IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S APPENDIX

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

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 2nd day of May, 2019. Electronic Service of the foregoing Appellant's Appendix shall be made in accordance with the Master Service List as follows:

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specific allegation, Petitioner raises two arguments. *Id.* at 45-52. First, he argues that "if counsel had performed the necessary investigation required of capital counsel, the jurors would have heard from witnesses, other than [Petitioner], who would have lent support and credibility to [Petitioner's] version of events." *Id.* at 48; *see id.* at 45-48 (summarizing Petitioner's testimony at trial). And second, he argues that "[i]f counsel had conducted an objectively reasonable investigation . . . they would have had supporting evidence to pursue a FASD diagnosis," noting that "Dr. Etcoff was not an expert in FASD and thus, was not even the proper expert to offer this medical diagnosis" and "[b]ecause the one expert who testified at [Petitioner's] trial failed to present the most important evidence regarding [Petitioner's] lack of mental state to commit first-degree murder, the jury was never given any evidence to reject to State's case." *Id.* at 51; *see id.* at 48-52 (summarizing Dr. Etcoff's testimony at trial).

Petitioner's third allegation in support of his claim that trial counsel were ineffective during pretrial and guilt phases is his allegation that "[t]here is a reasonable probability of a more favorable outcome if trial counsel had performed effectively." *Id.* at 52. In support of this specific allegation, Petitioner raises three arguments. *Id.* at 52-68. First, Petitioner argues that "if counsel had performed effectively, the jury would have heard that [Petitioner] suffered from Fetal Alcohol Spectrum Disorder (FASD) – and specifically, Alcohol Related Neurodevelopmental Disorder (ARND)" and "that, because of this medical diagnosis, [Petitioner] was unable to form the intent to commit first-degree murder and his prior bad act evidence would have been put in context." *Id.* at 52; *see id.* at 52-56 (articulating the factual basis in support of this argument). Next, Petitioner argues that "[i]f counsel had investigated lay witnesses (family and friends) who knew [Petitioner]," favorable evidence would have been presented at trial, which would have, in turn, "given credibility and support to [Petitioner] and his defense." *Id.* at 56; *see also id.* at 66 ("The evidence would have shown that [Petitioner] was deeply dependent upon [the victim], that [Petitioner] could not foresee living without [the victim's] support, and based upon his mental slowness and drug addiction, that he killed [the victim] in the heat of passion."); *id.* at 56-66 (articulating the

factual basis in support of this argument). And lastly, Petitioner argues that "[h]ad counsel hired a neuropharmacological expert, like Dr. Jonathan Lipman, the jurors would have heard evidence that would have mitigated and explained [Petitioner's] behavior and assisted in his defense that he killed [the victim] in the heat of passion." *Id.* at 66; *see id.* at 66-68 (articulating the factual basis in support of this argument).

Petitioner's fourth allegation in support of his claim that trial counsel were ineffective during pretrial and guilt phases is his allegation that counsel were ineffective for "failing to present evidence that [Petitioner's] sperm inside [the victim's] vagina was from pre-ejaculate fluid." *Id.* at 69. Specifically, Petitioner argues that "[i]f counsel had presented evidence that sperm can be found in pre-ejaculate fluid, this would have permitted the defense to argue that [Petitioner] could have deposited spermatozoa without ejaculation, bolstering [Petitioner's] credibility as to this point of his testimony—and by extension to his entire testimony." *Id.* at 70.

Petitioner's fifth allegation in support of his claim that trial counsel were ineffective during pretrial and guilt phases is his allegation that counsel were ineffective for "failing to challenge the DNA evidence." *Id.* at 70. In support of this specific allegation, Petitioner raises four arguments. *Id.* at 70-75. First, Petitioner argues that counsel were ineffective for failing to ask any question of Terry Cook on cross-examination and for failing to challenge his ability to testify as an expert.[3] *Id.* at 70; *see id.* at 70-73 (articulating the factual basis in support of this argument). Second, Petitioner argues that counsel were ineffective for "waiving [Petitioner's] confrontation clause rights regarding the DNA evidence." *Id.* at 73; *see id.* at 73-74 (articulating the factual basis in support of this argument). Next, Petitioner argues that counsel were ineffective for "failing to interview Willie Wiltz." *Id.* at 74; *see id.* at 74-75 (articulating the factual basis in support of this argument). And lastly, Petitioner argues that he was ultimately prejudiced by these aforementioned errors insofar as "by leaving unchecked the State's presentation of evidence that [Petitioner's] sperm was found

[3] As explained in the Petition, Mr. Cook "was a criminalist with the Las Vegas Metro Police Department Crime Laboratory." Petition at 70.

inside the victim, the defense impeached their own client's testimony that while he had sexual intercourse with the victim he did not ejaculate." *Id.* at 75.

Petitioner's sixth allegation in support of his claim that trial counsel were ineffective during pretrial and guilt phases is his allegation that counsel were ineffective in "failing to conduct an adequate voir dire." *Id.* at 75. In support of this specific allegation, Petitioner raises two arguments. *Id.* at 75-78. First, he argues that "counsel were ineffective for failing to challenge a number of biased jurors including jurors Fittro, #461, Hill, #474, Ewell, #435, and Ochoa, #467." *Id.* at 75; *see id.* at 75-77 (articulating the factual basis in support of this argument). And second he argues that counsel were ineffective for "failing to life qualify death-scrupled jurors," noting that "several jurors were excused because of their seemingly anti-death penalty views, and counsel failed to attempt to rehabilitate them." *Id.* at 77; *see id.* at 77-78 (articulating the factual basis in support of this argument).

Petitioner's seventh allegation in support of his claim that trial counsel were ineffective during pretrial and guilt phases is his allegation that counsel were ineffective for "failing to object to numerous instances of improper closing argument and questioning." *Id.* at 78. Specifically, Petitioner argues that trial counsel "failed to object to repeated instances of improper argument by the prosecutor," which, according to Petitioner, included "the State argu[ing] improper victim evidence, improperly articulat[ing] the test for reasonable doubt, improperly rais[ing] the issue of punishment at the guilt phase, and improperly comment[ing] on [Petitioner's] right to remain silent." *Id.* at 78; *see id.* at 78-80, 292-94 (articulating the factual basis in support of this argument).

Petitioner's eighth allegation in support of his claim that trial counsel were ineffective during pretrial and guilt phases is his allegation that counsel were ineffective for "failing to lodge contemporaneous objections." *Id.* at 80. Specifically, Petitioner argues that trial counsel "failed to make contemporaneous objections throughout, including failing to object to erroneous or missing jury instructions; failing to object to prospective jurors who should have been excused; failing to object to improper victim impact evidence, and failing to

object to improper arguments made by the prosecution." *Id.*; *see id.* at 80-81, 192-96, 212-16, 290-300 (articulating the factual basis for this argument).

Petitioner's ninth allegation in support of his claim that trial counsel were ineffective during pretrial and guilt phases is his allegation that counsel were ineffective for "failing to make certain arguments on behalf of their client." *Id.* at 81. Specifically, Petitioner argues that counsel were ineffective for "failing to argue that that [sic] [Petitioner] could not have been convicted of burglary because he could not have burglarized his own home." *Id.*

Petitioner's final allegation in support of his claim that trial counsel were ineffective during pretrial and guilt phases is his allegation of cumulative prejudice. *Id.* at 82. Specifically, he argues that "[t]here is a reasonable probability that, but for all of trial counsel's errors enumerated above, the results of the proceeding would have been different." *Id.*

The Court should reject this claim of ineffective assistance of counsel—namely, that trial counsel was ineffective during the pretrial and guilt phases—because all ten of the allegations upon which this claim is predicated are themselves procedurally defaulted. As noted above, this is the third habeas petition in which Petitioner is raising claims related to the guilt phase of his capital proceedings. All guilt-phase claims/allegations of ineffective assistance of counsel should have been raised in Petitioner's first habeas petition. The factual basis for each and every allegation raised in Claim One of the Petition was available during the timeframe in which Petitioner's first habeas petition was filed. And the record reflects that many of the aforementioned allegations were, in fact, raised by Mr. Schieck—Petitioner's first post-conviction counsel. *See* Exhibits in Support of Amended Petition for Writ of Habeas Corpus (Exh.) 46 at 13-59. Therefore, because all allegations of ineffective assistance of trial counsel raised by Petitioner in the instant Petition were reasonably available at the time Petitioner filed his first habeas petition, this Court should deny Claim

One on the basis that it consists exclusively of procedurally defaulted allegations of ineffective assistance of counsel.[4]

2. Petitioner's Claim That The Trial Judge Failed To Properly Instruct The Jury Consists Of Allegations That Are Either Barred Under The Law Of The Case Or Waived Under NRS 34.810(1)(b)(2).

Claim Two of the Petition states that Petitioner's "conviction is invalid under the federal constitutional guarantees of the right [to] due process, confrontation, effective counsel, equal protection, trial before an impartial jury, freedom from cruel and unusual punishment, and a reliable sentence because the trial court failed to properly instruct the jury." Petition at 84. In support of this claim, Petitioner raises six allegations of judicial error. *Id.* at 84-94. The State will first briefly outline what these detailed allegations are and will then explain why they are either barred under the law of the case or waived under NRS 34.810(1)(b)(2).

Petitioner's first allegation in support of his claim that the trial judge failed to properly instruct the jury is his allegation that the first-degree murder instruction on premeditation and deliberation given by the trial court was unconstitutional. *Id.* at 84-88. Petitioner's second allegation is that the malice instruction given by the trial court was unconstitutional. *Id.* at 88-89. Petitioner's third allegation is that the jury instruction given by the trial court on felony murder based on a robbery theory was inadequate insofar as the jury was not instructed "that afterthought robbery does not satisfy the felony murder rule." *Id.* at 89-90. Petitioner's fourth allegation is that the jury instruction given by the trial court on felony murder based on a burglary theory insofar as the jury was not instructed "that a person cannot be convicted of burglarizing his own home." *Id.* at 90-91. Petitioner's fifth allegation

[4] The Petition includes a "Statement with Respect to Claims Raised for the First Time in the Instant Petition." Petition at 13. In this section, Petitioner argues that he "was prevented from litigating Claim One (IAC Guilt Phase) and Claim Three (IAC Penalty Phase)" because he "was prevented from proving the necessary elements of his ineffective assistance of counsel claims by this Court's refusal to admit and consider relevant evidence, and concomitant failure to provide resources adequate to allow counsel to fully and fairly litigate these constitutional issues." *Id.* at 13-14. He further alleges that "[t]his Court's denial of funds rendered the state corrective process inadequate." *Id.* at 14. The Court should reject these bold, naked allegations and find that they are insufficient to establish the good cause necessary to present claims that are otherwise procedurally defaulted (i.e. those claims of ineffective assistance of trial counsel raised in Claim One).

is that "the equal and exact instruction improperly minimized the State's burden of proof." *Id.* at 91-92. Petitioner's final allegation in support of his claim that the trial judge failed to properly instruct the jury is that the reasonable doubt instruction given by the trial court was flawed insofar as it "made identifying reasonable doubt unconstitutionally difficult to recognize while determining the lack of reasonable doubt was more easily determinable." *Id.* at 92-94.

The first and second allegations raised by Petitioner are barred under the law of the case. *See State v. Loveless*, 62 Nev. 312, 317, 150 P.2d 1015, 1017 (1944) (quoting *Wright v. Carson Water Co.,* 22 Nev. 304, 308, 39 P. 872, 873-74 (1895)) ("The decision (on the first appeal) is the law of the case, not only binding on the parties and their privies, but on the court below and on this court itself. A ruling of an appellate court upon a point distinctly made upon a previous appeal is, in all subsequent proceedings in the same case upon substantially the same facts, a final adjudication, from the consequences of which the court cannot depart."). As explained by the Nevada Supreme Court in *Hall v. State*, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975), "[t]he doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." *See also Pellegrini v. State*, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing *McNelton v. State,* 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)) ("Under the law of the case doctrine, issues previously determined by this court on appeal may not be reargued as a basis for habeas relief.").

In appealing from the denial of the first habeas petition, Petitioner raised claims concerning the premeditation-and-deliberation jury instruction and the malice jury instruction—albeit, on the basis of ineffective assistance of counsel. *See* Exh. 5 at 7 ("[Petitioner] also contends on appeal that the district court improperly denied his claims of ineffective assistance of trial counsel with respect to the guilt phase" insofar as Petitioner alleged that counsel was ineffective for the "failure to object to a jury instruction regarding premeditation and deliberation" and for the "failure to object to a jury instruction regarding malice"). In its April 7, 2006, Order of Affirmance, the Nevada Supreme Court rejected

these claims, explaining that "overwhelming evidence supported [Petitioner's] conviction and that any errors in the jury instruction . . . were harmless beyond a reasonable doubt, whether [Petitioner's] trial counsel objected to them or not." *Id.* at 8. The fact that the Nevada Supreme Court addressed these claims within context of ineffective-assistance-of-counsel claims does not change the fact that the Nevada Supreme Court ultimately held that any errors in the jury instructions concerning malice or premeditation and deliberation were harmless beyond a reasonable doubt. That being the case, the allegations raised by Petitioner in the instant Petition pertaining to the premeditation-and-deliberation jury instruction and malice jury instruction are barred under the law of the case.[5]

Allegations three through six in support of Petitioner's claim that the trial judge failed to properly instruct the jury should be deemed waived under NRS 34.810(1)(b)(2). NRS 34.810(1)(b)(2) maintains that "[t]he court *shall* dismiss a petition if the court determines that . . . [t]he petitioner's conviction was the result of a trial and the grounds for the petition could have been . . . [r]aised in a direct appeal or a prior petition for a writ of habeas corpus or post-conviction relief . . . unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner." (emphasis added); *see also* NRS 34.724(2) (stating that a post-conviction petition is not a substitute for the remedy of a direct review); *Franklin v. State*, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) *disapproved of on other grounds by Thomas v. State*, 115 Nev. 148, 979 P.2d 222 (1999) (explaining that "claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings")). Petitioner's allegations concerning the felony-murder jury instructions, the equal-and-exact-justice jury instruction, and the

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[5] This Court should further note that the Nevada Supreme Court made it a point of including the following footnote in explaining its position regarding the jury instructions:

> We note that this court has consistently rejected the claims of error [Petitioner] 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).

Exh. 5 at 8, n.20.

reasonable-doubt jury instruction all could have been raised on direct appeal to the Nevada Supreme Court. Moreover, Petitioner has failed to demonstrate good cause for the failure to present these grounds earlier.[6] That being the case, this Court should find that these allegations are waived.

3. Petitioner's Claim That The State Engaged In Purposeful Discrimination By Using Peremptory Strikes To Remove Two African-American Venire Members At Petitioner's Trial Is Barred Under The Law Of The Case.

Claim Six of the Petition states that Petitioner's "conviction is invalid under federal constitutional guarantees of due process, a fair trial, a fair and impartial jury, and a jury of his peers, because the State engaged in purposeful discrimination by using peremptory strikes to remove both African-American venire members at [Petitioner's] first trial." Petition at 197. Specifically, Petitioner alleges that "[f]rom a qualified panel of thirty-six

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[6] The Petition includes a "Statement with Respect to Claims Re-Raised in the Instant Petition" in which it appears that Petitioner attempts to set out a blanket allegation of good cause insofar as he explains why he is re-raising "the grounds raised on direct appeal to the Nevada Supreme Court." Petition at 11. First, he argues he is doing this "because [he] is entitled to a cumulative consideration of the constitutional errors which infected his conviction and death sentence." *Id.* Then he goes on to allege that "[t]he failure to raise these claims adequately on direct appeal was the result of ineffective assistance of counsel on direct appeal," explaining that his appellate counsel "raised but, in some instances, failed to adequately plead . . . Claim Two (Guilt Phase Jury Instructions) (in part), Claim Four (Sexual Assault Aggravator) (in part), Claim Five (Penalty Phase Jury Instructions) (in part), Claim Six (Batson Guilty Phase), Claim Seven (Witt Error Guilt Phase), Claim Ten (Trial Court Error Guilt Phase), Claim Eleven (Insufficiency of the Evidence), Claim Twelve (Improper Victim Impact Evidence—Penalty Trial), Claim Fifteen (Prosecutorial Misconduct Guilt Phase), Claim Sixteen (Prosecutorial Misconduct Penalty Phase), Claim Seventeen (Trial Court Error Penalty Trial), Claim Twenty-Three (Trial Court Error in Not Striking the State's Notice of Intent to Seek Death Penalty—First Trial)[, and] Claim Twenty-Six (Cumulative Error) (in part). *Id.*

The Court should reject Petitioner's attempt to furnish good cause by arguing ineffective assistance of appellate counsel. While such a claim can certainly serve as good cause, it cannot serve as good cause here (for any of the aforementioned claims) because the claim itself is procedurally defaulted. As with Petitioner's claim of ineffective assistance of trial counsel, *see supra* at 8-13, this claim of ineffective assistance of appellate counsel was reasonably available at the time Petitioner filed his first habeas petition. And the record reflects that a claim of ineffective assistance of appellate counsel was, in fact, raised by Mr. Schieck—Petitioner's first post-conviction counsel. *See* Exh. 46 at 36-38. Therefore, because Petitioner's allegation of ineffective assistance of appellate counsel was reasonably available at the time Petitioner filed his first habeas petition, this Court should deny Petitioner's current attempt to establish good cause by relying on this procedurally defaulted claim. It is for this very same reason that the Court should deny Claim Nineteen—which sets out a claim of ineffective assistance of appellate counsel. *See infra* at 25-26.

potential jurors, the State exercised peremptory challenges to strike the only two African-Americans on the basis of their race, in violation of clearly establish Supreme Court authority" and further alleges that "[c]omparative juror analysis reveals that the State's explanations for striking these two jurors were pretextual, and offered only to conceal the State's true, discriminatory purpose." *Id.*; *see id.* at 200-10 (articulating the factual basis in support of these allegations).

The Court should deny this claim on the basis that it is barred under the law of the case. *See Pellegrini*, 117 Nev. at 879, 34 P.3d at 532 (citing *McNelton,* 115 Nev. at 414-15, 990 P.2d at 1275) ("Under the law of the case doctrine, issues previously determined by this court on appeal may not be reargued as a basis for habeas relief."). Petitioner raised this exact *Batson* claim on direct appeal to the Nevada Supreme Court, and the Nevada Supreme Court ultimately rejected this claim upon its conclusion that it "lack[ed] merit." Exh. 2 at 10-11; Exh. 110 at 46-51. Therefore, this Court should find that Petitioner's *Batson* claim is barred under the law of the case.

4. Petitioner's Claim That The Court Erred By Failing To Strike Biased Prospective Jurors For Cause Is Waived Under NRS 34.810(1)(b)(2).

Claim Seven of the Petition states that Petitioner's "conviction is invalid under federal constitutional guarantees of due process, a fair trial, and a fair and impartial jury, because the trial court erred by failing to strike biased prospective jurors for cause." Petition at 212. This claim of judicial error rests on Petitioner's allegation that there were three jurors who "demonstrated impermissible bias" but were nonetheless seated as jurors. *Id.* at 214; *see id.* at 214-16 (articulating the factual basis in support of this allegation).

The Court should find that this claim of judicial error is waived under NRS 34.810(1)(b)(2). *See Franklin*, 110 Nev. at 752, 877 P.2d at 1059. Petitioner's allegation that there were three biased jurors who the district court failed to remove for cause could have been raised on direct appeal to the Nevada Supreme Court. Moreover, Petitioner has failed to demonstrate good cause for the failure to present this ground earlier.[7] That being the case,

[7] *See supra* at n.6.

this Court should find that Petitioner's claim that the district court erred by failing to strike biased prospective jurors for cause has been waived.

5. Petitioner's Claim That The Court Erred In Admitting Evidence That Should Have Been Inadmissible Consists Of Allegations That Are Either Barred Under The Law Of The Case Or Waived Under NRS 34.810(1)(b)(2).

Claim Ten of the Petition states that Petitioner's "conviction is invalid under the federal constitutional guarantees of due process, equal protection, and trial before an impartial jury due to trial court error in the introduction of inadmissible evidence." Petition at 247. In support of this claim, Petitioner raises four detailed allegations of judicial error. *Id.* at 247-65. The State will first briefly outline what these detailed allegations are and will then explain why they are either barred under the law of the case or waived under NRS 34.810(1)(b)(2).

Petitioner's first allegation in support of his claim that the court erred in allowing inadmissible evidence to be introduced is his allegation that "[t]he trial court violated [Petitioner's] due process rights by permitting the State to introduce irrelevant prior bad act evidence at [Petitioner's] guilt-phase trial." *Id.* at 247. In support of this specific allegation, Petitioner raises three arguments. *Id.* at 248-61. First, Petitioner argues that "[t]he trial court erred in finding the prior bad act evidence relevant, and in failing to weigh its probative value against its prejudicial effect." *Id.* at 248; *see id.* at 248-51 (articulating the factual basis in support of this argument). Second, Petitioner argues that "[t]he trial court erred in permitting the State to merely proffer evidence at the Petrocelli hearing because it deprived [Petitioner] of due process and resulted in a lack of adequate notice to [Petitioner] of the evidence the State would ultimately present at trial." *Id.* at 251; *see id.* at 251-59 (articulating the factual basis in support of this argument). And lastly, Petitioner argues that "[t]he trial court erred in admitting the prior bad act evidence as excited utterances." *Id.* at 259; *see id.* at 259-61 (articulating the factual basis in support of this argument).

Petitioner's second allegation in support of his claim that the court erred in allowing inadmissible evidence to be introduced is his allegation that "[t]he trial court erred in admitting inadmissible hearsay evidence of [Petitioner's] state of mind." *Id.* at 261.

Specifically, Petitioner argues that the testimony of Lisa Duran and Dina Freeman should not have been admitted because it was not relevant to any issue in the case. *Id.*

Petitioner's third allegation in support of his claim that the court erred in allowing inadmissible evidence to be introduced is his allegation that the court "erred in admitting inadmissible evidence of a misdemeanor arrest the day after the offense." *Id.* at 262. Specifically, Petitioner takes issue with the court's admitting evidence of his arrest for petit larceny the day after killing the victim. *Id.* Petitioner avers that that this "shoplifting incident was irrelevant to the killing, as it happened after the fact, and had no relevant to the State's case." *Id.* at 263.

Petitioner's last allegation in support of his claim that the court erred in allowing inadmissible evidence to be introduced is his allegation that the court "erred in admitting inadmissible bad character evidence." *Id.* at 263. Specifically, Petitioner argues that the court should not have allowed the State to introduce evidence of his bad character through witnesses LaDonna Jackson and Deborah Turner." *Id.*

This Court should find that all four allegations of judicial error, which Petitioner raises in support of his claim that the trial court violated his due process rights by permitting the State to introduce irrelevant prior bad act evidence, should have been raised on direct appeal to the Nevada Supreme Court. *See* NRS 34.810(1)(b)(2); *Franklin*, 110 Nev. at 752, 877 P.2d at 1059. And, in fact, all four allegations (including most of the specific arguments made in support of each one) in support of this claim of judicial error were raised in some fashion on direct appeal to the Nevada Supreme Court. *See* Exh. 110 at 27-38 (arguing that the trial court abused its discretion by allowing the State to introduce evidence of prior domestic batteries by Petitioner when that evidence was not relevant to matters in issue); *id.* at 38-40 (arguing that the trial court abused its discretion by allowing the State to introduce testimony regarding a shoplifting incident that occurred the day after the killing); *id.* at 40-44 (arguing that the trial court abused its discretion by allowing the State to introduce character evidence that Petitioner was unemployed and a chronic thief and this evidence was admitted without the scrutiny of a pre-trial *Petrocelli* hearing). In its 1998 published opinion on the

matter, the Nevada Supreme Court rejected these allegations of judicial error in affirming the judgment of conviction and sentence of death. *See* Exh. 2 at 3-4, 10-11; *see also* Exh. 3 at 2. Therefore, those claims that were raised and considered by the Nevada Supreme Court are barred under the law of the case. *See Pellegrini*, 117 Nev. at 879, 34 P.3d at 532 (citing *McNelton,* 115 Nev. at 414-15, 990 P.2d at 1275) ("Under the law of the case doctrine, issues previously determined by this court on appeal may not be reargued as a basis for habeas relief.").

As to those specific arguments that were not raised, however, this Court should find that Petitioner has waived these arguments by his failure to raise them on appeal. *See* NRS 34.810(1)(b)(2); *Franklin*, 110 Nev. at 752, 877 P.2d at 1059. Moreover, Petitioner has failed to demonstrate good cause for the failure to present these arguments earlier.[8] That being the case, this Court should find that Petitioner's claim that the trial court violated his due process rights by permitting the State to introduce irrelevant prior bad act evidence consists of allegations/arguments that are either barred under the law of the case or waived under NRS 34.810(2).

6. Petitioner's Claim That The State Failed To Prove Beyond A Reasonable Doubt The Charges Of Burglary, Robbery, And First Degree Murder Is Barred Under The Law Of The Case.

Claim Eleven of the Petition states that Petitioner's "conviction is invalid under the federal constitutional guarantees of due process, equal protection, and a trial before an impartial jury because the State failed to prove beyond a reasonable doubt the charges of burglary, robbery, and first degree murder." Petition at 266.

As to charge of burglary, Petitioner argues that "[t]he State failed to show any evidence that [Petitioner] entered [the victim's] trailer with any intent other than to go home and see his girlfriend." *Id.* at 267. As to charge of robbery, Petitioner argues that the State failed to present evidence "that [Petitioner] entered the trailer with any intent other than to go home" or "that [Petitioner] used force on [the victim] with the intent to take anything from her." *Id.* at 268. As to the charge of first degree murder, Petitioner raises two arguments. *Id.*

[8] *See supra* at n.6.

at 269-72. First, Petitioner argues that the State failed to prove that the murder was premeditated and deliberate. *Id.* at 269-71. And second, Petitioner argues that the State failed to prove felony murder under either a theory of burglary or robbery because "[t]here was insufficient evidence to support either theory." *Id.* at 272.

The Court should deny these claims on the basis that they are barred under the law of the case. Petitioner raised these same insufficiency-of-the-evidence claims on direct appeal to the Nevada Supreme Court (*see* Exh. 110 at 52-61), and the Nevada Supreme Court rejected each claim. *See Pellegrini*, 117 Nev. at 879, 34 P.3d at 532 (citing *McNelton,* 115 Nev. at 414-15, 990 P.2d at 1275) ("Under the law of the case doctrine, issues previously determined by this court on appeal may not be reargued as a basis for habeas relief."). As to charge of burglary, the Nevada Supreme Court concluded the following:

> At trial, the State introduced evidence that [the victim] wanted to end her relationship with [Petitioner], that [Petitioner] had threatened and abused [the victim] in the past, and that [Petitioner] had threatened and abused [the victim] in the past, and that [the victim] did not communicate with [Petitioner] while he was in jail. Moreover, there was testimony that the trailer appeared ransacked, and that [the victim's] social security card and car keys were found in [Petitioner's] possession. Accordingly, we conclude that there is sufficient evidence to support the conviction of burglary . . . .

Id. at 7. As to the charge of robbery, the Nevada Supreme Court agreed with the State's argument that "a rational trier of fact could find that [Petitioner] took [the victim's] social security card and car through the use of actual violence or the threat of violence" and thus held that "there [was] sufficient evidence to support the conviction of robbery . . . ." *Id.* at 5-6.

As to the charge of first degree murder, this Court should note that while Petitioner adequately briefed the issue in his Opening Brief (*see* Exh. 110 at 58-61), the Nevada Supreme Court omitted a detailed discussion of this specific issue. *See* Exh. 2. Nonetheless, in finding that the evidence was sufficient to support the charges of burglary and robbery, it necessarily follows that the Court rejected any notion that the State failed to prove felony murder under either a theory of burglary or robbery. *See* Exh. 2 at 4-7. And in light of the fact that there was sufficient evidence to support the conviction of first degree murder under

either a theory of burglary or robbery, Petitioner cannot establish that he was prejudiced by the Nevada Supreme Court's failure to address the issue of first degree murder on the basis of premeditation and deliberation.

7. Petitioner's Claim Of Prosecutorial Misconduct Consists Of Allegations That Are Either Barred Under The Law Of The Case Or Waived Under NRS 34.810(1)(b)(2).

Claim Fifteen of the Petition states that Petitioner's "conviction is invalid under federal constitutional guarantees of due process, a fair trial, equal protection, and trial before an impartial jury due to the prosecutor's misconduct during the guilt phase of the trial." Petition at 290. In support of this claim, Petitioner raises seven allegations of prosecutorial misconduct. *Id.* at 290-300. The State will first briefly outline what these allegations are and will then explain why they are either barred under the law of the case or waived under NRS 34.810(1)(b)(2).

Petitioner's first alleges that "[t]he prosecutor committed misconduct by asking the jury to answer the question of why people stay with abusive partners." *Id.* at 291. Next, Petitioner alleges that "[t]he prosecutor improperly commented on [Petitioner's] post-arrest silence and improperly cross-examined [Petitioner] regarding punishment." *Id.* at 292. Third, Petitioner alleges that "[t]he State improperly disparaged [Petitioner] in front of the jury." *Id.* at 294. Petitioner next argues that "[t]he prosecution improperly misstated the presumption of innocence." *Id.* at 295. Fifth, Petitioner argues that "[t]he State improperly quantified reasonable doubt." *Id.* at 296. Sixth, Petitioner argues that "[t]he State misrepresented the record on appeal to the Nevada Supreme Court." *Id.* at 296. And last, Petitioner argues that "[t]he prosecution failed to turn over exculpatory evidence concerning Deborah Tuner's 1996 felony conviction." *Id.* at 298.

As for Petitioner's second allegation—i.e., that the prosecutor improperly commented on his post-arrest silence and improperly cross-examined him regarding punishment—this Court should note that Petitioner raised this allegation both on direct appeal and again in his first habeas petition (couched in terms of an ineffective-assistance-of-counsel claim). *See* Exh. 46 at 30-32; Exh. 110 at 73-74. And as for Petitioner's fifth allegation—i.e., that the

State improperly quantified reasonable doubt—this Court should note that Petitioner raised this allegation in his first habeas petition (again, couched in terms of an ineffective-assistance-of-counsel claim). In its April 7, 2006, Order of Affirmance, the Nevada Supreme Court rejected these allegations upon concluding "that overwhelming evidence supported [Petitioner's] conviction and that any errors in the jury instructions *or the prosecutor's remarks* were harmless beyond a reasonable doubt, whether [Petitioner's] trial counsel objected to them or not." Exh. 5 at 7-8 (emphasis added). Given the Nevada Supreme Court's ruling on the matter, this Court should find that allegations two and five that Petitioner raised in support of his claim of prosecutorial misconduct are barred under the law of the case. *See Pellegrini*, 117 Nev. at 879, 34 P.3d at 532 (citing *McNelton*, 115 Nev. at 414-15, 990 P.2d at 1275) ("Under the law of the case doctrine, issues previously determined by this court on appeal may not be reargued as a basis for habeas relief.").

As for the remaining allegations raised in support of Petitioner's claim of prosecutorial misconduct—that is, allegations one, three, four, six, and seven—this Court should find that Petitioner waived these arguments by his failure to raise them on appeal or in a previous habeas petition. *See* NRS 34.810(1)(b)(2); *Franklin*, 110 Nev. at 752, 877 P.2d at 1059. Moreover, Petitioner has failed to demonstrate good cause for the failure to present these arguments earlier.[9] That being the case, this Court should find that Petitioner's claim of prosecutorial misconduct consists of allegations that are either barred under the law of the case or waived under NRS 34.810(2).

8. Petitioner's Claim That His Conviction Is Invalid Because The Jury In His Case Was Drawn From A Venire From Which Members Of His Race Were Systematically Excluded And Unrepresented Is Barred Under The Law Of The Case.

Claim Eighteen of the Petition states that Petitioner'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

[9] *See supra* at n.6.

to his trial and conviction by a jury drawn from a venire from which members of his race were systematically excluded and unrepresented." Petition at 323.

Petitioner, however, raised this claim on both direct appeal and in his first habeas petition. In fact, in its April 7, 2006, Order of Affirmance, the Nevada Supreme Court noted just that:

> [Petitioner] 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. [Petitioner], 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.

Exh. 5 at 9. Accordingly, this Court should find that Petitioner's claim that his conviction is invalid because the jury in this case was drawn from a venire from which members of his race were systematically excluded and unrepresented is barred by the law of the case. *See Pellegrini*, 117 Nev. at 879, 34 P.3d at 532 (citing *McNelton*, 115 Nev. at 414-15, 990 P.2d at 1275) ("Under the law of the case doctrine, issues previously determined by this court on appeal may not be reargued as a basis for habeas relief.").

9. Petitioner's Claim That Appellate Counsel Were Ineffective On The First Direct Appeal Consists Exclusively Of Allegations Of Ineffective Assistance Of Counsel Which Are Themselves Procedurally Barred.

Claim Nineteen of the Petition states that Petitioner'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." Petition at 327. In support of this claim, Petitioner raises ten allegations of ineffective assistance of appellate counsel. The State will first briefly outline what these allegations are and will then go on to explain why they are all procedurally defaulted.

First, Petitioner alleges that appellate counsel were ineffective for "failing to assert that the first-degree murder instruction given at [Petitioner'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[.]" *Id.* Second, Petitioner alleges that appellate

counsel were ineffective for "failing to assert that the malice instruction was vague and ambiguous and gave the State an improper presumption of implied malice[.]" *Id.* Third, Petitioner alleges that appellate counsel were ineffective for "failing to argue that the jury instruction on reasonable doubt was incorrect[.]" *Id.* Fourth, Petitioner alleges that appellate counsel were ineffective for "failing to request the jurors be instructed that in order to find [Petitioner] guilty of felony murder, it had to find he formed the intent to commit the underlying felony of robbery before the murder[.]" *Id.* Fifth, Petitioner alleges that appellate counsel were ineffective for "failing to request an instruction that [Petitioner] 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[.]" *Id.* Sixth, Petitioner alleges that appellate counsel were ineffective for "failing to argue that the jury instruction on equal and exact justice was improper[.]" *Id.* Seventh, Petitioner alleges that appellate counsel were ineffective for "failing to raise a comprehensive comparative juror analysis regarding the State's Batson error[.]" *Id.* Eighth, Petitioner alleges that appellate counsel were ineffective for "failing to challenge the unconstitutional voir dire[.]" *Id.* at 327-28. Ninth, Petitioner alleges that appellate counsel were ineffective for "failing to raise a claim of prosecutorial misconduct in argument[.]" *Id.* at 328. And last, Petitioner alleges that appellate counsel were ineffective for "failing to assert the unconstitutionality of the prosecutor's cross-examination of [Petitioner] concerning possible punishments[.]" *Id.*

The Court should reject this claim of ineffective assistance of counsel—namely, that appellate counsel were ineffective on the first direct appeal—because all ten of the allegations upon which this claim is predicated are themselves procedurally defaulted. As noted above, this is the third habeas petition in which Petitioner is raising claims related to the guilt-phase of his capital proceedings. All guilt-phase claims/allegations of ineffective assistance of counsel—to include claims/allegations of ineffective assistance of *appellate* counsel—should have been raised in Petitioner's first habeas petition. The factual basis for each and every allegation raised in Claim Nineteen of the Petition was available during the timeframe in which Petitioner's first habeas petition was filed. And the record reflects that

many of the aforementioned allegations were, in fact, raised by Mr. Schieck—Petitioner's first post-conviction counsel. *See* Exh. 46 at 36-38. Therefore, because all allegations of ineffective assistance of appellate counsel raised by Petitioner in the instant Petition were reasonably available at the time Petitioner filed his first habeas petition, this Court should deny Claim Nineteen on the basis that it consists exclusively of procedurally defaulted allegations of ineffective assistance of appellate counsel.

10. Petitioner's Claim That The Trial Court Erred In Denying His Motion To Strike The State's Notice Of Intent To Seek Death Penalty Is Barred Under The Law Of The Case.

Claim Twenty-Three of the Petition states that Petitioner'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 [Petitioner's] motion to strike the State's notice of intent to seek the death penalty." Petition at 337.

Petitioner raised this exact claim on direct appeal to the Nevada Supreme Court, and the Nevada Supreme Court rejected this claim upon concluding that it lacked merit. *See* Exh. 2 at 10-11; Exh. 110 at 61-72. Accordingly, this Court should find that this claim of judicial error is barred under the law of the case. *See Pellegrini*, 117 Nev. at 879, 34 P.3d at 532 (citing *McNelton*, 115 Nev. at 414-15, 990 P.2d at 1275) ("Under the law of the case doctrine, issues previously determined by this court on appeal may not be reargued as a basis for habeas relief.").

B. The Claims Relating To The Guilt-Phase Are Successive Under NRS 34.810(2), And Petitioner Has Failed To Establish Good Cause.

NRS 34.810(2) requires the district court to dismiss "[a] second or successive petition 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 or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." And as with NRS 34.726(1), the procedural bar described in NRS 34.810(2) is mandatory. *See Evans v. State*, 117 Nev. 609, 622, 28 P.3d 498, 507 (2001) ("[A] court *must dismiss* a habeas petition if it presents claims that either

were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." (emphasis added)).

As noted above, the instant habeas petition constitutes the third habeas petition as far the guilt-phase claims are concerned. To the extent that Petitioner articulates new and different allegations within these guilt-phase claims, this Court should find that Petitioner's failure to assert those ground in a prior petition constitutes an abuse of the writ. And while NRS 34.810(3) affords Petitioner the opportunity to overcome the procedural bar described in subsection (2), Petitioner fails to establish good cause for the very same reasons that he failed to establish good cause under NRS 34.726(1). *See supra* at 7-26. That being the case, this Court should deny the Petition as far as the guilt-phase claims are concerned on the basis that these guilt-phase claims are procedurally barred under NRS 34.810(2).

C. The State Specifically Pleads Laches Under NRS 34.800(2) Because More Than 17 Years Have Elapsed Between The Nevada Supreme Court's Decision On Petitioner's Direct Appeal Of The Judgment Of Conviction (Relating To The Guilt-Phase Of The Capital Proceedings) And The Filing Of The Instant Petition.

NRS 34.800(2) creates a rebuttable presumption of prejudice to the State if "[a] period exceeding 5 years [elapses] between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction." The Nevada Supreme Court observed in *Groesbeck v. Warden*, 100 Nev. 259, 261, 679 P.2d 1268, 1269 (1984), how "petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system" and that "[t]he necessity for a workable system dictates that there must exist a time when a criminal conviction is final." To invoke NRS 34.800(2)'s presumption of prejudice, the statute requires that the State specifically plead laches.

The State affirmatively pleads laches in this case as far as the guilt-phase claims are concerned. In order to overcome the presumption of prejudice to the State, Petitioner has the heavy burden of proving a fundamental miscarriage of justice. *See Little v. Warden*, 117

Nev. 845, 853, 34 P.3d 540, 545 (2001). Based on Petitioner's representations and on what he has filed with this Court thus far, Petitioner has failed to meet that burden. That being the case, this Court should dismiss the guilt-phase claims of the Petition pursuant to NRS 34.800(2).

II. The Claims Relating To The Penalty-Phase Are Procedurally Barred Under Both NRS 34.726(1) And NRS 34.810(2), And The State Specifically Pleads Laches Under NRS 34.800(2).

9 of the 26 claims raised by Petitioner pertain to the penalty-phase of his capital proceedings. All of these claims, however, are untimely under NRS 34.726(1), and Petitioner has failed to establish good cause to overcome this procedural bar. All of these claims are also successive under NRS 34.810(2), and Petitioner has failed to establish good cause to justify raising them again. Finally, because more than 7 years have elapsed between the Nevada Supreme Court's decision on Petitioner's direct appeal of the Judgment of Conviction (relating to the second penalty hearing and sentence of death) and the filing of the instant Petition, the State pleads laches pursuant to NRS 34.800(2) and seeks to avail itself of that statute's rebuttable presumption of prejudice.

A. The Claims Relating To The Penalty Phase Are Untimely Under NRS 34.726(1), And Petitioner Has Failed To Establish Good Cause.

Here, the Judgment of Conviction (relating to the second penalty hearing and sentence of death) in Petitioner's case was filed on May 10, 2007. Petitioner timely filed a Notice of Appeal, and on October 20, 2009, the Nevada Supreme Court issued an Order affirming the judgment of the district court. *Chappell*, 114 Nev. at 1403, 972 P.2d at 838. Remittitur issued on June 8, 2010. Accordingly, Petitioner had until June 8, 2011, to file a timely Petition in which to argue his penalty-phase claims. The instant Petition, however, was filed on November 16, 2016—more than 5 years after the one-year deadline had expired. Such untimeliness can be excused if Petitioner can establish good cause for the delay. This, however, he has failed to do.

A brief recapitulation of Petitioner's capital proceedings from the second penalty hearing forward is necessary to give context to Petitioner's attempt to establish good cause

justifying the re-raising of the nine claims pertaining to his second penalty hearing. As noted above, 9 of the 26 claims raised by Petitioner pertain to the penalty-phase of Petitioner's capital proceedings—specifically, the penalty re-trial that ultimately resulted in another death sentence on May 10, 2007. During this second penalty hearing, Petitioner was represented by Mr. Schieck.[10] In his appeal from the death sentence that ultimately resulted from this penalty re-trial, Petitioner was represented by JoNell Thomas. On October 20, 2009, the Nevada Supreme Court affirmed the judgment of conviction and sentence of death; remittitur issued on June 8, 2010. Petitioner then filed his second habeas petition shortly thereafter (on June 22, 2010). Mr. Oram, who was appointed as Petitioner's post-conviction counsel, filed a supplemental brief in support of the second habeas petition on February 15, 2012. The District Court denied the petition and issued its Findings of Fact, Conclusions of Law and Order to that effect on November 16, 2012. In his appeal from the denial of his second habeas petition, Petitioner continued to be represented by Mr. Oram. On June 18, 2015, the Nevada Supreme Court affirmed the District Court's denial of Petitioner's second habeas petition; remittitur issued on November 17, 2015. Almost exactly one year to the day, Petitioner, through Brad Levinson and Sandy Ciel (both Assistant Federal Public Defenders), filed the instant habeas petition.

Page 11 of the Petition filed by Petitioner, through Mr. Levinson and Ms. Ciel, contains a section entitled "Statement with Respect to Claims Re-Raised in the Instant Petition" in which Petitioner argues that he is re-raising "claims which were previously raised during his prior post-conviction proceedings because state post-conviction counsel failed to adequately develop, present, or demonstrate prejudice with respect to those claims." Specifically, Petitioner argues that Mr. Schieck and Mr. Oram were each ineffective in representing Petitioner in his post-conviction proceedings.

Petitioner is correct in arguing that he had a right to post-conviction counsel in his post-conviction capital proceedings. *See* NRS 34.820(1)(a). And concomitant with this right

[10] And, as noted by Petitioner, Clark Patrick from the Special Public Defender's Office joined Mr. Schieck in the penalty re-trial as second chair. *See* Petition at 99-100.

is the right to *effective* post-conviction counsel. *McKague v. Warden, Nevada State Prison*, 112 Nev. 159, 165 n.5, 912 P.2d 255, 258 n.5 (1996) ("As a matter of statutory interpretation, we note that where state law entitles one to the appointment of counsel to assist with an initial collateral attack after judgment and sentence, 'it is axiomatic that the right to counsel includes the concomitant right to effective assistance of counsel.' [*Commonwealth v. Albert*, 561 A.2d 736, 738, 522 Pa. 331, 334 (1989)]. Thus, a petitioner may make an ineffectiveness of post-conviction counsel claim if that post-conviction counsel was appointed pursuant to NRS 34.820(1)(a)." (emphasis in original)); *Crump v. Demosthenes*, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997) ("We now hold that footnote 5 in *McKague* requires that a petitioner who has counsel appointed by statutory mandate is entitled to effective assistance of that counsel."). Petitioner, however, is wrong in arguing that the ineffectiveness of both Mr. Schieck and Mr. Oram can establish good cause to justify the re-raising of the nine claims addressed in this section of the State's Response.

