court may either reweigh the aggravating circumstances against the mitigating evidence or conduct a harmless error analysis. Witter, 112 Nev. at 929-30, 921 P.2d at 900. In the present case, the jury designated as mitigating circumstances (1) that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, and (2) any other mitigating circumstances. We conclude that the remaining three aggravators, robbery, burglary and sexual assault, clearly outweigh the mitigating evidence presented by Chappell. We therefore conclude that Chappell's death sentence was proper.

Mandatory review of propriety of death penalty

NRS 177.055(2)[5] requires this court to review every death penalty sentence. Pursuant to the statutory requirement, and in addition to the contentions raised by Chappell and addressed above, we have determined that the aggravating circumstances of robbery, burglary and sexual assault, found by the jury, are supported by sufficient evidence. Moreover, there is no evidence in the record indicating that Chappell's death sentence was imposed under the influence of passion, prejudice or any arbitrary factor. Lastly, we have concluded that the death sentence Chappell received was not excessive considering the seriousness of his crimes and Chappell as a person.

Additional issues raised on appeal

Chappell further contends that: (1) the State's use of peremptory challenges to excuse two African-American jurors from the jury pool was discriminatory; (2) the district court erred in admitting hearsay statements; (3) the district court erred by denying Chappell's motion to strike the notice of intent to seek the death penalty; (4) the State improperly

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[5] NRS 177.055(2) provides:

> 2. Whether or not the defendant or his counsel affirmatively waives the appeal, the sentence must be reviewed on the record by the supreme court, which shall consider, in a single proceeding if an appeal is taken:
>
> (a) Any error enumerated by way of appeal;
>
> (b) Whether the evidence supports the finding of an aggravating circumstance or circumstances;
>
> (c) Whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor; and
>
> (d) Whether the sentence of death is excessive, considering both the crime and the defendant.

appealed to the jury for vengeance during the penalty phase; (5) cumulative error denied Chappell a fair hearing; and (6) victim impact testimony denied Chappell a fair penalty hearing. We have reviewed each of these issues and conclude that they lack merit.

CONCLUSION

For the foregoing reasons, we affirm the judgment of conviction for robbery, burglary and first-degree murder and the sentence of death.[6] [7]

Shearing, J.

Rose, J.

Young, J.

[6]The Honorable Charles E. Springer, Chief Justice, voluntarily recused himself from participation in the decision of this appeal.

[7]The Honorable A. William Maupin, Justice, voluntarily recused himself from participation in the decision of this appeal.

EXHIBIT 4

FFCL
DAVID M. SCHIECK, ESQ.
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Attorney for CHAPPELL

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

JAMES MONTELL CHAPPELL, Petitioner, vs. THE STATE OF NEVADA, Respondent.	CASE NO. C 131341 DEPT. NO. XI IV DATE: N/A TIME: N/A

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The Petition and Supplemental Petition for Habeas Corpus (Post Conviction) having come on for hearing before the Honorable Michael Douglas, District Court Judge, on April 2, 2004, the Petitioner not present, represented by David M. Schieck, Esq., and the State of Nevada by Chief Deputy District Attorney Clark Peterson; the Court having considered the evidence produced at the Evidentiary Hearing and the pleadings and affidavits on file; now makes the following Findings of Fact, Conclusions of Law and Judgment:

FINDINGS OF FACT

1. The Court has considered all claims regarding errors of trial counsel at the trial phase and finds that any errors

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were harmless due to the overwhelming evidence of guilt.

2. The Court need not address the first prong of Strickland v. Washington, 566 U.S. 668, 104 S.Ct. 2052 (1984) that there was deficient performance of trial counsel as the Court has determined that none of the claimed errors prejudiced the outcome of the case.

3. Based on the Court's determination that none of the claimed trial errors would have effected the outcome of the trial the Court makes no determination as to the merits of any claimed errors or deficiencies.

4. With respect to the penalty hearing, the Court finds that there were several witnesses that were available to provide testimony in mitigation from both Michigan and Arizona.

5. Defense counsel was deficient in not locating and presenting these witnesses at the penalty hearing. The substance of the testimony is reflected in affidavits submitted by CHAPPELL which the Court finds sufficient to determine that the outcome of the penalty hearing cannot be relied upon as having produced a just result. The outcome of the penalty hearing was prejudiced by the failure to produce and present the numerous witnesses that could have described CHAPPELL and the dynamics of his relationship with the victim and their children.

CONCLUSIONS OF LAW

1. A criminal defendant is entitled to receive reasonable effective assistance of counsel through trial, including the

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penalty hearing, and upon direct appeal of his conviction. Strickland v. Washington, 460 U.S. 668 (1984). In order to establish a claim of ineffective assistance of counsel the defendant must establish first that counsel's performance was deficient and second that the deficient performance prejudiced the defense.

