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

Volume 30 of 31

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

RENE L. VALLADARES
Federal Public Defender
BRAD D. LEVENSON
Assistant Federal Public Defender
Nevada Bar No. 13804
Brad_Levenson@fd.org
SCOTT WISNIEWSKI
Assistant Federal Public Defender
Nevada Bar No. 144415
Scott_Wisniewski@fd.org
ELLESSE HENDERSON
Nevada Bar No. 14674C
Ellesse_Henderson@fd.org
411 E. Bonneville, Suite 250
Las Vegas, Nevada 89101
(702) 388-6577
Attorneys for Appellant

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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:

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

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

this person he's so wonderful. He's a saint. How could this possibly have happened? It's just this is unthinkable that this could have occurred, and both of those biases can be equally controlling, and so we are looking for those sorts of things in these individuals.

Q Is there any way for the subjects of this testing to know which bias, whether negative or positive, might end up helping Mr. Chappell?

A No.

Q Okay. And did you see any evidence of either of those biases here?

A No.

Q And their results of their testing, they did overlap and indicate broadly similar functioning for Mr. Chappell?

A For the most part. That would be actually the next slide, I think. For the most part --

Q There it is.

A Yes. In communication, there was some discrepancy. Mr. Ford thought that Mr. Chappell was doing really quite fairly well, quite well in a lot of areas except for written communication, but Terry Wallace and his sister Myra Chappell-King both were saying considerable difficulties receptive and expressive. In fact, they were very consistent with each other, almost three standard deviations below the mean. That's kind of within the moderately to severely

impaired range with respect to receptive skills.

When it came to the other two domains, daily living skills and socialization, there was a lot of overlap between each individual's reports of functioning.

Q And that evidence is accuracy.

A Yes. It brings more convergent validity to the -- to the Vineland test that way.

Q Now, were the results of the Vineland consistent with people who have FASD?

A When I do this, I'm looking at not just the Vineland, but also all of the neuropsychological testing --

Q Sure.

A -- to see if it's consistent. You've got your CDC criteria of you've got to have three domains, but there's also a lot of research out there. You know, one of those was the disconnection between IQ, academics and adaptive. So I wanted to see if those sorts of things were also consistent with what we see with Mr. Chappell, and so that's what this aspect is for, is looking for those consistencies with the research.

Q And now the Vineland wasn't the only adaptive function test that you gave; correct?

A No. I gave some direct measures of adaptive skills. The challenge that we have with this is it's in a controlled setting, and it's directly measuring their skill, their knowledge. So it's not a perfect overlap to kind of how they

would actually do in the real world, but, yeah, we look at kind of language-based skills, communication skills and daily skills, counting change, things like that.

Q And when it comes to this type of forensic testing for people who are in an institutional environment, like a prison, there's no way to test your real-world skills; correct?

A Well, no. No.

Q Okay.

A And that's the same in my neuropsych office. I'm not testing their real-world skills there either because it's again a contrived setting. It's a controlled setting.

Q You don't take them out on the street and asked them to read a bus schedule?

A No. No, I don't. That's not part of my practice. Actually, we do that a lot in rehab settings though, yeah.

Q Oh. Okay. Now, we're back to the chart that we looked at before. So just to summarize the testing that you did, is it fair to say that Mr. Chappell's results are consistent with someone who has a case of FASD?

A Yes. And also it's consistent with the expectation that I have of a lot of variability. I mean, you see the jagged portrayal, some skills that he's doing really quite well in, and other skills that he's doing much, much more poorly in and well within the impaired range. So that variability is something that I see in Mr. Chappell's case which is consistent

with FASD.

Q And one of those FASD consistencies was in the area of the downward slope of IQ, academic and adaptive functioning; correct?

A Yes, very similar.

Q Oh, I'm sorry. Go ahead.

A Sorry. Yeah, his pattern of performance which is on the right compared to the research study on the left for those with FAE, which he would be classified within, very consistent pattern, doing much more poorly on math, and adaptive skills that are much lower then you would expect based off of their IQ.

MR. WISNIEWSKI: Okay. And with the Court's permission, can I have the mic again.

THE COURT: Yes.

BY MR. WISNIEWSKI:

Q So, Doctor, the one issue that I'm seeing at least is that it looks like the WRAT reading and WRAT spelling show Mr. Chappell as above the mean in those testing areas for academic function; is that correct?

A He's not actually absolutely above the mean. The very top line up there is a zero. That's actually a mean score.

Q Okay.

A He's performing above expectations based off of where

his IQ was.

Q Oh, okay. Is that at all inconsistent with a diagnosis of FASD?

A No, it's not. You know, we sometimes will see people with FASD that have all of those areas impaired, but there's a lot of variability again, and consistently across his years Mr. Chappell has done better in these language-based skills. He has much more troubles with the math skills, the more abstract problem solving mathematics -- mathematical skills. So it's not inconsistent. I do see people with higher scores.