As far as the allegations of ineffective assistance of counsel against Mr. Schieck are concerned, this Court should find that those allegations are all procedurally defaulted. *See State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. at 235, 112 P.3d at 1077 (explaining that "*Crump* does not stand for the proposition that claims of ineffective first post-conviction counsel are immune to other procedural default, e.g., untimeliness under NRS 34.726 or NRS 34.800"). Mr. Schieck represented Petitioner from 2002 to 2007. During that timeframe, Mr. Schieck filed a supplemental petition to Petitioner's first habeas petition and was ultimately successful in getting Petitioner's first death sentence vacated and a new penalty hearing ordered. *See* Exhs. 4, 46, and 109. Sentenced to death again, Petitioner appealed but to no avail. The Nevada Supreme Court affirmed and issued its remittitur on June 8, 2010. Exh. 7. More than six years have elapsed between the date of remittitur and the present day. Pursuant to the Nevada Supreme Court's decision in *Rippo v. State*, 368 P.3d 729, 740, 132 Nev. Adv. Rep. 11 (2016), Petitioner had to assert any ineffective-assistance-of-counsel claims against Mr. Schieck by June 8, 2011—one-year after the Nevada Supreme Court issued its remittitur in its decision affirming the judgment of conviction and sentence

of death associated with the second penalty hearing. *See Rippo*, 368 P.3d at 740, 132 Nev. Adv. Rep. 11 (concluding that "a claim of ineffective assistance of postconviction counsel has been raised within a reasonable time after it became available so long as the postconviction petition is filed within one year after entry of the district court's order disposing of the prior postconviction petition or, if a timely appeal was taken from the district court's order, within one year after this court issues its remittitur"). And the record reflects that Petitioner did exactly that in his proper person habeas petition filed on June 22, 2010, and in the supplemental petition filed by Petitioner, through Mr. Oram, on February 15, 2012. *See* Exhs. 46, 160

To the extent Petitioner alleges that Mr. Oram was ineffective, the State concedes that any such ineffective-assistance-of-counsel claims are timely asserted. Mr. Oram is Petitioner's first post-conviction counsel after the second penalty hearing. And because the Nevada Supreme Court issued its remittitur in its decision affirming the District Court's denial of the second habeas petition[11] on November 17, 2015, the instant petition, which was filed on November 16, 2016, is timely as far as the ineffective-assistance-of-counsel claims against Mr. Oram are concerned.

The State's concession that the ineffective-assistance-of-counsel claims against Mr. Oram are timely should in no way be construed as a concession that such claims are of any merit. As will be explained by the State in addressing the penalty-phase-specific claims below, Petitioner has failed to establish that he received ineffective assistance of counsel from Mr. Oram insofar as he has failed to establish either deficient performance on the part of Mr. Oram and/or that he was prejudiced by any of the deficiencies that he alleges. And in failing to establish this, he has necessarily failed to establish the good cause he needs to overcome the procedural bars under NRS 34.726(1)(a), NRS 34.810(1)(b)(2), and NRS 34.810(2).

[11] Or, again, consistent with the bifurcated approach adopted by the State, the second habeas petition as far as guilt-phase claims are concerned and the first habeas petition as far as penalty-phase claims are concerned.

1. Petitioner's Claim That Trial Counsel Was Ineffective During The Second Penalty Phase Consists Exclusively Of Allegations Of Ineffective Assistance Of Counsel Which Are Themselves Procedurally Barred.

Claim Three of the Petition states that Petitioner's "death sentence is invalid under the federal constitutional guarantees of due process, confrontation, right to counsel, a reliable sentence, and equal protection due to the ineffective assistance of trial counsel during the second penalty phase of the proceedings." Petition at 95. In support of this claim, Petitioner raises four detailed allegations of ineffective assistance of counsel. *Id.* at 95-179. The State will first briefly outline what all of these detailed allegations are and will then go on to explain why they are all procedurally defaulted.

Petitioner's first allegation in support of his claim that trial counsel were ineffective during the second penalty phase is his allegation that counsel were ineffective for "failing to investigate and present compelling mitigating evidence at the penalty hearing." *Id.* at 97. In support of this specific allegation, Petitioner raises seven arguments. *See id.* at 97-152. First, he argues that counsel "failed to adequately prepare for the penalty retrial." *Id.* at 97; *see id.* at 97-102 (articulating the factual basis in support of this argument). Second, he argues that had counsel "adequately investigated and prepared for the penalty retrial, they could have presented compelling mitigating evidence." *Id.* at 102; *see id.* at 102-11 (articulating the factual basis in support of this argument). Third, he argues that counsel were ineffective for "failing to identify, prepare and present lay witnesses." *Id.* at 112; *see id.* at 112-28 (articulating the factual basis in support of this argument). Fourth, he argues that counsel were ineffective for "failing to adequately prepare Dr. Etcoff." *Id.* at 130; *see id.* at 130-36 (articulating the factual basis in support of this argument). Fifth, he argues that counsel were ineffective for "failing to investigate and present evidence that [Petitioner] suffers from a Fetal Alcohol Spectrum Disorder." *Id.* at 136; *see id.* at 136-49 (articulating the factual basis in support of this argument). Sixth, Petitioner argues that counsel were ineffective for "failing to present an expert on addiction and drug toxicity." *Id.* at 148; *see id.* at 148-51 (articulating the factual basis in support of this argument). And last, he argues "cumulative prejudice" insofar as he avers that if counsel "had performed effectively, the jury would have

heard a much more complete and compelling picture of the adversity [Petitioner] faced throughout his life." *Id.* at 152.

Petitioner's second allegation in support of his claim that trial counsel was ineffective during the second penalty phase is his allegation that counsel were ineffective for "failing to rebut the State's sole aggravating circumstance." *Id.* at 153. In support of this specific allegation, Petitioner raises six arguments. *Id.* at 153-68. First, he argues that counsel were ineffective for "failing to challenge and rebut testimony that there was semen inside the victim." *Id.* at 153; *see id.* at 153-55 (articulating the factual basis in support of this argument). Second, he argues that counsel were ineffective for "fail[ing] to prepare expert witness Todd Cameron Grey to rebut the sexual assault." *Id.* at 155; *see id.* at 155-57 (articulating the factual basis in support of this argument). Third, he argues that counsel were ineffective for "fail[ing] to impeach the testimony of Chief Medical Examiner Giles Sheldon Green." *Id.* at 157; *see id.* at 157-62 (articulating the factual basis in support of this argument). Fourth, he argues that counsel were ineffective for "failing to interview the State's witnesses before trial." *Id.* at 162; *see id.* at 162-64. Fifth, he argues that counsel were ineffective for "fail[ing] to request a mistaken belief of consent jury instruction." *Id.* at 164; 164-66 (articulating the factual basis in support of this claim). And last, he argues that he was prejudiced by all of the aforementioned deficiencies. *See id.* at 166-68.

Petitioner's third allegation in support of his claim that trial counsel were ineffective during the second penalty phase is his allegation that counsel that were ineffective for "failing to conduct an adequate voir dire." *Id.* at 168. Specifically, Petitioner argues that counsel was ineffective because he "failed to attempt to qualify three death-scrupled jurors who were struck for cause by the court." *Id.* at 168-69 (articulating the factual basis in support of this argument).

Petitioner's final allegation in support of his claim that trial counsel was ineffective during the second penalty phase is his allegation that counsel were ineffective for "failing to protect [Petitioner's] right to a fair hearing by raising appropriate objections." *Id.* at 170. In support of this specific allegation, Petitioner raises five arguments. *See id.* at 170-79. First,

he argues that counsel "failed to object to cumulative victim impact evidence." *Id.* at 170; *see id.* at 170-72, 273-76 (articulating the factual basis in support of this argument). Second, he argues that counsel "failed to object to prosecutorial misconduct." *Id.* at 172; *see id.* at 172-75, 301-09 (articulating the factual basis in support of this argument). Third, he argues that counsel "failed to object to highly suspect and prejudicial hearsay statements." *Id.* at 175; *see id.* at 175-76, 310-22 (articulating the factual basis in support of this argument). Fourth, he argues that counsel "failed to object when the state improperly impeached a defense witness." *Id.* at 176; *see id.* at 176-78 (articulating the factual basis in support of this argument). And last, he argues several other instances in which he believed counsel's failure to object constituted deficient performance. *Id.* at 179, 192-96, 310-22; *see id.* at 179 (articulating the factual basis in support of this argument).

The Court should reject this claim of ineffective assistance of counsel—namely, that trial counsel was ineffective during the second penalty phase—because all four of the allegations upon which this claim is predicated are themselves procedurally defaulted. *See State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. at 235, 112 P.3d at 1077. As noted above, Mr. Schieck represented Petitioner during the second penalty hearing. Accordingly, all of these claims of ineffective assistance of counsel are directed toward Mr. Schieck. However, Mr. Schieck's representation of Petitioner came to an end in 2007 at which point Ms. Thomas represented Petitioner on his direct appeal from the second judgment of conviction and sentence of death. The Nevada Supreme Court ultimately affirmed the judgment of conviction and sentence of death and issued its remittitur on June 8, 2010. Thus, in order to have timely asserted any ineffective-assistance-of-counsel claims against Mr. Schieck, Petitioner would have had to do this by June 8, 2011—in other words, within one year after the Nevada Supreme Court issued its remittitur in its decision affirming the judgment of conviction and sentence of death associated with the second penalty hearing. However, *more than six years* have elapsed between the date of remittitur and the present day.

To be sure, Petitioner did, in fact, timely file a proper person habeas petition on June 22, 2010, and, through Mr. Oram, filed a supplemental petition filed on February 15, 2012, in which he raised multiple allegations of ineffective assistance of counsel against Mr. Schieck. *See* Exhs. 46, 160. While Petitioner can argue ineffective assistance of counsel on the part of Mr. Oram in developing the ineffective-assistance-of-counsel claims against Mr. Schieck, the Court should reject Petitioner's feeble attempt to do that here. First, the Court should note that each of the four claims along with their corresponding allegations/arguments are couched exclusively in terms of trial counsel, not post-conviction counsel. *See* Petition at 97 ("Trial Counsel were ineffective . . . ."); *Id.* ("Trial counsel failed . . . ."); *Id.* at 102 ("If trial counsel had adequately investigated . . . ."); *Id.* at 112 ("Trial counsel were ineffective . . . ."); *Id.* at 115 (Trial counsel failed . . . ."); *Id.* at 116 (same); *Id.* at 128 ("Trial counsel were ineffective . . . ."); *Id.* at 130 (same); *Id.* at 136 (same); *Id.* ("Trial counsel knew . . . ."); *Id.* at 146 ("There is a reasonable probability of a more favorable outcome if trial counsel had presented evidence . . . ."); *Id.* at 148 ("Trial counsel were ineffective . . . ."); *Id.* at 153 (same); *Id.* at 155 ("Trial counsel failed . . . ."); *Id.* at 157 (same); *Id.* at 162 ("Trial counsel were ineffective . . . ."); *Id.* at 164 ("Trial counsel failed . . . ."); *Id.* at 168 ("Trial counsel were ineffective . . . ."); *Id.* at 170 (same); *Id.* at 172 ("Trial counsel failed . . . ."); *Id.* at 175 (same); *Id.* at 176 (same); *Id.* at 179 ("[T]rial counsel also failed . . . ."). Thus, all of the claims and allegations of ineffective assistance of counsel raised in Claim Three of the Petition and the arguments in support thereof are targeted at Mr. Schieck, not Mr. Oram. Granted, Mr. Oram is mentioned in passing on page 12 of the Petition where Petitioner makes the conclusory statement that his "previous post-conviction counsel, David Schieck and Chris Oram, were ineffective in failing to present the additional information contained in [Claims One, Two, Three, Four, Five, Six, Nine, Ten, Eleven, Twelve, Thirteen, Fifteen, Sixteen, Nineteen, Twenty, Twenty-Three, Twenty-Five, and Twenty-Six]." The Court should find that this statement—which appears nowhere within Claim Three of the Petition and in no way alleges with specificity that Mr. Oram was ineffective for failing to adequately develop his ineffective-assistance-of-counsel claims against Mr. Schieck—is insufficient to

forth a cognizable claim of ineffective assistance of counsel as regards Mr. Oram's performance in developing ineffective-assistance-of-counsel claims against Mr. Schieck.

Nonetheless, to the extent this Court does find that Petitioner's blanket allegation of ineffective assistance of counsel against Mr. Oram (on page 11 of the Petition) is sufficient to raise a claim of ineffective assistance of counsel against Mr. Oram for failure to adequately develop the ineffective-assistance-of-counsel claims against Mr. Schieck, the Court should still deny this claim on the basis that Petitioner has failed to meet his burden under *Strickland*. As noted above, all claims and corresponding allegations/arguments were framed in terms of ineffective assistance of *trial* counsel, not the ineffective assistance of *post-conviction* counsel. And so even assuming Petitioner's conclusory allegation implicating Mr. Oram's effectiveness as counsel was sufficient to raise a cognizable ineffective-assistance-of-counsel claim, it certainly is not sufficient to prove such a claim. As noted by the Nevada Supreme Court in *Means v. State*, "*Strickland* dictates that [the Court's] evaluation begin[ ] with the 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " 120 Nev. 1001, 1011, 1003 P.3d 25 (2004) (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065). To overcome this presumption, the petitioner bears the burden of proving "the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." *Id.* at 1012, 1003 P.3d at 33.

There is no denying that Petitioner here, in the Petition he has filed through Assistant Public Defenders Mr. Levinson and Ms. Ciel, has set out exceptionally detailed factual allegations in support of his claim that trial counsel were ineffective during the second penalty hearing. But the only issues that can be considered on the merits given the posture of the case—again, because all claims against Mr. Schieck himself are procedurally defaulted—are those implicating the effectiveness of Mr. Oram's assistance as post-conviction counsel. And notwithstanding the exceptionally detailed allegations impugning Mr. Schieck's effectiveness as counsel, the bottom line is that they do not explain what made Mr. Oram defective in his post-conviction representation of Petitioner or how Petitioner was prejudiced

by any alleged deficiency on the part of Mr. Oram. After explaining on page 11 of the Petition that he is re-raising the issues he has raised in previous pleadings because "state post-conviction counsel failed to adequately develop, present, or demonstrate prejudice with respect to those claims," Petitioner goes on to argue on page 12 of the Petition that his "previous post-conviction counsel, David Schieck and Chris Oram, were ineffective in failing to present the additional information contained in [Claims One, Two, Three, Four, Five, Six, Nine, Ten, Eleven, Twelve, Thirteen, Fifteen, Sixteen, Nineteen, Twenty, Twenty-Three, Twenty-Five, and Twenty-Six]."

This broad-sweeping, conclusory statement does not meet Petitioner's burden under *Strickland*, and this Court should reject Petitioner's attempt to argue otherwise. Entirely absent from the 84 pages that make up Claim Three of the Petition is any meaningful analysis as to how it is that *Mr. Oram was deficient* for not elaborating (any more than he already did in his supplemental petition) on Mr. Schieck's alleged ineffectiveness in purportedly (1) "failing to investigate and present compelling mitigating evidence at the penalty hearing," *see* Petition at 97; (2) "failing to rebut the State's sole aggravating circumstance," *see id.* at 153; (3) "failing to conduct an adequate voir dire," *see id.* at 168; and (4) "failing to protect [Petitioner's] right to a fair hearing by raising appropriate objections," *see id.* at 170.[12] So much for Petitioner's feeble attempt to establish deficient performance on the part of Mr. Oram.

Petitioner's attempt to meet *Strickland*'s second prong—i.e., prejudice—on the basis of any alleged deficiencies on the part of Mr. Oram fares no better. As for Petitioner's first allegation in support of his claim that trial counsel was ineffective during the second penalty phase—i.e., his allegation that counsel was ineffective for failing to investigate and present compelling mitigating evidence at the penalty hearing—the record reflects that Mr. Oram raised many of the arguments Petitioner now makes in support of this allegation in the

[12] These are the four allegations of ineffective assistance of trial counsel upon which Petitioner's overall claim of ineffective assistance of counsel during the second penalty hearing is predicated.

instant habeas petition. *Compare* Petition at 97-102 (arguing that counsel "failed to adequately prepare for the penalty retrial") *with* Exh. 43 at 23-25 (arguing that counsel "failed to properly investigate and prepare for the penalty phase"); Petition at 112-30 (arguing that counsel were ineffective for "failing to identify, prepare, and present lay witnesses")[13] *with* Exh. 43 at 25-28 (arguing that counsel were ineffective for the "failure to produce testimony from James Ford and Ivory Morrell") *and* Exh. 43 at 35-36 (arguing that counsel were ineffective for the "failure to properly prepare a lay mitigation witness");[14]

[13] To be sure, the instant Petition goes into much more detail as to why counsel were ineffective for "failing to identify, prepare, and present lay witnesses," going in depth as to why counsel were ineffective for failing to call Ernestine Harvey and Carla Chappell—two of the eight witnesses Mr. Schieck initially argued in the first habeas petition should have been presented as mitigation witnesses but ultimately decided not to present at the penalty retrial—to testify at the penalty retrial as well as going into depth as to how there were "[m]yriad other witnesses [ ] available to testify to [Petitioner's] tragic upbringing, his obvious intellectual deficits, and that the drugs he used to escape overpowered him." *See* Petition at 115- 16. These issues, however, were discussed on March 20, 2007, at the close of the second penalty hearing. *See* Exh. 176 at 152-54. When counsel for the State expressed his concern that Mr. Schieck failed to call many of the very witnesses who the Nevada Supreme Court agreed (in its April 7, 2006, Order of Affirmance) should have been presented as mitigation witnesses, Mr. Schieck made it very clear that his decision not to call them was a deliberate, strategic decision. *See id.* at 154 (responding to the State's concern and going through names of these witnesses and then concluding that of all the witnesses they "called the witnesses [they] felt were necessary and appropriate in this penalty hearing").

The Court should further note that neither Mr. Schieck's nor Mr. Patrick's declaration—which are marked as Exhibits 94 and 108, respectively—concedes deficiency for the failure to identify, prepare, or present many of the lay witnesses Petitioner argues should have been presented at the second penalty hearing. Given each man's willingness to fall on his sword, candidly admitting that he was deficient in several respects, it is telling that nowhere in either declaration is an admission of deficiency regarding the issue of lay-witness mitigation evidence (with the exception of William Roger Moore, who is discussed below, *see infra* at n.14). *See* Exhs. 94, 108. Thus, given Mr. Scheick's representations to the Court at the close of the second penalty hearing, it is clear that the decision not to call either Ernestine Harvey or Carla Chappell or not to present any of the other lay witnesses identified by Petitioner in the instant petition (again, with the exception of Mr. Moore, who is discussed below, *see infra* at n.14) constituted a strategic decision. Accordingly, it would have been futile for Mr. Oram to allege that Mr. Schieck was ineffective in this respect, and counsel cannot be deemed ineffective for failing to make futile arguments. *See Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

[14] Nestled within the Petitioner's third argument in support of his allegation that counsel was ineffective for "failing to identify, prepare, and present lay witnesses" is the claim that "trial counsel" was ineffective for failing to present William Roger Moore as a witness at the penalty rehearing. As noted above, Petitioner's "trial counsel" consisted of Messrs. Schieck and Patrick. And, again, as discussed extensively above, any claims of ineffective assistance of counsel against Messrs. Schieck and Patrick are procedurally defaulted. But to the extent the Court chooses to construe Petitioner's argument as an argument that Mr. Oram was ineffective for failing to allege that Messrs. Schieck and Patrick were ineffective for failing to call Mr. Moore, the Court should deny this claim on the basis that Petitioner has failed to establish prejudice. While both Messrs. Schieck and Patrick conceded in their respective declarations that they had no strategic decision for failing to Mr. Moore, Petitioner still fails to meet the *Strickland* standard insofar as he cannot establish that he was prejudiced by counsel's failure to call Mr. Moore. As Petitioner's juvenile

Petition at 130-36 (arguing that counsel were ineffective for "failing to adequately prepare Dr. Etcoff") *with* Exh. 43 at 30-35 (arguing that counsel were ineffective for the "failure to properly prepare expert witnesses prior to penalty phase"); [15] Petition at 136-47 (arguing that counsel were ineffective for "failing to investigate and present evidence that [Petitioner] suffers from a Fetal Alcohol Spectrum Disorder") *with* Exh. 43 at 23 (arguing that counsel were ineffective for the "[f]ailure to test [Petitioner] for the effects of fetal alcohol syndrome and/or being born to a drug addicted mother") *and* Exh. 43 at 30 (arguing that "[t]here was evidence that [Petitioner's] mother may have been addicted to drugs and alcohol" and that "[a] proper investigation should have been conducted to determine whether [Petitioner] was born to a mother who was ingesting narcotics and/or alcohol during her pregnancy" and that "[t]here is no indication in the voluminous file that counsel investigated the possibility of fetal alcohol syndrome"). And the Nevada Supreme Court, in its June 18, 2015, Order of Affirmance, denied these arguments and ultimately concluded that trial counsel were not ineffective during the second penalty phase for failing to investigate and present compelling mitigating evidence at the penalty hearing. *See* Exh. 10 at 3-6, 8.

As for Petitioner's second allegation in support of his claim that trial counsel were ineffective during the second penalty phase—i.e., his allegation that counsel was ineffective for failing to rebut the State's sole aggravating circumstance—the record again reflects that Mr. Oram raised many of the arguments Petitioner now makes in support of this allegation in

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probation officer, Mr. Moore would have testified regarding Petitioner's troubled upbringing in Michigan. Exh. 72. Trial counsel, however, had already presented such evidence through other witnesses—namely, Willy Chappell, Fred Dean, Benjamin Dean, and Mira Chappell King. *See* Exh. 169 at 239-52, 264-301, 303-314, and 318-348. Because the subject matter of Mr. Moore's proffered testimony was substantially covered by these other witnesses, Petitioner cannot establish that had he been able to introduce the testimony of Mr. Moore, he would not have been sentenced to death. Moreover, the jury did, after all, find all the mitigating factors that Mr. Moore's testimony regarding Petitioner's troubled youth would have served to establish. *See* Exh. 39 (finding the following relevant mitigating factors: that Petitioner "has had no father figure in his life," that Petitioner "was raised in an abusive household," that Petitioner "was the victim of physical abuse as a child," that Petitioner "was born to a drug/alcohol addicted mother," and that Petitioner "was raised in a depressed housing area"). Because Petitioner cannot establish that he was prejudiced by trial counsel's failure to call Mr. Moore, he necessarily fails to establish that Mr. Oram, as post-conviction counsel, was ineffective for failing to arguing that trial counsel was ineffective for failing to call Mr. Moore.

[15] This includes Dr. Etcoff, Dr. Grey, and Dr. Danton. *See* Exh. 43 at 30-35.

the instant habeas petition. *Compare* Petition at 153-55 (arguing that trial counsel were ineffective for "failing to challenge and rebut testimony that there was semen inside the victim") *with* Exh. 43 at 28-29 (arguing that "[p]enalty phase counsel was ineffective for failing to provide expert testimony that sperm could be located in the vaginal cavity of the victim . . . ."); Petition at 155-57 (arguing that counsel were ineffective because they "failed to prepare expert witness Todd Cameron Grey to rebut the sexual assault") *with* Exh. 43 at 30-35 (arguing that counsel were ineffective for the "failure to properly prepare expert witnesses prior to penalty phase");[16] Petition at 159-62 (arguing that counsel were ineffective for "failing to properly prepare Dr. William Danton to testify that the sex was consensual) *with* Exh. 43 at 30-35 (arguing that counsel were ineffective for the "failure to properly prepare expert witnesses prior to penalty phase").[17] And the Nevada Supreme Court, in its June 18, 2015, Order of Affirmance, denied these arguments and ultimately concluded that trial counsel were not ineffective during the second penalty phase for failing to rebut the State's sole aggravating circumstance. *See* Exh. 10 at 4-5, 7-8. Moreover, to the extent Petitioner now raises new / more-detailed arguments in support of this allegation of ineffective assistance of counsel, he still cannot establish prejudice in light of the Nevada Supreme Court's conclusion that there was "great weight of evidence demonstrating that any sexual conduct that occurred on the day of the murder was not consensual." *Id.* at 7.

As for Petitioner's third allegation in support of his claim that trial counsel were ineffective during the second penalty phase—i.e., his allegation that counsel were ineffective for failing to conduct an adequate voir dire—it would have been futile for Mr. Oram to argue that trial counsel were ineffective for "fail[ing] to attempt to qualify three death-scrupled jurors who were struck for cause by the court." Petition at 168. Again, to the extent the Court chooses to construe Petitioner's argument as an argument that Mr. Oram was ineffective for failing to allege that Messrs. Schieck and Patrick were ineffective for failing to attempt to qualify three death-scrupled jurors, the Court should nonetheless find that Petitioner has

[16] *See supra* at n.15.

[17] *See supra* at n.15.

failed to demonstrate prejudice. Given the unequivocal responses from prospective jurors Jackson, Stio, and Cohen's that they would not sentence a criminal defendant to death, Petitioner cannot prove that even if counsel had attempted to rehabilitate them, there is a reasonable probability that the State's challenges for cause would have been denied. *See* Exh. 184 at 73-75, 128-31

Lastly, as for Petitioner's final allegation in support of his claim that trial counsel were ineffective during the second penalty phase—i.e., his allegation that counsel were ineffective for failing to protect Petitioner's right to a fair hearing by raising appropriate objections—the record once again reflects that Mr. Oram raised many of the arguments Petitioner now makes in support of this allegation in the instant petition. *Compare* Petition at 170-72 (arguing that counsel were ineffective because they "failed to object to cumulative victim impact evidence") *with* Exh. 43 at 36-39 (arguing that both trial and appellate counsel were ineffective for "failure to object to the cumulative victim impact panel in violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution"); Petition at 172-75 (arguing that counsel were ineffective because they "failed to object to prosecutorial misconduct") *with* Exh. 43 at 39-42 (arguing that counsel were ineffective for "failing to object to improper prosecutorial arguments during the penalty phase"); Petition at 176-78 (arguing that counsel were ineffective because they "failed to object when the state improperly impeached a defense witness") *with* Exh. 43 at 42-43 (arguing that counsel were ineffective for the "failure to object to improper impeachment"). And the Nevada Supreme Court, in its June 18, 2015, Order of Affirmance, denied these arguments and ultimately concluded that trial counsel were not ineffective during the second penalty phase for failing to protect Petitioner's right to a fair hearing by raising appropriate objections. *See* Exh. 10 at 9-13.

Based on the foregoing, the Court should deny Petitioner's claim that trial counsel were ineffective during the second penalty phase because all four of the allegations upon

which this claim is predicated are themselves procedurally defaulted, and Petitioner has failed to sufficiently plead good cause to excuse this default.[18]

2. Petitioner's Claim That The Sexual Assault Aggravator Was Not Proven By Sufficient Evidence Consists Of Allegations That Are Either Barred Under The Law Of The Case Or Waived Under NRS 34.810(1)(b)(2).

Claim Four of the Petition states that Petitioner's "sentence of death is invalid under the federal constitutional guarantees of due process, confrontation, effective counsel, equal protection, trial before an impartial jury, freedom from cruel and unusual punishment, and a reliable sentence because the sexual assault aggravator was not proven by sufficient evidence, and is invalid as applied to [Petitioner]." Petition at 180. In support of this claim, Petitioner raises two allegations. *Id.* at 184-90. The State will first briefly outline what these allegations are and will then explain why they are barred under the law of the case or waived under NRS 34.810(1)(b)(2).

Petitioner first alleges that "[t]he evidence presented was insufficient to prove the sexual assault aggravating circumstance." *Id.* at 184. In support of this specific allegation, Petitioner raises two arguments. First, he argues that "[t]he State failed to prove that [Petitioner] sexually assault [the victim]." *Id.*; *see id.* at 184-86 (articulating the factual basis in support of this argument). And second, he argues that "[t]he State failed to prove that the

[18] As discussed in footnote 4, the Petition includes a "Statement with Respect to Claims Raised for the First Time in the Instant Petition." Petition at 13. In this section, Petitioner argues that he "was prevented from litigating Claim One (IAC Guilt Phase) and Claim Three (IAC Penalty Phase)" because he "was prevented from proving the necessary elements of his ineffective assistance of counsel claims by this Court's refusal to admit and consider relevant evidence, and concomitant failure to provide resources adequate to allow counsel to fully and fairly litigate these constitutional issues." *Id.* at 13-14. He further alleges that "[t]his Court's denial of funds rendered the state corrective process inadequate." *Id.* at 14. The Court should reject these bold, naked allegations and find that they are insufficient to establish the good cause necessary to present claims that are otherwise procedurally defaulted (i.e. those claims of ineffective assistance of trial counsel raised in Claim Three).

As far as the claims related to the second penalty hearing are concerned, Petitioner further argues that the Court's failure to grant an evidentiary hearing constitutes good cause to excuse "any failure to previously develop the factual basis for claims stemming from [Petitioner's] second penalty phase." *Id.* at 12. This attempt to establish good cause fails, however. Petitioner's claim that the district court erred in denying his request for an evidentiary hearing is barred under the law of the case. In its October 20, 2009, Order of Affirmance, the Nevada Supreme Court affirmed the District Court's decision to deny Petitioner's request for an evidentiary hearing. Accordingly, Petitioner's attempt to establish good cause on the basis of an allegation that is itself barred necessarily fails.

killing was committed during the perpetration of a sexual assault." *Id.* at 186; *see id.* at 186-88 (articulating the factual basis in support of this argument).

Petitioner next alleges that "[t]he sexual assault aggravating circumstance is invalid because it fails to perform the required narrowing function under the Eighth Amendment." *Id.* at 189. Specifically, Petitioner argues that "[b]ecause the State made the sexual assault a potential basis for the burglary, it must be excluded as an aggravating circumstance for the same reason that the burglary must be excluded." *Id.*

As far as Petitioner's first allegation is concerned—i.e., that the evidence presented was insufficient to prove the sexual assault aggravator—this Court should find that it is barred under the law of the case. *See Pellegrini*, 117 Nev. at 879, 34 P.3d at 532 (citing *McNelton v. State,* 115 Nev. at 414-15, 990 P.2d at 1275) ("Under the law of the case doctrine, issues previously determined by this court on appeal may not be reargued as a basis for habeas relief."). The Nevada Supreme Court addressed this exact allegation in its December 30, 1998, Opinion affirming the Judgment of Conviction and sentence of death:

> [Petitioner] argues that the State failed to prove beyond a reasonable doubt that the sexual encounter between [Petitioner] and [the victim] was nonconsensual. We do not agree. The jury was instructed to find sexual assault if [Petitioner] engaged in sexual intercourse with [the victim] "against [her] will" or under conditions in which [Petitioner] knew or should have known that [the victim] was "mentally and emotionally incapable of resisting." The evidence at trial and during the penalty hearing showed that [the victim] and [Petitioner] had an abusive relationship, that [the victim] had ended her relationship with [Petitioner], that [Petitioner] was extremely jealous of [the victim's] relationships with other men, and that [the victim] was involved with another man at the time of the killing. We conclude that a rational trier of fact could have concluded that either [the victim] would not have consented to sexual intercourse under these circumstances or was mentally or emotionally incapable of resisting [Petitioner's] advances, and that [Petitioner] therefore committed sexual assault. Consequently, the evidence supports the jury's finding of sexual assault as an aggravating circumstance.

Exh. 2 at 7-8. Therefore, this Court should find that the allegation raised by Petitioner in the instant Petition pertaining to the sufficiency of the evidence supporting the sexual assault aggravator is barred under the law of the case.

As far as Petitioner's second allegation is concerned—i.e., that the sexual assault aggravating circumstance is invalid because it fails to perform the required narrowing

function under the Eighth Amendment—this Court should find that it is waived under NRS 34.810(1)(b)(2). *See Franklin*, 110 Nev. at 752, 877 P.2d at 1059. This allegation could have been raised on direct appeal to the Nevada Supreme Court. Moreover, Petitioner has failed to demonstrate good cause for the failure to present this ground earlier.[19] That being the case, the Court should find that this allegation has been waived.

3. Petitioner's Claim That Trial Judge Failed To Properly Instruct The Jury Consists Of Allegations That Are Either Barred Under The Law Of The Case Or Waived Under NRS 34.810(1)(b)(2).

Claim Five of the Petition states that Petitioner's "sentence of death is invalid under the federal constitutional guarantees of the right [to] due process, confrontation, effective counsel, equal protection, trial before an impartial jury, freedom from cruel and unusual punishment, and a reliable sentence because the jury was not properly instructed at the penalty phase retrial." Petition at 192. In support of this claim, Petitioner raises five allegations of judicial error. *Id.* at 192-96. The State will first briefly outline what these

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[19] As discussed in footnote 6, the Petition includes a "Statement with Respect to Claims Re-Raised in the Instant Petition" in which it appears that Petitioner attempts to set out a blanket allegation of good cause insofar as he explains why he is re-raising "the grounds raised on direct appeal to the Nevada Supreme Court." Petition at 11. This would ostensibly apply to the penalty-phase claims (resulting from the second penalty hearing) raised on direct appeal no less than it does to guilt-phase claims raised on direct appeal. Again, Petitioner argues that "[t]he failure to raise these claims adequately on direct appeal was the result of ineffective assistance of counsel on direct appeal," explaining that his appellate counsel "raised but, in some instances, failed to adequately plead . . . Claim Two (Guilt Phase Jury Instructions) (in part), Claim Four (Sexual Assault Aggravator) (in part), Claim Five (Penalty Phase Jury Instructions) (in part), Claim Six (Batson Guilty Phase), Claim Seven (Witt Error Guilt Phase), Claim Ten (Trial Court Error Guilt Phase), Claim Eleven (Insufficiency of the Evidence), Claim Twelve (Improper Victim Impact Evidence—Penalty Trial), Claim Fifteen (Prosecutorial Misconduct Guilt Phase), Claim Sixteen (Prosecutorial Misconduct Penalty Phase), Claim Seventeen (Trial Court Error Penalty Trial), Claim Twenty-Three (Trial Court Error in Not Striking the State's Notice of Intent to Seek Death Penalty—First Trial)[, and] Claim Twenty-Six (Cumulative Error) (in part). *Id.*

The Court should reject Petitioner's attempt to furnish good cause by arguing ineffective assistance of penalty-phase appellate counsel. While such a claim can certainly serve as good cause, it cannot serve as good cause here (for any of the aforementioned claims) because the claim itself is procedurally defaulted. As with Petitioner's claim of ineffective assistance of penalty-phase trial counsel, *see supra* at 33-36, this claim of ineffective assistance of penalty-phase appellate counsel was reasonably available at the time Petitioner filed his second habeas petition. And the record reflects that claims of ineffective assistance of appellate counsel were, in fact, raised by Mr. Oram—Petitioner's second post-conviction counsel. *See* Exh. 43 at 36-42. Therefore, because Petitioner's allegation of ineffective assistance of appellate counsel was reasonably available at the time Petitioner filed his second habeas petition, this Court should deny Petitioner's current attempt to establish good cause by relying on this procedurally defaulted claim. It is for this very same reason that the Court should deny Claim Twenty—which sets out a claim of ineffective assistance of appellate counsel. *See infra* at 56-59.

allegations are and will then explain why they are either barred under the law of the case or waived under NRS 34.810(1)(b).

Petitioner first alleges that "the jury was not instructed that it was required to find that mitigating circumstances did not outweigh aggravating circumstances beyond a reasonable doubt." *Id.* at 192. Petitioner then alleges that "[t]he court's instruction at the penalty phase as to reasonable doubt was in error." *Id.* at 194. Third, Petitioner alleges that "[t]he penalty phase jury instruction which required jury unanimity was unconstitutional." *Id.* Fourth, Petitioner alleges that "[t]he court's anti-sympathy instruction was unduly prejudicial." *Id.* at 195. And last, Petitioner alleges that "[s]ingly and cumulatively the jury instructions rendered [Petitioner's] trial fundamentally unfair." *Id.* at 196.

As far as Petitioner's first allegation is concerned—i.e., that the jury was not instructed that it was required to find that mitigating circumstances did not outweigh aggravating circumstances beyond a reasonable doubt—the Court should find that it is barred under the law of the case. *See Pellegrini*, 117 Nev. at 879, 34 P.3d at 532 (citing *McNelton v. State,* 115 Nev. at 414-15, 990 P.2d at 1275) ("Under the law of the case doctrine, issues previously determined by this court on appeal may not be reargued as a basis for habeas relief."). The Nevada Supreme Court addressed this exact allegation in its October 20, 2009, Order of Affirmance:

> [Petitioner] 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 . . . [Petitioner] 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.[] And this 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 [Petitioner] fails to demonstrate plain error.

Exh. 7 at 25-26. Therefore, this Court should find that the allegation raised by Petitioner in the instant Petition pertaining to this jury instruction is barred under the law of the case.

As far as all the remaining allegations are concerned, this Court should find that they are waived under NRS 34.810(1)(b)(2). *See Franklin*, 110 Nev. at 752, 877 P.2d at 1059. These allegations could have been raised on direct appeal to the Nevada Supreme Court. Moreover, Petitioner has failed to demonstrate good cause for the failure to present these grounds earlier.[20] That being the case, this Court should find that these allegations have been waived.

4. Petitioner's Claim The State Engaged In Purposeful Discrimination By Using Peremptory Strikes To Remove Two African-American Venire Members At Petitioner's Penalty Retrial Is Waived Under NRS 34.810(1)(b)(2).

Claim Eight states that Petitioner's "death sentence is invalid under federal constitutional guarantees of due process, a fair trial, and a fair and impartial jury, because the State engaged in purposeful discrimination by using peremptory strikes to remove two African-American venire members at [Petitioner's] penalty re-trial." Petition at 217. Specifically, Petitioner takes issue with the State's exercising its peremptory challenges to strike prospective jurors Mills and Theus and alleges that "[c]omparative juror analysis reveals that the State's purpose for challenging these jurors could only have been discriminatory." *Id.* at 217; *see id.* at 217-34 (articulating the factual basis in support of these allegations).

The Court should find that this claim is waived under NRS 34.810(1)(b)(2). *See Franklin*, 110 Nev. at 752, 877 P.2d at 1059. This claim and all of its corresponding allegations could have been raised on direct appeal to the Nevada Supreme Court. However, page 13 of the Petition includes a "Statement with Respect to Claims Raised for the First Time in the Instant Petition." In this section, Petitioner argues that the new claims he raises were not raised previously due to "ineffective assistance of trial, appellate, and state post-

[20] *See supra* at n.19.

conviction counsel." Petition at 13. Among the genuinely new claims is Claim Eight.[21] But as noted above, any claims of ineffective assistance of counsel against Mr. Schieck (and, for that matter, Ms. Thomas, who was appellate counsel following the second penalty hearing) are procedurally defaulted. Thus, the only claim that can be considered on the merits are those claims of ineffective assistance of counsel against Mr. Oram.

In order to prevail on a claim of ineffective assistance of counsel against Mr. Oram on the basis of what he has alleged in Ground Eight, Petitioner has the burden of demonstrating that Mr. Oram was deficient for failing to allege that Messrs. Schieck and Patrick were deficient for failing to raise a *Batson* challenge to the State's striking prospective jurors Mills and Theus. This, in turn, requires a showing that but for Messrs. Schieck's and Patrick's failure to make a *Batson* challenge, the *Batson* challenge would have been successful. In *Carrera v. Ayers*, 699 F.3d 1104, 1107-08 (9th Cir. 2012), the United States Court of Appeals for the Ninth Circuit held that in evaluating the likelihood of success of a petitioner's hypothetical objection under a state law analogue to *Batson*, the petitioner had the burden under *Strickland* to show a "reasonable probability" that he would have prevailed on such a claim.

Here, Petitioner has failed to establish that he was prejudiced by Messrs. Schieck's and Patrick's failure to make a *Batson* challenge. As acknowledged by Petitioner, prospective juror Mills indicated on the questionnaire, in regards to her opinions and feelings about the criminal justice system, that her 22-year-old son was a victim of medical malpractice and that she the believed this experience "could affect her ability to be fair in [Petitioner's] case because she 'was angry at first with the lawyers and the judge.' " Exh. 155

[21] Petitioner also alleges that Claims Nine, Fourteen, Eighteen, Twenty-One, Twenty-Two, Twenty-Four, and Twenty-Five are "new" claims in whole. Petitioner is correct as far as Claims Fourteen, Twenty-One, Twenty-Two, Twenty-Four, and Twenty-Five are concerned and that is why the State has addressed these claims on the merits in section III of this Response. *See infra* at 59-76. Claim Nine, however, is not new in whole. It is simply another attempt—as with just about all of the other claims raised in the Petition—to relitigate an issue that has been settled by the Nevada Supreme Court by repackaging an old argument and spicing it up with new allegations. But, as the Nevada Supreme Court, has made very clear, issues previously determined by the Nevada Supreme Court may not be reargued as a basis for habeas relief. *See Pellegrini*, 117 Nev. at 879, 34 P.3d at 532 (citing *McNelton*, 115 Nev. at 414-15, 990 P.2d at 1275). And this law of the case "cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." *Hall*, 91 Nev. at 316, 535 P.2d at 799.

at 116-17; Exh. 188; Petition at 221. Moreover, as acknowledged by Petitioner, prospective juror Mills indicated on the questionnaire that her ability to be fair and impartial would probably be affected if the defendant and the victim were of different races. Exh. 188; Petition at 225. As for prospective juror Theus, the record reflects that he expressed a religious and moral opposition to the death penalty. Exh. 203; Exh. 155 at 182-84. Given that both juror Mills' and Juror Theus' abilities to be fair in the case were suspect, the State had valid, non-discriminatory reasons for striking both juror Mills and juror Theus. Any *Batson* challenge would thus have failed.

Because Petitioner has failed to establish that he was prejudiced by Messrs. Schieck's and Patrick's failure to make a *Batson* challenge, he has necessary failed to prove ineffective assistance of counsel on the part of Mr. Oram since he cannot prove that he was prejudiced by Mr. Oram's failure to allege a non-meritorious claim of ineffective assistance of counsel against Messrs. Schieck and Patrick. And because Petitioner has failed to establish ineffective assistance of counsel on the part of Mr. Oram, he has failed to establish good cause to excuse the failure to present Claim Eight earlier. Accordingly, the Court should find that this claim and its corresponding allegations have been waived under NRS 34.810(1)(b)(2), and Petitioner has failed to establish good cause to overcome this procedural bar.

5. Petitioner's Claim That The Trial Court Erred By Failing To Strike Biased Prospective Jurors For Cause Consists Of Allegations That Are Either Barred Under The Law Of The Case Or Waived Under NRS 34.810(1)(b)(2).

Claim Nine states that Petitioner's "death sentence is invalid under federal constitutional guarantees of due process, a fair trial, and a fair and impartial jury, because the trial court erred by failing to strike biased prospective jurors for cause." Petition at 236. This claim of judicial error rests on Petitioner's allegations that there were jurors seated who were impermissibly biased. *Id.* Specifically, Petitioner alleges that jurors Taylor, Smith, Bundren, Forbes, Noahr, Morin, White, Feuerhmmaer, and Washington were impermissibly biased but were nonetheless seated as jurors at the penalty retrial. *See id.* at 236-42. Petitioner then goes on to allege that he was prejudiced by the trial court's "failure to remove prospective jurors

Hibbard, Ramirez, and Button from the jury panel because [Petitioner] had to use his peremptory challenges against these prospective jurors." *Id.* at 243-46.

As for the latter allegation—i.e., that the trial court erred by failing to dismiss prospective jurors Hibbard, Ramirez, and Button for cause—this Court should find that this allegation is barred under the law of the case. *See Pellegrini*, 117 Nev. at 879, 34 P.3d at 532 (citing *McNelton,* 115 Nev. at 414-15, 990 P.2d at 1275) ("Under the law of the case doctrine, issues previously determined by this court on appeal may not be reargued as a basis for habeas relief."). Petitioner argued this very issue on direct appeal to the Nevada Supreme Court. *See* Exh. 156 at 39-45. And in its October 20, 2009, Order of Affirmance, the Nevada Supreme Court rejected the argument that the trial court erred in failing to dismiss these prospective jurors for cause.[22] *See* Exh. 7 at 9-11. Accordingly, the Court should find that this allegation is barred under the law of the case.