2. Deficient assistance requires a showing that trial counsel's representation of the defendant fell below an objective standard of reasonableness. If the defendant establishes that counsel's performance was deficient, the defendant must next show that, but for counsel's error, the result of the trial probably would have been different. State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322 (1993).

3. The performance of trial counsel is found to be deficient in failing to locate, interview and call as witnesses at the penalty hearing numerous witnesses that would have established mitigating factors for CHAPPELL.

4. The failures of counsel were prejudicial to CHAPPELL'S defense and were so serious as to deprive CHAPPELL of fair penalty hearing, to wit: a penalty hearing whose result was reliable, such that, but for counsel's error the result of the penalty hearing probably would have been different.

5. Pre-trial investigation and preparation for trial are key to effective representation of counsel. Defense counsel has a duty "to make reasonable investigation or to make a reasonable decision that makes particular investigation

unnecessary." Strickland, 466 U.S. at 691; State v. Love, 109 Nev. 1136, 865 P.2d 322 (1993). Counsel is required to present all available mitigation evidence at a penalty hearing in a capital case.

STIPULATION OF COUNSEL

Due to the appointment of Judge Michael Douglas to the Nevada Supreme Court, the above named parties by and through their respective counsel hereby stipulate that the Findings of Fact and Conclusions of Law adequately reflect the ruling of Judge Douglas and that the Order may be executed by the Chief Judge of the Eighth Judicial District Court.

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Las Vegas NV 89155

ORDER

Based on the Findings of Fact and Conclusions of Law herein contained, it is hereby

ORDERED, ADJUDGED AND DECREED that JAMES CHAPPELL'S Petition and Supplemental Petition for Habeas Corpus (Post Conviction) is denied as to his Conviction and granted as to his sentence which is hereby vacated and the matter is to be reset for a new penalty hearing.

DATED AND DONE: June 2nd, 2004

DISTRICT COURT JUDGE

RM

EXHIBIT 5

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES MONTELL CHAPPELL,
Appellant/Cross-Respondent,
vs.
THE STATE OF NEVADA,
Respondent/Cross-Appellant.

No. 43493

ORDER OF AFFIRMANCE

This is an appeal and cross-appeal from a district court order partially granting and partially denying a post-conviction petition for a writ of habeas corpus in a death penalty case.[1] Eighth Judicial District Court, Clark County; Eighth Judicial District Court Dept. 11, Judge.

Appellant James Chappell was convicted by the district court on December 31, 1996, pursuant to a jury verdict, of burglary, robbery with the use of a deadly weapon, and first-degree murder with the use of a deadly weapon. The jury found four circumstances aggravated the murder: it was committed during a burglary and/or home invasion, it was committed during a robbery, it was committed during a sexual assault, and it involved torture or depravity of mind. Chappell was sentenced to death. On direct appeal this court struck the aggravator based on torture or depravity of mind, but affirmed Chappell's conviction and death sentence.[2]

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[1]The Honorable Michael Douglas, Justice, and the Honorable A. William Maupin, Justice, did not participate in the decision of this matter.

[2]See Chappell v. State, 114 Nev. 1403, 972 P.2d 838 (1998).

Chappell originally filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent Chappell, and counsel filed a supplement to the petition.

After an evidentiary hearing, the district court partially granted and partially denied the petition. The district court found merit in Chappell's claim that his trial counsel were ineffective for failing to investigate and call several witnesses to testify on his behalf during his penalty hearing. That omitted testimony, the district court found, had a reasonable likelihood of impacting the jury's decision to return a death sentence. It therefore ordered a new penalty hearing, vacating Chappell's death sentence. The district court, however, denied Chappell relief on those claims in his petition relating to the guilt phase of his trial, and upheld his conviction. Chappell appeals and the State cross-appeals. We address the State's cross-appeal first.

The State's cross-appeal

The State contends that the district court improperly granted relief on Chappell's claim that his trial counsel were ineffective for failing to investigate and call several witnesses to testify on his behalf during his penalty hearing. The State maintains that Chappell's trial counsel did not act unreasonably in this matter and that even if the omitted witnesses had testified during the hearing, their testimony "would not have changed the outcome of the case." The State therefore maintains that the district court erroneously granted Chappell a new penalty hearing. We disagree.