Q Okay. And turning to Mr. Chappell's executive functioning, it seems to show a much larger difference in ability between high structure and low structure testing versus adaptive function. Can you explain that.

A So we talked a little bit about the high structured executive function, low structure, where in the high structure you know what you have to do. You just have to accomplish it. Low structure, you don't know what you have to do. You have to figure it out. This is something that we see extremely commonly with FASD where they may do okay on these higher structure tasks where they just have -- they know what the rules are.

When you put them in situations where there's less structure about what they need to do, they break down. They have a lot more troubles. They're more perseverative. They

have a harder time abstracting. And then you put them in a real-world setting and needing them to actually apply their knowledge and their skills, they have considerably greater difficulty. That stepwise pattern is something that we see very classically in FASD.

Q So, Doctor, to sort of summarize your findings then, you indicated that Mr. Chappell suffers from functional deficits in nine separate neuropsychological domains?

A Yes.

Q Was there anything especially significant about his testing?

A Well, about 40 percent of his test scores on that chart were within the impaired range, a little under half, which is -- in a normal person, if I gave that same number of tests, I might see, might see 10, 15 percent of scores that are impaired. So he's demonstrating a lot more impairments than you would expect just if he was normally developing.

Also, of those scores that were impaired, near 30, about 30 percent of them were actually within at least the moderately impaired range, so very significantly impacting on his functioning.

Q And now with those nine domains, you'd previously testified that the CDC standard for diagnosis of an FASD condition is three domains of deficit; correct?

A Yes.

Q And in your career, both in a clinical and a forensic setting, how many patients have you examined for FASD?

A In my research career and my clinical career?

Q Whatever you think is salient.

A Or just in clinical? In clinical career, probably 300 or so.

Q How many of those were at nine levels of deficit?

A Not that many. There were a few that I've seen that had, you know, maybe 9 or 10, more in the 6 to 7 range, and then a few that were kind of these -- these kind of cusp type 3 or 4 domains.

Q Do you have an idea of a percentage that fell into the nine category?

A No. It's, you know, it's definitely a overabundance of impairments, but I don't know the percentage specifically about that.

Q Okay. And now we previously talked a little bit about the difference between the 1996 IOM guidelines and the 2004 CDC guidelines. Would Mr. Chappell have been diagnosable with FASD under either paradigm?

A I mean, from the neuropsychological perspective, yes. He has a complex pattern of impairments that fits within the IOM's criteria. And he's got deficits in greater than three domains of functioning that fits within the CDC criteria.

Q Okay. And the CDC criteria is a bit more stringent

than the IOM, and he fails or passes, depending on your perspective, the CDC criteria?

A He meets that, yes.

Q Yes. So what diagnosis would have been appropriate at the time of the -- under the DSM-IV in this case?

A Yeah. The DSM-IV, we would've made the diagnosis of cognitive disorder NOS, Not Otherwise Specified. It's sort of a catchall diagnosis because the DSM -- DSM-IV didn't have a lot of specific types of conditions that were being described. So a lot of conditions ended up in the cognitive disorder NOS.

Q Have you had a chance prior to today's hearing to review the report of Dr. Davies?

A Yes.

Q Okay. And did he diagnose Mr. Chappell with anything?

A Yes. With ARND, alcohol-related neurodevelopmental disorder.

Q Okay. Do you feel that your findings in the neuropsychological evaluation are consistent with his diagnosis?

A Very much so.

MR. WISNIEWSKI: If I can just have a moment, Your Honor.

Pass the witness, Judge -- Your Honor.

MR. OWENS: No questions, Judge.

THE COURT: All right. Thank you.

And I'll just have one question then. So if the deficits were caused by something other than fetal alcohol syndrome, they'd still be the same deficits; right?

THE WITNESS: Yes.

THE COURT: Okay.

THE WITNESS: It would be the same deficits, and one of the ways that we tease that out, the way that I tease it out in my part of the evaluation is I look to see about testing that happened earlier in life because if a person is doing great until they're, like, 18 years old and then suddenly they're doing lousy, that ain't -- that's not fetal alcohol syndrome. That's maybe he had a head injury. So from that perspective, that's what I look at.

You'll be hearing from Dr. Brown who does a similar look at the history of him, behaviorally to see if there's -- to see about what his behavioral functioning is from an early age, before other reasons why a person might have these sorts of conditions, whether it be, you know, head injuries, substance abuse themselves, things like that.

THE COURT: Okay. So did you look at Dr. Etcoff's report --

THE WITNESS: Yes.

THE COURT: -- that was done back in, like, '96, I guess. Yes.

THE WITNESS: Yes.

THE COURT: So were the findings that Dr. Etcoff made back then as far as the deficits you're speaking of consistent with what you were seeing?