As for the remaining allegation—i.e., that the trial court erred in allowing jurors Taylor, Smith, Bundren, Forbes, Noahr, Morin, White, Feuerhmmaer, and Washington to be seated because they were impermissibly biased—the Court should find that this allegation is waived under NRS 34.810(1)(b)(2). *See Franklin*, 110 Nev. at 752, 877 P.2d at 1059. This allegation could have been raised on direct appeal to the Nevada Supreme Court. Moreover, Petitioner has failed to demonstrate good cause for the failure to present this allegation earlier.[23] That being the case, this Court should find that this allegation has been waived.

6. Petitioner's Claim That The Trial Court Allowed Impermissible And Cumulative Victim-Impact Evidence Consists Of Allegations That Are Either Barred Under The Law Of The Case Or Waived Under NRS 34.810(1)(b)(2).

Claim Twelve states that Petitioner's "sentence of death is invalid under federal constitutional guarantees of due process, a fair trial, and a fair and impartial jury, because the trial court allowed impermissible and cumulative victim-impact evidence." Petition at 273.

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[22] In its October 20, 2009, Order of Affirmance, the Nevada Supreme Court referred to prospective juror Hibbard as prospective juror H, prospective juror Ramirez as prospective juror R, and prospective juror Button as prospective juror D. Exh. 7 at 9-11.

[23] *See supra* at nn.19, 21.

In support of this claim, Petitioner raises three allegations. *Id.* at 273-76. The State will briefly outline what these allegations are and then explain why they are either barred under the law of the case or waived under NRS 34.810(1)(b)(2).

Petitioner first alleges that the trial court erred in allowing two letters—one written by Christina Reese (the victim's cousin) and one written by Doris Waskowski (the victim's aunt)—and the testimony of Norma Penfield (the victim's grandmother) and Caroline Monson (the victim's grand-aunt). *Id.* at 273-74. According to Petitioner, "[t]hese letters and testimony included improper victim-impact evidence of the witnesses' opinions concerning the crime and [Petitioner]." *Id.* at 274. Petitioner next alleges that the State made impermissible victim to victim comparisons insofar as it allegedly "encourage[d] the jury to sentence [Petitioner] to death based on an implication that the victim's live was more valuable than another victim's life might have been." *Id.* at 274. Lastly, Petitioner alleges that the trial court erred in admitting excessive victim-impact testimony. *Id.* at 275-76.

As for the last allegation—i.e., that the trial court erred in admitting excessive victim-impact testimony—the Court should find that this allegation is barred under the law of the case. *See Pellegrini*, 117 Nev. at 879, 34 P.3d at 532 (citing *McNelton,* 115 Nev. at 414-15, 990 P.2d at 1275) ("Under the law of the case doctrine, issues previously determined by this court on appeal may not be reargued as a basis for habeas relief."). In its October 20, 2009, Order of Affirmance, the Nevada Supreme Court rejected this allegation. *See* Exh. 7 at 18-20. Accordingly, the Court should find that this allegation is barred under the law of the case.

As for the remaining two allegations, the Court should find that they are waived under NRS 34.810(1)(b)(2). *See Franklin*, 110 Nev. at 752, 877 P.2d at 1059. These allegations could have been raised on direct appeal to the Nevada Supreme Court. Moreover, Petitioner has failed to demonstrate good cause for the failure to present these allegations earlier.[24] That being the case, this Court should find that these allegations have been waived.

7. Petitioner's Claim Of Prosecutorial Misconduct Consists Of Allegations That Are Either Barred Under The Law Of The Case Or Waived Under NRS 34.810(1)(b)(2).

[24] *See supra* at n.19.

Claim Sixteen states that Petitioner's "death sentence is invalid under federal constitutional guarantees of due process, a fair trial, a fair and impartial jury, and a reliable sentence due to prosecutorial misconduct in the opening statement and closing argument." Petition at 301. In support of this claim, Petitioner raises seven allegations of prosecutorial misconduct. *Id.* at 301-09. The State will first briefly outline what these detailed allegations are and will then go on to explain why they are either barred under the law of the case or waived under NRS 34.810(1)(b)(2).

Petitioner first alleges that "[t]he prosecution improperly disparaged [his] character." *Id.* at 301; *see id.* at 301-02 (articulating the factual basis in support of this allegation). Petitioner next alleges that "[t]he prosecutor improperly warned the jurors against being deceived by [Petitioner]." *Id.*; *see id.* at 302-03 (articulating the factual basis in support of this allegation). Third, Petitioner alleges that the "[t]he State improperly disparaged [Petitioner's] case." *Id.* at 303; *see id.* at 303-04 (articulating the factual basis in support of this allegation). Petitioner next alleges that "[t]he prosecutor made inflammatory arguments." *Id.* at 304; *see id.* at 304-05 (articulating the factual basis in support of this allegation). Fifth, Petitioner alleges that "[t]he prosecutor improperly commented on [Petitioner's] right to remain silent." *Id.* at 305; *see id.* at 305-06 (articulating the factual basis in support of this allegation). Petitioner next alleges that "[t]he prosecutor improperly stated the role of mitigating circumstances." *Id.* at 306; *see id.* at 306-07 (articulating the factual basis in support of this allegation). And last, Petitioner alleges that "[t]he prosecutors made improper arguments based on justice and mercy." *Id.* at 307; *see id.* at 307-09.

As far as Petitioner's second, fourth, fifth, sixth, and seventh allegation in support of his claim of prosecutorial misconduct are concerned, the Court should find that these allegations are barred under the law of the case. *See Pellegrini*, 117 Nev. at 879, 34 P.3d at 532 (*citing McNelton,* 115 Nev. at 414-15, 990 P.2d at 1275) ("Under the law of the case doctrine, issues previously determined by this court on appeal may not be reargued as a basis for habeas relief."). These allegations have already been raised on direct appeal to the Nevada Supreme Court. *See* Exh. 156 at 56-70. And in its October 20, 2009, Order of

Affirmance, the Nevada Supreme Court rejected these allegations. *See* Exh. 7 at 21-25. Accordingly, the Court should find that these allegations are barred under the law of the case.

As for the remaining allegations, the Court should find that they are waived under NRS 34.810(1)(b)(2). *See Franklin*, 110 Nev. at 752, 877 P.2d at 1059. These allegations could have been raised on direct appeal to the Nevada Supreme Court. Moreover, Petitioner has failed to demonstrate good cause for the failure to present these allegations earlier.[25] That being the case, this Court should find that these allegations have been waived.

8. Petitioner's Claim That The Court Erred In Admitting Evidence That Should Have Been Inadmissible Consists Of Allegations That Are Either Barred Under The Law Of The Case Or Waived Under NRS 34.810(1)(b)(2).

Claim Seventeen states that Petitioner's "death sentence is invalid under federal constitutional guarantees of due process, confrontation, effective counsel, equal protection, trial before an impartial jury, freedom from cruel and unusual punishment, and a reliable sentence" because the trial court improperly admitted inadmissible evidence. Petition at 310. In support of this claim, Petitioner raises four allegations of judicial error. *See id.* at 310-22. The State will briefly outline what these allegations are and then explain why they are either barred under the law of the case or waived under NRS 34.810(1)(b)(2).

Petitioner first alleges that the court erred in admitting "unreliable hearsay statements in support of the alleged aggravating circumstances." *Id.* at 310; *see id.* at 310-16 (articulating the factual basis in support of this allegation). Petitioner next alleges that the court erred in allowing "the introduction of presentence investigation reports." *Id.* at 317; *see id.* at 317-20 (articulating the factual basis in support of this allegation). Third, Petitioner alleges that the court erred in permitting "the State to introduce [Petitioner's] testimony from the first trial." *Id.* at 320; *see id.* at 320-22 (articulating the factual basis in support of this allegation). And last, Petitioner alleges that the court erred in "admitting highly prejudicial gruesome photographs." *Id.* at 322.

[25] *See supra* at n.19.

As far as Petitioner's first, second, and third allegations are concerned, the Court should find that these allegations are barred under the law of the case. *See Pellegrini*, 117 Nev. at 879, 34 P.3d at 532 (citing *McNelton,* 115 Nev. at 414-15, 990 P.2d at 1275) ("Under the law of the case doctrine, issues previously determined by this court on appeal may not be reargued as a basis for habeas relief."). These allegations have already been raised on direct appeal to the Nevada Supreme Court. *See* Exh. 156 at 45-52, 55-56. And in its October 20, 2009, Order of Affirmance, the Nevada Supreme Court rejected these allegations. *See* Exh. 7 at 21-25. Accordingly, the Court should find that these allegations are barred under the law of the case.

As for the remaining allegation—i.e., that the court erred in admitting highly prejudicial gruesome photographs—the Court should find that this allegation is waived under NRS 34.810(1)(b)(2). *See Franklin*, 110 Nev. at 752, 877 P.2d at 1059. This allegation could have been raised on direct appeal to the Nevada Supreme Court. Moreover, Petitioner has failed to demonstrate good cause for the failure to present this allegations earlier.[26] That being the case, the Court should find that this allegations has been waived.

9. Petitioner's Claim That Appellate Counsel Were Ineffective On The Second Direct Appeal Consists Exclusively Of Allegations Of Ineffective Assistance Of Counsel Which Are Themselves Procedurally Barred

Claim Twenty of the Petition states that Petitioner'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 first direct appeal." Petition at 329. In support of this claim, Petitioner raises twelve allegations of ineffective assistance of appellate counsel. The State will first briefly outline what these allegations are and will then go on to explain why they are all procedurally defaulted.

First, Petitioner alleges that appellate counsel were ineffective for "failing to argue that the State failed to prove that the murder was committed during the perpetration of a

[26] *See supra* at n.19.

sexual assault [.]" *Id.* Second, Petitioner alleges that appellate counsel were ineffective 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[.]" *Id.* Third, Petitioner alleges that appellate counsel were ineffective 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[.]" *Id.* Fourth, Petitioner alleges that appellate counsel were ineffective for "failing to support the argument concerning the arbitrariness of Nevada's death penalty scheme[.]" *Id.* Fifth, Petitioner alleges that appellate counsel were ineffective for "failing to argue that the State exercised peremptory strikes in a discriminatory manner[.]" *Id.* Sixth, Petitioner alleges that appellate counsel were ineffective for "failing to raise additional challenges to the presentation of victim impact testimony[.]" *Id.* Seventh, Petitioner alleges that appellate counsel were ineffective for "failing to adequately challenge all of the constitutionally infirm jury instructions[.]" *Id.* Eighth, Petitioner alleges that appellate counsel were ineffective for "failing to argue that [Petitioner] should be categorically excluded from the death penalty based on severe mental illness[.]" *Id.* at 329-30. Ninth, Petitioner alleges that appellate counsel were ineffective for "failing to argue that elected judges rendered the proceedings unfair[.]" *Id.* at 330. Tenth, Petitioner alleges that appellate counsel were ineffective for "failing to argue that the conditions of [Petitioner's] confinement on death row rendered his sentence cruel and unusual." *Id.* Eleventh, Petitioner alleges that appellate counsel were ineffective for "failing to challenge the failure to record all bench conferences[.]" *Id.* And last, Petitioner alleges that appellate counsel were ineffective for "failing to challenge Nevada's lethal injection procedures[.]" *Id.*

The Court should reject this claim of ineffective assistance of counsel—namely, that appellate counsel was ineffective on the second direct appeal—because all twelve of the allegations upon which this claim is predicated are themselves procedurally defaulted. As noted above, this is the second habeas petition in which Petitioner is raising claims related to the penalty-phase of his capital proceedings. All penalty-phase claims/allegations of

ineffective assistance of counsel—to include claims/allegations of ineffective assistance of *appellate* counsel—should have been raised in Petitioner's second habeas petition (or, rather, his first habeas petition after the second penalty hearing). The factual basis for each and every allegation raised in Claim Twenty of the Petition was available during the timeframe in which Petitioner's second habeas petition was filed. And the record reflects that many of the aforementioned allegations were, in fact, raised by Mr. Oram—Petitioner's second post-conviction counsel. *See* Exh. 46 at 36-38.

To the extent Petitioner's appellate counsel (i.e., Ms. Thomas) did not raise each and every claim/allegation/argument that Petitioner now makes, the Court should find that Petitioner has failed to overcome the presumption that appellate counsel's actions were reasonable and, thus, Mr. Oram cannot be deemed ineffective for failing to attack appellate counsel's strategic decisions. The United States Supreme Court has observed that it is "difficult" to prevail on a claim of ineffective appellate counsel based on counsel failing to raise a particular claim. *Smith v. Robbins*, 528 U.S. 259, 288, 120 S. Ct. 746, 782 (2000). In that vein, the United States Court of Appeals for the Third Circuit has noted that "it is a well-established principle that counsel decides which issues to pursue on appeal, [ ] and there is no duty to raise every possible claim. [ ] An exercise of professional judgment is required." *Sistrunk v. Vaughn*, 96 F.3d 666, 670, (3d Cir. 1996) (quoting *Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983)). Moreover, a claim of ineffective assistance of appellate counsel is more likely to succeed "only when ignored issues are clearly stronger than those presented[.]" *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986). Here, Petitioner's penalty-phase appellate counsel filed an 80-page Opening Brief, raising 16 discrete issues, several of which broke down into several sub-issues. Importantly, the issues presented by appellate counsel in this Opening Brief were the strongest issues—i.e., those most likely of being resolved in Petitioner's favor—that could have been raised. None of the "new" claims, allegations, or arguments that Petitioner now raises were stronger than those actually presented. Accordingly, Petitioner's appellate counsel was not deficient in representing Petitioner on appeal from the penalty retrial. And because Petitioner has failed to establish

deficiency on the part of his appellate counsel, he has necessarily failed to establish deficiency on the part of Mr. Oram, who would have been responsible for raising such ineffective-assistance-of-counsel claims in the second habeas petition.

Therefore, because all allegations of ineffective assistance of appellate counsel raised by Petitioner in the instant Petition were reasonably available at the time Petitioner filed his second habeas petition, this Court should deny Claim Twenty on the basis that it consists exclusively of procedurally defaulted allegations of ineffective assistance of appellate counsel, and Petitioner has failed to establish good cause to overcome this procedural default.

B. The Claims Relating To The Penalty Phase Are Successive Under NRS 34.810(2), And Petitioner Has Failed To Establish Good Cause.

As noted above, the instant habeas petition constitutes the second habeas petition as far the penalty-phase claims are concerned. To the extent that Petitioner articulates new and different allegations within these penalty-phase claims, this Court should find that Petitioner's failure to assert those ground in a prior petition constitutes an abuse of the writ. And while NRS 34.810(3) affords Petitioner the opportunity to overcome the procedural bar described in subsection (2), Petitioner fails to establish either good cause for the very same reasons that he failed to establish good cause under NRS 34.726(1). *See supra* at 28-56. That being the case, the Court should deny the Petition as far as the penalty-phase claims are concerned on the basis that these penalty-phase claims are procedurally barred under NRS 34.810(2).

C. The State Specifically Pleads Laches Under NRS 34.800(2) Because More Than 7 Years Have Elapsed Between The Nevada Supreme Court's Decision On Petitioner's Direct Appeal Of The Judgment Of Conviction (Relating To The Penalty Retrial) And The Filing Of The Instant Petition.

Again, treating the instant habeas petition as the third habeas petition as far as guilt-phase claims are concerned and the second habeas petition as far as penalty-phase claims are concerned, the State will also affirmatively plead laches in this case as far as the penalty-phase claims are concerned. In order to overcome the presumption of prejudice to the State, Petitioner has the heavy burden of proving a fundamental miscarriage of justice. *See Little*,

117 Nev. at 853, 34 P.3d at 545. Based on Petitioner's representations and on what he has filed with this Court thus far, Petitioner has failed to meet that burden. That being the case, this Court should dismiss the penalty-phase claims of the Petition pursuant to NRS 34.800(2).

III. All Remaining Claims Are Without Merit.

Those claims that have yet to be addressed are the following: Claim Thirteen, which raises a constitutional challenge to the death penalty; Claim Fourteen, which alleges that Petitioner is ineligible for the death penalty by virtue of mental illness; Claim Twenty-One, which alleges that Petitioner's conviction and death sentence are invalid because judges in Nevada are elected; Claim Twenty-Two, which alleges that Petitioner's conviction and death sentence are invalid due to the conditions of his confinement on death row; Claim Twenty-Four, which alleges that Petitioner's conviction and sentence of death are invalid because of unrecorded bench conferences; Claim Twenty-Five, which raises a constitutional challenge to Nevada's lethal injection protocol; and Claim Twenty-Six, which alleges cumulative error.

For four out of these seven remaining claims—specifically, Claims Twenty-One, Twenty-Two, Twenty-Four, and Twenty-Six—it would be a misnomer to classify them as either guilt-phase-specific or penalty-phase-specific claims, largely because they implicate both phases of Petitioner's capital proceedings. The remaining three—namely, Claims Thirteen, Fourteen, and Twenty-Five—deal with certain perennial issues associated with the death penalty. Accordingly, rather than trying to force them into one of the two aforementioned classifications—that is, guilt-phase and penalty-phase—the State has opted to address them in this third (and final) section of its Response.

To the extent any of the claims raised below could have been raised before, Petitioner argues ineffective assistance of post-conviction counsel as good cause to justify the re-raising of them. *See* Petition at 13-14. And, as explained above, ineffective assistance of post-conviction counsel can certainly constitute good-cause to excuse the procedural bars that have effectively precluded just about all of Petitioner's twenty-six claims. *See McNelton*, 115 Nev. 296, 416 n.5, 990 P.2d 1263, 1276 n.5 (1999); *Crump*, 113 Nev. 293, 303, 934

P.2d 247, 253 (1997). Here, however, Petitioner's allegation of ineffective assistance of post-conviction counsel must fail. Because none of the seven claims addressed in this section of the State's Response are meritorious, Petitioner has failed to establish that he was prejudiced (1) by post-conviction counsel's failure to raise the claims and/or (2) by post-conviction counsel's "fail[ure] to adequately plead" these claims. *See* Petition at 11. Without further ado, the State will now address Claims Thirteen, Fourteen, Twenty-One, Twenty-Two, Twenty-Four, Twenty-Five, and Twenty-Six of the Petition.

A. Petitioner's Claim That The Death Penalty Is Unconstitutional Consists Of Allegations That Are All Barred Under The Law Of The Case; Nonetheless, This Claim And Its Corresponding Allegations Are Without Merit.

Claim Thirteen of the Petition states that Petitioner's "sentence of death is invalid under federal constitutional guarantees of the right [to] due process, confrontation, effective counsel, equal protection, trial before an impartial jury, freedom from cruel and unusual punishment, and a reliable sentence because the death penalty is unconstitutional as imposed and administered in Nevada." Petition at 277. In support of this claim, Petitioner raises three allegations. The State will first briefly outline what these allegations are and will then go on to explain why they are all barred under the law of the case.

Petitioner first alleges that "Nevada's death penalty scheme results in the arbitrary and capricious infliction of the death penalty." *Id.* Second, Petitioner alleges that "Nevada has no real mechanism to provide for clemency in capital cases." *Id.* at 283. And third, Petitioner alleges that "[t]he death penalty is cruel and unusual punishment under any circumstances." *Id.* at 284.

All three allegations upon which Petitioner's claim regarding the constitutionality of the death penalty is premised have been raised at some point in prior proceedings and rejected by the Nevada Supreme Court. For instance, Petitioner's first allegation—i.e., that Nevada's death penalty scheme results in the arbitrary and capricious infliction of the death penalty—was raised in his first habeas petition. Exh. 46 at 56-59. And the Nevada Supreme Court rejected it in its April 7, 2006, Order of Affirmance. Exh. 5 at 9-10. The remaining two allegations—i.e., that Nevada has no real mechanism for clemency in capital cases and that

the death penalty is cruel and unusual in any circumstances—were raised in Petitioner's second habeas petition. And the Nevada Supreme Court wrote the following in its June 18, 2015, Order of Affirmance rejecting these allegations:

> [Petitioner] 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). [ ]

Exh. 102, n.1.

Accordingly, the Court should find that Petitioner's claim that the death penalty is unconstitutional is barred under the law of the case. *See Pellegrini*, 117 Nev. at 879, 34 P.3d at 532 (citing *McNelton*, 115 Nev. at 414-15, 990 P.2d at 1275) ("Under the law of the case doctrine, issues previously determined by this court on appeal may not be reargued as a basis for habeas relief."). Notwithstanding this, the State will briefly respond to each of the three allegations raised in support Petitioner's claim regarding the constitutionality of the death penalty given the salience of the issue.

1. Petitioner's Allegation That The Death Penalty Scheme Results In The Arbitrary And Capricious Infliction Of The Death Penalty Is Without Merit.

Petitioner first alleges that "Nevada's death penalty scheme results in the arbitrary and capricious infliction of the death penalty." Petition at 277. This allegation is supported by two arguments. *Id.* at 277-83. First, that "Nevada's death penalty scheme fails to genuinely narrow the class of death eligible defendants." *Id.* at 277-80. And second, that "[t]he statutory scheme grants the Nevada Supreme Court unfettered discretion." *Id.* at 280-83.

As to the first argument, the Nevada Supreme Court has repeatedly concluded that Nevada's death penalty scheme sufficiently narrows the class of people eligible for the death penalty. *See Thomas v. State*, 122 Nev. 1361, 1373, 148 P.3d 727, 735-36 (2006); *Weber v. State*, 121 Nev. 554, 585, 119 P.3d 107, 128 (2005); *Leonard v. State*, 117 Nev. 53, 82-83, 17 P.3d 397, 415-16 (2001); *Middleton v. State*, 114 Nev. 1089, 1116-17, 968 P.2d 296, 314-15 (1998). Moreover, the Nevada scheme has been held to properly serve its constitutional

narrowing function on numerous occasions. *See Zant v. Stephens*, 462 U.S. 862, 877, 103 S. Ct. 2733, 2742 (1983); *Servin v. State*, 117 Nev. 775, 785-786, 32 P.3d 1277, 1285 (2001); *Gallego v. State*, 117 Nev. 348, 370-371, 23 P.3d 227, 242 (2001); *see also Evans*, 117 Nev. at 637, 28 P.3d at 517-518; *Deutscher v. State*, 95 Nev. 669, 676, 601 P.2d 407, 412 (1979).

Within this first argument, Petitioner further alleges that the imposition of death in his own case serves as an example of how Nevada's death penalty scheme operates in an arbitrary and capricious manner insofar as the "jury [ ] has complete discretion to decide whether to impose the death penalty . . . ." Petition at 278-79. This Court should note, however, that the Nevada Supreme Court, in its December 30, 1998, Opinion, explained that "there is no evidence in the record indicating that [Petitioner's] death sentence was imposed under the influence of passion, prejudice or any arbitrary factor" and ultimately concluded "that the death sentence [Petitioner] received was not excessive considering the seriousness of his crimes and [Petitioner] as a person." Exh. 2 at 10. Inasmuch as Petitioner compares his sentence with the sentence of other individuals, *see* Petition at 279, n.67, the fact that *different* juries determined *different* sentences after hearing *different* evidence about *different* murders does not make the system arbitrary and capricious.

Turning now to Petitioner's second argument, this Court should note that Petitioner actually raised this argument on his direct appeal from the second penalty hearing. *See* Exh. 156 at 36-38. In essence, Petitioner's argument that Nevada's death penalty statutory scheme grants the Nevada Supreme Court unfettered discretion is an attack on the constitutionality of NRS 177.055(3). *See* Petition at 280-82. The Nevada Supreme Court did not address the Petitioner's challenge to the constitutionality of NRS 177.055(3) in its October 20, 2009, Order of Affirmance, because NRS 177.055(3) was not the basis of Petitioner's second penalty hearing. *See* Exh. 7 at 5. As explained by the Nevada Supreme Court—

> NRS 177.055(3) was not the basis for [Petitioner's] second penalty hearing. That hearing was the result of the district court's finding that [Petitioner's] penalty phase counsel was ineffective rather than from this court's independent review of his death sentence. Because this court did not conduct a mandatory review of [Petitioner's] death sentence during his post-conviction appeal—that had already been done on direct appeal—[Petitioner's] second penalty hearing did not result from the application of NRS 177.055.

Id. at 5-6. Accordingly, this Court should find that there is no need to address Petitioner's challenge to the constitutionality of NRS 177.055(3) given that it was not even the basis for his second penalty hearing.

As an alternative argument, Petitioner states that "[e]ven if Nev. Rev. Stat. 177.055(3) was not the basis on which [Petitioner] was granted a new penalty hearing, [Petitioner's] constitutional rights were still violated because the statute permitted the Nevada Supreme Court, on direct appeal, to impose a sentence of less than death upon a finding of a constitutional violation but did not allow that Court to impose such a sentence on appeal of an order in post-conviction proceedings." Petition at 282-83. In its October 20, 2009, Order of Affirmance, the Nevada Supreme Court actually rejected this "equal protection" argument:

> [Petitioner'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.

Exh. 7 at 6. In light of the foregoing, this Court should likewise reject Petitioner's allegation that Nevada's statutory scheme grants the Nevada Supreme Court unfettered discretion.

2. Petitioner's Allegation That Nevada Has No Real Mechanism To Provide For Clemency In Capital Cases Is Without Merit.

Petitioner next alleges that Nevada's death penalty scheme is unconstitutional for failing to have a "functioning clemency procedure." Petition at 283-84. This allegation is without merit.

The statutory procedures for administering a grant of clemency do not implicate a constitutionally protected interest. *See Niergarth v. State*, 105 Nev. 26, 28, 768 P.2d 882, 883 (1989); *see generally Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 280-81 (1998) (noting that clemency is a matter of grace).

The United States Supreme Court has also made it clear that there is no constitutional right to a clemency hearing. *See Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458,

464, 101 S. Ct. 2460 (1981) ("Unlike probation, pardon and commutation decisions have not traditionally been the business of the courts; as such, they are rarely, if ever, appropriate subjects for judicial review . . . [A]n inmate has no 'constitutional or inherent right' to commutation of his sentence."); *see Joubert v. Nebraska Bd. of Pardons*, 87 F.3d 966, 968 (8th Cir.1996) ("It is well-established that prisoners have no constitutional or fundamental right to clemency."), *cert. denied*, 518 U.S. 1035, 117 S.Ct. 1 (1996).

Moreover, Nevada's clemency scheme was upheld in *Colwell*, 112 Nev. at 812. As the Court in *Colwell* stated, "NRS 213.085 does not completely deny the opportunity for 'clemency,' as Colwell's counsel contends, but rather modifies and limits the power of commutation. Accordingly, Colwell's counsel's claim lacks merit." *Id.*

3. Petitioner's Allegation That The Death Penalty Is Cruel And Unusual Punishment Under Any Circumstances Is Without Merit.

Lastly, Petitioner alleges that "[t]he death penalty is cruel and unusual under any circumstances." Petition at 284. This allegation has been consistently rejected by both the Nevada Supreme Court and the United States Supreme Court.

The Nevada Supreme Court has held that the death penalty does not violate the prohibition against cruel and unusual punishment found in either the United States Constitution or the Nevada Constitution. *See Bishop v. State*, 95 Nev. 511, 517-18, 597 P.2d 273, 276-77 (1979). The United States Supreme Court has likewise upheld the death penalty. *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909 (1976). Additionally, the Nevada death penalty scheme has been repeatedly held to be constitutional and not cruel and/or unusual punishment under either the Nevada or United States constitutions. *See, e.g.,* Colwell v. State, 112 Nev. 807, 814-815, 919 P.2d 403, 408 (1996). As the Nevada Supreme Court explained in *Colwell*—

> Finally, Colwell's counsel claims that the death penalty is cruel and unusual punishment in all circumstances in violation of the Eighth Amendment and the Nevada Constitution. Colwell's counsel concedes that the United States Supreme Court and this court have repeatedly upheld the general constitutionality of the death penalty under the Eighth Amendment. *See, e.g.*, *Bishop*, 95 Nev. at 517-18, 597 P.2d at 276-77. Colwell's counsel merely desires to preserve his argument should this court change its mind. We are not so inclined. We note that this court has also held that the death penalty is not unconstitutional under the Nevada Constitution. *Id.* Accordingly, we conclude that Colwell's counsel's claim on this issue lacks merit.

112 Nev. at 814-815, 919 P.2d at 408. Because the death penalty is indeed constitutional, Petitioner's claim that the death penalty constitutes cruel and unusual punishment under any circumstances necessarily fails.

B. Petitioner's Claim That Mental Illness Renders Him Ineligible For The Death Penalty Is Without Merit.

Claim Fourteen of the Petition states that Petitioner's "death sentence is invalid under federal constitutional guarantees of due process, a fair trial, and a fair and impartial jury, because his severe mental health impairments render him ineligible for the death penalty." Petition at 286. Relying on the United States Supreme Court's decision in *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183 (2005), and *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002), Petitioner argues that "[t]he execution of [Petitioner] would further violate the logic pronounced in both Atkins and Roper due to his debilitating neuropsychiatric and psychological mental illness including significant brain damage—which is most likely caused by his Fetal Alcohol Spectrum Disorder diagnosis—and his other mental illnesses." *Id.* at 287. Without specifying what these "other mental illnesses" are, Petitioner nonetheless avers that this "mental illness and the accompanying neuropsychological impairments affect his ability to process information, reason independently and rationally, form relationships with others, problem solve, and restrain impulses." *Id.* Moreover, according to Petitioner, he "has also, at all relevant times, suffered from psychological disorders (like addiction and attachment disorder), likely the product of genetic lineage, compounded and enhanced by a variety of damaging environmental factors during key periods of cognitive, social, and practical development." *Id.* at 287-88.

Petitioner's reliance on *Roper* and *Atkins* is misguided.[27] In *Atkins*, the United States Supreme Court determined that the execution of mentally retarded individuals constituted cruel and unusual punishment in violation of the Eighth Amendment. The Court concluded that although the intellectual deficiencies of mentally retarded criminals did "not warrant an

[27] Because *Roper*, in essence, utilized the reasoning employed in *Atkins* to reach the conclusion that the "Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed," 543 U.S. at 578, 125 S. Ct. at 1200, the State will focus its analysis on *Atkins* in explaining why Petitioner cannot avail himself of this case and its progeny.

exemption from criminal sanctions"—including life imprisonment—such criminals "should be categorically excluded from execution." *Id.* at 318, 122 S. Ct. at 2250. The Court explained that part of the basis for the holding was that there was a "serious question" as to whether the execution of mentally retarded offenders would serve the deterrence or retribution justifications of the death penalty. *Id.* at 318–319, 122 S. Ct. at 2250-51. Second, there was an enhanced risk in the case of mentally retarded offenders "that the death penalty w[ould] be imposed in spite of factors which may call for a less severe penalty," both because of "the possibility of false confessions" by mentally retarded defendants and because of the "lesser ability of mentally retarded defendants to make a persuasive showing of mitigation." *Id.* at 320, 122 S. Ct. at 2251.

The Court in *Atkins* left " 'to the states[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.' " *Id.* at 317, 122 S. Ct. at 2250 (quoting *Ford v. Wainwright*, 477 U.S. 399, 416-17 (1986) (which left to the states ways to enforce the constitutional restriction upon insane persons)). Although the Court declined to mandate a definition of mental retardation, it noted that existing state definitions generally conformed to clinical definitions set forth by the American Association on Mental Retardation ("AAMR") and the American Psychiatric Association ("APA"). The Court notably did not hold or suggest that such clinical definitions were to limit the states or the consideration of whether an individual is mentally retarded for the purposes of determining whether a person may receive the death penalty.

In response to *Atkins*, the Nevada Legislature enacted NRS 174.098 in 2003 which sets forth a procedure for determining whether someone is "intellectually disabled" for death penalty purposes.[28] NRS 174.098(1) allows a defendant to file a motion to declare that he is intellectually disabled in cases where the death penalty is sought. NRS 174.098(2) provides that the Court "[s]tay the proceedings" and "[h]old a hearing … to determine whether the defendant is intellectually disabled." According to NRS 174.098(7), " 'intellectually

[28] The 2013 amendment to NRS 174.098 substituted "intellectually disabled" for "mentally retarded" throughout the section and substituted "intellectual disability" for "mental retardation" in subsection (2)(a).

disabled' means significant subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period." Thus, in order to prove intellectual disability, NRS 174.098(7) requires that Petitioner satisfy the following three elements: (1) that he has significant subaverage general intellectual functioning; (2) the concurrent existence of deficits in adaptive behavior; *and* (3) that these conditions were manifested during the Petitioner's developmental period. And pursuant to NRS 174.098(5)(b), Petitioner bears the burden of proving these elements by a preponderance of the evidence.

Even accepting as true the findings made by the experts who examined Petitioner, this Court should reject Petitioner's argument that he suffered from "impairments akin to those identified in Roper, 543 U.S. 55 and Atkins, 536 U.S. at 318, 320-21." Petition at 288. In *Atkins*, the U.S. Supreme Court ruled that it is cruel and unusual to execute mentally retarded defendants, not defendants with a mental illness. Therefore, even assuming Petitioner really does suffer from Fetal Alcohol Spectrum Disorder (and whatever mental illnesses he alleges stem from this disorder), *Atkins* does not support the position advanced by Petitioner. Morever, neither the findings of Dr. Conner nor those of Dr. Brown nor those of Dr. Davies nor those of Dr. Etcoff nor those of Dr. Lipman nor those of Dr. Mendel—considered alone or in combination with each other—prove by a preponderance of the evidence that Petitioner has significant subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and that these conditions were manifested during his developmental period. *See* Exh. 85 (Declaration of Dr. Etcoff); Exh. 87 ("Neuropsychological Report" prepared by Dr. Conner); Exh. 88 ("Functional and Behavioral Assessment Case of James Montel Chappell" prepared by Dr. Brown); Exh. 89 ("Medical Expert Report" prepared by Dr. Davies); Exh. 90 ("Report of Neuropharmacological Opinion" prepared by Dr. Lipman); Exh. 128 (Medical Report prepared by Dr. Mendel); Exh. 178 ("Forensic Criminal Psychological Evaluation" prepared by Dr. Etcoff). Accordingly, this Court should deny Petitioner's claim that mental illness renders him ineligible for the death penalty.

C. Petitioner's Claim That His Conviction And Death Sentence Are Invalid Because Sentencing And Appellate Review Were Conducted Before Elected Judges Is Without Merit.

Claim Twenty-One of the Petition states that Petitioner'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 [Petitioner'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." Petition at 331. In essence, Petitioner contends that the system of elected judges in Nevada is unconstitutional because judges face the possibility of removal if they make a controversial decision.

In *McConnell v. State*, 125 Nev. 243, 256, 212 P.3d 307, 316, the Nevada Supreme Court rejected such a claim. In *McConnell*, 125 Nev. at 256, 212 P.3d at 316, the petitioner had raised "an ineffective-assistance claim based on appellate counsel's failure to argue that it was prejudicial to have elected judges and justices preside over his trial and appellate review because elected judges are beholden to the electorate and therefore cannot be impartial." The Court denied the petitioner's claim on two grounds. *Id.* First, the Court explained that the petitioner "failed to substantiate this claim with any specific factual allegations demonstrating *actual* judicial bias." *Id.* (emphasis added). The Court further held that the "argument is unpersuasive and would not have had a reasonable probability of success." *Id.*

Likewise, Petitioner here fails to demonstrate that any proceeding in his case was impacted by judicial bias related to an election but is instead raising a generalized argument that an elected judiciary cannot be fair. Petitioner's allegation that Judge Maupin, who presided over the guilt-phase of his capital proceedings, was biased against Petitioner by virtue of the fact that he was running for a seat on the Nevada Supreme Court at the time that he was presiding over the trial is nothing more than a bare allegation. Petition at 334. And his allegation that "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" amounts to nothing more than mere speculation. *Id.* Therefore, as the Court in *McConnell*

rejected such the nonsensical argument that an elected judiciary cannot be fair, this Court should similarly reject Petitioner's claim, which is premised on just such an argument.

D. Petitioner's Claim That His Death Sentence Is Unconstitutional Because Of The Conditions Of His Confinement On Death Row Is Without Merit.

Claim Twenty-Two of the Petition states that Petitioner's "sentence of death is invalid under the federal constitutional guarantees of the right [to] due process, equal protection and freedom from cruel and unusual punishment due to the conditions of his confinement on death row." Petition at 335. Petitioner's claim attacking the conditions of confinement is outside the scope of what can be brought in a habeas petition. *Becoat v. State*, 2016 Nev. Unpub. LEXIS 550, *1 (Nev. 2016) ("A challenge to the conditions of confinement is outside the scope of claims permissible in a petition for a writ of habeas corpus.");[29] *see also Bowen v. Warden*, 100 Nev. 489, 490, 686 P.2d 250, 250 (1984). Therefore, the Court should deny Petitioner's claim regarding the conditions of his confinement.

E. Petitioner's Claim That His Conviction And Death Sentence Are Invalid Because Trial Counsel Failed To Preserve The Record Of Objections And Court Rulings Is Without Merit.

Claim Twenty-Four states that Petitioner'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 [Petitioner's] appeal and post-conviction litigation." Petition at 340. This claim is couched in terms of an ineffective-assistance-of-counsel claim. *See* Petition at 341 ("[Petitioner's] counsel failed to object to this practice, simultaneously creating significant gaps in the trial transcript and failing to preserve the record for appeal."); *id.* ("Because defense counsel failed to properly object to these occurrences (and, in fact, actively sought them on occasions, [Petitioner] has been denied the opportunity for effective post-conviction review of his conviction and sentence."); *id.* at 342 ("It is reasonably probable that had counsel not been ineffective, the results of the

[29] Citation to the unpublished opinion in *Bowen* as persuasive authority is permissible pursuant to NRAP 36(c)(3). *See also MB Am., Inc. v. Alaska Pac. Leasing Co.,* 132 Nev. __, __, 367 P.3d 1286, 1292, n.1 (2016) (Feb. 4, 2016) (allowing citation to unpublished orders, entered on or after January 1, 2016, for their persuasive value).

proceedings would have been different."). Accordingly, the Court should assess this claim under *Strickland*'s two-pronged test.

In determining the reasonableness of counsel's actions regarding the issue of unrecorded bench conferences, this Court should note that the primary authority regarding unrecorded bench conferences at the time of the guilt phase of Petitioner's trial was *Lopez v. State*, 105 Nev. 68, 769 P.2d 1276 (1989), and that the primary authority regarding bench conferences at the time of Petitioner's second penalty hearing was *Daniel v. State*, 119 Nev. 498, 78 P.3d 890 (2003). In the latter case, the Nevada Supreme Court explicitly stated that defendants *do not* have an absolute right to have proceedings recorded. *Daniel*, 119 Nev. at 508, 78 P.3d at 897. And, in both cases, the Nevada Supreme Court explained that the party who challenges missing portions of the record must demonstrate that the missing portions of the record undermine meaningful appellate review such that he or she is prejudiced by the error. *Id.*; *Lopez*, 105 Nev. at 85, 769 P.2d at 1287 (requiring petitioner to "show some specific error or prejudice resulting from the failure to record or preserve trial proceeding records."). Given that there was no absolute right to have all bench conferences recorded, this Court should find that counsel (during both the guilt phase of the trial and the second penalty hearing) was not deficient for failing to request that all conferences be recorded.

But more significantly, because failure to record bench conferences is not per se error, Petitioner bears the burden of proving how he was prejudiced by counsel's failure to address the issue. Petitioner attempts to evade this burden by arguing the "many of the instances of off-the-record discussions contain no guidance in the surrounding transcript to explain what was being discussed during trial" and thus "[b]ecause of the difficulty this has created, [Petitioner] should not be required to show specific prejudice from counsel's error in failing to preserve the record." Petition at 342. That it may be difficult to establish such prejudice does not justify ignoring the issue. Given Petitioner's failure to point to any specific error or prejudice resulting from the unrecorded bench conferences he cites in the Petition, this Court should find that Petitioner has necessarily failed to establish *Strickland*'s second prong—i.e.,

prejudice—insofar as he has failed to prove that had these bench conferences been recorded, there is a reasonable probability that a more favorable outcome would have resulted.

F. Petitioner's Claim That The Lethal Injection Violates The Constitutional Prohibition Against Cruel And Unusual Punishments Is Without Merit.

Claim Twenty-Five of the Petition states that Petitioner'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." Petition at 343. In support of this claim, Petitioner raises four allegations. There is no need to outline these allegations, however, in light of the fact Petitioner's overall claim falls outside the scope of a habeas petition.

In *McConnell*, 125 Nev. at 248-49, 212 P.3d at 311, the Nevada Supreme Court wrote the following in rejecting a challenge to the lethal injection protocol in Nevada:

> [A] challenge to the lethal injection protocol in Nevada does not implicate the validity of a death sentence because it does not challenge the death sentence itself but seeks to invalidate a particular procedure for carrying out the sentence. In Nevada, the method of execution–"injection of a lethal drug"–is mandated by statute. NRS 176.355(1). But the manner in which the lethal injection is carried out–the lethal injection protocol–is left by statute to the Director of the Department of Corrections. NRS 176.355(2)(b) (providing that the Director shall "[s]elect the drug or combination of drugs to be used for the execution after consulting with the State Health Officer"). Because the lethal injection protocol is not mandated by statute, granting relief on a claim that a specific protocol is unconstitutional would not implicate the legal validity of the death sentence itself. Rather, while granting relief on such a claim would preclude the Director from using the particular protocol found to be unconstitutional, the Director would be free to use some other protocol to carry out the death sentence. Because McConnell's challenge to the lethal injection protocol would not preclude his execution under current law using another protocol, we conclude that the challenge to the lethal injection protocol does not implicate the validity of the death sentence and therefore falls outside the scope of a post-conviction petition for a writ of habeas corpus.

Thus, this claim is inappropriate for consideration on collateral review. But, in any case, the challenge to the lethal injection protocol is meritless. As noted above, the death penalty in and of itself does not violate the Eighth and Fourteenth Amendments. The United States Supreme Court has consistently found that the death penalty does not constitute cruel and unusual punishment. *See e.g., Kennedy v. Louisiana*, 554 U.S. 407, 420, 128 S. Ct. 2641, 2650 (2008) (citing *Gregg*, 428 U.S. at 153, 96 S. Ct. at 2009). The Nevada Supreme Court

has found likewise. *See e.g., Maestas v. State*, 128 Nev. 124, 142 n.14, 275 P.3d 74, 86 n.14 (2012).

Nor does the method of lethal injection constitute cruel and unusual punishment. The United States Supreme Court has affirmed the use of lethal injection to carry out a sentence of death. *Baze v. Rees*, 553 U.S. 35, 63, 128 S. Ct. 1520, 1538 (2008) (plurality opinion). The Supreme Court of Nevada has likewise found lethal injection to comport with the requirements of the Eighth Amendment. *McConnell*, 120 Nev. at 1056, 102 P.3d at 616; *State v. Haberstroh*, 119 Nev. 173, 188, 69 P.3d 676, 686 (2003). Therefore, Petitioner's contentions, even if not cognizable on habeas, are meritless, as the procedures involved in Nevada's lethal injection protocol are not "*sure or very likely* to cause serious illness and needless suffering," and do not give rise to "sufficiently *imminent* dangers." *Baze*, 553 U.S. at 50, 128 S. Ct. at 1531.