A claim of ineffective assistance of counsel presents a mixed question of law and fact subject to independent review.[3] To establish that counsel's assistance was ineffective, a two-part test must be satisfied.[4] First, it must be shown that the performance of the petitioner's trial counsel was deficient, falling below an objective standard of reasonableness.[5] Second, there must be prejudice.[6] Prejudice is demonstrated by showing that, but for the errors of the petitioner's trial counsel, there is a reasonable probability that the result of the proceedings would have been different.[7] Both parts of the test do not need to be considered if an insufficient showing is made on either one.[8]

Here, Chappell's trial counsel acknowledged during the evidentiary hearing that Chappell had provided him with a list of several potential witnesses who could have testified favorably about his character and his long relationship with the victim, Deborah Panos. Although Chappell's trial counsel did some investigation, he conceded that he "had a hard time finding these people. And quite frankly, the ones that we did find, I was still focusing on the killing and not the long relationship. I had no idea that the trial [was] going to be about the long relationship." Thus,

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[3]See Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

[4]See Strickland v. Washington, 466 U.S. 668, 687 (1984); Kirksey, 112 Nev. at 987-88, 923 P.2d at 1107.

[5]See Strickland, 466 U.S. at 687.

[6]Id.

[7]Id. at 694.

[8]Id. at 697.

most of these potential witnesses were never contacted by Chappell's trial counsel and did not testify at his penalty hearing.

Chappell's post-conviction counsel, however, was able to locate six of these omitted witnesses and obtain affidavits from five of them. These witnesses generally described in the affidavits what they would have testified to during Chappell's penalty hearing.[9] Many of them also averred that they would have been willing to testify, but they were never contacted or asked to do so.

These affidavits were submitted to the district court for review. The district court found that these witnesses "could have described CHAPPELL and the dynamics of his relationship with the victim and their children," and that the inclusion of their testimony during Chappell's penalty hearing would have probably resulted in the jury returning a sentence other than death.

It is well-settled that a defendant has a right to present all relevant evidence mitigating a death sentence during a penalty hearing,[10] and presenting to the jury "the fullest information possible regarding the defendant's life and characteristics is essential to the selection of an appropriate sentence."[11] A defendant's trial counsel therefore has a duty

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[9]A total of seven affidavits were obtained by Chappell's post-conviction counsel. One of these witnesses testified during the penalty phase of Chappell's trial, but not the guilt phase. Another affidavit was prepared by an investigator who had contacted and spoken with a seventh potential witness.

[10]See NRS 175.552(3); see also NRS 200.035.

[11]Wilson v. State, 105 Nev. 110, 115, 771 P.2d 583, 586 (1989).

to make all reasonable investigations into such evidence or to make a reasonable decision not to do so.[12]

We conclude that the district court appropriately found that the failure of Chappell's trial counsel to investigate the omitted witnesses and to call them to testify during Chappell's penalty hearing constituted conduct that fell below an objective standard of reasonableness. Chappell faced a death sentence and had provided his trial counsel with a list of witnesses who could have testified favorably on his behalf during his penalty hearing. His trial counsel had a duty to thoroughly investigate and act upon this information or make a reasonable decision not to do so. It appears that he did neither, making only a slight effort to determine whether these witnesses could have provided testimony that may have benefited his client. That Chappell's post-conviction counsel was able to locate them and obtain affidavits further supports this conclusion.

Also consistent with the district court's decision, our independent review of the affidavits reveals a reasonable probability that Chappell was prejudiced by counsel's deficient performance. The jury in this case heard much evidence and argument from the State about Chappell's bad character, criminal history, and abusive relationship with Panos. The testimony of the omitted witnesses would have countered that argument, providing the jury with a more complete picture of Chappell and the history of the former couple's relationship, which, as the district court found, had a reasonable probability of altering his sentence. The district court's decision to find Chappell's trial counsel ineffective was

[12]See Strickland, 466 U.S. at 691.

supported by substantial evidence and not clearly wrong.[13] We affirm its decision.[14]

Given the new penalty hearing that is required, two claims that Chappell raises in this appeal regarding his original penalty hearing warrant comment. First, he contends that his trial and appellate counsel were ineffective in failing to challenge the improper expression by the victim's aunt of her belief that Chappell should be sentenced to death.[15] We need not decide whether this failure constituted ineffective assistance of counsel, but we caution the State to prevent such inflammatory testimony in the new hearing. Second, Chappell contends that the instruction given to the jury regarding the proper use of "other matter" character evidence admitted during the penalty hearing was inadequate. He has failed to demonstrate either good cause for not raising this claim

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[13]See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994); cf. Wilson, 105 Nev. at 115, 771 P.2d at 586 (concluding that the failure of defendant's trial counsel to present more evidence mitigating his sentence constituted ineffective assistance and warranted a new penalty hearing).

[14]Chappell also contends on appeal that the district court improperly denied him relief on this claim as it related to the performance of his trial counsel during the guilt phase. Given the overwhelming evidence of Chappell's guilt, see Chappell, 114 Nev. at 1407, 972 P.2d at 840, however, we conclude that he is unable to make the necessary showing of prejudice, i.e., that there was a reasonable likelihood that had these witnesses testified during the guilt phase of his trial, the result would have been different. We affirm the district court's decision on this claim.

[15]See Witter v. State, 112 Nev. 908, 922, 921 P.2d 886, 896 (1996), receded from on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

on direct appeal or prejudice, and it is procedurally barred.[16] In fact, the pertinent case law that Chappell invokes was not decided until after his trial.[17] But we take this opportunity to alert the parties to our 2001 decision in Evans v. State where we provided appropriate jury instructions regarding the use of this evidence.[18]

A new penalty hearing is warranted in this case. We reject the State's cross-appeal and affirm the decision below in this respect. We turn to Chappell's appeal.

Chappell's appeal

Because we affirm the district court's decision to grant Chappell a new penalty hearing, we conclude that Chappell's other claims of ineffective assistance of counsel relating to the penalty phase do not warrant further discussion.

Chappell also contends on appeal that the district court improperly denied his claims of ineffective assistance of trial counsel with respect to the guilt phase: failure to object to the exclusion of African-Americans from the prospective jury pool; failure to object to a jury instruction regarding premeditation and deliberation; failure to object to a jury instruction regarding malice; failure to object to remarks by the prosecutor during arguments to the jury, including an erroneous quantification of the reasonable doubt standard; failure to object to

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[16]See NRS 34.810.

[17]See Evans v. State, 117 Nev. 609, 634-37, 28 P.3d 498, 515-17 (2001); see also Hollaway v. State, 116 Nev. 732, 745-46, 6 P.3d 987, 996 (2000).

[18]See Evans, 117 Nev. at 635-37, 28 P.3d at 516-17.

portions of Chappell's cross-examination by the prosecutor; and failure to move to strike the State's notice of intent to seek death on the basis that the State was unconstitutionally motivated by race in pursuing a death sentence against him.

We have carefully reviewed each of these claims and conclude that Chappell has failed to demonstrate that the performance of his trial counsel with respect to them both fell below an objective standard of reasonableness and prejudiced the outcome of the guilt phase of his trial. In reaching this conclusion, we note that overwhelming evidence supported Chappell's conviction[19] and that any errors in the jury instructions or the prosecutor's remarks were harmless beyond a reasonable doubt, whether Chappell's trial counsel objected to them or not.[20] Chappell has also failed to support with specific factual allegations his assertion that the State's decision to seek the death penalty against him was racially motivated[21] or explain how a motion based on such an assertion had any likelihood of success. We therefore conclude that the district court properly denied Chappell relief on these claims.[22]

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[19]See Chappell, 114 Nev. at 1407, 972 P.2d at 840.

[20]We note that this court has consistently rejected the claims of error Chappell raises respecting the instructions. See Garner v. State, 116 Nev. 770, 788-89, 6 P.3d 1013, 1025 (2000), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002); Cordova v. State, 116 Nev. 664, 666-67, 6 P.3d 481, 483 (2000).

[21]See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

[22]Chappell also raises these same issues as claims of ineffective assistance of appellate counsel. See Kirksey, 112 Nev. at 998, 923 P.2d at

continued on next page . . .

Chappell also appeals from the district court's denial of issues that he framed as direct appeal claims. NRS 34.810(1)(b)(2) provides that a claim shall be dismissed if the defendant's conviction was the result of a trial and the claim could have been raised on direct appeal, unless both good cause and prejudice are established to excuse this failure[23] or the denial of his claim on procedural grounds would result in a fundamental miscarriage of justice.[24]

He contends that his constitutional rights were violated because African-Americans were underrepresented on his jury and did not represent a fair cross-section of the community. Chappell, however, essentially raised this issue on direct appeal, and it was rejected by this court. Our prior determination on this matter is the law of the case and precludes relitigation of the issue.[25]

He further contends that Nevada's death penalty scheme fails to constitutionally narrow the class of persons eligible to receive a death sentence because it contains statutory aggravating circumstances that are numerous and vague. Chappell has failed to demonstrate good cause as to why this claim was not raised on direct appeal and prejudice, and it is also procedurally barred.

. . . continued

1113-14. For the same reasons we affirm the district court's decision to deny them.

[23]See NRS 34.810(3); Evans, 117 Nev. at 646-47, 28 P.3d at 523.

[24]See Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

[25]See Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).