G. Petitioner's Claim Of Cumulative Error Is Without Merit.

Claim Twenty-Six of the Petition states that Petitioner'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 [Petitioner's] right to the effective assistance of counsel." Petition at 374. In support of this claim Petitioner "incorporates each and every factual allegation contained in [the] Petition." *Id.*

This Court should note that Petitioner has raised his claim of cumulative error in his appeal from the first trial, in his appeal from the second penalty hearing, and in his appeal from the denial of his second habeas petition; and each time it was raised, it was rejected by the Nevada Supreme Court. *See* Exh. 2 at 11; Exh. 7 at 29; Exh. 10 at 13-14. These determinations are law of the case and cannot be reconsidered by this Court. *See Pellegrini*, 117 Nev. at 879, 34 P.3d at 532 (citing *McNelton v. State,* 115 Nev. at 414-15, 990 P.2d at 1275) ("Under the law of the case doctrine, issues previously determined by this court on appeal may not be reargued as a basis for habeas relief."). And to the extent Petitioner argues

cumulative error as good cause to excuse any of his procedurally defaulted claims,[30] the Court should reject such an attempt to establish good cause for the very same reason—that is, because this Court is bound by the Nevada Supreme Court's previous determinations that there was no prejudicial error. In *Rippo*, 368 P.3d at 750, 132 Nev. Adv. Rep. 11 (2016), the Nevada Supreme Court rejected a similar claim that "cumulative error" constituted good cause to overcome the procedural bars. In rejecting the claim, the Nevada Supreme Court found that the assertion of "cumulative error" as good cause, "ignore[d] [the] prior determination that there was no error with respect to the claims that previously were rejected on appeal on their merits." *Id.* Similarly, this Court should reject Petitioner's attempt to argue cumulative error as good cause because this Court is bound by the Nevada Supreme Court's determinations that there was no error, or alternatively, no prejudicial error, and that cumulative error review did not warrant a new trial.[31]

To the extent Petitioner seeks to add to the mix the new ineffective-assistance-of-counsel errors he raises in the instant Petition, this Court should note that the Nevada Supreme Court has yet to endorse application of its direct appeal cumulative error standard to the post-conviction *Strickland* context. *McConnell*, 125 Nev. at 259, 212 P.3d at 318. Nevertheless, even where available, a cumulative error finding in the context of a *Strickland* claim is extraordinarily rare and requires an extensive aggregation of errors. *See e.g., Harris*

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[30] As explained in a previous footnote, *see supra* at n.6, the Petition includes a "Statement with Respect to Claims Re-Raised in the Instant Petition" in which it appears that Petitioner attempts to set out a blanket allegation of good cause insofar as he explains why he is re-raising "the grounds raised on direct appeal to the Nevada Supreme Court." Petition at 11. There he argues that it is doing it, in part, "because [he] is entitled to a cumulative consideration of the constitutional errors which infected his conviction and death sentence." *Id.* Because Petitioner has set out a discrete claim regarding cumulative error, the State will therefore address in this portion of the Response why this claim does not constitute good cause to excuse any of his procedurally defaulted claims.

[31] To be sure, in its June 18, 2015, Order of Affirmance, the Nevada Supreme Court did find two errors but nonetheless concluded that relief was not warranted:

> [Petitioner] 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, [ ] we concluded that any deficiencies in counsel's performance had no cumulative impact warranting relief.

Exh. 10 at 13-14 (internal citation omitted).

By and through Ramseyer, 64 F.3d at 1438. In fact, logic dictates that there can be no cumulative error where the defendant fails to demonstrate any single violation of *Strickland*. *See Turner v. Quarterman*, 481 F.3d 292, 301 (5th Cir. 2007) ("[W]here individual allegations of error are not of constitutional stature or are not errors, there is 'nothing to cumulate.' ") (quoting *Yohey v. Collins*, 985 F.2d 222, 229 (5th Cir. 1993)); *Hughes v. Epps*, 694 F. Supp. 2d 533, 563 (N.D. Miss. 2010) (citing *Leal v. Dretke*, 428 F.3d 543, 552-53 (5th Cir. 2005)). Because Petitioner previously has not demonstrated, and again fails to demonstrate, that any claim warrants relief under *Strickland*, there is nothing to cumulate. Therefore, Petitioner's cumulative-error claim should be denied.

Alternatively, Petitioner fails to demonstrate cumulative error sufficient to warrant reversal. In addressing a claim of cumulative error, the relevant factors are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged. *Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-5 (2000). As far as the issue of guilt is concerned, the Nevada Supreme Court commented on the "overwhelming evidence of guilt in this case" in its December 30, 1998, Opinion affirming the judgment of conviction and sentence of death. Exh. 2 at 4. And the following excerpt from the Nevada Supreme Court's October 20, 2009, Order of Affirmance, explaining why the death penalty was not an excessive punishment in Petitioner's case adequately reflects the gravity of the crimes committed by Petitioner:

> The evidence shows that [Petitioner] had beaten [the victim] 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 [the victim's] home, beat her, sexually assaulted her, and stabbed her thirteen times. [Petitioner'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 [Petitioner] had a history of blaming others for his problems and his behavior. And in fact, while [Petitioner] admitted to killing [the victim], he continued to blame her, at least in part, for her murder at his hands. [Petitioner] 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.

Exh. 7 at 30. Finally, as to the quantity and character of the errors alleged by Petitioner, this

Court should find that Petitioner has failed to establish that the errors, even when aggregated, deprived him of a reasonable likelihood of a better outcome at trial. Therefore, even if counsel was in any way deficient, there is no reasonable probability that Petitioner would have received a better result but for the alleged deficiencies.

CONCLUSION

Based on the foregoing, the State respectfully requests that the Petition for Writ of Habeas Corpus (Post- Conviction) be denied.

DATED this 5th day of April, 2017.

Respectfully submitted,

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BY */s/ Steven S. Owens*
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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of State's Response to Petition for Writ of Habeas Corpus (Post-Conviction) was made this 5th day of April, 2017, by Electronic Filing to:

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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,

Respondents.

Case No. C131341
Dept. No. V

Date of Hearing: August 7, 2017
Time of Hearing: 9:00 a.m.

REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION); EXHIBITS

(Death Penalty Habeas Corpus Case)

Petitioner James Montell Chappell replies to the State's Response to Petition for Writ of Habeas Corpus (Post-Conviction).

/ / /

/ / /

Chappell bases this Reply on the attached memorandum of points and authorities and the entire file in this matter.

DATED this 5th day of July, 2017.

Respectfully submitted
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

James Chappell filed his Petition for Writ of Habeas Corpus (Post-Conviction) on November 16, 2016 ("Petition" or "Pet."). On January 4, 2017, this Court ordered the State to respond to Chappell's Petition. The State filed its Response on April 5, 2017. This Reply follows.

The State argues that the majority of claims raised in Chappell's Petition should be dismissed under the timeliness provisions of NRS 34.726, the procedural and successive petition bar of NRS 34.810, and the laches provision of NRS 34.800. Specifically, the State argues Claims One through Twelve, Fifteen though Twenty, and Twenty-Three are procedurally barred. The State also argues that portions of Claims Two, Four, Five, Six, Nine, Ten through Thirteen, Fifteen through Eighteen, Twenty-Three, and Twenty-Six should be rejected due to the doctrine of "law-of-the-case." Finally, the State argues that Claims Thirteen, Fourteen, Twenty-One, Twenty-Two, Twenty-Four, and Twenty-Five should be denied on the merits.

With regard to the State's argument that the majority of Chappell's claims be denied on procedural grounds (NRS 34.726, 34.800, 34.810), Chappell requests that this Court deny the State's request for dismissal and that this Court grant Chappell discovery and an evidentiary hearing, in order to permit him to demonstrate that he can overcome the procedural bars asserted by the State.[1] Chappell can overcome the procedural bars because any delay in raising the claims and facts contained in the

[1] Chappell will be filing a Motion for Evidentiary Hearing and Motion for Discovery on or before July 17, 2017.

instant Petition is the result of initial post-conviction counsel's ineffectiveness and this Court's refusal to grant Chappell the funds and evidentiary hearing necessary to fully develop and present the facts proving his claims of constitutional error. Both the ineffectiveness of initial post-conviction counsel and this Court's refusal to grant funding to post-conviction counsel foreclosed Chappell's attempts to take advantage of the state corrective process in the state post-conviction proceeding.

Further, as will be discussed below, the law-of-the-case doctrine does not bar review of Chappell's claims because: (1) subsequent proceedings have produced substantially new or different evidence; (2) the law-of-the-case doctrine is not absolute and courts have the discretion to revisit the wisdom of their legal conclusions; and/or (3) Chappell is entitled to a cumulative consideration of the constitutional issues which infect his conviction and death sentence.

And finally, as will be discussed, this Court should grant relief as to those claims which the State concedes must be decided on the merits. Chappell is entitled to relief on the claims raised in his Petition.

II. CHAPPELL'S CLAIMS ARE NOT PROCEDURALLY BARRED

A. Both Chappell's Guilt and Punishment Ineffective Assistance of Post-Conviction Counsel Claims Are Timely Under Rippo v. State

Chappell's judgment of conviction was not final until the Nevada Supreme Court issued remittitur following the affirmance of Chappell's penalty retrial. Thus, for purposes of raising ineffective assistance of initial post-conviction counsel claims, the relevant date here, pursuant to Rippo v. State, 132 Nev. __, 368 P.3d 729 (2016) (cert. granted, judgment vacated on other grounds by Rippo v. Baker, 137 S. Ct. 905

(2017), is November 16, 2016, one year from the issuance of remittitur after denial of the initial post-conviction proceedings. Rippo, 368 P.3d at 739-40. Because Chappell filed his current state petition on November 16, 2016, his claims, both guilt and punishment, related to the ineffectiveness of post-conviction counsel, are timely filed.[2]

As discussed in the Petition, the Nevada Supreme Court granted Chappell a new penalty trial following the granting in part of Chappell's first state post-conviction petition, which had been filed by attorney David Schieck. See Ex. 5.[3] Chappell's penalty retrial, where Schieck was lead counsel, took place in March 2007, and in May 2007 Chappell was again sentenced to death. See Ex. 6. That judgment of conviction became final upon issuance of remittitur in June, 2010. Ex. 159. Chappell filed a proper person petition for writ of habeas corpus in this Court on June 22, 2010. Ex. 160. This Court denied the petition on November 16, 2012, Ex. 9, the Nevada Supreme Court issued an affirmance on June 18, 2015, Ex. 164, and issued remittitur on November 17, 2015. Ex. 165. The instant state petition was filed on November 16, 2016.

Nevada Revised Statutes (NRS) Chapter 34 provides for the filing of a single post-conviction petition for a writ of habeas corpus following entry of a valid judgment of conviction and direct appeal therefrom. A post-conviction petition filed before the

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[2] See Claims One through Six, Eight through Sixteen, and Eighteen through Twenty-Six. See Pet. at 11-13.

[3] Citations to exhibits 1-334 are to those exhibits filed with Chappell's November 16, 2016 Petition. Citations to exhibits 335-68 are to exhibits filed with this Reply.

final judgment of conviction is entered is a nullity as prematurely filed. NRS 34.724 permits a post-conviction petition for a writ of habeas corpus to be filed by "[a]ny person convicted of a crime and under sentence of death or imprisonment[.]" In Chappell's case, there was no valid judgment of conviction until the penalty rehearing was complete. The prior judgment of conviction from Chappell's first trial was invalid for the purpose of filing a post-conviction petition because it lacked the essential requirement of a sentence, because the previous sentence had been vacated on appeal. Put simply, a judgment of conviction is not final until there is a written judgment setting forth the plea; the verdict or finding; and the adjudication and sentence, including the date of sentence and a reference to the statute under which the defendant is sentenced. See NRS 176.105 ("If a defendant is found guilty and is sentenced as provided by law, the judgment of conviction must set forth: (a) The plea; (b) The verdict or finding; (c) The adjudication and sentence, including the date of the sentence, any term of imprisonment . . . . a reference to the statute under which the defendant is sentenced . . . ."); see Ex Parte Dela, 25 Nev. 346, 350, 60 P. 217, 218 (1900) (there are two essentials to a judgment of conviction—"the statement defining the punishment, and the statement of the offense for which the punishment is inflicted"); Ex Parte Roberts, 9 Nev. 44 (1873) (judgment was void because it did not state a valid sentence); Ex Parte Salge, 1 Nev. 449, 453 (1865) (a valid judgment of conviction must list the reciting court and cause, the sentence defining the punishment, and a statement of the offense for which the punishment is inflicted); Bradley v. State, 109 Nev. 1090, 1094, 864 P.2d 1272, 1275 (1993) (citing NRS

176.035(1)); Johnson v. State, 118 Nev. 787, 802 n.31, 59 P.3d 450, 460 n. 31 (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) (citing Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987)); Doyle v. State, 116 Nev. 148, 157, 995 P.2d 465, 471 (2000) (same); Berman v. U.S., 302 U.S. 211, 212 (1937) ("Final judgment in a criminal case means sentence. The sentence is the judgment"); Midland Asphalt Corp. v. U.S., 489 U.S. 794, 798 (1989) (same). In Chappell's case, his judgment of conviction could not have been final until after his penalty re-trial due to the necessity of a sentence. See Magwood v. Patterson, 561 U.S. 320, 332 (2010).

This issue was considered at length by the Ninth Circuit Court of Appeals in Edelbacher v. Calderon, 160 F.3d 582 (9th Cir. 1998). There, a defendant sought habeas corpus review of his conviction at a time when his conviction had been affirmed but his sentence of death had been vacated and he was awaiting a new penalty hearing. The court held that "[w]hen there is a pending state penalty retrial and no unusual circumstances, we decline to depart from the general rule that a petitioner must wait the outcome of the state proceedings before commencing his federal habeas corpus action." Id. at 583. The Court explained that it was generally not feasible to conduct habeas review of the guilt phase of a case prior to a determination of the sentence in part because it was necessary to know whether the case was capital or not. Id. at 585-86. The ruling emphasized that the United States Supreme Court "has repeatedly held that the death penalty is qualitatively different

from all other punishments and that the severity of the death sentence mandates heightened scrutiny in the review of any colorable claim of error." Id. at 585 & n.4; see also Bums v Parke, 95 F.3d 465, 467 (7th Cir. 1996) (noting that "guilt and sentencing are successive phases of the same case, rather than different cases;" holding that a judgment refers to the sentence rather than the conviction).

Other decisions are in accord with the Ninth Circuit's decision in Edelbacher. See Colvin v. U.S., 204 F.3d 1221, 1225 (9th Cir. 2000) (When an appellate court partially or wholly reverses a defendant's conviction or sentence and remands to the district court, the petitioner's judgment does not become final until the time for appealing the entire amended judgment has passed); United States v. Dodson, 291 F.3d 268, 276 (4th Cir. 2002) (rejecting the precise procedure proposed by the State here and concluding that, "Each count has the same date of finality, and, as to each count, conviction and sentence are final on the same date.").

Therefore, under Ninth Circuit case law, the relevant state post-conviction petition in question is the one filed by Christopher Oram following Chappell's penalty phase rehearing, not the one filed by David Schieck following Chappell's first trial. And consistent with the Ninth Circuit holdings, Chappell's guilt-phase claims related to the ineffectiveness of post-conviction counsel are timely because they were raised within one year of the finality of the judgment, as defined in Rippo. The same is true for Chappell's penalty retrial claims—they too were raised within one year of the finality of the judgment.

In the post-conviction petition filed following the penalty retrial, Oram raised a single guilt-phase claim. See Ex. 43 at 58-61 (IAC of trial, appellate, and post-conviction counsel for failing to raise proper objections to erroneous guilt-phase jury instructions). However, because Chappell's judgement of conviction was not final until the completion of his penalty retrial, Oram was ineffective for not raising all potential guilt phase claims including those raised by Shieck in the first state petition, (see Ex. 46), and those raised in Chappell's current petition.

Moreover, to the extent the Nevada Supreme Court refused to consider the one guilt-phase issue raised by Oram, the Nevada Supreme Court's decision was in error. In rejecting Oram's claim, the Nevada Supreme Court found the claim not properly raised "because the proceeding at issue is [Chappell's] second penalty hearing." Ex. 10 at 2, n.1; see also Ex. 11 (order denying rehearing). The Nevada Supreme Court's decision was inconsistent with that Court's administration of its own procedural rules, which are intended to afford petitioner's adequate opportunity to enforce the right to the effective assistance of post-conviction counsel. See Nika v. State, 120 Nev. 600, 606-07, 97 P.3d 1140, 1145 (2004); Moore v. State, Case No. 46801 at 4-5, Order dated April 23, 2008 (Ex. 335) (raising of guilt phase claims not procedurally barred as those claims raised in prior post-conviction petition were premature in light of then-pending penalty retrial).[4]

[4] Chappell does not cite Moore for precedential value. See NRAP 36(c)(3) ("A party may cite for its persuasive value, if any, an unpublished disposition by this court on or after January 1, 2016."). " Rather, Moore is cited as an example of how a similarly situated capital litigant was treated, in order to ensure that Chappell's state and federal Constitutional rights to equal protection and due process are not violated.

If Chappell had, as the State asserts, one year from the issuance of remittitur after denial of the initial post-conviction proceedings to timely assert any allegations of ineffective assistance of first state post-conviction counsel with regard to the guilt-phase this would have led to an absurd result: Chappell would have been represented by David Schieck at the second penalty hearing at the same time that he was challenging the effectiveness of Schieck on post-conviction. In other words, Chappell would have been arguing that Schieck's performance had been ineffective and prejudicial in post-conviction proceedings at the same time Shieck was defending Chappell at the second penalty hearing. Such a procedure would have been highly debilitating to the attorney-client relationship and would have created additional conflicts that would have been the source of future claims, and requiring such a procedure would have been necessarily inadequate to enforce the petitioner's constitutional rights. See Nika, 120 Nev. at 606-07, 97 P.3d at 1145.

Under Crump v. Warden, 113 Nev. 293, 302-03, 934 P.2d 247, 253 (1997), ineffective assistance of counsel constitutes cause to excuse the failure to raise claims in the first post-conviction proceeding. The first post-conviction proceeding in this case however resulted in a reversal of Chappell's death sentence. Because Chappell's post-conviction counsel after the penalty rehearing, Oram, raised only one guilt-phase issue in the state post-conviction petition, Chappell's only recourse is to raise the guilt–phase claims now so he can enforce his right to effective assistance of habeas counsel within the meaning of Crump. Should the Court decide otherwise, it would eliminate any avenue of review of first habeas counsel's ineffectiveness as to guilt-

phase claims (Schieck) solely because the Nevada Supreme Court has previously vacated the penalty judgment. Such a rule would simply not be rational because it would leave the petitioner with no remedy at all as to substantial constitutional claims.

B. This Court Is Required to Accept Chappell's Allegations as True and, Where a Factual Inquiry is Needed, to Grant Discovery and an Evidentiary Hearing

The State titled its pleading a "Response," but asks this Court to dismiss twenty-one of the twenty-six claims raised here as procedurally barred. Thus, the State's pleading could easily be titled "Motion to Dismiss." The State's Response does not discuss or acknowledge the standards applicable to reviewing a motion to dismiss, but it is clear that, under those standards, Chappell's claims cannot properly be dismissed.

For purposes of dismissing claims, this Court is required to liberally construe Chappell's claims and accept all the factual allegations as true. Thomas v. Nevada Yellow Cab Corp., 130 Nev. ___, 327 P.3d 518, 520 (2014); see also Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc., 896 F.2d 1542, 1550 (9th Cir. 1990) ("For purposes of the motion, the allegations of the non-moving party must be accepted as true while the allegations of the moving party which have been denied are assumed to be false."). This Court can dismiss Chappell's claims only if "it appears beyond a doubt that the [petitioner] could prove no set of facts which, if accepted by the trier of fact, would entitle him to relief." Dynamic Transit v. Trans Pac. Ventures, 128 Nev. ___, 291 P.3d 114, 117 (2012) (citations omitted).

This Court further is obligated to grant an evidentiary hearing "when the petitioner asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief." Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002). This standard merely requires "something more than a naked allegation" to merit an evidentiary hearing. Id. at 354, 46 P.3d at 1230 (internal citations omitted); see also Means v. State, 120 Nev. 1001, 1018, 103 P.3d 25, 36 (2004); Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 226 (1984). A claim is "belied by the record" only if it is affirmatively repelled by the record, as opposed to a claim that is subject to factual dispute. See Mann, 118 Nev. at 354, 46 P.3d at 1230. Where resolution of a question of procedural default requires a factual inquiry, the petitioner is entitled to an adequate hearing on the issue, both under state law, see Crump, 113 Nev. at 305, 934 P.2d at 254, and under federal due process principles.

In this case, Chappell has filed, concurrently with this Opposition, a Motion for an Evidentiary Hearing and a Motion for Leave to Conduct Discovery, in which he explains the need for an evidentiary hearing and discovery to resolve both the procedural issues and the merits of his constitutional claims. Chappell hereby incorporates the arguments contained in those motions as if fully set forth herein.

The allegations in Chappell's Petition, taken as true, establish his right to relief. As shown below, the Petition also demonstrates that the default rules asserted by the State are either inapplicable to Chappell's case, excused by showings of cause, or cannot constitutionally be applied to his case.

C. Chappell Can Demonstrate Good Cause and Prejudice Based on Post-Conviction Counsel's Ineffectiveness

To demonstrate "cause" to overcome procedural default under NRS 34.726 and NRS 34.810 for failing to present on direct appeal or in the state post-conviction proceeding the claims raised for the first time in the instant Petition, Chappell must demonstrate to this Court that an "impediment external to the defense" prevented Chappell from raising the claim earlier. See Rippo, 132 Nev. at __, 368 P.3d at 738; Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); Murray v. Carrier, 477 U.S. 478, 492 (1986); Evans v. State, 117 Nev. 609, 646-47, 28 P.3d 498, 523 (2001), overruled in part on other grounds by Lisle v. State, 131 Nev. __, 351 P.3d 725 (2015). "'A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of any default.'" Rippo, 368 P.3d at 738 (quoting Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003)). In his Petition, Chappell alleges that to the extent he failed to raise any claims, legal arguments, or supporting facts in his post-conviction petition, that failure was the result of the ineffective assistance of post-conviction counsel, as compounded or induced by the rulings of this Court. See Pet. at 11-14. The Nevada Supreme Court has held that ineffective assistance of post-conviction counsel constitutes cause to overcome procedural default. Rippo, 368 P.3d at 738.

The second component of the good-cause showing requires Chappell to demonstrate that dismissal of the Petition as untimely will unduly prejudice him. Whether Chappell can show good cause and prejudice based on the ineffective assistance of prior post-conviction counsel "is intricately related to the merits of his

claims." Bennett v. State, 111 Nev. 1099, 1103, 901 P.2d 676, 679 (1995); see Rippo, 368 P.3d at 740 ("A showing of undue prejudice necessarily implicates the merits of the postconviction-counsel claim"). As discussed above, in the procedural posture of a motion to dismiss, Chappell's claims must be viewed in the light most favorable to Chappell.[5]

State post-conviction counsel Oram was required to provide Chappell with reasonably effective assistance under the objective standard enunciated in Strickland v. Washington, 466 U.S. 668, 669-700 (1984). In Rippo, the Nevada Supreme Court "explicitly adopt[ed] the Strickland standard to evaluate postconviction counsel's performance where there is a statutory right to effective assistance of counsel." 368 P.3d at 741; see Crump, 113 Nev. at 304, 934 P.2d at 254. A reasonable investigation must take place before post-conviction counsel can make a strategic choice regarding which issues to include in a habeas petition. Strickland, 466 U.S. at 691 ("[C]ounsel

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[5] While the State asserts that Claims One through Twelve, Fifteen though Twenty, and Twenty-Three are procedurally barred, the State omits any discussion of "prejudice" with respect to Claims One, Two, Four through Seven, Nine through Twelve, Fifteen through Twenty, and Twenty-Three in its Response. Thus, the State has effectively conceded that Chappell can overcome prejudice and therefore, this Court cannot impose the procedural bars against Chappell as to those claims. See Polk v. State, 126 Nev. 180, 181, 185-86, 233 P.3d 357, 358, 360 (2010); Bates v. Chronister, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984); NRAP 31(d)(2). Further, Chappell sets forth clearly in the Petition why he would be prejudiced should his claims be found procedurally barred. See Pet. 44-68, 75-83 (Claim One); Pet. 87-94 (Claim Two); Pet. 184-91 (Claim Four); Pet. 193-96 (Claim Five); 210-11 (Claim Six); 214-16 (Claim Seven); Pet. 236-46 (Claim Nine); 248-65 (Claim Ten); 266-72 (Claim Eleven); 273-76 (Claim Twelve); 291-300 (Claim Fifteen); Pet. 301-09 (Claim Sixteen); Pet. 310-22 (Claim Seventeen); Pet. 323-26 (Claim Eighteen); Pet. 327-28 (Claim Nineteen); Pet. 329-30 (Claim Twenty); Pet. 337-39 (Claim Twenty-Three). Chappell will not repeat those arguments but rather, incorporates them herein. As to Claims Three and Eight, which the State affirmatively argues that Chappell cannot demonstrate prejudice (Resp. at 34-42 (Claim Three) and 47-48 (Claim Eight)), Chappell will discuss the merits of those claims in Section III, below.

has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."); see Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994) ("[C]ounsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client.") (emphasis in original). Post-conviction counsel's failure to investigate and raise the issues contained in the instant Petition, therefore, cannot be characterized as a strategic choice to which any deference is owed. See Correll v. Ryan, 539 F.3d 938, 948 (9th Cir. 2008) ("An uninformed strategy is not a reasoned strategy. It is, in fact, no strategy at all.").

Here, Oram failed to raise all available guilt and penalty-phase claims although counsel was on notice as to the need to do so. See Ex. 164. Thus, there could not have been a strategic choice to omit the facts and arguments contained in the instant Petition. Moreover, as discussed below, Oram requested funds from this Court to retain an investigator and an expert to conduct the investigation necessary to develop and present Chappell's claims, refuting any suggestion that his failure to do so was the result of a strategic decision.

As Oram's requests for funds demonstrate, he knew that he was required to do more than simply read the transcript and raise naked allegations. See Exs. 44, 97, 145. Under the Nevada Indigent Defense Standards of Performance, ADKT 411 (2008), post-conviction counsel is required to "secure the services of investigators or experts where necessary to develop claims to be raised in the post-conviction petition." Standard 3-9(f). This rule recognizes the importance of investigating,

developing, and presenting extra-record evidence in post-conviction proceedings where there is an allegation that trial counsel or direct appellate counsel was ineffective, in order to satisfy the prejudice prong of Strickland, 466 U.S. at 669-700. See Bennett v. State, 111 Nev. at 1108, 901 P.2d at 682; Wilson v. State, 105 Nev. 110, 113-15, 771 P.2d 583, 584-86 (1989); see also Ford v. Warden, 111 Nev. 872, 881, 901 P.2d 123, 128 (1995) (claim that client's mental state prevented counsel from adequately litigating habeas proceedings rejected because claims raised were "legal in nature and were . . . gathered from reading the trial proceedings and the appellate record."). In Chappell's case however, this Court denied any type of funding to Chappell for post-conviction purposes. See 10/19/12 TT at 11-12.

Oram pleaded eleven grounds for relief including allegations of ineffective assistance of trial and appellate counsel as well as myriad other pretrial and trial errors. See Ex. 43. In order for Chappell to have had any chance of success on any of these claims, however, Oram would have had to conduct his own investigation and present this Court with all of the evidence that he claimed trial counsel were ineffective for failing to present. But this Court's improper denial of funds to Chappell crippled initial post-conviction counsel's ability to demonstrate prejudice from trial counsel's deficiency. See Daniels v. Woodford, 428 F.3d 1181, 1206 (9th Cir. 2005) (holding that where counsel's failure to investigate was due, in part, to "repeated problems with securing state funding," counsel's failures "were not the result of strategic decision-making").

In the context of applying the Strickland standard, both the Ninth Circuit and the United States Supreme Court agree that the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines) should serve as guides to determining what is reasonable. See, e.g., Padilla v. Kentucky, 559 U.S. 356, 366 (2010) ("We long have recognized that '[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable'"); accord Wiggins v. Smith, 539 U.S. 510, 524 (2003); Strickland, 466 U.S. at 668; see also Smith v. Mahoney, 596 F.3d 1133, 1142 (9th Cir. 2010) ("By 1982, the ABA had released criminal justice standards requiring a defense attorney to thoroughly investigate the circumstances of a case"); Jones v. Ryan, 583 F.3d 626, 637 (9th Cir. 2009) ("The Supreme Court has, however, consistently relied upon relevant ABA Guidelines in effect at the time of trial when reviewing attorney conduct and examining reasonableness."). According to the ABA Guidelines, "[p]ost-conviction counsel should fully discharge the ongoing obligations imposed by these Guidelines, including the obligations to . . . continue an aggressive investigation of all aspects of the case." 2003 ABA Guideline 10.15.1(c); see also 1989 ABA Guideline 11.9.3(B-C) ("[Post-conviction] [c]ounsel should consider conducting a full investigation of the case, relating to both the guilt/innocence and sentencing phases. . . . Post-conviction counsel should seek to present to the appropriate court or courts all arguably meritorious issues").

The only way for Chappell to prove that he was prejudiced by trial counsel's failure to investigate was for state post-conviction counsel to review trial counsel's entire file and conduct a full investigation of the case, as undersigned counsel have now done. See Martinez v. Ryan, 566 U.S. 1, 13 (2012) ("Ineffective-assistance claims often depend on evidence outside the trial record."); United States v. Benford, 574 F.3d 1228, 1231 (9th Cir. 2009) ("ineffectiveness of counsel claims usually cannot be advanced without the development of facts outside the original record."); United States v. Laughlin, 933 F.2d 786, 788 (9th Cir. 1991) (the effectiveness of defense counsel "is more appropriately reserved for habeas corpus proceedings, where facts outside the record, but necessary to the disposition of the claim, may be fully developed."); Nika v. State, 120 Nev. 600, 606, 97 P.3d 1140, 1144-45 (2004) (post-conviction counsel needs "to investigate possible avenues of relief."); Rippo, 368 P.3d at 739 (post-conviction counsel needs "to investigate additional claims that may not appear from the record."); cf. Bolden v. State, 99 Nev. 181, 183, 659 P.2d 886, 887 (1983) ("In the present case, appellant's claim that his trial counsel provided him with constitutionally ineffective assistance, based as it is upon the factual allegations of the petition and accompanying affidavit, could not have been raised and determined on direct appeal due to the necessity of an evidentiary hearing to resolve questions of fact.").

There is a reasonable probability that, if initial post-conviction counsel had competently investigated and presented the claims raised in the instant Petition, the results of the post-conviction proceeding would have been different. "Because the

failure to conduct a reasonable investigation lacked a strategic rationale, [initial post-conviction counsel's] representation was ineffective." Daniels, 428 F.3d at 1206. Chappell has demonstrated good cause and prejudice based on prior post-conviction counsel's ineffectiveness. Chappell's allegations entitle him to an evidentiary hearing on the issue.

D. Chappell Can Demonstrate Good Cause and Prejudice Based on This Court's Denial of Resources

"An impediment external to the defense" sufficient to overcome procedural default "may be demonstrated by a showing 'that the factual or legal basis for a claim was not reasonably available to counsel, or that "some interference by officials," made compliance impracticable.'" Hathaway, 119 Nev. 248 at 252, 71 P.3d at 506 (quoting Murray, 477 U.S. at 488) (emphasis added); see also Rippo, 368 P.3d at 738. In Chappell's case, the factual basis supporting the claims of trial counsel's ineffectiveness for failure to investigate and present guilt and penalty-phase evidence were not reasonably available to Chappell, in substantial part, because this Court denied Chappell funds to conduct the investigation necessary to discover those facts. See Pet. at 13-14.

In February 2012, post-conviction counsel Oram filed three motions requesting funding. In the first motion, counsel requested funding to hire an investigator to assist in the post-conviction proceedings. Ex. 44. The same day counsel requested funding to hire an expert on sexual assault. Ex. 97. And two days later, initial post-conviction counsel requested funding for three additional experts: (1) an expert to administer a Positron Emission Tomography (PET) Scan to determine whether

Chappell suffered from disorders of the brain; (2) an expert to perform a full neurological exam in order to address whether any additional issues existed with respect to Chappell; (3) and an expert to evaluate Chappell for Fetal Alcohol Spectrum Disorder (FASD) due to Chappell's mother's drinking during her pregnancy with Chappell. Ex. 145. The State filed an opposition to Chappell's request for funds. Ex. 336.

On October 19, 2012, during oral argument in support of Chappell's state petition, Oram renewed his funds request. This Court denied all funding requests. 10/19/12 TT at 11-12. This Court made a decision to deny funds by concluding, without benefit of any extra-record investigation, that no mitigation evidence existed that could conceivably outweigh what it believed to be an extremely aggravated crime.

In Trevino v. Davis, the court explained the flaw in such a ruling:

> Trevino essentially argues that the facially deficient investigation by the state trial counsel should have put his state habeas counsel on notice to investigate a claim for failure to investigate. The district court's approach, on the other hand, suggests that Trevino's state habeas counsel could not have rendered ineffective assistance for failing to assert a claim based on his trial counsel's failure to investigate because there was no record evidence of what mitigating evidence his trial counsel failed to discover.
>
> We conclude Trevino has the better argument here. If state habeas counsel is not subject to the same Strickland requirement to perform some minimum investigation prior to bringing the initial state habeas petition, the Martinez/Trevino rule would have limited utility (if any) in addressing Wiggins claims. There is a serious danger, under the district court's reasoning, that a state trial counsel's failure to investigate (and put into the record) mitigation evidence could insulate state habeas counsel from an

> ineffective assistance claim simply because the evidence was missing. That would only compound the problem with state trial counsel's failure to conduct a reasonable investigation in the first place, and Wiggins claims for deficient investigation might be effectively unreviewable under Martinez/Trevino.

Trevino v. Davis, 829 F.3d 328, 348-49 (5th Cir. 2016) (emphasis added).

By failing to grant Chappell the funds to investigate, this Court completely precluded Chappell from showing prejudice as a result of trial counsel's deficient performance. "[A] due process violation arising from the participation of an interested judge is a defect 'not amenable' to harmless-error review." Williams v. Pennsylvania, 136 S. Ct. 1899, 1909 (2016) (quoting Puckett v. United States, 556 U.S. 129, 141 (2009)). Where a habeas petitioner is prevented from developing and presenting facts which are necessary to proving his claims of constitutional error, as this Court did during Chappell's post-conviction proceedings, the state corrective process cannot be deemed adequate to protect the petitioner's rights.

"When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695. The Supreme Court has made clear that, "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982) (emphasis in original). "[I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing

sentence." Tennard v. Dretke, 542 U.S. 274, 278 (2004) (quoting Penry v. Lynaugh, 492 U.S. 302, 319 (1989), abrogated on other grounds by Atkins v. Virginia, 536 U.S. 304, 321 (2002)). This Court's denial of funds and an evidentiary hearing on the basis that it would not consider and give effect to any newly presented evidence that might change its perception of how trial counsel performed and what the jury considered, despite being required to do so under Strickland, was a violation of clearly established Supreme Court precedent. See Martinez, 566 U.S. at 13 ("Ineffective-assistance of counsel claims often depend on evidence outside the trial record."); 2003 ABA Guideline 10.15.1, Commentary ("collateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation . . . ."). It is precisely because the claims needed to be developed further that Chappell was entitled to funds and an evidentiary hearing. See generally Ake v. Oklahoma, 470 U.S. 68, 86-87 (1985) (where mental state is "significant factor" at trial and penalty hearing, denial of expert assistance denied due process); Martinez, 566 U.S. at 11 (claims of ineffective assistance of prior counsel "often require investigative work," and effective assistance of counsel necessary to enforce Sixth Amendment right to effective trial counsel).

E. Chappell Can Overcome Any Procedural Default Under NRS 34.800 and 34.810

The State argues laches under NRS 34.800 because of the prejudice that it claims will "inevitably" result in the State's inability to conduct a retrial due to the

long passage of time since both the guilt and penalty-phases of trial. Resp. at 4.[6] Chappell was represented by initial post-conviction counsel when the presumption of prejudice under NRS 34.800(2) supposedly attached. The claim of ineffective assistance of initial post-conviction counsel for failing to present the claims contained in the instant Petition was not factually or legally available to Chappell until this Court denied his state post-conviction petition filed by Oram. See Rippo, 368 P.3d at 739-40. Chappell brought his claim of ineffective assistance of initial post-conviction counsel within one year thereafter, a presumptively reasonable time under Rippo. Id.

Chappell can rebut the presumption of prejudice to the State's ability to respond to the Petition under NRS 34.800(1)(a) because "the petition is based upon grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred." Chappell was prevented from discovering and presenting the grounds alleged in the instant Petition previously because of state post-conviction counsel's ineffectiveness and this Court's denial of funding. See, e.g., Crump, 113 Nev. at 305, 934 P.2d at 354; see also State v. Eighth Judicial District Court (Riker), 121 Nev. 225, 239, 112 P.3d 1070, 1079

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[6] Chappell alleges on information and belief that all of the witnesses who testified for the State at his trial are still alive, except Chappell's grandmother, who died before the penalty re-trial and whose testimony was read into the record during the State's rebuttal, and none of the evidence presented at trial has been destroyed. The State has provided no evidence to support its argument, which is thus rank speculation. See Groesbeck v. Warden, 100 Nev. 259, 261, 679 P.2d 1268, 1269 (1984) (common law laches requires showing of prejudice). Additional evidence has come to light that favors Chappell—in particular, mitigating evidence—that may make it more difficult for the State to obtain a conviction or death sentence, but that cannot be a form of prejudice resulting from delay that the statute contemplates.

(2005) ("Riker contends that our order in O'Neill v. State flouts NRS 34.800(2) by not addressing laches and the presumption of prejudice to the state set forth in that statute. However, that statute requires the state to specifically plead laches and prejudice. Nor is it likely such a pleading would have gained relief given our determination that O'Neill had established cause and prejudice under NRS 34.726 for the untimely filing of his petition.") (emphasis added).

This Court's denial of investigative and expert funding prevented state post-conviction counsel from performing a basic duty in habeas corpus litigation, which is to show, by reference to evidence outside the trial record, what evidence trial counsel would have presented if counsel had done a competent investigation. See, e.g., In re Marquez, 822 P.2d 435, 446 (Cal. 1992) ("To determine whether prejudice [from ineffective assistance of counsel] has been established, we compare the actual trial with the hypothetical trial that would have taken place had counsel completely investigated and presented the . . . defense, [citation]"); Wilson, 105 Nev. at 113-15, 117-18, 771 P.2d at 584-85, 587-88 (granting relief to defendant based on trial counsel's failure to investigate and present mitigating evidence, where post-conviction hearing showed what evidence should have been presented, but denying relief to other defendant on same claim where post-conviction hearing showed mitigating evidence that should have been presented did not establish prejudice). The instant Petition is Chappell's only opportunity to raise his allegation that state post-conviction counsel was ineffective. See Trevino v. Thaler, 133 S. Ct. 1911, 1918-19 (2016).

In either case, the failure to develop and present the evidence contained in the instant Petition was not Chappell's fault, and could not have been avoided by him through the exercise of reasonable diligence. Chappell exercised all the diligence he could by relying on his counsel to represent his interests, and on this Court to ensure that he, as an indigent, had the funds necessary to vindicate his constitutional rights. If not for initial post-conviction counsel's ineffectiveness, and if not for this Court's refusal to grant Chappell investigative and expert funds, all of the facts and arguments contained in the instant Petition could have been raised sooner.[7]

Chappell can rebut the presumption of prejudice to the State's ability to retry him under NRS 34.800(1)(b), and also demonstrate that the NRS 34.810(1)(b) bar should not be applied to his claims, because Chappell would not have been eligible for the death penalty if his jurors had heard the mitigation evidence presented in the instant petition. Thus, "a fundamental miscarriage of justice has occurred in the

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[7] Furthermore, Chappell can overcome NRS 34.800 because he can demonstrate that any delay in raising the facts and claims contained in the instant Petition is not attributable to him. See State v. Powell, 122 Nev. 751, 759, 138 P.3d 453, 458 (2006). Following the penalty retrial, this Court entered judgment against Chappell on May 6, 2007. Ex. 6. The Nevada Supreme Court affirmed Chappell's conviction and sentence on October 20, 2009, Ex. 7, and denied Chappell's petition for rehearing on December 16, 2009, Ex. 8. June 22, 2010, Chappell filed his state petition for writ of habeas corpus. Ex. 160. Chappell diligently litigated that petition until November 16, 2012, when this Court issued its order denying the petition. Ex. 9. The Nevada Supreme Court affirmed the denial of post-conviction relief on June 18, 2015. Ex. 10. Chappell sought rehearing, which was denied on October 22, 2015. Ex. 11. The Nevada Supreme Court issued remittitur on November 17, 2015. Ex. 165. Chappell filed his federal petition for writ of habeas corpus on August 17, 2016, and the instant Petition on November 16, 2016. Thus, Chappell has been actively litigating his claims of constitutional error for the entire time since his conviction became final, and any and all delay in raising the claims and facts contained in the instant Petition is the result of initial post-conviction counsel's ineffectiveness, and this Court's refusal to grant funds.

proceedings resulting in the judgment of conviction or sentence," NRS 34.800(1)(b), and a "fundamental miscarriage of justice would result from the court's failure to consider the claim[s]." Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

Under Nevada law, the finding that the aggravating circumstances outweigh the mitigation exposes the defendant to a greater punishment than that authorized by the guilty verdict alone, and that factual finding is necessary to impose the death penalty.[8] Accordingly, under controlling Supreme Court case law, the finding that the aggravating circumstances are not outweighed by the mitigation must be made beyond a reasonable doubt, whether the statute expressly says so or not. Hurst v. Florida, 136 S. Ct. 616, 621-22 (2016); but see McConnell v. State, 125 Nev. 243, 254, 212 P.3d 307, 314-15 (2009); Nunnery v. State, 127 Nev. 749, 772-73, 263 P.3d 235, 251 (2011).

It was a fundamental miscarriage of justice for the jury to sentence Chappell to death without having heard evidence regarding Chappell's mother's drug and alcohol addiction and how that led to severe consequences in Chappell's upbringing. The jurors should have heard about how Chappell and his siblings were left alone while they grew up, often without food or the basic necessities. The jurors should have heard about the emotional isolation that impacted Chappell during his

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[8] NRS 175.554(3) ("The 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."); see also Hollaway v. State, 116 Nev. 732, 745, 6 P.3d 987, 996 (2000).

formative years. The jurors should have learned that, at a very young age, Chappell turned to alcohol and drugs as a coping mechanism. The jurors should have heard from the myriad lay witnesses who knew Chappell intimately and could have given the jurors a more accurate portrayal of his personality and the dynamics of his relationship with Panos. The jurors should have heard about Chappell being born with FASD and how that impacted his entire life.

Perhaps most importantly, the jurors should have heard from an expert who could have explained to the jurors the impact of Chappell's childhood trauma and loss. The jurors should have heard from an expert who could have assisted the jurors in understanding Chappell's addiction and drug toxicity. And the jurors should have heard how the offense in the instant case was directly linked to Chappell's traumatic upbringing, disease of addiction, and FASD, Pet. at 97-153. It was a fundamental miscarriage of justice that this Court denied Chappell's state post-conviction petition without providing him an opportunity to develop and present this evidence. Thus it would be a fundamental miscarriage of justice for this Court to fail to consider the claims in the instant Petition at this time.

F. None of the Procedural Bars Raised by the State Can Be Constitutionally Applied

The State seeks to bar consideration of Chappell's constitutional claims by invoking procedural default rules that are not applied consistently and do not provide adequate notice of when they will be applied or excused. Refusing to review Chappell's constitutional claims on the basis of these default rules would violate the due process right to adequate notice and the equal protection right to consistent

treatment of similarly situated litigants. See, e.g., Bush v. Gore, 531 U.S. 98, 106-09 (2000) (per curiam); Village of Willowbrook v. Olech, 528 U.S. 562, 564-65 (2000) (per curiam); Myers v. Ylst, 897 F.2d 417, 421 (9th Cir. 1990) (Equal Protection Clause requires consistent application of state law to similarly-situated litigants); see also U.S. Const. amend. XIV; Nev. Const. art. 1 § 8(5).