We conclude that the district court properly denied Chappell relief on these direct appeal claims, as he failed to overcome the procedural bar of NRS 34.810 or to otherwise demonstrate that invoking that bar to these claims' review would result in a fundamental miscarriage of justice.

McConnell issue

We finally address Chappell's challenge to the validity of the three aggravating circumstances pending against him. He contends that his trial and appellate counsel were ineffective for failing to object to "[t]he use of overlapping aggravating circumstances to impose death." To the extent that he contends the aggravators based on robbery and burglary are duplicative of each other, he is not entitled to relief.[26]

Chappell also claims specifically that the three felony aggravators found by the jury are invalid pursuant to our 2004 decision, McConnell v. State.[27] The State responds that this claim is not cognizable because it was not raised in the district court. The State also asserts that McConnell announced a new rule that should not apply retroactively to Chappell's conviction, which has been final since 1999. Finally, the State argues that even if McConnell applies, the aggravating circumstances should remain viable because there was overwhelming evidence of premeditation and deliberation in this case.

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[26]See Bennett v. Dist. Ct., 121 Nev. ___, ___ n.4, 121 P.3d 605, 608 n.4 (2005).

[27]120 Nev. 1043, 102 P.3d 606 (2004), reh'g denied, McConnell v. State (McConnell II), 121 Nev. ___, 107 P.3d 1287 (2005).

As we explain below, we conclude that Chappell's McConnell claim has merit and that two of the three aggravators pending against him violate the holding in McConnell as a matter of law and cannot be realleged. In reaching this conclusion, we recognize that Chappell did not cite McConnell in challenging his aggravators in his habeas petition before the district court—he is raising this issue for the first time on appeal. However, McConnell was not decided at the time Chappell filed his petition below, and that decision renders two of the three aggravators invalid as a matter of law. The State has had an opportunity to address this issue on appeal during briefing and oral arguments. The interests of justice and judicial economy warrant resolving the issue now, prior to any new penalty hearing.[28] We further recognize that this court has not decided whether McConnell applies retroactively to final cases.[29] However, because we affirm the district court's decision to grant Chappell a new penalty hearing, Chappell's conviction in regard to his sentence is not final, and retroactivity is not an issue.[30]

> In McConnell, this court advised that if the State
>
> charges alternative theories of first-degree murder intending to seek a death sentence, jurors in the guilt phase should receive a special verdict form that allows them to indicate whether they find first-degree murder based on deliberation and premeditation, felony murder, or both. Without the return of such a form showing that the jury did

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[28]See Bennett, 121 Nev. at ___, 121 P.3d at 608.

[29]See McConnell II, 121 Nev. at ___, 107 P.3d at 1290.

[30]See Bennett, 121 Nev. at ___, 121 P.3d at 608-09.

> not rely on felony murder to find first-degree murder, the State cannot use aggravators based on felonies which could support the felony murder.[31]

Chappell was charged with open murder based upon the theories of premeditated and deliberate murder and/or felony murder. The felonies underlying the felony-murder theory were one count of burglary and/or one count of robbery with the use of a deadly weapon. The jury found Chappell guilty of first-degree murder with the use of a deadly weapon, but the verdict form does not indicate which theory or theories it relied upon to do so. Following Chappell's direct appeal, three aggravators found by the jury in support of his death sentence remained valid:

> The murder was committed while the person was engaged in the commission of or an attempt to commit any Burglary and/or Home Invasion.
>
> The murder was committed while the person was engaged in the commission of or an attempt to commit any Robbery.
>
> The murder was committed while the person was engaged in the commission of or an attempt to commit any Sexual Assault.[32]

Under McConnell, this court does not determine whether there was adequate proof of premeditation and deliberation on Chappell's part, but rather whether the record establishes conclusively that no juror

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[31]McConnell, 120 Nev. at 1069, 102 P.3d at 624.

[32]At the time of Chappell's trial, sexual assault was included in the list of enumerated felonies under NRS 200.033(4). That subsection was later amended, and sexual assault was removed from subsection (4) and made into its own distinct aggravating circumstance in subsection (13). See 1997 Nev. Stat., ch. 356, § 1, at 1293-94.

relied on felony murder to find first-degree murder. The record here carries no such assurance. We conclude that McConnell squarely applies to Chappell's case and renders infirm the aggravators based on the robbery and burglary, the predicate felonies that supported the felony-murder theory. However, our conclusion does not extend to the aggravator based upon sexual assault.