NRS 34.726 does not contain an express limitations period for the time during which an otherwise "untimely" state petition must be filed, and the Nevada Supreme Court has declined to impose any sort of express time frame for filing a petition based upon evidence obtained long after the expiration of the one-year limitations period. See Riker, 121 Nev. at 235, 112 P.3d at 1076; State v. Bennett, 119 Nev. 589, 597, 81 P.3d 1, 6-7 (2003); Bennett v. State, 111 Nev. at 1103, 901 P.2d at 679. In an oral argument before the Nevada Supreme Court that occurred in 2010, a justice of the Nevada Supreme Court and the State of Nevada acknowledged that there was no definite time frame in which to file a successive petition under NRS 34.726(1)(a). During that proceeding, the following exchange occurred between Justice Gibbons and the representative of the State, Steven S. Owens:

> THE COURT: But Mr. Owens we haven't specified the period of time within which a second post-conviction petition must be filed. In orders we've generally focused on the years period of time. But generally it's been reasonable time. Would it be appropriate in this case to specify that time in applying the procedural bar?
>
> OWENS: I definitely would like some clarification on that particular issue. . . . If they come upon documents or information or knowledge and did not act on it and did not bring it to the state court's attention in a timely manner then that is not good cause.

Ex. 337 at 5.

If a justice of the Nevada Supreme Court and a representative of the Clark County District Attorney's Office thought the parameters of the time period for filing a successive petition under NRS 34.726(1)(a) in 2010 were unclear, it necessarily follows that Chappell could not be on notice of such a rule on June 8, 2010, when the Nevada Supreme Court issued its remittitur on direct appeal. Rather, as the State itself recognizes, a petitioner is merely required to file an otherwise untimely petition within "a reasonable time," (Resp. at 31) citing Rippo, 368 P.3d at 740. See Hathaway, 119 Nev. at 255, 71 P.3d at 508 ("a petitioner can establish good cause for the delay under NRS 34.726(1) if the petitioner establishes . . . that the petitioner filed a habeas corpus petition within a reasonable time after learning [of the reason for delay] . . . ."). The Nevada Supreme Court in Rippo agreed that a claim of ineffective assistance of post-conviction counsel brought within one year after disposition of the post-conviction petition in question was raised within a reasonable time, but did not otherwise alter the Hathaway standard. 368 P.3d at 740.

1. The Nevada Supreme Court has exercised its discretion to default rules in an inconsistent manner

The Nevada Supreme Court has exercised complete discretion to address constitutional claims, when an adequate record is presented to resolve them, at any stage of the proceedings, despite the default rules contained in NRS 34.726, 34.800, and 34.810. A purely discretionary procedural bar is inadequate to preclude review of the merits of constitutional claims. See, e.g., Valerio v. Crawford, 306 F.3d 742, 774 (9th Cir. 2002) (en banc); Morales v. Calderon, 85 F.3d 1387, 1391 (9th Cir. 1996).

Although the Nevada Supreme Court asserted in Pellegrini v. State, 117 Nev. 860, 886, 34 P.3d 519, 536 (2001) that application of the statutory default rules, some of which were adopted in the 1980s, was mandatory, the examples cited below establish that the Nevada Supreme Court has always exercised, and continues to exercise, complete discretion in applying them. See also Ybarra v. Warden, No. 43981, Order Dismissing Appeal (November 28, 2005), Ex. 338, and Ybarra v. Warden, No. 43981, Order Denying Rehearing (February 2, 2006), Ex. 339 (both reiterating that application of the statutory default rules is mandatory despite alleged inconsistencies in application).

The Nevada Supreme Court has disregarded default rules and addressed constitutional claims, in the exercise of its complete discretion to do so, in a multitude of cases. See, e.g., Rippo v. State, 122 Nev. 1086, 1095, 146 P.3d 279, 285 (2006) (issue raised by Nevada Supreme Court sua sponte in 2006, when conviction and sentence final in 1998); Hill v. State, 114 Nev. 169, 178-79, 953 P.2d 1077, 1084 (1998) (addressing merits claims raised for first time on appeal from denial of third post-conviction petition because claims "of constitutional dimension which, if true, might invalidate Hill's death sentence and the record is sufficiently developed to provide an adequate basis for review."); Bejarano v. Warden, 112 Nev. 1466, 1471 n.2, 929 P.2d 922, 926 n.2 (1996) (addressing claim on merits despite default rules); Bennett, 111 Nev. at 1103, 901 P.2d at 679 (addressing claims asserted to be barred by default rules; "[w]ithout expressly addressing the remaining procedural bases for the dismissal of Bennett's petition, we therefore choose to reach the merits of Bennett's

contentions"); Ford, 111 Nev. at 886-87, 901 P.2d at 131-32 (addressing claim of error in court's mandatory sentence review on direct appeal raised for first time on appeal in second collateral attack, without discussing or applying default rules); Lane v. State, 110 Nev. 1156, 1168, 881 P.2d 1358, 1366-67 (1994) (vacating aggravating factor finding based on instructional error on mandatory review without noting issue not raised at trial or on appeal); Powell v. State, 108 Nev. 700, 705-06, 838 P.2d 921, 924-25 (1992) (addressing issue of delay in probable cause determination without indicating that issue not raised at trial or on appeal); Lord v. State, 107 Nev. 28, 38, 806 P.2d 548, 554 (1991) ("Normally a proper objection is a prerequisite to our considering the issue on appeal. However, since this issue is of constitutional proportions, we elect to address it now.") (citation omitted); Bejarano v. State, 106 Nev. 840, 843, 801 P.2d 1388, 1390 (1990) (on appeal from denial of collateral relief, "[w]e consider sua sponte whether the failure to present such [mitigating] evidence constitutes ineffective assistance"); Grondin v. State, 97 Nev. 454, 455-57, 634 P.2d 456, 457-58 (1981) (entertaining allegation of ineffective assistance of post-conviction counsel raised for the first time on appeal of denial of post-conviction relief and remanding for an evidentiary hearing without requiring allegations of "cause" in a successive petition); Krewson v. Warden, 96 Nev. 886, 887, 620 P.2d 859, 859 (1980) (court obligated to consider constitutional issues raised for the first time on appeal); Gunter v. State, 95 Nev. 319, 320, 594 P.2d 708, 709 (1979) (court "obligated" to consider constitutional issues raised for the first time on appeal); Stocks v. Warden, 86 Nev. 758, 760-61, 476 P.2d 469, 470 (1978) (court "choose[s] to entertain" second

post-conviction petition which could have been barred); Warden v. Lischko, 90 Nev. 221, 222-23, 523 P.2d 6, 7 (1974) (trial court's "choice" to rule on barred claim "within its discretionary power"); Hardison v. State, 84 Nev. 125, 128, 437 P.2d 868, 870 (1968) ("[S]ince appellant's contentions are grounded on constitutional questions this court is obligated to consider them on appeal."); Farmer v. Director, No. 18052, Order Dismissing Appeal (March 31, 1988) (addressing two substantive claims on merits (guilty plea involuntary, insufficiency of aggravating circumstances) despite failure to raise on direct appeal), Ex. 340; Farmer v. State, No. 22562, Order Dismissing Appeal (February 20, 1992) (denying claim of improper admission of victim impact evidence on merits despite default), Ex. 341; Feazell v. State, No. 37789, Order Affirming in Part and Vacating in Part, at 5-6 (November 14, 2002) (granting penalty-phase relief sua sponte (on appeal of first state habeas corpus petition) on basis of ineffective assistance of post-conviction counsel without requiring Petitioner to plead "cause" under NRS 34.726(1) or 34.810), Ex. 342; Hardison v. State, No. 24195, Order of Remand (May 24, 1994) (addressing claims and granting relief despite timeliness and successive petition procedural bars raised by State), Ex. 343; Hill v. State, No. 18253, Order Dismissing Appeal (June 29, 1987) (dismissing untimely appeal from denial of second post-conviction relief petition but sua sponte directing trial court to entertain merits of new petition), Ex. 344; Jones v. State, No. 24497, Order Dismissing Appeal (August 28, 1996) (holding challenge to jurisdiction of court waived by guilty plea, without citing existing state rule that lack of jurisdiction not waivable; see, e.g., Application of Alexander, 80 Nev. 354, 358, 393 P.2d 615, 616-17

(1964); NRS 174.105(3)), Ex. 345; Jones v. McDaniel, No. 39091, Order of Affirmance (December 19, 2002) (rejecting Petitioner's three-judge panel claims on merits despite direct appeal and subsequent petition bar; rejecting jurisdictional challenge on law-of-the-case grounds, without citing authority that lack of jurisdiction not waivable), Ex. 346; Milligan v. State, No. 21504, Order Dismissing Appeal (June 17, 1991) (rejecting two substantive claims on merits (error to admit uncorroborated testimony of accomplice, death penalty cruel and unusual) despite failure to raise on direct appeal), Ex. 347; Neuschafer v. Warden, No. 18371, Order Dismissing Appeal (August 19, 1987) (addressing merits of claims without discussion of default rules, in case decided without briefing, and in which court expressed "serious doubts" about authority of counsel to pursue appeal, but decided to "elect" to entertain appeal due to "gravity of appellant's sentence"), Ex. 348; Nevius v. Sumner (Nevius I), Nos. 17059, 17060, Order Dismissing Appeal and Denying Petition (February 19, 1986) (reviewing first and second collateral petitions in consolidated opinion, without addressing default rules as to second petition), Ex. 349; Nevius v. Warden (Nevius II), No. 29027, Order Dismissing Appeal (October 9, 1996) (entertaining claim in petition filed directly with Nevada Supreme Court despite failure to raise claim in district court; noting that district court had "discretion to dismiss appellant's petition . . . ."), Ex. 350; Nevius v. Warden (Nevius III), Order Denying Rehearing (July 17, 1998) (same), Ex. 351; Rogers v. Warden, No. 22858, Order Dismissing Appeal (May 28, 1993) (addressing two claims on merits (objection to M'Naughten test for insanity, error to place the burden on defendant to prove insanity) despite successive petition

bar and direct appeal bar; claims rejected under law of the case), Ex. 352-53; Stevens v. State, No. 24138, Order of Remand (July 8, 1994) (finding cause on basis of failure to appoint counsel in proceeding in which appointment of counsel not mandatory); cf. Crump, 113 Nev. at 303, 934 P.2d at 253, Ex. 354; Williams v. State, No. 20732, Order Dismissing Appeal (July 18, 1990) (addressing claim in third collateral proceeding on merits without discussion of default rules), Ex. 355; Williams v. State, No. 29084, Order Dismissing Appeal (August 29, 1997) (addressing claim that trial counsel failed to rebut aggravating evidence; claim rejected under law of the case), Ex. 356; Ybarra v. Director, No. 19705, Order Dismissing Appeal (June 29, 1989) (addressing previously-raised claim without reference to default rules), Ex. 357.

The Nevada Supreme Court has declined to apply the one-year rule of NRS 34.726 to bar its review of constitutional claims contained in successive capital habeas petitions. See, e.g., Hill, 114 Nev. at 178-79, 953 P.2d at 1084 (February 1998) (addressing claims on merits filed directly with the Nevada Supreme Court; successive petition claims filed September 19, 1996, approximately ten years after direct appeal remittitur issued on April 29, 1986); Bennett, 111 Nev. at 1101, 901 P.2d at 678 (August 1995) (amended petition filed December 30, 1993); Farmer v. State, No. 29120, Order Dismissing Appeal (November 20, 1997) (successive petition filed August 28, 1995), Ex. 358; Nevius v. Warden (Nevius II), No. 29027, Order Dismissing Appeal (October 9, 1996) (successive petition filed August 23, 1996), Ex. 350; Nevius v. Warden (Nevius III), Order Denying Rehearing (July 17, 1998) (successive petition filed February 7, 1997), Ex. 351; Riley v. State, No. 33750, Order

Dismissing Appeal (November 19, 1999) (successive petition filed August 26, 1998), Ex. 359; Sechrest v. State, No. 29170, Order Dismissing Appeal (November 20, 1997) (successive petition filed July 27, 1996), Ex. 360; Jones v. McDaniel, No. 39091, Order of Affirmance (December 19, 2002) (addressing all three-judge panel claims on merits; successive petition filed May 1, 2000), Ex. 346.

The Nevada Supreme Court also routinely disregards the procedural bar arising from failure to raise claims in earlier proceedings. See Valerio, 306 F.3d at 778; see also Bejarano, 112 Nev. at 1471 n.2, 929 P.2d at 926 n.2 (addressing claim on merits despite default rules); Bennett, 111 Nev. at 1103, 901 P.2d at 679 (addressing claims asserted to be barred by default rules; "[w]ithout expressly addressing the remaining procedural bases for the dismissal of Bennett's petition, we therefore choose to reach the merits of Bennett's contentions"); Ford, 111 Nev. at 886-87, 901 P.2d at 131-32 (1995) (addressing claim of error in court's mandatory sentence review on direct appeal raised for first time on appeal in second collateral attack, without discussing or applying default rules); Hill, 114 Nev. at 178-79, 953 P.2d at 1084 (addressing merits of claims raised for first time on appeal from denial of third post-conviction petition because claims "of constitutional dimension which, if true, might invalidate Hill's death sentence and the record is sufficiently developed to provide an adequate basis for review."); Farmer v. State, No. 22562, Order Dismissing Appeal (February 20, 1992), Ex. 341; Feazell v. State, No. 37789, Order Affirming in Part and Vacating in Part, at 5-6 (November 14, 2002), Ex. 342; Hardison v. State, No. 24195, Order of Remand (May 24, 1994), Ex. 343; Neuschafer v. Warden, No.

18371, Order Dismissing Appeal (August 19, 1987), Ex. 348; Ybarra v. Director, No. 19705, Order Dismissing Appeal (June 29, 1989), Ex. 357.

The Nevada Supreme Court has declined to apply the rebuttable presumption of NRS 34.800(2) to capital habeas petitioners. See, e.g., Bejarano, 112 Nev. at 1471 n.2, 929 P.2d at 926 n.2 (addressing claim on merits despite default rules; successive petition filed approximately five years after direct appeal remittitur issued on January 10, 1989); Ford, 111 Nev. at 886-87, 901 P.2d at 131-32 (addressing claim of error in court's mandatory sentence review on direct appeal raised for first time on appeal in second collateral attack, without discussing or applying default rules; successive petition filed November 12, 1991, approximately five years after direct appeal remittitur issued on April 29, 1986); Hill, 114 Nev. at 178-79, 953 P.2d at 1084 (addressing claims on merits filed directly with the Nevada Supreme Court; successive petition claims filed September 19, 1996, approximately ten years after direct appeal remittitur issued on September 5, 1986); Weber v. State, No. 62473, Order Affirming in Part, Reversing in Part and Remanding (June 24, 2016), Ex. 361; Farmer v. State, No. 29120, Order Dismissing Appeal (November 20, 1997), Ex. 358; Jones v. McDaniel, No. 39091, Order of Affirmance (December 19, 2002), Ex. 346; Milligan v. Warden, No. 37845, Order of Affirmance (July 24, 2002), Ex. 362; Nevius v. Warden (Nevius II), No. 29027, Order Dismissing Appeal (October 9, 1996), Ex. 350; Nevius v. Warden (Nevius III), Order Denying Rehearing (July 17, 1998), Ex. 351; O'Neill v. State, No. 39143, Order of Reversal and Remand, at 2 (December 18, 2002), Ex. 363; Riley v. State, No. 33750, Order Dismissing Appeal (November 19,

1999), Ex.359; Sechrest v. State, No. 29170, Order Dismissing Appeal (November 20, 1997), Ex. 360; Williams v. State, No. 29084, Order Dismissing Appeal (August 29, 1997), Ex. 356.

The State has admitted that the Nevada Supreme Court disregards procedural default rules on grounds that cannot be reconciled with a theory of consistent application. Bennett v. State, No. 38934, Respondent's Answering Brief at 8 (November 26, 2002) ("upon appeal the Nevada Supreme Court graciously waived the procedural bars and reached the merits"); Nevius v. McDaniel, No. CV-N-96-785-HDM(RAM), Response to Nevius's Supplemental Memorandum at 3 (D. Nev. October 18, 1999) (Nevada Supreme Court noted issue raised only on petition for rehearing in successive proceeding, "but it did not procedurally default the claim. Instead, 'in the interests of judicial economy' and, more than likely, out of its utter frustration with the litigious Mr. Nevius and to get the matter out of the Nevada Supreme Court once and for all, the court addressed the claim on its merits"), Ex. 364. Default bars that can be "graciously waived," or disregarded out of "frustration," are not "rules" that bind the actions of courts at all, but are the result of mere exercises of unfettered discretion; and such impediments cannot constitutionally bar review of meritorious claims. Lonchar v. Thomas, 517 U.S. 314, 323 (1996) (citing Opinion on the Writ of Habeas Corpus, Wilm. 77, 87, 97 Eng. Rep. 29, 36 (1758)) ("There is no such thing in the Law, as Writs of Grace and Favour issuing from the Judges."). The Nevada Supreme Court's practices make review of the merits of constitutional claims a

matter of "grace and favor," and they cannot constitutionally be applied to bar consideration of Chappell's claims.

The Nevada Supreme Court has provided a laboratory example of its disparate, and therefore unconstitutional, treatment of is default rules in the Rippo case. There, the Court, on appeal from the denial of post-conviction habeas corpus relief, sua sponte directed the parties to be prepared to argue an issue arising from a penalty-phase jury instruction regarding whether the jury had to be unanimous in finding that the mitigating evidence outweighed the aggravating factors to preclude death-eligibility. Rippo v. State, No. 44094, Order Directing Oral Argument (March 16, 2006). The issue was addressed on the merits in its decision. Rippo, 122 Nev. at 1094-95, 146 P.3d at 285. This instructional issue had not been raised in any previous proceeding, cf. NRS 34.810(1)(b)(2), or in the habeas proceedings in the trial court, or in the Nevada Supreme Court itself. The only issue raised with respect to this jury instruction was whether it adequately informed the jury that non-statutory aggravating evidence that was not relevant to the statutory aggravating factors could be considered in the weighing process for finding death-eligibility. The Supreme Court first raised the issue sua sponte in its order directing oral argument in 2006, long after the one year rule, NRS 34.726(1), had elapsed from the finality of the conviction and sentence in 1998. Rippo v. State, 113 Nev. 1239, 1265, 946 P.2d 1017, 1033 (1997).

The Nevada Supreme Court has found certain constitutional claims procedurally defaulted before those claims could even be raised. In Thomas v. State,

120 Nev. 37, 50, 83 P.3d 818, 827 (2004), the Court held that claims alleging that the Court performs constitutionally-inadequate appellate review must be raised on direct appeal, before the Court has actually performed appellate review of the defendant's conviction and sentence. The Court also required "specific supporting facts" in order to prevail on such a claim even though such facts would not exist before appellate review occurs. See id.

The Nevada Supreme Court has reached diametrically opposite conclusions on whether an erroneous court ruling establishes "cause" to review the merits of a constitutional claim on post-conviction. See, e.g., Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946-47 (1994) (concluding that erroneous court ruling established cause for raising claim in later proceedings); Harris v. Warden, 114 Nev. 956, 958-59, 964 P.2d 785, 786-87 (1998) (same); see also Birges v. State, 107 Nev. 809, 810-11, 820 P.2d 764, 766 (1991) (erroneous procedural dismissal establishes "cause" to entertain successive petition). Contra Evans, 117 Nev. at 644, 28 P.3d at 521 (holding Lozada exception applies only when federal court has found previous ruling erroneous). However, the Nevada Supreme Court continues to treat an erroneous court ruling as "cause" in unpublished dispositions without observing the limitation it established in Evans. Feazell v. State, No. 37789, Order Affirming in Part and Vacating in Part, at 7 n.19 (November 14, 2002) (citing Lozada), Ex. 342; O'Neill v. State, No. 39143, Order of Reversal and Remand, at 5 & n.13 (December 18, 2002) (citing Lozada), Ex. 363.

The Nevada Supreme Court has reached inconsistent results on the issue of whether a procedural rule that does not exist at the time of a purported default may preclude the review of the merits of meritorious claims. Compare Pellegrini, 117 Nev. at 874-75 (applying NRS 34.726 to preclude review of merits of successive habeas petition when one-year default rule announced for the first time in that case), and Jones v. McDaniel, No. 39091, Order of Affirmance (December 19, 2002) (same), Ex. 346, with State v. Haberstroh, 119 Nev. 173, 180, 69 P.3d 676, 681-82 (2003) (refusing to retroactively apply rule that parties may not stipulate out of procedural default rules), and Smith v. State, No. 20959, Order of Remand (September 14, 1990) (refusing to apply default rule that was not in existence at the time of the purported default), Ex. 365; Rider v. State, No. 20925, Order (April 30, 1990) (same), Ex. 366.

The Nevada Supreme Court has taken opposite positions on whether application of procedural default rules is waivable by the State. Haberstroh, 119 Nev. at 180-81, 69 P.3d at 681-82, holding that parties could not stipulate to overcome State's procedural defenses, but construing a stipulation as establishing cause to overcome default rules without identifying any theory of cause that such a stipulation would establish or how it existed before the stipulation was entered. See also Jones v. State, No. 24497, Order Dismissing Appeal (August 28, 1996), Ex. 345; Rogers v. Warden, No. 36137, Order of Affirmance, at 5-6 (May 13, 2002) (raising miscarriage of justice exception sua sponte but failing to analyze Petitioner's challenge to aggravating circumstance under actual innocence standard), Ex. 367; Feazell v. State, No. 37789, Order Affirming in Part and Vacating in Part (November 14, 2002)

(sua sponte reaching both theory of cause not litigated in District Court or Supreme Court, and substantive issue, post-Pellegrini), Ex. 342. Contra Doleman v. State, No. 33424, Order Dismissing Appeal (March 17, 2000), Ex. 368.

The Nevada Supreme Court could not apply any supposed default rules to bar consideration of Chappell's claims when it has failed to apply those rules to similarly-situated petitioners, without violating the equal protection and due process clauses of the Fourteenth Amendment, and thus has failed to provide notice of what default rules will be enforced. Bush, 531 U.S. at 104-09; Willowbrook, 528 U.S. at 564-65; Ford v. Georgia, 498 U.S. 411, 425 (1991).

2. Consideration of the Petition cannot be barred by applying the successive petition doctrine

The same arguments made above, which show that the bar of NRS 34.726 cannot be applied, show that the successive petition bar cannot be applied. The ineffectiveness of counsel in the initial post-conviction proceeding precludes application of the successive petition bar based on that proceeding. Further, the application of the successive petition bar to NRS 34.810 has been explicitly held inadequate to bar review of constitutional claims in later proceedings. See, e.g., Valerio, 306 F.3d at 776-78; see also Koerner v. Grigas, 328 F.3d 1039, 1053 (9th Cir. 2003); cf. Pellegrini, 117 Nev. at 869-75, 34 P.3d at 525-29. The fact that the state and federal courts have reached directly opposite conclusions as to the pattern of applying this rule indicates that it is not sufficiently clear to satisfy due process standards of notice and equal protection standards of consistent application under the federal Constitution. This Court must therefore address these constitutional

issues and conclude that this rule cannot bar review of Chappell's constitutional claims.

G. The Law-of-the-Case Doctrine Does Not Bar Review of Chappell's Claims

Finally, the State complains that many of the claims contained in the instant Petition were previously raised and are therefore barred under NRS 34.810(2) by the law-of-the-case doctrine, and as an abuse of the writ. See Resp. at 14-15 (Claims Two (A), (B)); 43 (Claim Four (A)); 45-46 (Claim Five (A)); 17 (Claim Six); 49 (Claim Nine (C)); 19-20 (Claim Ten); 21-22 (Claim Eleven (A), (B), (C)); 50 (Claim Twelve (C)); 22-23 (Claim Fifteen (B), (E)); 51-52 (Claim Sixteen (B), (D), (E), (F), (G)); 23-24 (Claim Eighteen); 26 (Claim Twenty-Three). Chappell acknowledged in his Petition which claims had been raised, or partially raised, previously. Pet. at 11-13. As explained above, however, state post-conviction counsel did not conduct any investigation to support the claims raised or to show that Chappell suffered prejudice as a result of trial counsel's ineffectiveness. Furthermore, state post-conviction counsel ineffectively failed to raise all potentially meritorious arguments or law in support of the claims he did raise.

If state post-conviction counsel had conducted a reasonable investigation, he would have pleaded the factual allegations that are contained in Chappell's instant Petition which specifically show prejudice. State post-conviction counsel failed to investigate and present evidence of prejudice from trial counsel's failure to conduct an adequate investigation into the existence of both guilt and penalty evidence. Because Chappell has made specific claims regarding what trial counsel should have

discovered and presented, the evidence presented in the instant Petition is substantially different from that which was presented in earlier proceedings. The law-of-the-case doctrine does not bar reconsideration of such claims when "subsequent proceedings [have] produce[d] substantially new or different evidence." See Hsu v. County of Clark, 123 Nev. 625, 630, 173 P.3d 724, 729 (2007) (recognizing exceptions to law-of-case doctrine adopted by courts in other states and federal system); see also Bejarano v. State, 122 Nev. 1066, 1074, 146 P.3d 265, 271 (2006) (holding "the doctrine of the law of the case is not absolute, and we have the discretion to revisit the wisdom of our legal conclusions if we determine such action is warranted."). State post-conviction counsel's ineffectiveness for failing to develop the facts necessary to support the claims raised, therefore, renders the law-of-the-case doctrine inapplicable to Claims Six, Nine, and Eighteen.

Additionally, Chappell can overcome the law-of-the-case doctrine as to all the claims the State argues are governed by law-of-the-case because he is entitled to a cumulative consideration of the constitutional issues which infect his conviction and death sentence. This Court cannot perform an appropriate harmless error review without considering the prejudice arising from claims that Chappell has previously raised. See Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985); see also Williams v. Taylor, 529 U.S. 362, 397-98 (2000) ("the State Supreme Court's prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation") (citing

Clemons v. Mississippi, 494 U.S. 738, 751-54 (1990)); Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2005) (considering "cumulative effect of multiple errors and not simply conducting a balkanized issue-by-issue harmless error review" when invalidating aggravating circumstance).

Further, the law-of-the-case doctrine does not apply where there has been an intervening change in the law or where the prior court's decision was clearly erroneous and would result in manifest injustice if enforced. Hsu, 123 Nev. at 630, 173 P.33d at 728-29. Based upon the above, the State cannot show that the law-of-the-case doctrine is controlling for Claims Two (A), Four (A), and Five (A),

H. Laches Does Not Bar Review of Chappell's Claims

Finally, while NRS 34.800 permits dismissal of a petition, it does not require dismissal. The first provision of the laches bar explicitly states: "A petition may be dismissed." NRS 34.800(1) (emphasis added). This permissive language defeats the State's argument that the laches provision must bar consideration of the Petition. Resp. at 4. In addition, as shown above, the State has not made an attempt to demonstrate that it has been prejudiced by any delay, which is a component of laches.

The Nevada Supreme Court has exercised discretion to ignore the laches bar. In Robins v. State, 385 P.3d 57 at *4 n.3 (Nev. 2016) (unpublished), the Nevada Supreme Court noted the laches "statute clearly uses permissive language" and "the district court could exercise its discretion and decline to dismiss the petition under NRS 34.800." Id. (emphasis added). Similarly, in Weber v. State, No. 62473, 2016 WL 3524627, at *3 n.1 (Nev. June 24, 2016) (unpublished), the Nevada Supreme Court ignored the State's argument that laches barred a capital habeas petitioner's petition.

In Weber, the State pleaded laches, the petitioner declined to address laches, and the Nevada Supreme Court noted it "could have summarily affirmed the district court's decision" to apply laches, but instead ignored laches. Id.; see also Lisle v. State, 131 Nev. __, 351 P.3d 725, 728-29 (2015) (disregarding the State's assertion of laches); State v. Bennett, 119 Nev. 589, 81 P.3d 1, 8 (Nev. 2003) (same). Thus, the permissive language of the NRS 34.800 allows the Court to disregard laches here.

III. CHAPPELL'S CLAIMS ARE MERITORIOUS

The State argues that Claims Thirteen, Fourteen, Twenty-One, Twenty-Two, Twenty-Four, and Twenty-Six should be denied on the merits. Resp. 57-73. The State also argues that Chappell cannot show prejudice for overcoming procedural bar as to Claims Three and Eight. Resp. 32-42, 47-48. The State is incorrect as to all eight claims, as will be discussed in detail below.

A. Claim Three: Chappell Received the Ineffective Assistance of Trial Counsel During the Second Penalty Phase Proceedings

In Claim Three, Chappell argued that his trial counsel (David Schieck and Clark Patrick) were ineffective for: failing to investigate and present compelling mitigating evidence at the penalty retrial (Claim Three (B)—Pet. at 97-152); failing to rebut the State's sole aggravating circumstance (Claim Three (C)—Pet. at 153-68); failing to conduct an adequate voir dire (Claim Three (D)—Pet. at 168-69); and failing to protect Chappell's right to a fair trial by raising appropriate objections (Claim Three (E)—Pet. at 170-79). Chappell also argued that the failure to raise any portion of this claim prior to the instant Petition was due to the ineffectiveness of his state post-conviction counsel. Pet. at 11-12. Chappell further argued that, to the extent

any part of this claim was raised before, Chappell is raising it in the instant Petition because his state post-conviction counsel failed to adequately investigate or demonstrate prejudice with respect to the claim. Id.

The State first argues Claim Three is procedurally barred as untimely. Resp. 34-36. However, as discussed in Section II.A., above, Chappell's judgment of conviction was not final until the Nevada Supreme Court issued remittitur following the affirmance of Chappell's penalty retrial. Thus, for purposes of raising ineffective assistance of initial post-conviction counsel claims, which Chappell does here, the relevant date, pursuant to Rippo, 132 Nev. __, 368 P.3d at 739, was November 17, 2016, one year from the issuance of remittitur after denial of the initial post-conviction proceedings. And because Chappell filed his current state petition on November 16, 2016, Chappell's ineffective assistance of post-conviction counsel claim in Claim Three is timely.

The State next argues that Chappell has not stated with specificity how he was prejudiced by post-conviction counsel's performance (Oram). Resp. at 36-41. The State's argument is specious. Chappell clearly demonstrates in Claim Three, with specificity (as even the State concedes – see Resp. at 36),[9] how trial counsel's performance was deficient at the penalty retrial, and how that deficient performance prejudiced Chappell's case. Pet. at 97-179. Moreover, Chappell clearly states that Oram himself was deficient for failing to present the additional information contained

[9] "There is no denying that Petitioner here, in the Petition he has filed . . . . has set out exceptionally detailed factual allegations in support of his claim that trial counsel were ineffective during the second penalty hearing." Resp. at 36.

in Claim Three (Pet. at 12), and that there was a reasonable probability of a more favorable outcome if Oram had performed effectively. See Crump, 113 Nev. at 302-03, 934 P.2d at 253.

With respect to Claim Three (B) (failure to investigate and present compelling mitigating evidence at the penalty retrial), trial counsel failed to call numerous witnesses, including family and friends, who would have testified to Chappell's traumatic and violent psycho-social history including, but not limited to, the following evidence: Chappell's mother's drinking and drug addiction during her pregnancy with Chappell and after Chappell was born; Chappell's mother's untimely and violent death when Chappell was three years old; how Chappell was raised by a grandmother who alternated between physically abusing Chappell and his siblings and neglecting them both emotionally and economically, often leaving the children alone for days at a time without the basic necessities to live; evidence that Chappell himself was sexually molested as a child and his childhood was dominated by physical and emotional trauma; evidence that Chappell was raised in a neighborhood filled with drug-dealing, drug addiction, prostitution, poverty, and violence; how Chappell was bullied as a child and how he struggled socially; evidence showing that Chappell turned to alcohol and drugs as early as his teen years as means to escape reality; evidence that Chappell craved attention of an adult male role model; and a more accurate and detailed evidence of the troubled relationship between Chappell and Panos, including evidence that Panos herself had invited Chappell to move with her to Arizona and then later to Nevada. Pet. at 102-28.

Trial counsel further failed to call an expert to explain to the jury what impact Chappell's childhood trauma and loss had upon him. See Ex. 128; Pet. at 128-30. Moreover, counsel was ineffective for failing to present evidence, by way of experts, that Chappell suffered from FASD/ARND, and the effect of that upon Chappell throughout his childhood, adolescence, and early adulthood, and at the time of the crimes. See Ex. 87; Ex. 88; Ex. 89; Pet. at 136-47. Trial counsel were also ineffective for failing to present an expert on Chappell's addiction and drug toxicity, and the impact this had upon his life and at the time of the crimes. See Ex. 90; Pet. at 148-51.

Moreover, trial counsel were ineffective for failing to prepare Dr. Etcoff, an expert who testified at the penalty retrial. Dr. Etcoff, was never asked to perform a full neuropsychological evaluation of Chappell, was only given a handful of documents to review about Chappell—none of which contained information regarding Chappell's history of head injury—and was never given access to witnesses or information which would have corroborated Chappell's history of mental and psychological trauma. Pet. at 130-36; Ex. 85.

The prejudice from the above mentioned failures is obvious. Because of counsel's deficient performance, the jury did not hear an accurate and compelling portrait of Chappell and the adversity he faced throughout his life. The jury did not hear that Chappell was brain damaged at birth as a result of his mother's prenatal drinking; that because of the brain damage, Chappell lacked the skills to cope with his traumatic childhood; that the abuse and neglect Chappell suffered was severe and

pervasive; that the brain damage and the inability to cope with trauma caused Chappell to turn to drugs and alcohol; that the drugs then exacerbated the lack of impulse control and caused Chappell to steal to support his drug habit; that Chappell's poor intellect and lack of impulse control caused him to engage in the same kinds of violence he witnessed growing up; that the many risk factors Chappell faced combined with his brain damage rendered him incapable of properly coping with life's challenges; and how all of these things coalesced on the day of the offense to cause Chappell to react the way he did to evidence of Panos's infidelity.

With regard to the evidence of Chappell's FASD/ARND, if trial counsel had presented this evidence and the impact it had on his behavior, it is reasonably likely that at least one juror would have found one or more mitigating factors that were related to brain damage and FASD. It is also reasonably likely that at least one juror would have found the mitigating circumstances outweighed the sole aggravating circumstance.

With regard to the evidence that Chappell was an addict, if counsel had presented evidence regarding why Chappell became addicted to drugs, how he came to be powerless in the face of the addiction, how it lead Chappell to steal, and how he became paranoid and violent, an expert could have given context to the jurors to explain why Chappell's drug use was mitigating in nature.

And with regard to the failure to prepare Dr. Etcoff for his penalty retrial testimony, if he had been adequately prepared, Dr. Etcoff would have assisted the jurors in understanding how Chappell's upbringing, intellect, and psychology made

him so fearful and anxious about losing Panos that he was unable to think logically and rationally or to control his emotions at the time of the crime.

There is a reasonable probability that if trial counsel had presented this lay and expert evidence, the results of the proceeding would have been different. Further, post-conviction counsel was likewise ineffective for failing to raise Claim Three (A), and to this degree, in the state-court post-conviction litigation. But for post-conviction counsel's deficient performance, Chappell would have received penalty-phase relief from a reasonably impartial appellate tribunal. Because this claim is meritorious, Chappell can overcome the procedural bar.

With regard to Claim Three (C) (failure to rebut the State's sole aggravating circumstance), trial counsel were ineffective for failing to challenge and rebut testimony that Chappell's semen was inside Panos's vagina (Pet. at 153-55); for failing to prepare expert witnesses Dr. Grey and Dr. Danton (Pet. at 155-57, 159-62); for failing to impeach state's witness Dr. Green (Pet. at 157-59); for failing to interview State's witnesses including Clare McGuire and Dina Richardson (Pet. at 162-64); and was ineffective for failing to request a jury instruction as to mistaken belief of consent (Pet. at 164-66).

Counsel's failures referenced above were prejudicial to Chappell's case. Chappell never denied having sexual intercourse with Panos. 03/19/07 TT at 74-75. Chappell testified that he stopped having sex with her without ejaculating and that Panos then initiated oral sex. Id. at 76-77. At trial the State argued that Chappell

did not tell the truth about the sexual encounter and that he sexually assaulted Panos. 03/20/07 TT at 72, 138.

Had trial counsel hired an expert to explain that sperm and genetic material could be deposited without ejaculation, the State would not have been able to argue that Chappell had been lying about the sex being consensual based on the DNA evidence.

Trial counsel would also have been able to corroborate other portions of Chappell's testimony through effective cross-examination of State's witnesses if counsel had interviewed those witnesses before they took the stand. Counsel could have argued that if Chappell was telling the truth about some facts, he was similarly telling the truth about the sexual contact that he had with Panos. Failure to interview these witnesses left the jury with the impression that Chappell was untruthful. Because the jury did not believe Chappell's version, they accepted the only other version they were presented with, the State's, which included the speculation about sexual assault.

Effective cross-examination of Dr. Green would have used his own prior testimony and scientific research to discredit his assertion that Panos's blunt force injuries were inflicted fifteen to thirty minutes before the stab wounds that ended her life.

And failure to request a jury instruction that reasonable belief in consent was a defense to sexual assault meant that the one legal mechanism most likely to require a jury to find against sexual assault was not triggered. Chappell expressed his belief

that the sex he had with Panos was consensual and Dr. Danton offered testimony to show why that belief was reasonable based upon past interactions with Panos and Panos's own motives.

If the jury had heard the additional evidence discussed above, and if defense counsel had impeached the State's witnesses, a reasonable belief in the consent instruction would have likely resulted in at least one juror finding that Chappell was not guilty of sexual assault and therefore not eligible for the death penalty.

Post-conviction counsel Oram did not plead this claim with the specificity that current counsel does here. Counsel's failure to raise this claim, and raise it with the specificity pled here, prejudiced Chappell. Thus, Chappell can overcome the procedural bar.

With regard to Claim Four (D) (failure to conduct an adequate voir dire—Pet. at 168-69), counsel failed to rehabilitate three death-scrupled prospective jurors who were excluded for cause (jurors Jackson, Stio, and Cohen). Had counsel at least attempted to rehabilitate these jurors, it is reasonably probable the State's challenges for cause would have been denied, forcing the state to exclude jurors with peremptory strikes or having the three jurors (Jackson, Stio, Cohen) seated on the final jury. Post-conviction counsel did not raise this meritorious claim. Thus, Chappell can overcome the procedural bar.

And finally, with respect to Claim Four (E) (failure to raise appropriate objections at the penalty retrial including that counsel failed to object to cumulative victim impact evidence, failed to object to prosecutorial misconduct, failed to object to

prejudicial hearsay statements, and failed to object to the state's improper impeachment of witness Fred Dean) (Pet. at 170-79), there is a reasonable probability that, but for counsel's errors, the results of Chappell's penalty retrial would have been different.

Post-conviction counsel Oram did not plead this claim with the specificity that current counsel does here. Counsel's failure to raise this claim, and raise it with the specificity pled here, prejudiced Chappell. Thus, Chappell can overcome the procedural bar.

Because Chappell can show cause and prejudice to overcome the prejudicial bar, and because Claim Three has merit, this Court should grant penalty-phase relief and Chappell should receive a new sentencing trial.

B. Claim Eight: The State Engaged In Purposeful Discrimination by Using Peremptory Strikes To Remove Two African-American Venire Members at the Penalty Retrial

In Claim Eight, Chappell argued the State engaged in discriminatory behavior by striking two African-American prospective jurors at Chappell's penalty retrial: Mills and Theus. The striking of the two African-American venire members established a prima facie violation pursuant to Batson v. Kentucky, 476 U.S. 79, 89 (1986). See Foster v. Chatman, 136 S. Ct. 1737, 1755 (2016) ("Two peremptory strikes on the basis of race are two more than the Constitution allows."). Despite the prosecutor's discriminatory behavior, trial counsel failed to raise a Batson challenge, and no hearing was held on the record.

The State first argues that this Court should find the issue waived under NRS 34.810(1)(b)(2) because the issue could have been raised on direct appeal to the

Nevada Supreme Court. Resp. 40. The State is incorrect. Chappell supports his claim with a comparative juror analysis that reveals the State's purpose for challenging the two minority jurors was purely discriminatory. That comparative juror analysis was made possible with evidence—in this case juror questionnaires from the two stricken jurors and those jurors who ultimately sat on the jury or who were questioned but not removed by the State—which was not included in the record. See Pet. at 218-34. Thus, this claim could not have been raised on direct appeal and NRS 34.810 does not apply.[10]

With respect to post-conviction counsel's ineffectiveness for not raising the Batson violation in the state post-conviction petition, the State argues that Chappell is unable to establish that he was prejudiced by trial counsel's failure to raise a Batson challenge. Resp. 47-48. The State is incorrect.

The State first argues that a Batson challenge to prospective juror Mills would have been unsuccessful because the juror's twenty-two year old son was the victim of medical malpractice and articulated that the experience could affect her ability to be fair in Chappell's case due to her anger "at first with the lawyers and the judge." Resp. 47; see 03/12/07 TT at 116. However, what the State omits is that Mills later clarified her answer and stated that she wanted "to see the facts and see how strong [the case is] and how it happened. Id. at 117. Mills then confirmed that she was able to set aside her feelings and judge Chappell's case fairly and impartially. And Mills

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[10] To the extent that direct appeal counsel could have included that evidence in the record, but did not, the failure to do so constituted ineffective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 395-97 (1985).

further stated that her poor opinion of lawyers and judges only existed "at the time" of her son's case, not currently. Id. at 116-17.[11]

Further, as discussed in the Petition, Mills was not alone in evincing such a cynical opinion of the justice system. Four white prospective jurors, who were eventually seated as jurors, expressed harsh and/or equivocal feelings. 03/13/07 TT at 54-55 (juror Forbes); Ex. 197 at 6 (jurors Bundren); 03/12/07 TT at 238, Ex. 192 at 6 (juror Morin); Ex. 193 at 5 (juror Kaleikini-Johnson). See also Pet. at 222-23.

The State also points out that Mills indicated in her questionnaire that her ability to be fair and impartial would "probably" be affected if the defendant and victim were of different races. Resp. at 48; Ex. 188 at 7. However, during voir dire (and not mentioned by the State in the Response), Mills was asked about her response and she said this:

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

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[11] Mills also stated that she supported the death penalty and would not have a problem voting for death would not have a problem listening to both sides and then making an assessment of the appropriate punishment, and was able to keep an open mind regarding punishment. 03/12/07 TT at 111-20.

MILLS: No.

03/12/07 at 120. Thus Mills was rehabilitated and qualified to sit as a juror.

Further, jurors Forbes and Feuerhammer gave similar responses to those of Mills, but they were white and they were chosen to sit on Chappell's jury. See Ex. 199 at 7 (Forbes); Ex. 202 at 7 (Feuerhammer).

With respect to prospective juror Theus, the State argues that a Baston challenge by trial counsel would have been unsuccessful because Theus expressed a religious and moral opposition to the death penalty. Resp. 48. The State's portrayal of Theus's responses is inaccurate and misleading

First, Theus stated she could impose the death penalty if she thought it was appropriate, she would listen to all the evidence before making a decision, and she would follow the law and the instructions. See 03/12/07 TT at 182-94. Further, with respect to the State's argument that Theus had a religious and moral opposition to the death penalty, Theus was quite clear that she would consider the death penalty, she stated she could consider all four forms of punishment, and, while opposed to the death penalty, she would impose if the law required. Ex. 203 at 8; 03/12/07 TT at 184, 186, 193. Moreover, at least four white jurors who were selected to sit on Chappell's jury expressed similar religious views. See Ex. 202 at 7-8 (Freurhammer); Ex. 184 at 49, 52 (Feuerhammer); Ex. 204 at 8 (Soctt); Ex. 184 at 122-23 (Staley); Ex. 205 at 7 (Staley); Ex, 210 at 7-8 (Noahr).

As the above comparative analysis shows, prospective jurors Mills and Theus were removed by the State for no other reason than they were the same race as

Chappell. They gave similar answers to prospective jurors who were white, and, while Mills and Theus were stricken by the State, the white jurors were not and eventually went on to serve on Chappell's penalty phase jury.

Based upon the above, if counsel had raised this issue at trial, they would have been successful in their Batson challenge. Chappell's trial and post-conviction counsel were ineffective. Because a Batson violation is structural error, McCarty v. State, 132 Nev. __, 371 P.3d 1002, 1010 (2016); Conner v. State, 130 Nev. __, 327 P.3d 503, 511 (2014), the failure to raise this claim necessarily prejudiced Chappell, and Chappell's death sentence must be set aside.

C. Claim Thirteen: The Death Penalty in Nevada Is Unconstitutional

In Claim Thirteen, Chappell argued that the Nevada death penalty scheme is invalid for three reasons. In Claim Thirteen (A), Chappell argued the state's statutory scheme results in arbitrary and capricious infliction of the death penalty. In Claim Thirteen (B), Chappell argued that Nevada has no real mechanism to provide for clemency in capital cases. And in Claim Thirteen (C), Chappell argued that Nevada's death penalty is cruel and unusual punishment. See Pet. at 277-84. The State argues that all three subparts be denied on the merits. Chappell disagrees, as will be discussed below.

1. Nevada's capital sentencing scheme fails to genuinely narrow the class of death-eligible defendants

The State first argues Claim Thirteen (A) should be rejected based upon the law-of-the-case doctrine. Resp. 58-59. However, initial post-conviction counsel ineffectively failed to raise all potentially meritorious arguments in support of the

claim he did raise including that Nevada's statutory scheme improperly grants the state High Court unfettered discretion. See Pet. at 280-83. Thus, Claim Thirteen has not been addressed in its entirety by the state court, and Claim Thirteen (A) is not barred by law-of-the-case.

Moreover, Chappell can overcome the law-of-the-case doctrine because he is entitled to a cumulative consideration of the constitutional issues which infect his conviction and death sentence. See Big Pond, 101 Nev. at 3, 692 P.2d at 1289. Thus, this Court should consider the allegations in Claim Thirteen (A) along with the other claims of error when deciding whether Chappell is entitled to relief.

The State next argues that Claim Thirteen (A) should be rejected on the merits. Resp. at 59-61. Chappell disagrees.

Under contemporary standards of decency, death is not an appropriate punishment for a substantial portion of convicted first-degree murderers. Woodson v. North Carolina, 428 U.S. 280, 296 (1976). A capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty. See Arave v. Creech, 507 U.S. 463, 474 (1993); Zant v. Stephens, 462 U.S. 862, 877 (1983). Despite the Supreme Court's requirement for restrictive use of capital punishment, Nevada law permits broad imposition of the death penalty for virtually all first-degree murderers. In addition, a defendant can become death eligible where she or he was under sentence of imprisonment (including probation or parole) at the time, has been previously convicted of a violent felony, knowingly created a great risk of death to more than one person, killed a police officer, killed a child, killed an elderly person,

killed a person due to race, religion, or sexual orientation, or killed a person on school grounds. Id. Accordingly, Nevada death penalty laws make the death penalty available punishment for practically every murder.

The jury also has complete discretion to decide whether to impose the death penalty when it is available. There are a plethora of first-degree murder cases in Clark County that are more highly aggravated than Chappell's where juries returned sentences of less than death. See Pet. at 279-80 n.67.

Nevada's expansive aggravating factors, combined with the unfettered discretion given to the State in seeking death and to the juries in imposing death, have resulted in a death penalty scheme that is "cruel and unusual in the same way that being struck by lightning is cruel and unusual." Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).

Further, the Nevada Supreme Court has unfettered discretion to set aside death sentences and impose life sentences, or to remand for a new penalty hearing. NRS 177.055(3).

Ultimately, the Nevada Supreme Court's reversal of death sentences in cases more egregious than Chappell's case demonstrates that the lack of standards guiding the Nevada Supreme Court's review of death sentences causes the death penalty system to operate arbitrarily and capriciously. See Evans, 117 Nev. at 637, 28 P.3d at 517.

2. Nevada's death penalty laws lacks a mechanism to provide clemency

As argued in the Petition (Pet. at 283-84), executive clemency is an essential safeguard in a state's decision to deprive an individual of life. See Ohio Adult Parole Authority v. Woodward, 523 U.S. 272, 282 n.4 (1998) (Stevens, J., concurring in part, dissenting in part). Having established clemency as a safeguard, a state must also ensure that clemency proceedings comport with due process. Evitts v. Lucey, 469 U.S. 387, 401 (1985).

The State argues that Chappell does not have a constitutional right to clemency. Resp. at 61-62. While arguably that might be true, Nevada's procedure is unconstitutional nonetheless.

While Nevada has a process for clemency (NRS 213.010), in reality none exists. Since 1973, only a single death sentence has been commuted in this State, and that action was compelled by a finding that the defendant was ineligible to be executed under Atkins v. Virginia, 536 U.S. 304 (2002). Thus, clemency is effectively unavailable in Nevada. The failure to have a functioning clemency procedure makes Nevada's death penalty scheme unconstitutional. Moreover, the fact the clemency scheme has been upheld in the past, Resp. at 62, is of no import if the scheme is effectively never used. Chappell's death sentence should be reversed.

3. Nevada's death penalty laws enable categorically cruel and unusual punishment

The death penalty is cruel and unusual in all circumstances. See Glossip v. Gross, 135 S. Ct. 2726, 2755-80 (2015) (Breyer, J., dissenting), 2795 (Sotomayor, J., dissenting). In addition, the death penalty is invalid under the Nevada Constitution,

which prohibits the imposition of "cruel or unusual" punishments. Nev. Const. Art. 1 § 6. Accordingly, under the disjunctive language of the Nevada Constitution, the death penalty cannot be upheld. In short, Chappell is entitled to relief on Claim Thirteen, and should be given a new penalty trial.

D. Claim Fourteen: Severe Mental Illness Renders Chappell Ineligible for the Death Penalty

In Claim Fourteen, Chappell argued that his severe mental health impairments render him ineligible for the death penalty. Pet. at 286-89. In support of his claim, Chappell cited to Roper v. Simmons, 543 U.S. 551, 559-60 (2005) and Atkins, 536 U.S. at 318. In Roper and Atkins, the Supreme Court prohibited the execution of juveniles (Roper) and those with intellectual disabilities (Atkins) in part because of their reduced moral culpability. But, as Chappell argued in the Petition, he is arguably even more debilitated than someone with intellectual disability or a juvenile due to his neuropsychiatric issues, including significant brain damage and FASD/ARND, and his mental illnesses caused by his repeated and prolonged exposure to trauma and to his alcohol and drug addiction. See Pet. at 287-88.

In response, the State argues Claim Fourteen should be denied on the merits because Chappell is not intellectually disabled. Resp. at 65. Chappell's argument, however, is not that he is intellectually disabled. But rather, that the execution of a person with insufficient culpability, like Chappell, serves no retributive purpose, "violat[ing] his or her inherent dignity as a human being." See Hall v. Florida, 134 S. Ct. 1986, 1992 (2014) (reaffirming the duty of the government to respect the dignity of all persons); accord Moore v. Texas. 137 S. Ct. 1039, 1048 (2017).

Here, Chappell's impairments, mentioned above and in the Petition are akin to those identified in Roper and Aktins, as grounds for excluding juveniles and the intellectually disabled from eligibility for the death penalty.

Chappell's sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. Consequently, his sentence of death must be vacated.

E. Claim Twenty-One: Chappell's Convictions and Death Sentence Are Invalid Due to the Adjudication of His Capital Case by Popularly Elected Judges

In Claim Twenty-One, Chappell argued that his conviction and death sentence are invalid because his capital trial, sentencing, review on direct appeal, and state post-conviction proceedings 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 a fair and adequate appellate review. Pet. at 331-34.

Nevada law does not include any mechanism for insulating state judges and justices from majoritarian pressures which would affect the impartiality of an average person as a judge in a capital case. Making unpopular rulings favorable to a capital defendant or to a capitally-sentenced appellant or petitioner poses the threat to a judge or justice of expending significant personal resources, of both time and money, to defend against an election challenger who can exploit popular sentiment against the jurist's pro-capital defendant rulings, and poses the threat of ultimate removal from office. See Woodward v. Alabama, 134 S. Ct. 405, 408-09 (2013) (Sotomayor, J., dissenting from denial of pet. for writ of cert.) ("What could explain

Alabama judges' distinctive proclivity for imposing death sentences in cases where a jury has already rejected that penalty? . . . The only answer that is supported by empirical evidence is one that, in my view, casts a cloud of illegitimacy over the criminal justice system: Alabama judges, who are elected in partisan proceedings appear to have succumbed to electoral pressures.") (emphasis added). Indeed, justices of the Nevada Supreme Court and judges of the district courts have been defeated in elections, or have declined to seek re-election, because of their participation in unpopular decisions. See Pet. at 332-33.

As the Nevada Supreme Court has recognized, "[t]he United States Supreme Court has made it clear that '[t]he Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.'" Matter of Ross, 99 Nev. 1, 7, 656 P.2d 832, 835 (1983) (quoting Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980)). Judges and justices who are subject to popular election cannot be impartial in any capital case within due process and international law standards because of the threat of removal as a result of unpopular decisions in favor of a capital defendant. In light of this influence, the state court process to date is itself "defective." Taylor v. Maddox, 366 F.3d 992, 1001 (9th Cir. 2004); Hurles v. Ryan, 752 F.3d 768, 791 (9th Cir. 2014). Conducting a capital trial, direct appeal, or post-conviction before a tribunal that does not meet constitutional standards of impartiality is prejudicial per se, and requires that Chappell's conviction and death sentence be vacated.

The State argues that the Court should reject this claim because Chappell has failed to suggest that any proceeding in his case was impacted by judicial bias related to an election. Resp. at 66, citing McConnell v. State, 125 Nev. 243, 256, 212 P.3d 307, 316 (2009). However, Chappell has pleaded that his guilt-phase trial judge, the Honorable A. William Maupin, was running for a seat on the Nevada Supreme Court when he was Chappell's judge. As stated in the Petition, Judge Maupin had a direct motivation to appear tough on crime and rule in favor of the State at Chappell's trial in order to assist his election bid. See Pet. at 334. Moreover, as the Supreme Court has recently made clear, a showing of actual bias is not required when "the risk of bias was too high to be constitutionally tolerable." Rippo v. Baker, 137 S. Ct. 905, 907 (2017) (per curiam).

Based upon the above and the arguments in the Petition, relief should be granted on Claim Twenty-One.

F. Claim Twenty-Two: Chappell's Constitutional Rights Have Been Violated Due to the Length of Time Spent on Death Row

In Claim Twenty-Two, Chappell argued that his constitutional rights to due process, equal protection, and freedom from cruel and unusual punishment have been violated due to the effects of solitary confinement and the length of time he has spent on death row. The State contends that Chappell's "claim attacking the conditions of confinement is outside the scope of what can be brought in a habeas petition," citing Bowen v. Warden of Nevada State Prison, 100 Nev. 489, 686 P.2d 250 (1984). Resp. at 67.

In Bowen, the petitioner "challenged the constitutionality of a prison disciplinary proceeding which resulted in Bowen's being removed from the general prison population and placed in punitive segregation." 100 Nev. at 490, 686 P. 2d at 250. The Nevada Supreme Court held that "a petition for writ of habeas corpus may challenge the validity of current confinement, but not the conditions thereof." Id. Chappell's argument, however, is that his current confinement is invalid under the federal prohibition against cruel and unusual punishment. The critical distinction between Bowen and Chappell is that Bowen challenged a change in his classification that resulted from a prison disciplinary proceeding, while Chappell challenges the impact his classification as a capital prisoner has on the nature of his punishment. Because Chappell's claim is distinguishable from Bowen's, and because Chappell's challenge is to the validity of his sentence, and because he has a clear remedy—the reversal of his sentence—this claim is cognizable in habeas.[12] See Jones v. Chappell, 31 F. Supp. 3d 1050 (C.D. Cal. 2014), reversed on other grounds by Jones v. Davis, 806 F.3d 538 (9th Cir. 2015) (systemic delay and dysfunction of state's death penalty warranted vacating Jones's death sentence); see also Johnson v. Bredesen, 558 U.S. 1067, 1069 (2009) (Stevens, J., statement respecting denial of certiorari) (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."); Gomez v.

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[12] The State also cites to Becoat v. State, 2016 WL 3865 (Nev. 2016), an unpublished order denying a petition. Resp. at 67. The Becoat order itself does not state the nature of the claim raised by the petitioner other than it was a conditions of confinement claim: "A challenge to the conditions of confinement is outside the scope of claims permissible in a petition for a writ of habeas corpus." Id. Thus, it is impossible to determine what precedential value the order has in this case.

Fierro, 519 U.S. 918 (1996) (Stevens, J., dissenting) (excessive delays from sentencing to execution can themselves "constitute cruel and unusual punishment prohibited by the Eighth Amendment"); see also Lackey v. Texas, 514 U.S. 1045 (1995) (memorandum of Stevens, J., respecting denial of certiorari).

G. Claim Twenty-Four: Trial Counsel Failed to Preserve the Record for Purposes of Appellate and Post-Conviction Litigation

Throughout Chappell's guilt trial and penalty retrial, including voir dire, there were numerous bench conferences concerning objections or discussion of the parties which were not recorded and/or later preserved. See Pet. at 340-41. That potentially important substantive discussions were held is clear from the record preceding the unrecorded conferences. Such conduct insulated counsel's performance from post-conviction review.

The State, citing to Daniel v. State, 119 Nev. 498, 78 P.3d 890 (2003), argues that defendants do not have an absolute right to have all proceedings recorded. While the Daniel opinion does state that defendant's do not have an "absolute" right to have all proceedings recorded, the opinion continues: "the court must make a record of the contents of such [bench] conferences at the next break in the trial and allow attorneys to comment for the record." Daniel, 119 Nev. at 508, 78 P.3d at 897; see also SCR 250(5)(a). That did not happen here. Rather counsel engaged in off the record conferences and then failed to put the contents of those bench conferences onto the record. Thus, pursuant to Daniel, trial counsel were ineffective.

Again, citing to Daniel, the State next argues that the burden is on Chappell to show how he was prejudiced by counsel's failure to put on the record the content of

the unrecorded conferences. Resp. 68. The State is incorrect as to Chappell's burden. The court in Daniel held that the applicant must demonstrate that the subject matter of the missing portions of the records were "so significant" that the reviewing court cannot meaningfully review an appellant's point of error and the prejudicial effect of any error. Daniel, 119 Nev. at 508, 78 P.3d at 897. Chappell can meet that burden because the unrecorded conferences here were "significant," because they included voir dire and testimony of witnesses. See Pet. at 340-41.[13]

Because "[m]eaningful appellate review is inextricably linked to the availability of an accurate record of the lower court proceedings regarding the issues on appeal," Preciado v. State, 130 Nev. __, 318 P.3d 176, 178 (2014), and because Chappell was denied such review throughout both phases of his capital trial as well as voir dire, his judgment should be vacated. See Brown v. United States, 314 F.2d 293, 295 (9th Cir. 1963) (vacating judgment and remanding for a hearing to determine whether appellant was prejudiced by the error in failing to record government's summation argument).

H. Claim Twenty-Five: Chappell's Death Sentence is Unconstitutional Because Execution by Lethal Injection as Administered in Nevada Constitutes Cruel and Unusual Punishment

Execution by lethal injection as administered in Nevada presents an unacceptable risk of causing cruel pain and suffering. Nevada's execution protocol is similar to the lethal injection protocol employed in California prior to the litigation

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[13] The State also cites to Lopez v. State, 105 Nev. 68, 769 P.2d 1276 (1989). Resp. 68. In Lopez, the one day of testimony which was lost was reconstructed and thus capable of appellate review. Id. at 105 Nev. at 73-74, 769 P.2d at 1280-81. Here, the same is not true. Thus Lopez is not helpful to the State.

in Morales v. Hickman, 415 F. Supp. 2d 1037, 1039-40 (N.D. Cal. 2006), aff'd. 438 F.3d 926 (9th Cir. 2006), and the Kentucky protocol at issue in Baze v. Rees, 553 U.S. 35, 44-45 (2008); see, e.g., Glossip v. Gross, 135 S. Ct. 2726, 2739 (2015). The plurality holding in Baze specifically relied on the detailed and codified guidelines for execution adopted in Kentucky. 533 U.S. at 62-63. But Nevada's execution protocol fails to include the same safeguards as the California and Kentucky protocols. See Pet. at 358, 365-66 (Claim Twenty-Five).

NRS 176.355(1) provides that a sentence of death in Nevada "must be inflicted by an injection of a lethal drug." Pursuant to NRS 176.355(2)(b), the Director of the Department of Corrections shall "[s]elect the drug or combination of drugs to be used for the execution after consulting with the State Health Officer." Nevada's execution protocol does not require a physician's participation; does not specify what, if any, training the execution team must have; does not require regular practice sessions of the execution protocol; and does not require monitoring of the inmate's level of consciousness and IV lines. The use of sodium thiopental, pancuronium bromide, and potassium chloride without the protections imposed in Morales and Baze to ensure adequate administration of anesthesia poses an unreasonable risk of inflicting unnecessary suffering and violates the Eighth Amendment's ban on cruel and unusual punishments. See Pet. at 358-72.

Chappell acknowledges that the Nevada Supreme Court has held that an attack on the method of execution is not cognizable in habeas proceedings. McConnell v. State, 125 Nev. 243, 246-49, 212 P.3d 307, 310-11 (2009). See Resp. at 234-36. The

McConnell decision is based on the assumption that the petitioner's challenge amounts to nothing more than a manner of execution claim, which does not attack the validity of the judgment and allows the State to modify its procedures to execute the sentence in a constitutional manner. Chappell's claim is that it is simply not possible for the State of Nevada to execute a sentence of death against him. In addition to the unconstitutionality of the Nevada lethal injection protocol, the State has moved the death chamber from Nevada State Prison (NSP) in Carson, City to Ely State Prison in Ely, Nevada. That move may violate NRS 176.355(3), which requires that any execution in Nevada occur at NPS, the only "state prison" in existence at the time of the statute's enactment in 1983. See, e.g., Freytag v. Commission, 501 U.S. 868, 902 (1991) (Scalia, J., concurring) (use of the definite article in the Constitution's conferral of appointment authority on "the Courts of Law" "obviously narrows the class of eligible 'Courts of Law' to those courts of law envisioned by the Constitution"); Pineda v. Bank of America, N.A., 241 P.3d 870, 875 (Cal. 2010) ("Use of the indefinite articles 'a' or 'an' signals a general reference, while use of the definite article 'the' (or 'these' in the instance of plural nouns) refers to a specific person, place, or thing."). That Nevada subsequently constructed other state prisons cannot override the original intent of the legislature. See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 135 (2012) (when a known edifice is cited in a statute, the subsequent construction of an edifice that also falls under the statute does not change the original meaning). In this respect, Chappell's current claim constitutes an attack on the judgment of conviction that can be brought in habeas

corpus proceedings. The McConnell ruling also amounts to an unconstitutional suspension of the writ, Nev. Const. Art. 1 § 5, based upon the construction of the habeas statute.

Although the Supreme Court has entertained a challenge to an execution protocol brought in a civil rights action under 42 U.S.C. § 1983, in Nelson v. Campbell, 541 U.S. 637, 642 (2004), and Hill v. McDonough, 547 U.S. 573, 580 (2006), these cases do not preclude raising such claims in a habeas petition. In fact, the Supreme Court in Hill recognized that federal courts could dismiss 42 U.S.C. § 1983 suits challenging a lethal injection protocol to protect states against piecemeal litigation, leaving habeas corpus as a single avenue for such challenges. Hill, 547 U.S. at 583. Nowhere in its opinions did the Supreme Court state or suggest that habeas corpus proceedings cannot be used for lethal injection challenges. Indeed, in Nelson, the Court characterized a Section 1983 action in this context as "at the margins of habeas," Nelson, 541 U.S. at 646, and explicitly stated that it "need not here reach the difficult question of how to characterize method-of-execution claims generally," 541 U.S. at 644, which it "left open," 541 U.S. at 646.

In Gomez v. United States District Court, 503 U.S. 653, 653-54 (1992) (per curiam), the Court rejected a last-minute § 1983 challenge to a method of execution, partly on the basis of laches, but also because the inmate had not raised the challenge in his four previous habeas petitions. It thus remains an open question how much of the federal habeas corpus jurisprudence—including the requirement of exhaustion—and how much of the § 1983 jurisprudence—including the requirement that the claim

be ripe for adjudication—will be applied to this claim. Until this uncertainty is resolved, competent counsel must present this claim on habeas corpus. Thus, contrary to the State's assertion, state post-conviction counsel was ineffective for failing to do so. Resp. at 69-70.

I. Claim Twenty-Six: Chappell's Conviction and Death Sentence Are Invalid Due to Cumulative Error

Chappell's conviction and death sentence are invalid due to the cumulative effect of the constitutional errors enumerated in the Petition. Pet. at 374-75; see Chambers v. Mississippi, 410 U.S. 284, 294, 302-03 (1973). Chappell incorporates all of the allegations contained in his Petition as if fully set forth herein.

The State argues that this claim has been addressed previously by the Nevada Supreme Court on the direct appeal from the first trial, the direct appeal from the penalty retrial, and the appeal from the denial of the second habeas petition. See Resp. at 70. However, as discussed in the Petition and acknowledged by the State, (Resp. at 57-73), the instant Petition raises claims that were not raised on direct appeal or post-conviction habeas, including claims that direct appeal counsel and state post-conviction counsel were ineffective. Thus, the law-of-the-case doctrine does not bar reconsideration because "subsequent proceedings [have] produce[d] substantially new or different evidence." Hsu, 123 Nev. at 630, 173 P.3d at 729. State post-conviction counsel's ineffectiveness for failing to develop the facts necessary to support the claims raised, therefore, renders the law-of-the-case doctrine inapplicable. Further, Chappell can overcome the law-of-the-case doctrine because he is entitled to a cumulative consideration of the constitutional issues which infect

his conviction and death sentence and because this Court cannot perform an appropriate harmless error review without considering all of the claims that Chappell has previously raised. See Big Pond, 101 Nev. at 3, 692 P.2d at 1289 ("Nature of the errors, while not in themselves particularly egregious, together had the effect of unfairly undermining appellant's credibility and defense in a father close case.").

The State argues that to the extent Chappell "seeks to add to the mix the new ineffective-assistance-of-counsel errors he raises in the instant Petition," Chappell has not demonstrated "that any claim warrants relief under Strickland," and thus "there is nothing to cumulate." Resp. at 71, 72. The State's logic is flawed.

As even the State concedes, the Nevada Supreme Court has previously found that trial counsel were ineffective in this case for: (1) failing to introduce an expert to testify about the presence of sperm in the victim; and (2) failing to object the improper impeachment of witness Fred Dean, although the deficiency did not prejudice Chappell. Ex. 10 at 13-14. Here, Chappell raises additional ineffective assistance of counsel claims, including both guilt and penalty phase assignments of error, any one of which could tilt the balance, causing the Nevada Supreme Court to find Chappell was prejudiced by counsel's performance. Chappell is entitled to reversal of both his conviction and death sentence based upon cumulative error as asserted in Claim Twenty-Six.

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IV. CONCLUSION

For the foregoing reasons, Chappell requests that this Court grant Chappell's petition. In the alternative, Chappell requests that this Court hold the State's request to dismiss claims in abeyance pending discovery and an evidentiary hearing in order to show cause and prejudice to overcome the procedural default bars raised by the State.

DATED this 5th day of July, 2017.

RENE L. VALLADARES
Federal Public Defender

/s/ Brad D. Levenson
BRAD D. LEVENSON
Assistant Federal Public Defender
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/s/ Sandi Y. Irwin
SANDI Y. Irwin
Assistant Federal Public Defender
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CERTIFICATE OF SERVICE

In accordance with EDCR 7.26(a)(4) and 7.26(b)(5), the undersigned hereby certifies that on the 5th of July 2017, a true and accurate copy of the foregoing OPPOSITION TO STATE'S RESPONSE AND MOTION TO DISMISS; EXHIBITS was filed electronically with the Eighth Judicial District Court and served by Odyssey EFileNV, addressed as follows:

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

JAMES MONTELL CHAPPELL, Petitioner, v. THOMAS FILSON, Warden, Ely State Prison; ADAM LAXALT, Attorney General, State of Nevada, Respondents.	Case No. C131341 Dept. No. V **EXHIBITS IN SUPPORT OF REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)** **Exhibits 335-368** (Death Penalty Habeas Corpus Case)

335. Order Affirming in Part, Reversing In Part, And Remanding, Moore v. State, Case No. 46801, Nevada Supreme Court (April 23, 2008)

336. State's Opposition to Motion For Authorization to Obtain Sexual Assault Expert and Payment of Fees, and Opposition to Motion for Investigator and Payment of Fees, State v. Chappell, Case No. 95-C131341, Eight Judicial District Court (May 12, 2012)

337. Partial Transcript of Oral Argument, Rippo v. State, Nevada Supreme Court Case No. 53626 (October 3, 2011)

338. Order Affirming in Part, Reversing in Part, and Remanding, Ybarra v. Warden, Nevada Supreme Court Case No. 43981 (November 28, 2005)

339. Order Denying Rehearing, Ybarra v. Warden, Nevada Supreme Court Case No. 43981 (February 2, 2006)

340. Order Dismissing Appeal, Farmer v. Director, Nevada Department of Prisons, Nevada Supreme Court Case No. 18052 (March 31, 1988)

341. Order Dismissing Appeal, Farmer v. State, Nevada Supreme Court Case No. 22562, (February 20, 1992)

342. Order Affirming in Part and Vacating in Part, Feazell v. State, Nevada Supreme Court Case No. 37789 (November 14, 2002)

343. Order of Remand, Hardison v. State, Nevada Supreme Court Case No. 24195, (May 24, 1994)

344. Order Dismissing Appeal, Hill v. State, Nevada Supreme Court Case No. 18253 (June 29, 1987)

345. Order Dismissing Appeal, Jones v. State, Nevada Supreme Court Case No. 24497 (August 28, 1996)

346. Order of Affirmance, Jones v. Warden, Nevada Supreme Court Case No. 39091 (December 19, 2002)

347. Order Dismissing Appeal, Milligan v. State, Nevada Supreme Court Case No. 21504 (June 17, 1991)

348. Order Dismissing Appeal, Neuschafer v. Warden, Nevada Supreme Court Case No. 18371 (August 19, 1987)

349. Order Dismissing Appeal and Denying Petition, Nevius v. Sumner (Nevius I), Nevada Supreme Court Case Nos. 17059, 17060 (February 19, 1986)

350. Order Dismissing Appeal and Denying Petition for Writ of Habeas Corpus, Nevius v. Sumner (Nevius II), Nevada Supreme Court Case Nos. 29027, 29028 (October 9, 1996)

351. Order Denying Rehearing, Nevius v. Sumner (Nevius III), Nevada Supreme Court Case Nos. 29027, 29028 (July 17, 1998)

352. Order Dismissing Appeal, Rogers v. Warden, Nevada Supreme Court Case No. 22858 (May 28, 1993)

353. Amended Order Dismissing Appeal, Rogers v. Warden, Nevada Supreme Court Case No. 22858 (June 4, 1993)

354. Order of Remand, Stevens v. State, Nevada Supreme Court Case No. 24138, (July 8, 1994)

355. Order Dismissing Appeal, Williams v. State, Nevada Supreme Court Case No. 20732 (July 18, 1990)

356. Order Dismissing Appeal, Williams v. State, Nevada Supreme Court Case No. 29084 (August 29, 1997)

357. Order Dismissing Appeal, Ybarra v. Director, Nevada State Prison, Nevada Supreme Court Case No. 19705 (June 29, 1989)

358. Order Dismissing Appeal, Farmer v. State, Nevada Supreme Court Case No. 29120 (November 20, 1997)

359. Order Dismissing Appeal, Riley v. State, Nevada Supreme Court Case No. 33750 (November 19, 1999)

360. Order Dismissing Appeal, Sechrest v. State, Nevada Supreme Court Case No. 29170 (November 20, 1997)

361. Order Affirming in Part, Reversing in Part and Remanding, Weber v. State, Nevada Supreme Court Case No. 62473 (June 24, 2016)

362. Order of Affirmance, Milligan v. Warden, Nevada Supreme Court Case No. 37845 (July 24, 2002)

363. Order of Reversal and Remand, O'Neill v. State, Nevada Supreme Court Case No. 39143 (December 18, 2002)

364. Response to Nevius' Supplemental Memorandum of Points and Authorities in Support of Amended Second Successive Petition for Writ of Habeas Corpus, Nevius v. McDaniel, United States District Court Case No. CV-N-96-785-HDM (RAM) (October 18, 1999)

365. Order of Remand, Smith v. State, Nevada Supreme Court Case No. 20959 (September 14, 1990)

366. Order, Rider v. State, Nevada Supreme Court Case No. 20925 (April 30, 1990)

367. Order of Affirmance, Rogers v. Warden, Nevada Supreme Court Case No. 36137 (May 13, 2002)

368. Order, In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases, Nevada Supreme Court ADKT No. 411 (January 4, 2008)

CERTIFICATE OF MAILING

In accordance with EDCR 7.26(a)(4) and 7.26(b)(5), the undersigned hereby certifies that on the 5th of July 2017, a true and accurate copy of the foregoing EXHIBITS IN SUPPORT OF REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) was filed electronically with the Eighth Judicial District Court and served by Odyssey EFileNV, addressed as follows

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An employee of the Federal Public Defender

EXHIBIT 335

IN THE SUPREME COURT OF THE STATE OF NEVADA

RANDOLPH MOORE,
Appellant/Cross-Respondent,
vs.
THE STATE OF NEVADA,
Respondent/Cross-Appellant.

No. 46801

FILED

APR 23 2008

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

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

This is an appeal and cross-appeal from a district court order granting in part and denying in part a post-conviction petition for a writ of habeas corpus in a death penalty case. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

FACTUAL AND PROCEDURAL HISTORY

The district court convicted appellant Randolph Moore, pursuant to a jury verdict, of two counts of first-degree murder with the use of a deadly weapon and various other felonies. Codefendant Dale Flanagan's grandparents, Carl and Colleen Gordon, were found dead on November 6, 1984, Carl having been shot seven times in the back and chest and Colleen having been shot three times in the head. Six young men were involved in the plot to kill the Gordons. Moore shot Carl, and Flanagan shot Colleen. Flanagan and Moore were tried in September and October 1985 along with two other codefendants, Johnny Ray Luckett and Roy McDowell. The four men were convicted, and Flanagan and Moore

received death sentences. Tom Akers and Michael Walsh were also charged with the murders and pleaded guilty to manslaughter and murder, respectively.

On direct appeal, this court characterized as overwhelming the evidence that Moore, Flanagan, Luckett, and McDowell killed the Gordons so that Flanagan could obtain insurance proceeds and an inheritance. Although this court affirmed Moore's convictions, it reversed his and Flanagan's sentences and remanded the matter for a new penalty hearing due to prosecutorial misconduct.[1] Moore and Flanagan were again sentenced to death, and they appealed. This court affirmed the death sentences.[2] The United States Supreme Court vacated that decision, however, and remanded for reconsideration due to evidence presented at the second penalty hearing regarding Moore's and Flanagan's occult beliefs and activities.[3] Upon remand, this court held that use of such evidence had been unconstitutional and remanded the case to the district court for a third penalty hearing.[4] After the third penalty hearing,

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[1]Moore v. State, 104 Nev. 113, 754 P.2d 841 (1988) (citing Flanagan v. State (Flanagan I), 104 Nev. 105, 754 P.2d 836 (1988)).

[2]Flanagan v. State (Flanagan II), 107 Nev. 243, 810 P.2d 759 (1991).

[3]Moore v. Nevada, 503 U.S. 930 (1992).

[4]Flanagan v. State (Flanagan III), 109 Nev. 50, 846 P.2d 1053 (1993).

Moore and Flanagan once again received death sentences, and this court affirmed the death sentences on appeal.[5]

Moore filed a timely proper person post-conviction petition for a writ of habeas corpus in the district court. The district court later appointed counsel, who filed a supplemental petition, and conducted an evidentiary hearing. Subsequently, the district court entered three written orders resolving the petition and supplemental petition. On February 17, 2005, the district court entered an order denying Moore's claims that trial counsel was ineffective during the guilt phase of his trial. The district court entered a second written order on January 23, 2006, striking the burglary and robbery aggravating circumstances pursuant to McConnell v. State.[6] In that order, the district court also vacated Moore's death sentence, ordered a new penalty hearing, and denied as moot Moore's claims of ineffective assistance of counsel respecting his third penalty hearing. On March 21, 2006, the district court entered a third written order, denying Moore's claims that he received ineffective assistance of appellate counsel. This appeal followed.

Moore appeals, arguing that the district court improperly denied his claims relating to the guilt phase of his trial and subsequent appeal and that he is entitled to a new trial. The State cross-appeals,

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[5]Flanagan v. State (Flanagan IV), 112 Nev. 1409, 930 P.2d 691 (1996).

[6]120 Nev. 1043, 102 P.3d 606 (2004).

arguing that the district court erroneously struck two aggravating circumstances pursuant to McConnell and failed to properly reweigh the remaining aggravating and mitigating evidence.

As explained below, we conclude that the district court did not err in denying the claims related to the guilt phase of the trial. We further conclude that the district court properly struck the burglary and robbery aggravating circumstances pursuant to McConnell. However, we remand this matter and direct the district court to enter detailed findings as to whether the jury's consideration of the erroneous aggravating circumstances was harmless beyond a reasonable doubt.

DISCUSSION

Initially, we address a procedural default matter raised by the State. Shortly before the commencement of his third penalty hearing, Moore filed a petition for a writ of habeas corpus, which the district court denied. Subsequently, the district court held a hearing respecting its denial of the petition. At that hearing, the parties discussed a mandamus petition that Moore had filed with this court challenging the district court's denial of his habeas petition. In denying the mandamus petition, this court stated that a denial of a habeas petition was an independently appealable determination and not an appropriate matter for extraordinary relief. After some discussion of the jurisdictional posture of Moore's habeas petition, the district court concluded that its denial of the petition would be appealable only upon the entry of a final judgment in the criminal action. In this case, the district court concluded, the third penalty hearing remained pending and unresolved. Consequently, the

district court concluded that Moore's notice of appeal did not divest it of jurisdiction to proceed with the third penalty hearing. After the third penalty hearing, this court considered the appeal from the district court's denial of habeas relief, along with Moore's appeal from his third penalty hearing.[7]

The State argues that to the extent the instant petition raised guilt phase issues, it is procedurally barred and successive in light of the 1995 habeas petition. We disagree. In denying the 1995 habeas petition, the district court essentially considered it premature in light of the then pending third penalty hearing and concluded that the filing of a notice of appeal did not divest its jurisdiction to proceed with the third penalty hearing. Because the 1995 petition was denied as premature, we conclude that guilt phase matters raised in the instant habeas petition are not procedurally barred.

Before we address the propriety of the district court's resolution of the claims raised in Moore's post-conviction habeas petition, we first address the claims the State raises in its cross-appeal.

State's cross-appeal

The State argues on cross-appeal that the district court improperly applied McConnell retroactively to strike two aggravating circumstances. After the State filed its brief in this case, we resolved the

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[7]Flanagan IV, 112 Nev. at 1419-20, 930 P.2d at 698.

retroactivity issue in Bejarano v. State,[8] and held that McConnell applies retroactively to cases that are final. Based on Bejarano, we conclude that the State's argument lacks merit.

The State next argues that the district court erred in vacating the death sentence. We agree. A death sentence based in part on an invalid aggravator may be upheld by reweighing the aggravating and mitigating evidence or conducting a harmless-error review.[9] If it is clear beyond a reasonable doubt that the jury would have found the defendant death eligible and imposed a sentence of death despite the erroneous aggravating circumstances, then the error was harmless. On the other hand, if it cannot be determined beyond a reasonable doubt that the jury would have found the defendant death eligible and imposed death absent the erroneous aggravating circumstances, then the defendant is entitled to a new penalty hearing.[10]

Although the district court properly struck the burglary and robbery aggravating circumstances pursuant to McConnell, we are unable to discern from the district court's order whether its reweighing analysis was sufficient. Without a detailed explanation of its ruling, we are unable

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[8]122 Nev. 1066, 146 P.3d 265 (2006).

[9]Clemons v. Mississippi, 494 U.S. 738, 741 (1990); State v. Haberstroh, 119 Nev. 173, 183, 69 P.3d 676, 682-83 (2003).

[10]Browning v. State, 120 Nev. 347, 363-64, 91 P.3d 39, 51 (2004); Leslie v. Warden, 118 Nev. 773, 783, 59 P.3d 440, 447 (2002).

to review the propriety of the district court's conclusion that the jury's consideration of the erroneous aggravating circumstances was not harmless beyond a reasonable doubt in this case.[11] Therefore, we remand this matter with instructions to the district court to enter detailed findings as to whether the jury's consideration of the burglary and robbery aggravating circumstances was harmless beyond a reasonable doubt.

Moore's appeal

Claims of ineffective assistance of trial counsel

Moore contends that the district court improperly denied numerous claims of ineffective assistance of trial counsel related to the guilt phase of his trial. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defense.[12] A defendant must demonstrate prejudice by showing a reasonable probability that but for counsel's errors, the result of the trial

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[11]See Sochor v. Florida, 504 U.S. 527, 541 (1992) (O'Connor, J., concurring) (stating that "[a]n appellate court's bald assertion that an error of constitutional dimensions was 'harmless' cannot substitute for a principled explanation of how the court reached that conclusion").

[12]Strickland v. Washington, 466 U.S. 668, 687 (1984); Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

would have been different.[13] Both prongs of the test need not be considered if an insufficient showing is made on either one.[14]

In particular, Moore argues that the district court erred in denying the following claims of ineffective assistance of counsel: counsel failed to file unspecified pretrial motions; counsel failed to adequately interview two State witnesses, Rusty Havens and John Lucas; counsel failed to secure notes from police officers taken during interviews; counsel should have moved for discovery of the personnel file of police officer Ray Berni; counsel should have demanded full disclosure of State witness Angela Saldana's alleged role as a police agent; counsel failed to prevent the admission of irrelevant, prejudicial, and hearsay testimony; counsel should have responded to the State's opposition to his motion for appointment of a psychiatric expert; counsel should have objected to alleged restrictions the district court placed on his defense; counsel improperly participated in joint defense strategies with codefendants' counsel; counsel unreasonably relied upon the work product of codefendants' counsel; counsel should have moved for a change of venue; counsel should have sought sequestration of the jury; counsel failed to conduct meaningful voir dire; counsel should have filed a motion for the appointment of a psychiatrist ex parte and under seal; counsel elicited

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[13]Strickland, 466 U.S. at 694; Thomas v. State, 120 Nev. 37, 43-44, 83 P.3d 818, 823 (2004).

[14]Strickland, 466 U.S. at 697.

inflammatory evidence during cross-examination of witnesses; and counsel failed to develop a coherent theory of defense.

We have carefully considered Moore's arguments and submissions in support of these claims and conclude that, even if counsel's performance was deficient for any of the reasons listed above, Moore failed to demonstrate that the result of his trial would have been different. To the extent these claims implicated evidentiary matters, we conclude that Moore also failed to show prejudice in light of the overwhelming evidence of guilt. Therefore, we conclude that the district court did not err in denying these claims.[15]

In addition to the claims listed above, Moore argues that the district court erred in rejecting seven additional claims of ineffective assistance of counsel, which we address below in more detail.

First, Moore argues that the district court erroneously denied his claim that counsel inadequately communicated with him and was incompetent due to his partial hearing loss. However, Moore failed to explain how additional communication would have changed the outcome of his trial. And although the trial transcript shows that counsel experienced hearing difficulties throughout the trial, counsel asked for clarification in those instances. We conclude that Moore failed to

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[15]To the extent Moore contends that appellate counsel were ineffective for not raising any of these matters on direct appeal, we conclude that he failed to demonstrate that they had a reasonable probability of success. See Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

demonstrate that counsel was ineffective on these grounds and that the district court did not err in denying these claims.[16]

Second, Moore contends that the district court erred in denying his claim that counsel should have prevented the admission of a codefendant's testimony regarding Moore's connection to Satanic and occult practices, or should have at least requested a limiting instruction. This evidence was admitted over counsel's objection. And in Moore's appeal after his third penalty hearing, we concluded that this evidence was properly admitted as to the guilt phase, although the prosecutor's comments on this evidence during closing argument were improper.[17] Therefore, Moore cannot demonstrate prejudice resulting from counsel's failure to take additional steps to preclude admission of this evidence or to request a limiting instruction. Moreover, other evidence presented at trial showed that Moore and his codefendants committed the murders for financial gain, not because of Satanic or occult influences. Therefore, we conclude that the district court did not err in denying this claim.

Third, Moore argues that the district court improperly denied his claim that counsel was ineffective for not objecting to several instances

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[16]To the extent Moore contends that his appellate counsel were ineffective for not raising this matter on direct appeal, we conclude that he failed to demonstrate that it had a reasonable probability of success. See id.

[17]Flanagan v. State (Flanagan IV), 112 Nev. 1409, 1419, 930 P.2d 691, 698 (1988).

of prosecutorial misconduct. In particular, Moore asserted that the prosecutor, in the jury's presence, improperly referred to pretrial rulings respecting the admissibility of coconspirator testimony. Moore contended that the prosecutor's comments suggested to the jury that a conspiracy had been proven. Even if counsel should have objected to the challenged comments, Moore failed to show prejudice in light of the overwhelming evidence of Moore's extensive participation in planning and committing the murders.

Moore also contended that the prosecutor improperly referred to Moore and his codefendants as "devil worshippers" and argued that the men "shared witchcraft." Although the prosecutor's argument may have been improper, Moore failed to demonstrate any resulting prejudice considering the overwhelming evidence of guilt.

Moore further argued that the prosecutor engaged in a course of misconduct throughout the trial, including: failing to disclose exculpatory, impeachment, and mitigation evidence; threatening witnesses with prosecution if they declined to testify; providing witnesses with cash payments, immunity from prosecution, and other benefits in exchange for their testimony; improperly investigating potential jurors; improperly eliciting incriminating statements and physical evidence from Flanagan and others to prosecute Moore; and improperly relying on the statements of Angela Saldana. Moore, however, failed to adequately substantiate these claims or show any resulting prejudice from counsel's alleged deficiency in addressing these matters.

We conclude that Moore failed to establish that counsel was ineffective respecting any of the aforementioned allegations of prosecutorial misconduct. Therefore, we conclude that the district court did not err in denying this claim.[18]

Fourth, Moore contended that the district court erroneously denied his claim that counsel was ineffective for not challenging the district court's direction that defense objections and motions be made to the court reporter and outside his and the jury's presence. In an effort to streamline anticipated frequent objections related to severance matters, Judge Donald M. Mosley instructed all defense counsel to either wait until there was a break in the trial to raise an objection or ask the district court for leave to approach the court reporter and inform her of the nature of the objection counsel desired to be recorded. Although we conclude that Moore failed to demonstrate prejudice resulting from counsel's failure to object to this procedure, we express our disapproval of the district court's procedure in this regard. Parties are required to assert contemporaneous objections to preserve alleged errors for appellate review.[19] Judge Mosley's unusual procedure frustrated the defense's ability to comply with this fundamental

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[18]To the extent Moore contends that his appellate counsel were ineffective for not raising these matters on direct appeal, we conclude that he failed to demonstrate that they had a reasonable probability of success. See Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

[19]Sullivan v. State, 115 Nev. 383, 387 n.3, 990 P.2d 1258, 1260 n.3 (1999).

rule of appellate review. Additionally, it precluded the defense from securing any cautionary instructions to the jury should such instructions become necessary during the course of the trial. Therefore, we caution the district court to refrain from employing such practices that may impede a party's ability to comply with elemental rules of trial and appellate practice.