The critical consideration is McConnell's ban on the State's "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."[33] Here, the State did not rely upon sexual assault to support the theory of felony murder, and this omission was certainly not an attempt to circumvent McConnell since Chappell's trial was held long before that opinion. But most important, there is evidence in the record that could support finding not only that Chappell committed a sexual assault but that he did so with a criminal purpose distinct from the burglary and robbery. Therefore, based on the record before us, we conclude that the aggravator based upon sexual assault remains viable.

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[33]McConnell, 120 Nev. at 1069-70, 102 P.3d at 624-25 (quoting People v. Harris, 679 P.2d 433, 449 (Cal. 1984), rejected by People v. Proctor, 842 P.2d 1100, 1129-30 (Cal. 1992)).

Therefore, a single aggravator remains for the State to pursue if it decides to again seek a sentence of death against Chappell during the new penalty hearing.[34] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Rose

_____, J.
Becker

_____, J.
Gibbons

_____, J.
Hardesty

_____, J.
Parraguirre

cc: Eighth Judicial District Court Dept. 11, District Judge
Special Public Defender David M. Schieck
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

[34]See generally NRS 175.552.

EXHIBIT 6

ORIGINAL

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JOC
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FILED
MAY 10 3 28 PM '07
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
JAMES MONTELL CHAPPELL,
#1212860
Defendant.

Case No. C131341
Dept No. III

JUDGMENT OF CONVICTION

WHEREAS, on the 18th day of October, 1995, Defendant, JAMES MONTELL CHAPPELL, entered a plea of Not Guilty to the crime of COUNT 3 - MURDER WITH USE OF A DEADLY WEAPON (Felony), NRS 200.010, 200.030, 193.165; and

WHEREAS, the Defendant JAMES MONTELL CHAPPELL, was tried before a Jury and the Defendant was found guilty of the crime of COUNT 3 - FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON (Felony), in violation of NRS 200.010, 200.030, 193.165, and the Jury verdict was returned on or about the 16th day of October, 1996.

Thereafter, another trial jury, deliberating in the penalty phase of said trial, in accordance with the provisions of NRS 175.552 and 175.554, found, as to COUNT 3, that there was one (1) aggravating circumstance in connection with the commission of said crime, to-wit:

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1. The murder was committed during the perpetration of a sexual assault.

That on or about the 21st day of March, 2007, the Jury unanimously found, beyond a reasonable doubt, that there were no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances, and determined that the Defendant's punishment should be Death as to COUNT 3 - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON in the Nevada State Prison located at or near Carson City, State of Nevada.

WHEREAS, thereafter, on the 10th day of May, 2007, the Defendant being present in court with his counsel, DAVID SCHIECK, Special Public Defender and CLARK PATRICK, Deputy Special Public Defender, and CHRIS J. OWENS, Chief Deputy District Attorney and PAMELA WECKERLY, Deputy District Attorney, also being present; the above entitled Court did adjudge Defendant guilty thereof by reason of said trial and verdict and sentenced Defendant to DEATH for COUNT 3 - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON.

THEREFORE, the Clerk of the above entitled Court is hereby directed to enter this Judgment of Conviction as part of the record in the above entitled matter.

DATED this 10 day of May, 2007, in the City of Las Vegas, County of Clark, State of Nevada.

DISTRICT JUDGE

DA#95F08114X/mb
LVMPD EV# 9508311351
1° MURDER W/WPN - F

EXHIBIT 7

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES MONTELL CHAPPELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49478

FILED

OCT 20 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, sentencing appellant James Montell Chappell to death for first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

On December 31, 1996, Chappell was convicted, pursuant to a jury verdict, of burglary, robbery with the use of a deadly weapon, and first-degree murder with the use of a deadly weapon. The district court sentenced Chappell to serve a term of 4 to 10 years in prison for burglary and two consecutive terms of 6 to 15 years for robbery with the use of a deadly weapon. A jury sentenced him to death for first-degree murder with the use of a deadly weapon. On appeal, this court affirmed Chappell's convictions and sentence of death. Chappell v. State, 114 Nev. 1403, 972 P.2d 838 (1998).

On October 19, 1999, Chappell filed a post-conviction petition for a writ of habeas corpus in the district court. The district court granted Chappell's petition in part, vacated his sentence of death, and ordered a

new penalty hearing. This court affirmed. Chappell v. State, Docket No. 43493 (Order of Affirmance, April 7, 2006).

On May 10, 2007, following Chappell's second penalty hearing, a jury again sentenced him to death. This appeal followed.

Chappell raises thirteen claims of error arising from his second penalty hearing. Specifically, Chappell claims that his death sentence should be vacated because: (1) the sexual assault aggravator is invalid and unsupported by the evidence; (2) NRS 177.055(3), which governs this court's review of a death sentence, is unconstitutional; (3) his constitutional rights were violated when the district court declined to order the District Attorney's Office to conduct a second review of his case; (4) the district court erred in failing to dismiss three potential jurors for cause; (5) the district court erred in admitting unreliable hearsay evidence; (6) the district court erred in admitting two presentence investigation reports; (7) the district court erred in admitting improper victim impact testimony; (8) the district court erred in admitting Chappell's previous guilt-phase testimony; (9) the prosecution committed five instances of misconduct; (10) the district court erred in failing to instruct the jury that it had to find that the mitigators did not outweigh the aggravators beyond a reasonable doubt; (11) the jury erred in failing to find certain mitigating circumstances; (12) instructional error occurred during the guilt phase of his trial; and (13) he was prejudiced by cumulative error.

We conclude that each of these claims lacks merit. We further conclude that, pursuant to the mandatory review of NRS 177.055, there is

no indication that Chappell's death sentence was improperly imposed. Therefore, we affirm the judgment of conviction.

Sexual assault aggravator

The sole aggravator found by the jury was that the murder was committed while Chappell was engaged in the commission of a sexual assault. Chappell claims that the sexual assault aggravator should be stricken because (1) insufficient evidence supported it and (2) the aggravator is invalid under McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004).

Sufficiency of the evidence

Our review of the record reveals sufficient evidence to establish the sexual assault aggravator beyond a reasonable doubt as determined by a rational trier of fact. See Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980); see also Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998); Jackson v. Virginia, 443 U.S. 307, 319 (1979).

In particular, we note evidence presented at the penalty hearing showing that: (1) 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.

Although Chappell claims that the sexual encounter was consensual, we conclude 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." Chappell v. State, 114 Nev. 1403, 1409, 972 P.2d 838, 842 (1998).

Application of McConnell

Chappell contends that the sexual assault aggravator is invalid pursuant to this court's decision in McConnell because the State divided the felonies charged and used two (burglary and robbery) to prove felony murder and the remaining crime (sexual assault) as an aggravating circumstance. Chappell's claim is without merit.

In McConnell, this court deemed "it impermissible under the United States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated." Id. at 1069, 102 P.3d at 624. We also proscribed the practice of "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 1069-70, 102 P.3d at 624-25 (quoting People v. Harris, 679 P.2d 433, 449 (Cal. 1984), rejected by People v. Proctor, 842 P.2d 1100, 1129-30 (Cal. 1992)) (internal footnote omitted).

During the course of Chappell's direct appeal and post-conviction proceedings, three aggravators were stricken—a torture

aggravator and the aggravators for robbery and burglary[1]—leaving the sexual assault aggravator as the only aggravator alleged at Chappell's second penalty hearing. Chappell now claims that the State's decision to "split" the robbery, burglary, and sexual assault felonies and use the sexual assault only as an aggravator violated McConnell. Based on the evidence, however, we conclude that Chappell committed the sexual assault with a criminal purpose distinct from the burglary and robbery. See McConnell, 120 Nev. at 1069-70, 102 P.3d at 624-25. Therefore, Chappell's claim is without merit.

NRS 177.055(3)

Chappell argues that NRS 177.055(3) is unconstitutional because it grants this court "unfettered discretion" to impose a sentence of less than death upon the finding of a constitutional violation. Chappell further argues that allowing this court to impose a sentence of less than death on direct appeal, but not in post-conviction proceedings, violates his constitutional right to equal protection. Chappell's claims are without merit.

NRS 177.055(3) was not the basis for Chappell's second penalty hearing. That hearing was the result of the district court's finding that Chappell's penalty phase counsel was ineffective rather than from this court's independent review of his death sentence. Because this court

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[1]The robbery and burglary aggravators were stricken pursuant to McConnell. Chappell v. State, Docket No. 43493 (Order of Affirmance, April 7, 2006), at 10-14.

did not conduct a mandatory review of Chappell's death sentence during his post-conviction appeal—that had already been done on direct appeal—Chappell's second penalty hearing did not result from the application of NRS 177.055.

Likewise, Chappell's equal protection argument lacks merit. The legal standards applicable to a habeas proceeding are different from those applicable on direct appeal. A prisoner's equal protection rights are not violated when different statutes are applied in these two distinct proceedings. Because a defendant on direct appeal is not similarly situated to a defendant in post-conviction proceedings, there is no constitutional violation merely because the legal standards and statutory schemes are different during different stages of the legal process.