Fifth, Moore asserted that the district court erred in denying his claim that counsel was ineffective for not securing a complete record of bench conferences and chamber hearings and for failing to ensure his presence at all proceedings, specifically several pretrial chamber conferences. Moore further complained that because several bench conferences and chambers hearings were held out of public hearing and view, he was denied a public trial. A capital defendant does not have an absolute right to have trial proceedings recorded[20] or an unlimited right to be present at every trial proceeding.[21] Here, Moore failed to adequately explain how he was prejudiced by the omission of any recording from a bench conference or chamber hearing or his absence from any pretrial hearing. Further, Moore failed to adequately explain how conducting several bench conferences and chambers hearings out of the public view

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[20]Archanian v. State, 122 Nev. ___, ___, 145 P.3d 1008, 1018-19 (2006) (quoting Daniel v. State, 119 Nev. 498, 507, 78 P.3d 890, 897 (2003)).

[21]Gallegos v. State, 117 Nev. 348, 367, 23 P.3d 227, 240 (2001).

denied him his right to a public trial. Therefore, we conclude that the district court did not err in denying these claims.[22]

Sixth, Moore argues that the district court erred in denying his claim that counsel was ineffective for failing to object to several jury instructions and for not requesting others. Respecting his contention that counsel should have objected to the instructions on reasonable doubt,[23] implied malice,[24] and "equal and exact justice,"[25] these instructions comported with statutory and case law.

Moore also contended that counsel should have objected to a jury instruction advising the jurors that if they concluded beyond a reasonable that Moore was guilty, they should "so find, even though [the jurors] may believe one or more other persons are also guilty." Moore asserted that this language instructed the jurors to find him guilty if it also found a codefendant guilty. However, he failed to adequately explain why the challenged instruction was improper or cite to any relevant authority supporting his contention.

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[22]To the extent Moore contends that his appellate counsel were ineffective for not raising these matters on direct appeal, we conclude that he failed to demonstrate that they had a reasonable probability of success. See Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

[23]See NRS 175.211.

[24]See Cordova v. State, 116 Nev. 664, 666-67, 6 P.3d 481, 482-83 (2000).

[25]See Leonard v. State, 117 Nev. 53, 78, 17 P.3d 397, 413 (2001).

Moore further argued that counsel was ineffective for failing to object to the aiding and abetting instructions on the ground that they failed to clearly inform the jury of the specific intent necessary to hold him liable as an aider and abettor in Colleen Gordon's murder based on the reasoning this court later developed in Sharma v. State.[26] However, even assuming counsel should have objected to the challenged instructions, Moore cannot demonstrate prejudice here. The State presented overwhelming evidence that Moore and five other men planned and executed the murders expressly so that Flanagan would receive life insurance and inheritance proceeds. Murdering both Carl and Colleen was necessary to effectuate this objective. Moore, Flanagan, and the others planned the murders at least one month prior to the killings, discussing in detail who would shoot Carl and Colleen and in what manner, how the men would gain entry into the Gordon residence, and the types of weapons to be used. The men also agreed that the murders would be made to look like a burglary or robbery gone wrong. The evidence overwhelmingly supports a finding that Moore had the intent necessary to be held liable for Colleen's murder under an aiding or abetting theory of liability. Consequently, we conclude that Moore did not demonstrate a reasonable probability that the result of his trial would have been

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[26]118 Nev. 648, 655, 56 P.3d 868, 872 (2002); see Mitchell v. State, 122 Nev. ___, 149 P.3d 33, 38 (2006) (holding that Sharma clarified existing law).

different had counsel objected to the aiding and abetting instructions.[27] Therefore, we conclude that the district court did not err in denying this claim.

Moore also claimed that counsel was ineffective for not requesting instructions on the admissibility of prior inconsistent statements as substantive evidence, the limited use of prior bad act and character evidence, and the admissibility of hearsay. However, he did not adequately explain why these instructions were necessary or demonstrate a reasonable probability that the outcome of his trial would have been different but for counsel's failure to request the instructions.

For the foregoing reasons, we conclude that the district court did not err in denying Moore's claim that counsel was ineffective respecting any matter related to jury instructions.[28]

Seventh, Moore contends that the district court improperly denied his claim that counsel was ineffective for not filing a motion for a new trial. However, Moore failed to identify what grounds should have

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[27]To the extent Moore argues that the district court's instructions respecting aiding and abetting do not comport with Sharma, we conclude that this claim is procedurally barred absent a showing of good cause and actual prejudice, which Moore has failed to demonstrate. See NRS 34.810(1)(b), (3).

[28]To the extent Moore contends that his appellate counsel were ineffective for not raising these matters on direct appeal, we conclude that he failed to demonstrate that they had a reasonable probability of success. See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

been raised in a motion for a new trial.[29] Nor has he shown that if a motion for a new trial had been filed, it had any probability of success. Therefore, we conclude that the district court properly denied this claim.

Claims of ineffective assistance of appellate counsel

Moore contends that the district court improperly denied his claims that appellate counsel were ineffective. A successful claim of ineffective assistance of appellate counsel requires a showing that counsel's performance was deficient and that an omitted issue had a reasonable probability of success on appeal.[30]

Moore first contends that the district court erred in denying his claim that appellate counsel were not qualified to represent him in a capital case. In particular, he complained that counsel did not communicate with him and raised only a few issues on direct appeal. Moore also noted that one of his counsel was actually suspended from the practice of law in Nevada shortly after this court resolved Moore's direct appeal. However, Moore failed to adequately explain how any of these circumstances demonstrated that counsel were unqualified to represent him. Consequently, we conclude that the district court did not err in denying this claim.

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[29]Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

[30]Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

Second, Moore complains that the district court improperly denied his claim that appellate counsel failed to "federalize" several issues on direct appeal. Moore failed to show that had counsel invoked the United States Constitution when raising his claims that they would have had any greater likelihood of success on direct appeal. Therefore, we conclude that the district court did not err in denying this claim.

Miscellaneous claims

Moore argued that the district court erred in denying his claim that this court failed to provide him with a constitutionally adequate appellate review of his trial by summarily resolving on direct appeal matters related to the guilt phase of the trial. However, Moore failed to show that our consideration of his case was erroneous or flawed. Therefore, we conclude that the district court did not err in denying this claim.

Moore contended that he was entitled to relief due to the cumulative impact of trial and appellate counsel's errors. Although Moore's trial was not free from error, he failed to show that any of the errors considered cumulatively denied him a fair trial. Therefore, we conclude that the district court did not err in denying this claim.

Direct appeal claims

Moore raised a number of claims that were appropriate for direct appeal, including that the district failed to inquire into counsel's qualifications to try a capital case and conduct a hearing respecting Moore's motion to dismiss counsel. Moore further alleged that the district court erred in denying his motion to sever his trial from that of his

codefendants.[31] We conclude, however, that Moore showed neither good cause for failing to raise these issues earlier nor actual prejudice.[32] Therefore, we conclude that the district court did not err in denying these claims.

Moore also argued that he was prejudiced by the district court's instruction to the jury on premeditation and deliberation, commonly known as the Kazalyn instruction.[33] This instruction was later determined in Byford v. State to inadequately explain the distinction between first- and second-degree murder.[34] Moore contends that Polk v. Sandoval,[35] a recent decision by the United States Court of Appeals for the Ninth Circuit, mandates reversal of his first-degree murder conviction. In sum, Polk concluded that in reviewing the Kazalyn instruction in Byford and concluding that the decision was not retroactive in Garner v. State,[36] this court ignored clearly established federal law holding that an

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[31]To the extent Moore suggests that we should revisit this matter, we decline to do so.

[32]See NRS 34.810(1)(b)(2); State v. Williams, 120 Nev. 473, 477, 93 P.3d 1258, 1260-61 (2004).

[33]Kazalyn v. State, 108 Nev. 67, 75-76, 825 P.2d 578, 583-84 (1992).

[34]116 Nev. 215, 234-35, 994 P.2d 700, 713-14 (2000).

[35]503 F.3d 903 (9th Cir. 2007).

[36]116 Nev. 770, 6 P.3d 1013 (2000), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002).

instruction omitting an element of a crime and relieving the prosecution of its burden of proof violates the federal Constitution.[37] The Polk court concluded that given the "State's exceptionally weak evidence of deliberation," it could not conclude that the instructional error was harmless in that case.[38] We conclude, however, that the evidence adduced at Moore's trial overwhelmingly established that he and his cohorts methodically planned the murders for pecuniary gain. Considering Polk, we nonetheless conclude that any error in the challenged instruction was harmless beyond a reasonable doubt.[39]

CONCLUSION

Based upon the foregoing discussion, we affirm the district court's order denying Moore post-conviction relief as to claims related to the guilt phase of his trial. We further affirm the district court's order striking the robbery and burglary aggravating circumstances pursuant to McConnell. However, we remand this matter and direct the district court to enter detailed findings as to whether the jury's consideration of the

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[37]Polk, 503 F.3d at 911.

[38]Id. at 913.

[39]To the extent Moore contends that counsel was ineffective for not objecting to this instruction, we conclude that he failed to demonstrate the result of trial would have been different. See Strickland v. Washington, 466 U.S. 668, 694 (1984).

erroneous aggravating circumstances was harmless beyond a reasonable doubt.[40] Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[41]

_____, C.J.
Gibbons

_____, J.
Maupin

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Cherry

_____, J.
Saitta

_____, Sr.J.
Rose[42]

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[40]After entering detailed findings regarding harmless error review, if the district court concludes that a new penalty hearing is not warranted, the district court must then resolve the claims that Moore raised in his post-conviction habeas petition relating to his third penalty hearing.

[41]This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.

[42]The Honorable Robert E. Rose, Senior Justice, was appointed by the court to sit in place of the Honorable Michael Douglas, Justice, who

continued on next page . . .

cc: Hon. Michelle Leavitt, District Judge
Hon. Donald M. Mosley, District Judge
JoNell Thomas
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

. . . *continued*

voluntarily recused himself from participation in the decision of this matter. Nev. Const. art 6, §19; SCR 10.

EXHIBIT 336

OPPS

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
STEVEN S. OWENS
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JAMES MONTELL CHAPPELL,
#1212860

Defendant.

CASE NO: 95-C131341

DEPT NO: DEPT. XXV

STATE'S OPPOSITION TO MOTION FOR AUTHORIZATION TO OBTAIN SEXUAL ASSAULT EXPERT AND PAYMENT OF FEES, AND OPPOSITION TO MOTION FOR INVESTIGATOR AND PAYMENT OF FEES

DATE OF HEARING: 5/24/12
TIME OF HEARING: 9:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through STEVEN S. OWENS, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion for Sexual Assault Expert and for Payment of Fees and Opposition to Defendant's Motion for Investigator and for Payment of Fees.

This opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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DATED this 16th day of May, 2012.

Respectfully submitted,

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

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

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On December 31, 1996, James Montell Chappell ("Defendant") was convicted, pursuant to a jury verdict, of Burglary, Robbery With Use of a Deadly Weapon, and First-Degree Murder With the Use of a Deadly Weapon. Defendant was sentenced to serve a term of four (4) to ten (10) years in prison for Burglary and two consecutive terms of six (6) to fifteen (15) years for Robbery With the Use of a Deadly Weapon. A jury sentenced Defendant to death for First-Degree Murder With the Use of a Deadly Weapon. On appeal, the Nevada Supreme Court affirmed Defendant's convictions and sentence of death. Chappell v. State, 114 Nev. 1403, 972 P.2d 838 (1998).

On October 19, 1999, Defendant filed his first pro per post-conviction petition for writ of habeas corpus. David Schieck, Esq. was appointed as post-conviction counsel and Defendant filed a supplement to his petition on April 30, 2002. The District Court partially granted and partially denied the petition, vacated Defendant's sentence of death, and ordered a new penalty hearing. The District Court found merit in Defendant's claim that trial counsel was ineffective for failing to investigate and call mitigation witnesses to testify during Defendant's penalty hearing, and that the omitted testimony had a reasonable likelihood of impacting the jury's decision. The District Court otherwise upheld Defendant's conviction and denied his claims relating to the guilt phase of his trial. The

Nevada Supreme Court affirmed the District Court's decision. Chappell v. State, Docket No. 43493 (Order of Affirmance, April 7, 2006).

On May 10, 2007, following Defendant's second penalty hearing, a jury again sentenced Defendant to death. On appeal, the Nevada Supreme Court affirmed Defendant's sentence of death. Chappell v. State, Docket No. 49478 (Order of Affirmance, October 20, 2009).

On June 22, 2012, Defendant filed his second pro per post-conviction petition for writ of habeas corpus. Christopher R. Oram, Esq. was appointed as post-conviction counsel and Defendant filed a supplemental brief in support of his petition on February 15, 2012. On the same date he filed a Motion for Sexual Assault Expert and for Payment of Fees and a Motion for Investigator and for Payment of Fees. The State's Opposition to these motions has been consolidated and is as follows:

ARGUMENT

In support of Defendant's motion for a sexual assault expert, his argument, in its entirety, is that "In light of the seriousness of Mr. Chappell's conviction and sentence of death, I believe it is necessary that a sexual assault expert" be available.

In support of Defendant's motion for an Investigator, his argument, in its entirety, is that "In light of the seriousness of Mr. Chappell's conviction and sentence of death, I believe it is necessary that an investigator" be available.

Defendant fails to make any specific allegation as to what these experts and Investigators will uncover that could possible change the outcome of his case. Accordingly, Defendant's bare and conclusory motions should be denied. See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984); see also Caldwell v. Mississippi, 472 U.S. 320, 323, (1985) (deciding that defendant's general statements claiming necessity of an expert witness are insufficient to warrant the appointment of expert).

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CONCLUSION

For the foregoing reasons, Defendant's motion should be DENIED.

DATED this 16th day of May, 2012.

Respectfully submitted,

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

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

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing, was made this 16th day of May, 2012, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

CHRISTOPHER R. ORAM, ESQ.
520 South Fourth Street, 2nd Fl.
Las Vegas, Nevada 89101

Eileen Lewis

Employee for the District Attorney's Office

SSO/Ryan MacDonald/ed

OPPM

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DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES CHAPPELL,
#1212860,

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: 95C131341

DEPT NO: V

OPPOSITION TO MOTIONS FOR DISCOVERY AND FOR EVIDENTIARY HEARING

Comes now, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through STEVEN S. OWENS, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Motions for Discovery and for Evidentiary Hearing.

This opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

POINTS AND AUTHORITIES

Chappell moves for discovery and for an evidentiary hearing related to claims in his pending third petition for writ of habeas corpus. If the court is experiencing déjà vu, it's because Chappell similarly requested discovery and an evidentiary hearing in connection with his second state habeas petition in 2012. Those requests were appropriately denied at that time, the second petition was barred, and the denial of discovery and an evidentiary hearing

was upheld by the Nevada Supreme Court on appeal. Order of Affirmance (SC# 61967) filed June 18, 2015. Not satisfied with those results and well-accustomed to beating a dead horse, the federal public defender once again requests discovery and an evidentiary hearing. As before, the requests are inappropriate and ultimately unnecessary to the disposition of the current third habeas petition.

In a habeas proceeding, a party may invoke discovery only "[a]fter the writ has been granted and a date set for the [evidentiary] hearing." NRS 34.780(2). Even then, discovery is only permitted to the extent the judge for good cause shown grants leave to do so. Id. Only if an evidentiary hearing is required, may the district court direct that the record be expanded to include additional materials that are relevant to the determination of the merits of the petition. NRS 34.790(1). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief, unless the factual allegations are belied by the record. Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994). However, "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record." Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984); *citing* Grondin v. State, 97 Nev. 454, 634 P.2d 456 (1981). Chappell already received an evidentiary hearing in 2002 in connection with his first timely filed habeas petition. Because no evidentiary hearing has been ordered, nor should be ordered, on the procedurally barred third habeas petition, any discussion of discovery is premature and wholly irrelevant.

When a petitioner fails to demonstrate a valid basis exists to excuse the procedural bars, the district court must dismiss the petition without an evidentiary hearing. Pellegrini v. State, 117 Nev. 860, 869, 34 P.3d 519, 525 (2001); *see* NRS 34.745(4) (providing for summary dismissal of successive petitions); NRS 34.770(1)-(2) (providing that where a judge determines upon review of the pleadings and supporting documents "that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing"); Dickerson v. State, 114 Nev. 1084, 1088, 967 P.2d 1132, 1134 (1998) (discussing dismissal for failure to allege sufficient basis to overcome time bar at NRS 34.726); Bejarano

v. Warden, 112 Nev. 1466, 1471, 929 P.2d 922, 925-26 (1996) (discussing dismissal for failure to allege sufficient basis to overcome procedural bars at NRS 34.810). Before Defendant may be entitled to conduct discovery on his procedurally defaulted claims, he must first establish good cause to overcome the procedural bars. Otherwise, the petition must be dismissed without an evidentiary hearing and therefore without discovery.

Defendant requests discovery as if this were an initial timely filed habeas petition. It is not. His federal case authority is inapposite as it interprets federal statutes and rules and pertains to an initial timely filed federal habeas petitions. Discovery that may have been available in an initial post-conviction proceeding is barred when sought in an untimely or successive petition. Post v. Bradshaw, 422 F.3d 419 (6th Cir. 2005). To the extent federal authority may be persuasive at all, even the federal courts do not permit discovery on procedurally defaulted claims. Rucker v. Norris, 563 F.3d 766, 771 (8th Cir. 2009) ("As Rucker's federal claim is procedurally barred because it was not raised in the state courts, he cannot satisfy this requirement [good cause for discovery]"); Wellons v. Hall, 554 F.3d 923, 935 (11th Cir. 2009) ("Wellons was not entitled to discovery or an evidentiary hearing because the record reveals that his claims of judge, juror, and bailiff misconduct are procedurally barred from federal habeas review").

Although not controlling, federal law and procedure restrict a habeas petitioner's right to conduct post-conviction discovery. Only "in appropriate circumstances, a district court, confronted by a petition for habeas corpus which establishes a prima facie case for relief, may use or authorize the use of suitable discovery procedures…." Harris v. Nelson, 394 U.S. 286, 290, 89 S. Ct. 1082, 1086 (1969); see also Mayberry v. Petsock, 821 F.2d 179, 185 (3d Cir. 1987) ("Unless the petition itself passes scrutiny, there would be no basis to require the state to respond to discovery requests"). Federal courts do not allow prisoners to use federal discovery for fishing expeditions to investigate mere speculation. Calderon v. United States District Court for the Northern District of California, 98 F.3d 1102, 1106 (1996); see also Ward v. Whitley, 21 F.3d 1355, 1367 (5th Cir. 1994) ("federal habeas court must allow discovery and an evidentiary hearing only where a factual dispute, if resolved in the

petitioner's favor, would entitle him to relief…. Conclusory allegations are not enough to warrant discovery under Rule 6…; the petitioner must set forth specific allegations of fact. Rule 6…does not authorize fishing expeditions."); United States ex rel. Nunes v. Nelson, 467 F.2d 1380, 1380 (9th Cir. 1972) (state prisoner "is not entitled to discovery order to aid in the preparation of some future habeas corpus petition.")

The federal public defender's discovery requests are nothing more than a fishing expedition to satisfy curiosity in the hope of finding some helpful piece of evidence somewhere that will keep the post-conviction proceedings alive. The request for an evidentiary hearing at which 47 witnesses would be called to testify is absurd considering that this well-exceeds the number of witnesses called at the original guilt phase trial or either of the two penalty phase trials.

WHEREFORE, the State opposes Defendant's motions for discovery and for an evidentiary hearing and requests that they be denied.

DATED this 28th day of July, 2017.

Respectfully submitted,

STEVEN B. WOLFSON
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Nevada Bar #001565

BY */s/ Steven S. Owens*
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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of Opposition to Motions for Discovery and for Evidentiary Hearing was made this 28th day of July, 2017, by Electronic Filing to:

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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,

Respondents.

Case No. C131341
Dept. No. V

REPLY TO OPPOSITION TO MOTIONS FOR DISCOVERY AND FOR EVIDENTIARY HEARING

Date of Hearing: August 7, 2017
Time of Hearing: 9:00 a.m.

(Death Penalty Habeas Corpus Case)

Petitioner James Chappell replies to the State's Response to Motions for Discovery and Evidentiary Hearing.

Chappell bases this Reply on the attached memorandum of points and authorities and the entire file in this matter.

DATED this 31st day of July, 2017.

Respectfully submitted
RENE L. VALLADARES
Federal Public Defender

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

/s/ Sandi Y. Irwin
SANDI Y. IRWIN
Assistant Federal Public Defender

MEMORANDUM OF POINTS AND AUTHORITIES

On July 14, 2017, Chappell filed in this Court a Motion and Notice of Motion for Leave to Conduct Discovery, and a Motion and Notice of Motion for Evidentiary Hearing. On July 28, 2017, the State filed an "Opposition to Motions for Discovery and for Evidentiary Hearing" (hereinafter "Opposition" or "Opp.").

As a preliminary note, the State's Opposition is time barred pursuant to Rules of Practice for the Eighth Judicial District Court of the State of Nevada, Rule 2.20 (hereinafter "EDCR"). Pursuant to that rule, the State's Opposition was to be filed no later than July 24, 2017. EDCR 2.20(e) ("[w]ithin 10 days after the service of the motion . . . the opposing party must serve and file written notice of nonopposition or opposition thereto, together with a memorandum of points and authorities and supporting affidavits, if any, stating facts showing why the motion . . . should be denied."). Here, Chappell's Motions were served electronically on the State on July 14, 2017 and thus, the State's Oppositions were due no later than July 24, 2017.[1] The State's failure to file its opposition in a timely manner should be construed by this Court as an admission Chappell's Motions are meritorious and should be granted. EDCR 2.20(e) ("Failure of the opposing party to serve and file written opposition may be construed as an admission that the motion . . . is meritorious and a consent to

[1] Electronic service was made to motions@clarkcountyda.com, and as per agreement with the State to Eileen Davis, an employee for the District Attorney's Office. Both motions were opened by motions@clarkcountyda.com soon after filing and service.

granting the same."). Even if this Court were to consider the State's untimely Opposition, is it without merit.

The State's only argument is that discovery and an evidentiary hearing are only appropriate once a petitioner has demonstrated good cause to overcome the procedural default bars, and that because Chappell has failed to demonstrate good cause, he is neither entitled to discovery on the merits of his claims nor a hearing. Opp. at 2-3. First, the State does not even address, let alone refute, Chappell's arguments regarding his showing of good cause. See Mot. For Discovery at 7-18; Motion for Hearing at 7-8; Reply to Resp. to Pet., Section II. The State's failure to address Chappell's arguments amounts to a concession. See Polk v. State, 126 Nev. 180, 181, 185-86, 233 P.3d 357, 358, 360 (2010); Bates v. Chronister, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984). Further, what the State ignores is that, even if Chappell had not demonstrated good cause to overcome the default bars, he could still be entitled to discovery and a hearing in order to demonstrate good cause. Chappell cited to numerous cases in his Motion for Evidentiary Hearing in which hearings had been granted on procedural issues. Mtn. For Hearing at 9-10. For the same reasons that a petitioner may be entitled to an evidentiary hearing on procedural issues, so, too, is he entitled to discovery on procedural issues.

Moreover, Chappell's request for discovery is not, as the State alleges, a "fishing expedition." Opp. at 4. Rather, Chappell requests certain pieces of discovery based upon specific claims raised in his Petition. Again, the State does not attempt

to show why Chappell is not entitled to discovery, other than the broad generalizations found in its Opposition.

As previously stated, the State has done nothing to rebut Chappell's substantive arguments that he is entitled to discovery and an evidentiary hearing. For that reason alone, Chappell's Motions should be granted.

DATED this 31st day of July, 2017.

Respectfully submitted
RENE L. VALLADARES
Federal Public Defender

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

/s/ Sandi Y. Irwin
SANDI Y. IRWIN
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

In accordance with EDCR 7.26(a)(4) and 7.26(b)(5), the undersigned hereby certifies that on the 31st of July 2017, a true and accurate copy of the foregoing REPLY TO OPPOSITION TO MOTIONS FOR DISCOVERY AND FOR EVIDENTIARY HEARING was filed electronically with the Eighth Judicial District Court and served by Odyssey EFileNV, addressed as follows:

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

/s/ Stephanie Young
An Employee of the
Federal Public Defender
District of Nevada

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RENE L. VALLADARES
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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, Respondents.	Case No. C131341 Dept. No. V Date of Hearing: October 9, 2017 Time of Hearing: 9:00 a.m. **NOTICE OF SUPPLEMENTAL AUTHORITY** (Death Penalty Habeas Corpus Case)

Petitioner James Montell Chappell files this Notice of Supplemental Authority in support of his Petition for Writ of Habeas Corpus. This motion is based upon the

/ / /

/ / /

attached points and authorities and the entire file in this matter.

DATED this 29th day of September, 2017.

Respectfully submitted
RENE L. VALLADARES
Federal Public Defender

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

POINTS AND AUTHORITIES

In his Petition for Writ of Habeas Corpus, Chappell raised various guilt-phase claims related to his 1997 trial. See Pet. Claims One, Two, Four, Six, Seven, Ten, Eleven, Fifteen, Eighteen, Nineteen, Twenty-One, Twenty-Three, Twenty-Four, and Twenty-Six. In its Response to Chappell's Petition, the State argued that Chappell's guilt-phase claims were time barred as those claims should have been raised when the Nevada Supreme Court issued remittitur from the first direct appeal. See Resp. at 4-7. In the Reply to the Response, Chappell argued that his guilt-claims were timely for a variety of reasons, including that Chappell's judgment of conviction was not final until after his 2007 penalty retrial. See Reply at 6-7.

Most recently, the Ninth Circuit addressed a similar issue in Smith v. Williams, 2017 WL 3927193 (9th Cir. Sept. 8, 2017). In Smith, the petitioner was convicted in 1997 of, among other things, first degree murder and attempted murder. Id., at *1. In 2007, the state trial court, in a third state habeas petition, reversed Smith's convictions and sentences for first degree murder and attempted murder. Id. In 2009, the Nevada Supreme Court reversed the trial court and remanded the case with instructions to reinstate Smith's murder and attempted murder convictions and sentences. Id. The trial court did so, and entered a Second Amended Judgment of Conviction in 2012. Id.

In that same year, Smith filed a federal petition, which the district court dismissed as untimely. Smith, 2017 WL 3927193, at *1. The Ninth Circuit reversed the district court finding that the second amended judgement restarted the statute of

limitations as that was the judgment in which Smith was being held and could be incarcerated. Id. The Ninth Circuit explicitly rejected the state's argument that the statute of limitations ran from the original judgment. Id., at ** 2-3.

Here, Chappell's operative judgment, as explained in the Reply, was that arising from his penalty re-trial, not from his original trial. See Reply at 4-8. Because Smith supports that proposition, Chappell submits Smith is relevant to the issue of whether his guilt claims have been timely filed.

DATED this 29th day of September, 2017.

RENE L. VALLADARES
Federal Public Defender

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

CERTIFICATE OF SERVICE

In accordance with EDCR 7.26(a)(4) and 7.26(b)(5), the undersigned hereby certifies that on the 29th of September, 2017, a true and accurate copy of the foregoing NOTICE OF SUPPLEMENTAL AUTHORITY was filed electronically with the Eighth Judicial District Court and served by Odyssey EFileNV, addressed as follows:

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/s/ Stephanie Young
An Employee of the
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

JAMES MONTELL CHAPPELL,

Petitioner,

v.

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

Respondents.

Case No. C131341
Dept. No. 5

NOTICE OF ERRATA WITH REGARD TO EXHIBIT 333 IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

(Death Penalty Habeas Corpus Case)

TO THE HONORABLE COURT:

Petitioner James Montell Chappell hereby gives notice of errata to the Court and all parties regarding page three of Exhibit 333 to the Petition for Writ of Habeas Corpus filed November 16, 2016. When the Petition and its accompanying exhibits were filed, Exhibit 333 was inadvertently submitted without page three. A complete copy of Exhibit 333, including page three, is attached hereto as Exhibit A. Chappell

respectfully requests this Court substitute Exhibit A for Exhibit 333 in support of his Petition for Writ of Habeas Corpus.

DATED this 5th day of October, 2017.

Respectfully submitted
RENE L. VALLADARES
Federal Public Defender

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

CERTIFICATE OF SERVICE

In accordance with EDCR 7.26(a)(4) and 7.26(b)(5), the undersigned hereby certifies that on the October 5, 2017, a true and accurate copy of the foregoing NOTICE OF ERRATA WITH REGARD TO EXHIBIT 333 IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS was filed electronically with the Eighth Judicial District Court and served by Odyssey EFileNV, addressed as follows:

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Eileen.davis@clarkcountyda.com

/s/ Stephanie S. Young
An Employee of the
Federal Public Defender
District of Nevada

EXHIBIT A

EXHIBIT 333

Declaration of Dennis Reefer

I, Dennis Reefer, hereby declare as follows:

1. My name is Dennis Reefer and I am a retired Nevada state licensed private investigator. I am seventy-three years old and reside in Clark County, Nevada. In 2002, I was appointed by the courts to work with David Schieck on James Chappell's state post-conviction proceedings.

2. David Schieck wrote me a letter dated October 14, 2002. In that letter, Mr. Schieck told me it was unnecessary that I review the trial transcripts in James's case, or the discovery because the "the area of investigation at this point is very narrow." Mr. Schieck stated that my "primary task" was to locate witnesses for Mr. Schieck to interview. That letter is attached to this declaration.

3. Mr. Schieck provided some limited materials which gave me a basic understanding of the case, but he never asked me to review the entity casefile. It was my normal practice to review the entire case file when assigned to a case.

4. Mr. Schieck directed me to skip trace phone numbers and locations of individuals that he sent to me. I was willing to travel and conduct the Michigan investigation because I'm originally from Michigan and attended Michigan State University, which is located near the community where James grew up. I was previously a Michigan state law enforcement official, so I was also familiar with the courts and legal system around the state. Mr. Schieck ultimately did not ask me to physically work on the Michigan investigation. I did, however, make telephone calls to all of the witnesses and confirmed their identity and schedule dates and times for Mr. Schieck to interview them.

5. Mr. Schieck was a hands on attorney who preferred doing his own leg work. He conducted most of the witness interviews by himself, and I was never asked to speak with James.

6. I was also asked to do few other tasks for the case. Mr. Schieck requested that I travel to Arizona to speak with David Green, Chris Birdow, and James's former employers in Tucson. Schieck wanted me to substantiate James's work history. He also asked me to drive past the residence of Deborah Panos's mother to visually check on James's children without making any contact. Mr. Schieck also asked me to locate a local witness named Ernestine Harvey, but I was not able to find her.

7. I am not aware whether Mr. Scheick hired a mitigation specialist to work on James's case. I have done mitigation work in the past for other attorneys, but not in this case.

8. I was not contacted by any of James's representatives after my work on the state post-conviction proceedings ended. Herbert Duzant of the Federal Public Defender Office was the first person to speak with me about my work on James's case. I would have provided James's previous counsel with all of the details found in this declaration had I been contacted, and I would have testified to them.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and that this declaration was executed in Clark County, Nevada, on October 20, 2016.

Dennis R. Reefer

Dennis Reefer

David M. Schieck

Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
Fax (702) 386-2687
(702) 382-1844

October 14, 2002

Dennis Reefer
Reefer Investigations
4992 Crooked Stick Way
Las Vegas NV 89113

Re: Chappell v. State

Dear Dennis:

This is the Michigan case that we discussed last week. It is not necessary that you review the trial transcripts or discovery on the case because the area of investigation at this point is very narrow. The primary task is to locate the witnesses for me to interview. I am not sure you will need to travel to Michigan with me.

In order for you to have a basic understanding of the case I am enclosing the following documents: Opening Brief; Supplemental Points and Authorities; and transcript of the evidentiary hearing where the two public defenders testified concerning the allegation of ineffective assistance of counsel.

I will be forwarding the information on the witnesses in the next few days.

Very truly yours,

DAVID M. SCHIECK, ESQ.

DMS: kf
Enclosure

Electronically Filed
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Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. JAMES MONTELL CHAPPELL, Defendant.	CASE#: 95C131341 DEPT. V

BEFORE THE HONORABLE CAROLYN ELLSWORTH, DISTRICT COURT JUDGE

MONDAY, OCTOBER 9, 2017

RECORDER'S TRANSCRIPT OF PROCEEDINGS
DEFENDANT'S MOTION FOR LEAVE TO CONDUCT DISCOVERY; EXHIBITS
DEFENDANT'S MOTION FOR EVIDENTIARY HEARING; EXHIBITS
PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS

APPEARANCES:

For the State: STEVEN S. OWENS, ESQ.
Chief Deputy District Attorney

For the Defendant: BRADLEY D. LEVENSON, ESQ.
Assistant Federal Public Defender

RECORDED BY: LARA CORCORAN, COURT RECORDER

MONDAY, OCTOBER 9, 2017, AT 9:09 A.M.

THE COURT: Case number C31 -- C131341, State of Nevada versus James Chappell.

MR. LEVENSON: Good morning, Your Honor.

THE COURT: Good morning.

MR. LEVENSON: Brad Levenson, Office of the Federal Public Defender on behalf of Mr. Chappell who is in Ely State Prison and waives his appearance today.

MR. OWENS: I'm Steve Owens with the State.

THE COURT: All right. So, there are three things on the calendar this morning: Defendant's motion for leave to conduct discovery; Defendant's motion for the -- an evidentiary hearing; and the petition for writ of habeas corpus.

So, you know, obviously, the pleadings in this -- in the petition are voluminous. The State's opposition, in contrast, could be characterized as brief, though it is 75 pages. It is only brief by virtue of the fact that the original petition is -- well, and the exhibits are thousands of pages. So, I don't know how you want to approach this. Obviously, I don't think you want to try and regurgitate everything that's in there.

MR. LEVENSON: No, Your Honor. I'd like to just really concentrate on one major issue and if I --

THE COURT: All right.

MR. LEVENSON: -- have time, talk about two more. I want to focus the argument on Mr. Chappell's claim that his trial counsel and post-conviction counsel were ineffective for failing to hire an expert and present evidence of fetal alcohol spectrum disorder.

THE COURT: Okay. When you say trial counsel you're saying first trial --

MR. LEVENSON: Both.

THE COURT: -- guilt phase and --

MR. LEVENSON: Second trial.

THE COURT: -- second trial --

MR. LEVENSON: Penalty phase.

THE COURT: -- but not Mr. Oram you're not talking about.

MR. LEVENSON: Well, that would be -- so, that would be including, I guess, all the counsel here; first post-conviction counsel, Mr. Schieck, second post-conviction counsel, Mr. Oram. So, I'd like to explain why I think we could develop an ineffective assistance of post-conviction counsel for Mr. Oram. We have three theories for the Court. I'm sorry.

THE COURT: No, I -- you didn't --

MR. LEVENSON: Okay.

THE COURT: I was just taking a breath. Go ahead.

MR. LEVENSON: Okay. As this Court will remember in -- actually, I think it was this date, strangely enough. And it was 10-09-2012, I'm -- yeah, 2012. So, that's what, five years ago. This case was before the Court, and Mr. Oram represented Mr. Chappell. At that time, he had raised a number of motions for this Court asking for funding for four experts; an expert on FAS, an expert on sexual assault, an expert to do a PET scan, and an expert to do a full neurological evaluation. He also asked for funding for an investigator, and this Court denied him the funding at that time.

The State argued two things in their motions to -- of their oppositions to

the motion for funding; the State argued that Mr. Oram didn't argue with specificity what he needed the experts for and they also argued that it wouldn't matter whether the client had FAS based on the evidence presented at trial. And this Court denied the funding saying in part that you didn't see any prejudice even if there was an FASD expert hired. It was actually a very brief part of the full hearing.

Mr. Oram, while he did raise some motions requiring the funding, he never argued in his evidentiary hearing motion before this Court why he needed the funding for the FAS expert. He actually veered away from all of that and just discussed what was presented and why it was deficient at trial for the second penalty trial.

So, we offer three theories for this Court and why you can look at this issue either granting the petition or at a very least, granting us an evidentiary hearing so we can present the evidence to you.

One is denial of funding by this Court acts as good cause for this claim to be heard by the Court. So, it would become -- it would overcome any procedural bar in the lateness of the filing of this claim. We don't say there is any lateness in the filing of this claim, but we will argue that the Court's lack of funding for it can overcome a procedural default.

Second, that the Court's denial of funding prevented Mr. Oram from being effective -- an effective assistance of counsel for his client because he could not present the evidence to this Court that he thought this Court needed to hear.

THE COURT: Let me just interrupt you for a second.

MR. LEVENSON: Sure.

THE COURT: I believe that the State has conceded that as to Mr. Oram's effectiveness, challenging his effectiveness as second post-conviction counsel, that

they're not State and they're not arguing that it's procedurally barred.

MR. LEVENSON: Right. I believe on --

THE COURT: Am I correct on that?

MR. OWENS: Well, it gets --

THE COURT: Just --

MR. OWENS: -- technical. It's procedurally barred, but it's -- there's good cause. Mr. Oram's ineffectiveness constitutes good cause to overcome the one year time bar and successive petition bars if he in fact was --

THE COURT: If he was --

MR. OWENS: -- ineffective.

THE COURT: Okay. All right.

MR. LEVENSON: And then our third theory would be that Mr. Oram was, to the extent this Court finds it, he was ineffective for not arguing with specificity why he needed the experts that he requested including the FAS expert.

So, we know that the jurors knew a couple of things because they found mitigation evidence. They found, I believe, seven factors in mitigation and they found one factor in aggravation which is the sexual assault aggravator. So, we know that they knew that the jurors had a low -- that -- I'm sorry. Mr. Chappell had a low IQ. They knew that he had a learning disability and they knew that his mother drank, but they didn't know how this extenuated or reduced Mr. Chappell's moral culpability for the crime which is what you need to show in a penalty phase trial. So, trial counsel attempted to explain Mr. Chappell to the jury. His theory was if you brought in an expert, you can explain why Mr. Chappell did what he did. But FAS, fetal alcohol spectrum disorder, in our view, is the very basis of why Mr. Chappell acted the way he did.

If you looked at our experts -- and we had three experts just on FAS; we had Dr. Natalie Brown, Dr. Julian Davies, and Dr. Paul Connor; psychologist, neuropsychologist, and medical doctor. And they all explained how this FASD was basically the tentacle which reached through Mr. Chappell's life, explained why he had low IQ. It explained his assaultive behavior against the victim, Ms. Panos, which is extremely important because that's was -- that was the State's case, was the battery which he inflicted upon her so it explained that. It explained how he was so socially uncomfortable around people. And the jurors didn't know any of this.

And what's so important is FASD is completely involuntary. Mr. Chappell didn't choose to be born to a mother who drank and took drugs. Maybe compared to another Defendant -- a lot of times the State argue -- well, and actually that's the point I wanted to make. In this particular case, the State argued that this was Mr. Chappell's free choice. And I believe the prosecutor in the penalty retrial actually stated that Mr. Chappell chose evil. And what these experts could have done was explain to the juror that this is not a matter of free choice. This is a man who is born with multiple insults to the brain.

If you look at what Dr. Paul Connor found -- and I think what's important is Doctor Etcoff who was the expert in 1996 at guilt phase and who was the expert again in 2007 at the penalty retrial never did a full neurological evaluation of the client; he ran a couple of tests. And in his declaration submitted on behalf of our petition he explains that he never did a full neurological evaluation nor was he asked to do so by counsel.

So, Dr. Paul Connor is the first person who's done a neuropsychological evaluation, keeping in mind that Mr. Oram actually asked for funding for that, but was denied by this Court. And what does Mr. Connor find -- Dr.

Connor find? That he has insults in six areas of the brain; academic achievement, learning and memory, visual spatial construction, attention processing speed, and executive functioning. And what's so important about executive functioning is that this is what basically keeps someone from acting out or acting out impulsively. And Mr. Chappell had multiple injuries to this part of his brain which could have been explained to the jurors which would have given them a reason to sentence him to something other than death.

Dr. Julian Davies is our medical doctor and he actually diagnoses Mr. Chappell with FASD, specifically, alcohol-related neuropsychological disorder, ARND. And he finds that he has functional cognitive abnormalities and adaptive functioning impairment.

And then Dr. Brown actually wraps up all of the FASD in her report discussing why it was important for jurors to hear. There are guilt phase reasons while it was important, but it was also very important penalty reasons, like, as I said, it explains Mr. Chappell's prior domestic abuse of Ms. Panos, and also his drug addiction. Someone with FAS is much more likely to become drug addicted. So, this wasn't a free choice.

We also had Dr. Jonathan Lipman who is an expert in addiction. And he also tied in Mr. Chappell's FASD with his addiction and talks about why someone with FASD is much more likely prone to be addicted to drugs. Again, dissuading the jury that it wasn't just a matter of free choice.

And then we had Dr. Robert Thatcher who conducted a qEEG of our client. We were not allowed to do a PET scan by the prison. We could not transport Mr. Chappell out. So, we were forced to do a qEEG instead. Otherwise, we would have done the PET scan that Mr. Oram requested. And that qEEG also shows brain

impairment which supports Dr. Connor, Dr. Brown, and Dr. Davies.

So, why is this important? Mr. Oram identified the experts that he wanted to bring in, including addiction and FAS. We identified the same issues as Mr. Oram, maybe a little bit more, but we identified the same issues. We went ahead and hired our own experts and then we presented in this petition our experts on FASD. And so we think that all of this evidence of FASD would have given effect to the mitigating evidence, it would have brought it alive. It would have given the jurors a reason to spare Mr. Chappell's life because of his completely involuntary diagnosis of FASD.

And the Court should -- and I know the Court is aware of this, but I'd like to just raise it again that in *Wiggins versus Smith,* what you have to show is that one juror might have changed their stance on the death penalty. And we think out of the 12, if one juror had heard this evidence, they would have found a sentence other than death. So, we are asking this Court on this particular claim, for an evidentiary hearing or to granting of the writ.

THE COURT: Okay. State.

MR. OWENS: Let me start just by addressing procedurally where we're at. And this is where it gets really really complicated, but you can't talk about the substance of claims until we understand procedurally where we're at. And I noted in the reply brief that they said that we conceded that bars don't apply to certain claims because we address them on the merits. Well, when we say the merits, it has a couple different interpretations and we certainly didn't intend the interpretation that the federal public defender has given us.

And I assume they're talking about section three of our response brief. And section one and two, we split up the claims between those from trial ineffective

assistance of the counsel, David Schieck, at trial, and in the other section it was ineffective assistance of counsel at the second penalty hearing. And then we had these left over claims that didn't clearly fit within either one of those and we kind of grouped those in section three. And I know in that section we repeatedly talked about the merits, but that doesn't mean the procedural bars don't apply. Procedural bars apply to every claim.

We're simply recognizing that when it comes to the second penalty hearing, they had Mr. Oram, who was post-conviction counsel, able to allege David Schieck's ineffectiveness at that second penalty hearing. But because this is a death penalty case, they have the right to come in a second time, and that's what they're doing here today, to allege Mr. Oram's ineffectiveness in raising claims about Schieck's ineffectiveness at that second penalty hearing.

We recognize that Nevada Supreme Court has said that if they get back within one year of the conclusion of the last proceedings -- and they did, they were within one day. I mean, that's the *Ripple* case and that's been remanded from the U.S. Supreme Court and so that ruling may go by the wayside, I don't know, it may change. But historically, that's how we've been interpreting a lot of these, is they need to get back within one year. So, I'm kind of assuming that they have met that, that they have good cause to raise this in a second habeas petition challenging Oram's performance.

So, the question then becomes prejudice. They must show good cause and prejudice. And that's what we're doing in section three of the brief, is really to determine whether there's prejudice, you look at the merits of the claim. So, in that context, and we talk in section three about the merits, we're saying there's no prejudice. You still have to find that there was good cause and then you can review

the claim in that context. Good cause and prejudice, never solely on the merits.

Looking at fetal alcohol syndrome, I think I even said in one of my oppositions that this is Deja vu because I remember standing here with Mr. Oram and he said the very same thing that I'm hearing counsel say today, that he needed this fetal alcohol syndrome expert in order to explain to the jury what it meant to be born to an alcohol-addicted mother, how that affected him and all of his decisions in his whole life. Mr. --

THE COURT: I guess the difference -- excuse me for interrupting -- was that the reason the Court denied the funding was because there was no -- there was nothing to show that any of these experts -- that he'd talked to anybody, you know, he -- it was more, just, I need a PET scan, I need -- that's my recollection of it.