Review by the District Attorney's Death Review Committee

Chappell argues that his constitutional rights were violated when the State refused to resubmit his case to the District Attorney's Death Review Committee after remand for a new penalty hearing to reconsider its decision to seek the death penalty. Specifically, Chappell argues that by failing to review his case a second time and by relying on a 12-year-old decision to seek the death penalty, the State failed to consider contemporary standards of decency, thereby violating his due process rights and his right to be free from cruel and unusual punishment. See Roper v. Simmons, 543 U.S. 551, 594 (2005) (O'Connor, J., dissenting). Furthermore, Chappell argues that his equal protection rights were violated because the State failed to treat him in the same manner as other

defendants who faced capital proceedings at the same time. Chappell's claims are without merit.

As to Chappell's due process claim, he fails to demonstrate that his due process rights were violated. The Due Process Clause prohibits a prosecutorial decision that is "based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'" United States v. Armstrong, 517 U.S. 456, 464 (1996) (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)). "[T]he decision to seek the death penalty is a matter of prosecutorial discretion, to be exercised within the statutory limits set out in NRS 200.030 and NRS 200.033." Thomas v. State, 122 Nev. 1361, 1374, 148 P.3d 727, 736 (2006). Matters of prosecutorial discretion are "'within the entire control of the district attorney,' absent any unconstitutional discrimination." Id. at 1373, 148 P.3d at 736 (quoting Cairns v. Sheriff, 89 Nev. 113, 115, 508 P.2d 1015, 1017 (1973)). Because the decision to seek the death penalty is entirely within the discretion of the district attorney and Chappell fails to demonstrate that the prosecution engaged in unconstitutional discrimination or based its decision on any "unjustifiable standard," the district court's decision to deny Chappell's motion to compel the State to reconsider seeking the death penalty did not violate due process.

As to Chappell's Eighth Amendment claim, he fails to show that his sentence constituted cruel and unusual punishment. Chappell has not explained how contemporary standards of decency have changed such that the death penalty is no longer acceptable under the circumstances of his case. See Atkins v. Virginia, 536 U.S. 304, 213 (2002). Accordingly, even if the State had submitted the case for re-evaluation, contemporary

standards of decency would not have mandated against a decision to seek the death penalty.

Respecting his equal protection claim, Chappell fails to demonstrate any constitutional violation. As explained above, Chappell's second penalty hearing took place in 2007, about 12 years after the District Attorney's Office decided to seek the death penalty. Chappell argues that because the decision to seek the death penalty in other cases that proceeded to sentencing in 2007 were made more recently, he was not treated in the same manner as the defendants in those cases. Chappell offers no explanation of this claim, and he does not cite any authority in support of it. Moreover, Chappell is not "similarly situated" with defendants being tried for the first time. Chappell provides no evidence that he was treated differently than any other defendant who had previously been convicted and was granted a second penalty hearing.

Because the Death Review Committee is a creation of the Clark County District Attorney's Office and review by that committee is not mandated by any law, a defendant has no right to force the Clark County District Attorney to send a particular case to that committee for review. Accordingly, the district court did not err in denying Chappell's motion.

Failure to dismiss jurors for cause

Chappell argues that the district court erred in denying challenges for cause of three potential jurors he claims indicated their firm intent to impose a sentence of death. We conclude that Chappell's contentions lack merit.

A trial judge "has broad discretion in ruling on challenges for cause since these rulings involve factual determinations." Leonard v. State, 117 Nev. 53, 67, 17 P.3d 397, 406 (2001). In a capital case, the trial court properly excludes a juror for cause when that juror's views on capital punishment "'would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Walker v. State, 113 Nev. 853, 866, 944 P.2d 762, 770 (1997) (quoting Wainwright v. Witt, 469 U.S. 412, 424 (1985)) (internal quotation marks omitted). When a "'prospective juror's responses are equivocal, i.e., capable of multiple inferences, or conflicting, the trial court's determination of that juror's state of mind is binding.'" Walker, 113 Nev. at 865, 944 P.2d at 770 (quoting People v. Livaditis, 831 P.2d 297, 303 (Cal. 1992)). Further, when a juror expresses a preconceived notion regarding the outcome of the case, the juror is not disqualified "'if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.'" Blake v. State, 121 Nev. 779, 795, 121 P.3d 567, 577 (2005) (quoting Irvin v. Dowd, 366 U.S. 717, 723 (1961)). Finally, even if a district court errs in refusing to dismiss a juror for cause, a defendant is not prejudiced unless the seated jury includes a juror who is not fair and impartial. Weber v. State, 121 Nev. 554, 581, 119 P.3d 107, 125 (2005).

Prospective juror D

Chappell argues that the district court should have excused prospective juror D. During voir dire, this juror expressed some predisposition to impose a sentence of death. Chappell challenged her for