And so, to me the question is was he ineffective for not making sufficient showing for the Court to grant the funding? And then assuming that's the case, now that there's been, you know, affidavits by these experts is there reason then perhaps to have an evidentiary hearing, so obviously the State can cross-examine these witnesses because their argument is that this would have made a difference; i.e. the prejudice prong of *Strickland*.

And so that's kind of the difference because you're right, I mean, Mr. Oram asked -- was making these same type of arguments, I mean, most of the claims that the federal public defender has raised were raised by Mr. Oram, you know, and if -- I think the State did a good job of showing that in their response.

I'm sorry to have interrupted you. Go ahead.

MR. OWENS: Well, and I agree. I think they're saying that Mr. Oram didn't argue it the right way, didn't argue it passionately enough. I'm not understanding the distinction of what he's saying here today from what I heard Mr. Oram say. So,

how would -- what was -- what more was Mr. Oram supposed to do, I guess, is the point that I'm making. He argued it as best he could.

The other part is, they're saying that we've now went to federal court and we convinced some federal judges to give us this funding and we've gone out and gotten these experts, but they didn't get the PET scan done. Even the federal courts wouldn't foot the bill for that one. And to that argument I would say that doesn't matter because this Court's findings back with Mr. Oram said even if he had a diagnosis as meeting the criteria for fetal alcohol syndrome, it wouldn't have made a difference. This Court assumed that there were experts out there that Mr. Oram could have hired just like the federal PD has done, that they could have brought in those experts and they would have said XY and Z, the same thing the federal PD is saying here today, and still the Court said would not have made a difference. And that was affirmed on appeal.

So, I don't see that we're here any different from this Court's ruling. I don't see that what they brought to the table changes anything. And I think it's really controlled by law of the case and I don't see how they have shown anything different that wasn't already known and accounted for at the time, other than just bringing in experts now. But yeah, so what, we knew there -- that they could do that, we knew that -- we assumed that those experts would say what they have said. So, how does that alter the ruling before? I don't see a need for an evidentiary hearing on this.

They had experts. They had Dr. Danton and Dr. Etcoff, a couple of psychologists. It's not like they didn't have expert testimony. They had more than that. There was three or four experts that testified for the defense on various points at the -- both at the trial and at the redo of the second penalty hearing. It's not like

this was a case where trial counsel just said well, we're not aware of any experts out there, we can't get any funding for any experts. They got funding for experts, but can they go do forum shopping? Is the State's required to keep hiring doctors? The federal PD can go to federal court and get some more doctors, but was that really within the realm of possibility for trial counsel here? And that's why Mr. Oram -- that's another reason Mr. Oram wasn't allowed another doctor is -- hey, the trial counsel you're alleging was ineffective. They had two psychologists and now you're saying they should have had one that specialized in fetal alcohol syndrome when the jury had already heard about a lot of this information about the mother was -- had alcohol and that he had a low IQ. They had experts that talked about that, they just didn't give it the label of fetal alcohol syndrome. Why should you get yet another expert? And so that is another thing that factors in here today. Why should they get to come in and just keep forum shopping with more experts, coming up with new things that trial counsel should have done.

You're not entitled to a perfect trial; you're entitled to a adequate representation under the constitution. And with all the experts they had, and the issues that they pursued, and the testimony that they produced for this jury to consider, they found seven mitigating circumstances in that -- the redo of the penalty hearing. And we've had four aggravators initially and that's been whittled down to one which reaffirms what I've always said that it's -- it doesn't come down to a numbers game, it comes down to the facts. They're stubborn things; they're not going to change. It's going to still be the case no matter how many experts they come in with, how many issues they come in with, that Donte Johnson executed four men in the back of the head, the amount of mitigating evidence that you have to overcome that. And that's what it comes down to, is this weighing equation with the

jury back in that jury room. How much mitigation do we need to let him off the hook for four execution murders? Fetal alcohol syndrome is not enough; it's not going to do it. And -- yeah, I don't know what more to say on the issue. It's all procedurally barred. It all seems very repetitive of what we did before.

MR. LEVENSON: Your Honor, if I may.

THE COURT: Yes.

MR. LEVENSON: This is not the Donte Johnson case. This is the James Chappell case, and Mr. Chappell was convicted of killing his girlfriend. So, I just don't want anyone to be confused that this was execution of four people --

MR. OWENS: You know, we were talking about Donte Johnson with another attorney. I apologize. I have Donte -- you're right, this is James Chappell. I am so sorry.

THE COURT: Oh, I thought you were trying to draw some kind of analogy that really wasn't probably the same at all, but -- so, I --

MR. OWENS: I --

THE COURT: -- wasn't focusing on that. I know this is Mr. Chappell.

MR. LEVENSON: Yes.

MR. OWENS: They just published the decision on Donte Johnson and I -- so, yeah, they -- four execution murders, that was Donte Johnson. This was James Chappell. I'm sorry. He broke into the trailer, got out of jail a little bit early, broke into the -- through the window into the trailer where his girlfriend was. She knew he was coming, he was afraid of her. He said I'm going to do an O.J. Simpson on your ass and that's exactly what he did. He raped her and then he brutally murdered her. You still got to have all kinds of mitigation evidence to overcome the horrendous facts that the jury heard and the defense attorneys did their best job.

And I'm sorry. Thanks for pointing that out counsel.

MR. LEVENSON: Your Honor, I don't think we are in the same position we were back in 2012. Mr. Oram raised the issue, but he had no experts so he didn't have anyone to explain why this was important. And that's what we tried to --

THE COURT: Well, how is the testimony that you're looking to get in going to be different than what the testimony was that the jury heard? Because the jury did hear a lot about his learning disabilities, his, you know, horrible upbringing which I think no one would state that he didn't have, you know. I mean, that's clear that he drank, that he was a crack addict, you know, all these things, that his mother drank, that his -- it's unclear who the father was so I don't know if that plays any part. But there was testimony at the second penalty hearing from his expert witnesses. So, aren't you basically asking the Court to speculate now that if there had been these other experts, that that would have been a game changer? I don't -- how is that we --

MR. LEVENSON: I think it would be a game changer. You had Dr. Etcoff who was an expert on this case, who in his declaration says I didn't do what I should have done. I've looked at the FAS that has been presented by us and I didn't do a full neurological evaluation.

So, the jurors, one, did not know that Mr. Chappell suffered from severe brain damage which is an important fact. The jury had a bunch of widgets; they had a bunch of facts that were floating around. His mother drank. Okay. Well, a lot of mothers probably drank or did drink in the 50's, 60's, 70's, 80's, probably even today. What does that matter? And our experts would say well, it matters a lot. If your mother, in utero, is smoking heroin and drinking, you're going to come out with insults to your brain that are going to carry through for your entire life. So, it's going

to explain why you're a drug addict. It's not free choice as the State argued. Even Dr. Etcoff, the defense expert, got into this trap during cross-examination where he said well, it is a matter of free choice and I guess he had less free choice. But he didn't have any choice to be born with a mother with these complications because he came out very insulted, he came out compromised. So, he became a drug addict, he didn't know how to react in social situations, he probably beat Deborah Panos because of this. All of these things were the trigger which affected his life.

And what a good trial counsel wants to do in a punishment phase is give effect to the mitigating evidence and give the jurors a reason why they shouldn't put him -- or sentence him to death. And these are very valid reasons why FAS is important. If you have no say in how you were born, then jurors should understand why your actions, all of the actions that the State said were evil are based upon a series of complications that happened while you were in utero. And that's why we think it's important. Every single one of his actions are addressed by our experts.

And Mr. Owens' arguments I think are valid arguments, but for cross-examination at an evidentiary hearing, not to make before this Court. I think it's important that the State has never said he doesn't -- Mr. Chappell doesn't suffer from FAS. So, if we want to assume he suffers from FAS, then I think these experts give great reasons why at least one juror would have voted for something other than death. And at a minimum we should be able to present our experts, and Mr. Oram, and let this Court make a credibility finding whether you think it would have made a difference to one juror. At the very least I think we deserve that.

I -- the last thing I wanted to say is that we didn't order a PET scan and the federal government shut us down. The FPD has their own budget. We decide what we want to do. We couldn't get our client out for a PET scan because

he would have to leave the prison and without an order from the Court which we didn't ask for, we didn't do it. That's why we did a qEEG. It wasn't like the government looked at the bill and said we're not going to foot it. We just decided what we could do in the one year that we had that would give this Court as much information as possible.

THE COURT: All right. So, in your request for evidentiary hearing, you listed 48 witnesses.

MR. LEVENSON: Now, I --

THE COURT: I'm not hearing from those 48 witnesses because --

MR. LEVENSON: -- would love to have the FAS before this jury. I'm sorry. Before this Court.

THE COURT: Okay.

MR. LEVENSON: Which would be our experts and a couple of witnesses to discuss what counsel knew at the time, and probably counsel coming in and explaining why they didn't do what they did.

THE COURT: All right. So, I'm going to allow an evidentiary hearing, but it's going to be limited. So, Mr. Oram can testify and the experts on the fetal alcohol --

MR. LEVENSON: Brown, Davies, and Connor.

THE COURT: Correct. So that obviously, there can be cross-examination of Court. Then we have a better understanding about this whole idea of -- you know, are these experts really going to say that this person had no choice? I don't know, but I guess that remains to be seen as to whether they're going to say that.

I -- in just reading some of the information from the other affidavits, from his sister who -- you know, his older sister, I guess. I can't think of her name now, there's too many people and too many relationships. But, you know, she also --

born to the same mother who she doesn't remember because she was -- died, you know, hit by a car in the middle of the highway, drunk. So, you know, she hasn't murdered anybody. She was a crack addict, she was a prostitute at a early age and whatnot, but it appears that she managed to get her life together. So, it will be interesting to hear the actual testimony.

But I'm going to go ahead and allow the limited evidentiary hearing; when?

MR. LEVENSON: I'll need to speak to the three experts. I have a evidentiary hearing the first week in November in Reno, and then I have a petition due in a Texas federal case January 10th. So, between November and January I'm mostly out traveling into Texas. I would prefer to do it in February if possible. If -- again, I need to speak to the experts and make sure that they --

THE COURT: We'll put it on for a status check as to when -- after you've spoken with the experts. And are there any scheduling matters we need to keep in -- as far as the State -- dates --

MR. OWENS: No.

THE COURT: -- that we need to avoid?

MR. OWENS: No.

THE COURT CLERK: Your Honor, March would probably be better because February's our stack, if that's okay with you.

THE COURT: Because even limiting this I expect that it's probably going to take all day.

THE COURT CLERK: So, you want to do the status check in February and then we'll set the evidentiary in March sometime or do you want to go ahead and set the evidentiary hearing --

MR. LEVENSON: Can we do a status check in January? That way we'll have a good idea in January what's going on.

THE COURT: Sure.

THE COURT CLERK: Okay.

MR. LEVENSON: After January 10th if possible.

THE COURT CLERK: How about January 17th, 9:00 a.m.?

MR. LEVENSON: Thank you, Your Honor.

THE COURT: Thank you.

MR. LEVENSON: Thank you for reading the material.

MR. OWENS: Thanks, Judge.

[Proceedings concluded at 9:39 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Trisha Garcia
Court Transcriber

Electronically Filed
1/23/2018 9:00 AM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. JAMES MONTELL CHAPPELL, Defendant.	CASE NO. 95C131341 DEPT. NO. V

BEFORE THE HONORABLE CAROLYN ELLSWORTH, DISTRICT COURT JUDGE

WEDNESDAY, JANUARY 18, 2018

RECORDER'S TRANSCRIPT RE:
STATUS CHECK: SET EVIDENTIARY HEARING RE: PETITION FOR WRIT OF HABEAS CORPUS AND MOTION FOR LEAVE TO CONDUCT DISCOVERY: EXHIBITS

APPEARANCES:

For the Plaintiff: JONATHAN E. VAN BOSKERCK
Chief Deputy District Attorney

For the Defendant: BRAD LEVENSON
Assistant Federal Public Defender

RECORDED BY: LARA CORCORAN, COURT RECORDER

Case Number: 95C131341

LAS VEGAS, NEVADA, WEDNESDAY, JANUARY 17, 2018, 9:28 A.M.

* * * * *

THE COURT: C131341, State of Nevada versus James Chappell. Good morning.

MR. LEVENSON: Good morning.

THE COURT: And this is the status check for setting the evidentiary hearing. I wanted to ask you, I signed those orders regarding the out-of-state experts; can those experts appear via video?

MR. LEVENSON: We're going to fly them out here.

THE COURT: Is there some reason that you need to do that?

MR. LEVENSON: We would prefer to have them here, so we will – we're going to – it's at our cost, Your Honor.

THE COURT: I know, but I'm just – I guess I've never actually successfully made our video conferencing work, so maybe it's better to have them here, but –

MR. LEVENSON: We've also –

THE COURT: So we need to know, if we're going to set this hearing, about how long a time do we need. We've got –

MR. LEVENSON: So I believe –

THE COURT: Are they all three are coming?

MR. LEVENSON: All three are coming, and Mr. Oram has been subpoenaed as well for April 6th.

THE COURT: Okay.

THE CLERK: It is set April 6, Your Honor.

THE COURT: April 6?

THE CLERK: It is.

THE COURT: And do we have like the whole day set for this?

MR. VAN BOSKERCK: Judge, I think it was left on related to their discovery motion. I think that's why the status check stood.

THE CLERK: No, it was actually set from an e-mail, I think, correspondence between counsel. I was – I had to figure out how it was set, because it was not set from the last hearing. It is April –

MR. VAN BOSKERCK: I believe the e-mail said that the – whoever sent the e-mail from the Court said they were leaving it on because the defense discovery motion was still outstanding. And if you look at the minutes from the last hearing, there was some talk about the defense discovery –

THE CLERK: The status check –

MR. VAN BOSKERCK: – motion as well.

THE CLERK: – was left on, because initially the evidentiary hearing was set for today, I think in error, and so we left the status check on because the discovery motion was still outstanding.

MR. LEVENSON: And I believe the discovery motion –

THE CLERK: Does that make sense?

MR. VAN BOSKERCK: Yes.

MR. LEVENSON: The discovery motion did not go to the claim, actually, that the Court has granted an evidentiary hearing on, so –

MR. VAN BOSKERCK: Correct.

MR. LEVENSON: – what I understood is we had talked about a March date. I returned, talked to my experts, talked to Mr. Oram –

THE COURT: Right.

MR. LEVENSON: – came up with the April 6th date, dealt with Mr. Owens, and then the status conference was just left on calendar.

THE COURT: Okay. So I didn't think that the motion for leave to conduct discovery was set for now.

MR. VAN BOSKERCK: The claims raised in that, related to the Brady and the DNA, at this point the State would request the Court deny it since the evidentiary hearing doesn't relate to those claims.

MR. LEVENSON: And, Your Honor, I wasn't – I didn't think the conference today was about the discovery order. We can argue that later. I'm not prepared to argue it.

THE CLERK: It's just a status check –

THE COURT: Okay.

THE CLERK: – today.

THE COURT: Yeah, I'm not prepared either, because I didn't – I didn't read that.

(Colloquy between the Court and Law Clerk)

THE COURT: Yeah. All right. So we need to reset that motion for hearing.

THE CLERK: Yes.

THE COURT: And so we've got the – we've got the evidentiary hearing scheduled and that's fine. That's what the –

THE CLERK: It's all –

THE COURT: Okay.

THE CLERK: We do have 9 a.m. on a Friday, Your Honor.

THE COURT: Okay, so we can go all day if necessary, and we don't

have any time constraints. And are we – is that during our criminal stack though?

THE CLERK: No, it is not.

THE COURT: Oh, good. All right.

So when do you want to have the other motion heard? Do you care?

MR. VAN BOSKERCK: Court's pleasure.

THE COURT: Okay. What do we have?

THE CLERK: Would you like to do a couple weeks before that –

THE COURT: Well –

MR. LEVENSON: The –

THE CLERK: – or sooner?

THE COURT: I guess it's been twenty years, so – many years. It's not like we have to rush it. A couple weeks on a Monday so I can review it over the weekend.

THE CLERK: Okay, March 19th, 9 a.m. That's a Monday, for the discovery motion, and April 6th, 9 a.m., is the evidentiary hearing.

THE COURT: All right.

MR. VAN BOSKERCK: Thank you, Your Honor.

MR. LEVENSON: Thank you, Your Honor.

THE COURT: Thank you.

PROCEEDING CONCLUDED AT 9:32 A.M.

* * * * * * * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-video recording of this proceeding in the above-entitled case to the best of my ability.

Lara Corcoran

_____

LARA CORCORAN
Court Recorder/Transcriber

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Steven D. Grierson
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. JAMES MONTELL CHAPPELL, Defendant.	CASE NO. 95C131341 DEPT. NO. V

BEFORE THE HONORABLE CAROLYN ELLSWORTH, DISTRICT COURT JUDGE

MONDAY, MARCH 19, 2018

RECORDER'S TRANSCRIPT RE:
DEFENDANT'S MOTION FOR LEAVE TO CONDUCT DISCOVERY: EXHIBITS

APPEARANCES:

For the Plaintiff: STEVEN S. OWENS
Chief Deputy District Attorney

For the Defendant: BRAD LEVENSON
ELLESSE HENDERSON
Assistant Federal Public Defenders

RECORDED BY: LARA CORCORAN, COURT RECORDER

LAS VEGAS, NEVADA, MONDAY, MARCH 19, 2018, 9:16 A.M.

* * * * *

THE COURT: Case Number C131341, State of Nevada versus James Chappell.

MR. LEVENSON: Good morning, Your Honor.

THE COURT: Good morning.

MR. LEVENSON: Brad Levenson and Ellesse Henderson from the office of the Federal Public Defender on behalf of Mr. Chappell, who is in Ely State Prison today and waiving his appearance.

MR. OWENS: And Steve Owens for the State.

THE COURT: All right. Good morning. So we will waive his appearance today, Mr. Chappell's appearance. And this is defendant's motion for leave to conduct discovery.

MR. LEVENSON: Your Honor, before we begin that, we just had one quick housekeeping chore in anticipation of our April 6th hearing. We have four witnesses to be called at that hearing. When the Court ordered it back in October, you had directed limited hearing, which we understand. So we will be calling Chris Oram, post-conviction counsel, and our three experts from Washington.

Just out of an abundance of caution, we wanted to mention that in order for us to prove our ineffective assistance of counsel claim, there are two other parties, that would be David Schieck and Clark Patrick, who were counsel in 2007. We did submit declarations to this Court where both counsel stated they had no strategic reason for not presenting evidence of FASD, but we wanted to clarify from the Court whether you wanted to hear from them.

If the Court did want to hear from them, we would not be able to do it on

April 6th, because of the amount of evidence we're already presenting that day. We can revisit this at the end of the hearing on April 6th and you can tell us if you want to hear from them or we can certainly choose just a couple of hours on another date to have them come in, but I wanted just to clarify from the Court before we started our hearing.

THE COURT: Did you want to be heard on that part?

MR. OWENS: Well, yeah, our position all along was that no evidentiary hearing was needed. They originally said they wanted to call upwards of like 84 witnesses or something, and so now it's expanding beyond what we had – what the – Your Honor had originally ordered and I'm concerned about the slippery slope and where it stops and how many witnesses we call. And so – and they can't even appear on the 6th. So, yeah, I guess I'm opposed to it.

THE COURT: Well, basically, the only reason I wanted an evidentiary hearing at all in this case, and the only reason I felt there was any need to expand the record, was as to the allegation that Mr. Oram, as court-appointed, post-conviction counsel, regarding the second penalty phase, was ineffective himself. Now we're reaching back to why – you know, to Mr. Schieck's – Mr. Schieck, and who was the other?

MR. LEVENSON: Clark Patrick, Your Honor.

THE COURT: All right. So at this point I'm not inclined to allow that, but I might change my mind based upon what Chris Oram's testimony is and the testimony of the experts, but I – at the present time I don't want to say yes to that.

MR. LEVENSON: That's fine. We just again wanted to flag it for this Court.

THE COURT: Because really what I'm focusing on is did Mr. Oram,

when he did his petition, fail to address kind of the prejudice prong of Strickland, you know, by bringing forward evidence that would show that there was failure by prior counsel. So that's kind of my focus.

So let's – are you prepared now on the motion for discovery?

MR. LEVENSON: Yes, Your Honor.

THE COURT: Okay.

MR. LEVENSON: Ellesse Henderson will be arguing that today.

THE COURT: All right. Go ahead.

MS. HENDERSON: Good morning, Your Honor.

THE COURT: Good morning.

MS. HENDERSON: Thank you for setting this for a hearing. Because you already have our pleading and now our arguments, is there anything in particular you wanted me to address before getting started?

THE COURT: Well, it seems to me that as I go through your request for discovery that what you're focusing on, again, are not the things that I want to focus on for the hearing. And so any discovery, to me, has to be connected to the area of focus, otherwise you're just asking for discovery, to me, that seeks to go to the guilt phase and that's already been litigated.

MS. HENDERSON: This is separate from –

THE COURT: So tell me –

MS. HENDERSON: – the issue at the hearing, but it does relate to claims that are still pending. All the other claims in the petition are still pending at this time, and the discovery relates to some of those other claims.

THE COURT: Well, I understand that, but I'm not moved by those claims, as I think I've made fairly clear. That's why I'm limiting your – any

evidentiary hearing to this narrower scope. And it seems to me that what you're asking for in discovery are – goes back again to the guilt phase and those arguments, so relitigating things that have already been decided. So that's what I need you to address, as to why I would be wrong in that assumption.

MS. HENDERSON: Okay. They do go towards the guilt phase. You're correct, Your Honor. I can just briefly go over one of the discovery requests if you would like?

THE COURT: Well, if you're conceding that it all goes back to the guilt phase then I'm –

MS. HENDERSON: It is not solely related to guilt phase. These issues relate to guilt phase and penalty phase and post-conviction ineffectiveness. They're just not related to what is going to be discussed at the hearing on April 6.

THE COURT: All right. Well, if they're not related to the hearing then you don't need to do discovery, because the only point of discovery, right – so once I say I'm going to have a evidentiary hearing, you can apply to the Court for discovery, but I don't have to grant discovery except in the areas where I think it would be relevant, and I don't think it's – any discovery as to – so going to the vault, for example, and – no, I don't see that is relevant to our hearing that we're going forward on.

MR. LEVENSON: If I can interject, I think we're in this strange procedural posture, because in the last hearing we had, the State suggested we – that this was still pending and they asked to put it on calendar for argument. I think that's why we're here. The arguments we've made are the arguments we've made. If the Court wishes to move on, that's fine. We're not conceding anything, but I think we're here only because the State asked to put it on calendar and we had a

substitute DA in the Court last time.

THE COURT: Okay. Well, the minutes reflect, and that's my recollection as well, that you weren't prepared to argue them that – this motion and so that's why it got continued.

Mr. Owens.

MR. OWENS: I agree with everything the Court has already said on the matter, so I'll submit it.

THE COURT: All right. Well, so the motion is – for discovery is denied. And we were going to set the hearing, right?

MR. LEVENSON: I'm sorry?

THE COURT: Do we – have we set the hearing date?

MR. LEVENSON: Yes.

THE COURT: We have a firm date?

MR. LEVENSON: April 6th.

THE COURT: And it's April –

MR. LEVENSON: 6th, Your Honor –

THE COURT: – 6th.

MR. LEVENSON: – at 9 o'clock.

THE COURT: All right.

THE CLERK: And, yes, that's what we have, Your Honor.

And, counsel, could I just get your bar? Is it –

MS. HENDERSON: Ellesse, E-L-L-E –

THE CLERK: And it's – your bar is 14674C? Is that you?

MS. HENDERSON: Yes, yes it is.

THE CLERK: Okay. Thank you.

THE COURT: It's easier to remember when your bar number is 45, like mine. Yeah, and I'm not 85, no. All right. Thank you.

MR. LEVENSON: Thank you, Your Honor.

MS. HENDERSON: Thank you.

MR. OWENS: Thanks.

PROCEEDING CONCLUDED AT 9:24 A.M.

* * * * * * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-video recording of this proceeding in the above-entitled case to the best of my ability.

_____

LARA CORCORAN
Court Recorder/Transcriber

EXHIBIT(S) LIST

Case No.: C131341 Hearing Date: 4-6-18

Dept. No.: 5 Judge: CAROLYN ELLSWORTH

Court Clerk: Phyllis Irby ANDREA NATALI

Plaintiff: The State of Nevada Recorder: LARA CORCORAN

Counsel for Plaintiff: Steven Owens, Dep DA.

vs.

Defendant: James Chappell Counsel for Defendant: Bradley Levenson, Esq., Scott Wisniewski, Esq., Ellesse Henderson, Esq.

BEFORE THE COURT

Defendant's EXHIBITS

Exhibit Number	Exhibit Description	Date Offered	Objection	Date Admitted
1	95 C131341 Register of Actions	MAY 2 1 2018	NONE	MAY 2 1 2018
2	C131341 Receipt of file 1/14/10			
3	C131341 Motion for Autn 2/15/12			
4	C131341 State's Motion 5/16/12			
5	C131341 Transcript from 10/19/12			
6	" Findings of fact 11/16/12			
7	" Supplemental Brief 10/12/09			
8	Life History Questionnaire from Lewis Etcoff			
9	C131341 Special verdict 3/21/07			
10	Functional & Behavioral Assessment 3/3/16			
11	Materials Relied Upon (Amended)			
12	Curriculum Vitae Natalie Novic Brown			
13	Lewis Etcoff Evaluation			
14	State of MI Juvenile Division 0-10273A			
15	Cumulative Record Folder Lansing School Dist.			
16	News Paper/Lansing Police/Car Auto			
17	Neuropsychological Report Paul Connor			

Printed January 17, 2018

EXHIBIT(S) LIST

Case No.: C131341

The State of Nevada Plaintiff VS. James Chappell Defendant

Defendant's EXHIBITS

Exhibit Number	Exhibit Description	Date Offered	Objection	Date Admitted
18	Materials Relied Upon (Amended)	MAY 2 1 2018	NONE	MAY 2 1 2018
19	Medical Expert Report Julian Dares	↓	↓	↓
20	Materials Relied Upon (Amended)			
21	Neuropsychological Functioning P. Connor			
22	Psychological Expert Testimony N. Novick			
23	FASD - Demonstrative			
24	Sources Demonstrative (2 Boards)			
~~25~~				

Printed February 1, 2017

JCI pe11 CORA005380

REGISTER OF ACTIONS
CASE NO. 95C131341

The State of Nevada vs James M Chappell

Case Type:	Felony/Gross Misdemeanor
Date Filed:	10/10/1995
Location:	Department 5
Conversion Case Number:	C131341
Defendant's Scope ID #:	1212860
Lower Court Case Number:	95F08114
Supreme Court No.:	61967

RELATED CASE INFORMATION

Related Cases
95F08114X (Bind Over Related Case)

PARTY INFORMATION

Defendant	**Chappell, James M**	**Lead Attorneys** **Christopher R. Oram** *Retained* 7023845563(W)
Plaintiff	**State of Nevada**	**Steven B Wolfson** 702-671-2700(W)

CHARGE INFORMATION

Charges: Chappell, James M	Statute	Level	Date
1. BURGLARY.	205.060	Felony	01/01/1900
2. ROBBERY WITH A DEADLY WEAPON	200.380*165	Felony	01/01/1900
3. MURDER WITH A DEADLY WEAPON	200.010*165	Felony	01/01/1900
3. DEGREES OF MURDER	200.030	Felony	01/01/1900

EVENTS & ORDERS OF THE COURT

10/05/2010 **All Pending Motions** (8:30 AM) (Judicial Officer Glass, Jackie)

Minutes
10/05/2010 8:30 AM

- APPEARANCES CONTINUED: David Schieck, Special Public Defender, present. Defendant CHAPPELL not present and in the custody of the Nevada Department of Corrections. CONFIRMATION OF COUNSEL ... DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS This is a post-conviction matter on a Rule 250 case. COURT ORDERED, CHRIS ORAM APPOINTED AS COUNSEL. Colloquy. COURT FURTHER ORDERED, matter CONTINUED 30 DAYS for Mr. Oram to obtain the file from Mr. Schieck and familiarize himself with the case and, thereafter, a briefing schedule will be set. NDC 11/9/10 8:30 AM STATUS CHECK: SET BRIEFING SCHEDULE ... DEFENDANT'S POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS

Parties Present
Return to Register of Actions

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:XH

DEFENDANT'S EXHIBIT
C131341
5.21.18

JC1 pe11 CORA005275

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dschieck@clarkcountynv.gov
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

JAMES CHAPPELL,

Defendant.

CASE NO. C131341
DEPT. NO. 3

RECEIPT OF FILE

RECEIPT of the file in the above referenced matter and related cases is hereby acknowledged as follows:

2 boxes of the Cross Appeal in SC Case 43493 (volumes 1-11 and duplicate)

2 boxes of the Appeal in SC Case 49478 (18 volumes)

1 box of pleadings and trial files for two penalty hearings

1 box containing: crime scene photos; jury questionnaires and instructions; David Schieck trial files including trial notes

2 boxes of Howard Brooks trial files and notes, etc.

1 box of questionnaires, etc. of 2 penalty hearings (with dailies from 1st and 2nd penalty hearing

DATED: 1/14/10

Amanda Bleed
CHRISTOPHER ORAM, ESQ.
520 S. Fourth Street, 2nd Floor
Las Vegas NV 89101

DEFE ED
EXHIB

DEFENDANT'S EXHIBIT 2
C131341 5-21-18

SPECIAL PUBLIC DEFENDER
CLARK COUNTY NEVADA

JC1 pe11 CORA005275

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

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EXHIB

DEFENDANT'S EXHIBIT 2 C131341 5-21-18

SPECIAL PUBLIC DEFENDER
CLARK COUNTY NEVADA

JChappell CORA005439

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Attorney for Defendant
JAMES CHAPPELL

FILED
FEB 15 2 55 PM '12
CLERK OF COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

*****

THE STATE OF NEVADA,

Plaintiff,

vs.

JAMES CHAPPELL,

Defendant.

CASE NO. C131341
DEPT. NO. XXV

MOTION FOR AUTHORIZATION TO OBTAIN EXPERT SERVICES AND FOR PAYMENT OF FEES INCURRED HEREIN.

COMES NOW, Defendant, JAMES CHAPPELL, by and through his attorney, CHRISTOPHER R. ORAM, ESQ., hereby requests this Honorable Court to issue an order appointing an expert for Mr. Chappell. Defendant also requests on Order authorizing payment in excess of the statutory maximum three hundred dollars ($300.00), not to exceed three thousand dollars ($3,000.00) per expert unless prior Court approval is granted.

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DEFENDANT'S EXHIBIT 3 C131341 5-21-18

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

This motion is made and based pleadings and papers on file herein, the affidavit of counsel attached hereto, as well as any oral arguments of counsel adduced at the time of hearing.

DATED this 14th day of February, 2012.

Respectfully submitted

CHRISTOPHER R. ORAM, ESQ.
Nevada Bar #004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada, 89101

Attorney for Defendant
JAMES CHAPPELL

NOTICE OF MOTION

YOU, AND EACH OF YOU, will please take notice that the undersigned will bring the foregoing **MOTION FOR AUTHORIZATION TO OBTAIN EXPERT SERVICES AND FOR PAYMENT OF FEES INCURRED HEREIN** on for hearing on the 28 day of February, 2012, at the Clark County Courthouse, 200 Lewis Avenue in District Court, Department XXV at the hour of 9 .m. or as soon thereafter as counsel may be heard.

Respectfully submitted

CHRISTOPHER R. ORAM, ESQ.
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520 S. Fourth Street, 2nd Floor
Las Vegas, NV 89101

Attorney for Defendant
JAMES CHAPPELL

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POINTS AND AUTHORITIES

Nevada Revised Statute 7.135 states:

> Reimbursement for expenses; employment of investigative, expert or other services:The attorney appointed by a magistrate or district court to represent a defendant is entitled, in addition to the fee provided by N.R.S. 7.125 for his services to be reimbursed for expenses reasonably incurred by him in representing the defendant and may employ, subject to the prior approval of the magistrate or the district court in an ex parte application, such investigative, expert or other services as may be necessary for an adequate defense. Compensation to any person furnishing such investigative, expert or other services must not exceed $300.00, exclusive of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is:
>
> 1. Certified by the trial judge of the court, or by the magistrate if the services were rendered in connection with a case disposed of entirely before him, as necessary to provide fair compensation of services of an unusual character or duration: and
>
> 2. Approved by the presiding judge of the judicial district in which the attorney was appointed . . .

In the instant case, Mr. Chappell is currently in his post-conviction proceedings on charges of murder. In light of the seriousness of the capital conviction of Mr. Chappell, and the tasks that need to be completed in order to properly raise issues on behalf of Mr. Chappell, I believe it is necessary that experts be permitted to act in the capacity for Mr. Chappell through his post-conviction proceedings.

First, an expert is needed is perform a P.E.T. scan. In the instant case, the defense presented evidence in mitigation regarding the defendant's environment. However, the defense never had the defendant's brain properly analyzed. It was incumbent upon the defense to have the defendant properly analyzed.

A Positron Emission Tomography Scan (PET Scan) is a nuclear medicine imaging technique which produces a three dimensional picture of the functional process in the body. PET Neuroimaging is based on an assumption that areas of high radioactivity are associated with brain activity. What is actually measured indirectly is the flow of blood to different parts of the brain, which is generally believed to be correlated, and has been measured using the tracer oxygen. It can also assist in examining links between specific psychological processes or disorders in brain activity ("A Close look into the Brain," Julich Research Center, 29 April 2009.)

In the instant case, the defense should have investigated in an effort to determine whether Mr.

Chappell suffered from internal difficulties within the brain. A review of the file fails to reveal that counsel attempted to obtain an analysis of Mr. Chappell's brain. Mr. Chappell is currently requesting funding to conduct this testing.

A second expert is needed to perform a full neurological exam on Mr. Chappell in order to determine any additional issues that may be raised on his behalf. Over ten years had passed since Mr. Chappell had been tested prior to his third penalty phase.

Additionally, a third expert is needed to determine the possible effects of Fetal Alcohol Spectrum Disorder on Mr. Chappell. Fetal Alcohol Spectrum Disorders are a group of disorders that can occur in a person who's mother drank alcohol during pregnancy. The effects can include physical problems and problems with behavior and learning. . There was evidence that Mr. Chappell's mother may have been addicted to drugs and alcohol. A proper investigation should have been conducted to determine whether James was born to a mother who was ingesting narcotics and/or alcohol during her pregnancy. There is no indication in the voluminous file that counsel investigated the possibility of fetal alcohol syndrome.

WHEREFORE, for the foregoing reasons, Mr. Chappell requests this court to authorize an order granting the services of experts to perform a P.E.T. Scan, a neurological exam, and testing for Fetal Alcohol Syndrome. Additionally, for this Court to allow payment for his/her fees in excess of the statutory maximum three hundred dollars ($300.00), not to exceed three thousand dollars ($3,000.00) per expert unless prior Court approval is granted.

DATED this 14th day of February, 2012.

Respectfully submitted:

CHRISTOPHER R. ORAM, ESQ.
Nevada State Bar #004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101

Attorney for Defendant
JAMES CHAPPELL

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TEL. 702.384-5563 | FAX. 702.974-0623

JChappell CORA005443

AFFIDAVIT OF CHRISTOPHER R. ORAM, ESQ.
IN SUPPORT OF MOTION FOR AUTHORIZATION TO OBTAIN EXPERT SERVICES AND FOR PAYMENT OF FEES INCURRED HEREIN

STATE OF NEVADA)
)ss:
COUNTY OF CLARK)

CHRISTOPHER R. ORAM, ESQ., having been duly sworn, deposes and says:

1. Your Affiant is an attorney duly licensed to practice law in the State of Nevada.

2. James Chappell by and through his attorney, CHRISTOPHER R. ORAM, ESQ., hereby requests this Honorable Court to issue an order appointing an expert for Mr. Chappell Defendant also requests on Order authorizing payment in excess of the statutory maximum three hundred dollars ($300.00), not to exceed three thousand dollars ($3,000.00) per expert unless prior Court approval is granted.

3. In the instant case, Mr. Chappell is currently in his post-conviction proceedings on charges of murder. In light of the seriousness of the capital conviction of Mr. Chappell, and the tasks that need to be completed in order to properly raise issues on behalf of Mr. Chappell, I believe it is necessary that experts be permitted to act in the capacity for Mr. Chappell through his post-conviction proceedings.

4. Mr. Chappell requests this court to authorize an order granting the services of an expert to perform a P.E.T. Scan, a neurological exam, and testing for Fetal Alcohol Syndrome. Additionally, for this Court to allow payment for his/her fees in excess of the statutory maximum three hundred dollars ($300.00), not to exceed three thousand dollars ($3,000.00) per expert unless prior Court approval is granted.

5. That this motion is being made in good faith and not for purposes of delay.

6. Further your affiant sayeth naught.

DATED this 14th day of February, 2012.

CHRISTOPHER R. ORAM, ESQ.

SUBSCRIBED AND SWORN to before me this 14th day of February, 2012.

NOTARY PUBLIC in and for said County and State

JESSIE LEE VARGAS
Notary Public-State of Nevada
APPT. NO. 09-9721-1
My Appt. Expires February 18, 2013

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Attorney for Defendant
JAMES CHAPPELL

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA, Plaintiff, vs. JAMES CHAPPELL, Defendant.	CASE NO. C131341 DEPT. NO. XXV

RECEIPT OF COPY

The above **MOTION FOR AUTHORIZATION TO OBTAIN EXPERT SERVICES AND FOR PAYMENT OF FEES INCURRED HEREIN** is hereby acknowledged this 15 day of February, 2012.

Clark County District Attorney

By _____
200 Lewis Avenue
Las Vegas, Nevada 89155

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LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

ORIGINAL

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OPPS
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
STEVEN S. OWENS
Chief Deputy District Attorney
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200 Lewis Avenue
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Attorney for Plaintiff

FILED
MAY 16 2 35 PM '12
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

96C131341
OPPM
Opposition to Motion
1856331

THE STATE OF NEVADA,

Plaintiff,

-vs-

JAMES MONTELL CHAPPELL,
#1212860

Defendant.

CASE NO: 95-C131341

DEPT NO: XXV

STATE'S OPPOSITION TO MOTION FOR AUTHORIZATION TO OBTAIN EXPERT SERVICES AND PAYMENT OF FEES

DATE OF HEARING: 5/24/12
TIME OF HEARING: 9:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through STEVEN S. OWENS, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion for Authorization to Obtain Expert Service and for Payment of Fees.

This opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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RECEIVED
MAY 16 2012
CLERK OF THE COURT

DEFENDANT'S EXHIBIT 4 C131341 5-21-12

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DATED this 16th day of May, 2012.

Respectfully submitted,

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

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

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On December 31, 1996, James Montell Chappell ("Defendant") was convicted, pursuant to a jury verdict, of Burglary, Robbery With Use of a Deadly Weapon and First-Degree Murder With the Use of a Deadly Weapon. Defendant was sentenced to serve a term of four (4) to ten (10) years in prison for Burglary and two consecutive terms of six (6) to fifteen (15) years for Robbery With the Use of a Deadly Weapon. A jury sentenced Defendant to death for First-Degree Murder With the Use of a Deadly Weapon. On appeal, the Nevada Supreme Court affirmed Defendant's convictions and sentence of death. Chappell v. State, 114 Nev. 1403, 972 P.2d 838 (1998).

On October 19, 1999, Defendant filed his first pro per post-conviction petition for writ of habeas corpus. David Schieck, Esq. was appointed as post-conviction counsel and Defendant filed a supplement to his petition on April 30, 2002. The District Court partially granted and partially denied the petition, vacated Defendant's sentence of death, and ordered a new penalty hearing. The District Court found merit in Defendant's claim that trial counsel was ineffective for failing to investigate and call mitigation witnesses to testify during Defendant's penalty hearing, and that the omitted testimony had a reasonable likelihood of impacting the jury's decision. The District Court otherwise upheld Defendant's conviction and denied his claims relating to the guilt phase of his trial. The

Nevada Supreme Court affirmed the District Court's decision. Chappell v. State, Docket No. 43493 (Order of Affirmance, April 7, 2006).

On May 10, 2007, following Defendant's second penalty hearing, a jury again sentenced Defendant to death. On appeal, the Nevada Supreme Court affirmed Defendant's sentence of death. Chappell v. State, Docket No. 49478 (Order of Affirmance, October 20, 2009).

On June 22, 2012, Defendant filed his second pro per post-conviction petition for writ of habeas corpus. Christopher R. Oram, Esq. was appointed as post-conviction counsel and Defendant filed a supplemental brief in support of his petition on February 15, 2012. On the same date he filed a Motion for Authorization to Obtain Expert Service and for Payment of Fees. The State's Opposition is as follows:

ARGUMENT

Defendant's motion requests this Court authorize funds so that he may procure the services of three kinds of experts. Under Nevada post-conviction law there is no right to discovery until after the writ has been granted and a date set for an evidentiary hearing. NRS 34.780. Likewise, only if an evidentiary hearing is required may the parties seek to expand the record. NRS 34.790. Defendant's motion for expert services payment is therefore premature. Additionally, for the reasons discussed below, the grounds Defendant asserts in support of his motion are unsupported by "any specific factual allegations that would, if true, have entitled him" to relief, Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984), and therefore any evidentiary hearing on these claims is unwarranted. If an evidentiary hearing is unwarranted, Defendant cannot pursue discovery. NRS 34.780.

First, Defendant requests this Court to grant him extra funds to obtain a P.E.T. scan and explains that a P.E.T. scan will yield a 3-dimensional image of his brain. What Defendant fails to explain is what that will accomplish. Defendant does not claim that he suffers from brain damage or that a P.E.T. scan would possibly result in any findings that Defendant's brain activity is deficient. Thus, Defendant has not met his initial burden because he has not even attempted to allege how obtaining a P.E.T. scan would have

rendered a more favorable outcome. Molina, 120 Nev. at 192, 87 P.3d at 538. In order for Defendant to demonstrate a reasonable probability that, but for counsel's failure to obtain a P.E.T. scan, the result would have been different, it must be clear from the "record what it was about the defense case that a more adequate investigation would have uncovered." Id. It is Defendant's burden to make specific allegations in this regard. Defendant utterly fails to meet this burden, and his request for funds to undergo this procedure should be denied.

Second, Defendant states that excess funds should be available to him so that he may obtain another "full neurological exam." Defendant fails to explain what a neurological exam is: it could imply that he is requesting some physiological testing of his brain anatomy apart from the P.E.T. imaging test or it could refer to psychological testing.[1] Defendant states that "[o]ver ten years have passed since Mr. Chappell had been tested prior to his third penalty phase." There has been no third penalty phase. To the extent that this ground for granting his motion requests funds for more psychological testing, Defendant has been thoroughly examined by Drs. William Danton and Lewis Etcoff. 14 ROA 3317-3504. Defendant seems to imply that this Court must authorize funds for a new exam because the prior exams occurred over ten years ago. However, Defendant's theory of the defense was that he lacked free will at the time he stabbed Deborah Panos to death. Defendant does not explain how yet another examination more than 17 years later would reveal anything that would undermine faith in the outcome of the second penalty hearing. Accordingly, this ground for payment should be dismissed.

Third, Defendant claims that this Court should authorize payment of an expert "to determine the possible effects of Fetal Alcohol Spectrum Disorder" on Defendant. Defendant claims that a "proper investigation" would have revealed that Defendant was born

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[1]This helpfully illustrates why this court should deny all of Defendant's vague motions for discovery and for expert funds. Defendant generally wants this Court to award him funds "in order to determine any additional issues that may be raised on his behalf." Defendant's Motion for Authorization to Obtain Expert Services and for Payment of Fees Incurred Herein at 4. The State submits that this is a clear invitation to join Defendant on a "fishing expedition." This Court should decline that invitation. See Ward v. Whitley, 21 F.3d 1355, 1367 (5th Cir. 1994).