THE WITNESS: Well, Dr. Etcoff did a psychological evaluation. He did not do a neuropsychological evaluation. He did an IQ. He did an academic test, which is a pretty standard part of a psychological evaluation. So from the perspective of the IQ and academics, absolutely it's consistent.

From there on, he was not looking at brain behavioral relationships. He was looking at the person's symptoms. They're depressed. They have borderline personality disorder, social -- troubles with social stability, troubles with impulsivity, things like that. So he was identifying all these symptoms that the neuropsych testing is picking up on as well, and they fit within a category of the neurodevelopmental disorder associated with prenatal exposure, an FASD sort of thing because they were often symptoms that we see -- troubles with attention, troubles with academics, troubles with interpersonal relationships, troubles with poor behaviors, things like that. Those are all things that --

The difference with what Dr. Etcoff did was -- and what the DSM was doing is it's a symptom diagnosis. It's a cluster of symptoms, and you make this diagnosis of he has this pattern of symptoms of depression.

When you come to fetal alcohol spectrum disorders, you're looking at really kind of an underlying etiology type of a diagnosis. His problems are related to this neurological impairment that happened before birth, the prenatal alcohol exposure. So the symptoms are still there, but the FASD is -- when the FASD diagnosis is made, it's talking about these symptoms are really related to that underlying issue.

THE COURT: Oh, I understand that part. I'm just saying -- thinking, well, the etiology vis-à-vis a jury's consideration of, you know, whether something should -- is being considered as a mitigating factor or not may be -- are they not looking at -- and I don't know if you can answer this. So please feel free to say that's -- you know, I don't -- I don't go there -- are they not looking at the result because not every person who has fetal alcohol syndrome is going to behave the same; correct?

THE WITNESS: But the -- I understand what you're saying. With Dr. Etcoff's evaluation, he was doing it as his -- looking at behavior, like you said. The neuropsych evaluation is looking at skills, at functioning, at learning, memory, problem-solving which is a critical component in a person's day-to-day life, and that wasn't one of -- that wasn't part of the mandate that Dr. Etcoff apparently had. His was to do a psychological evaluation. So that investigation didn't happen with Dr. Etcoff's evaluation.

THE COURT: Okay. Any questions as a result of my questions?

FOLLOW-UP EXAMINATION

BY MR. WISNIEWSKI:

Q Just to summarize, Doctor, is it fair to say not necessarily that Dr. Etcoff was incorrect in the symptoms that he noticed, just that he didn't do the same depth of examination that you did?

A Yes.

MR. WISNIEWSKI: Okay. Just one second, Your Honor.

No further questions. Thank you.

MR. OWENS: Nothing further here.

THE COURT: Thank you. May this witness be excused?

MR. LEVENSON: Yes.

THE COURT: Thank you very much for your testimony.

THE WITNESS: Thank you, Your Honor.

THE COURT: Yes, we're going to take a rest room break for everyone involved here. So we'll be in recess for 10 minutes.

(Proceedings recessed 11:03 a.m. to 11:09 a.m.)

THE COURT: All right. We are back on the record.

You may call your next witness.

MR. WISNIEWSKI: Thank you, Your Honor. Defense would call Dr. Julian Davies.

JULIAN DAVIES

[having been called as a witness and being first duly sworn, testified as follows:]

THE CLERK: Thank you. Please be seated. State and spell your name for the record.

THE WITNESS: Julian, J-u-l-i-a-n. Davies, D-a-v-i-e-s.

MR. WISNIEWSKI: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. WISNIEWSKI:

Q Good morning, Doctor.

A Good morning.

Q Doctor, I'm going to speed through your qualifications just a little bit if that's all right with you.

A That's fine.

Q You are a professor in the Department of Pediatrics at the University of Washington School of Medicine?

A Yes, a clinical professor.

Q Okay. And you have a BA from Yale and an MD from UC San Francisco School of Medicine?

A Yes.

Q Okay. And you are licensed to practice medicine in Washington and Nebraska, I believe; correct?

A Correct.

Q What areas are you board certified in?

A Pediatrics.

Q Since 2003?
A Yes.
Q Okay. And you have done over 20 years of work in the field of FASD as a medical doctor?
A Fourteen years of work.
Q Fourteen years of work. I can't read my own handwriting.
MR. WISNIEWSKI: Judge, again, I know that you've indicated this is unnecessary, but we would move for his qualification as an expert in medicine and FASD.
THE COURT: Okay. Is the State objecting to his --
MR. OWENS: No.
THE COURT: -- offering his opinions in this case?
MR. OWENS: No, I do not.
THE COURT: He'll be allowed to offer his opinions. Thank you.
MR. WISNIEWSKI: Thank you, Your Honor.
BY MR. WISNIEWSKI:
Q Dr. Davies, I'm going to ask you to open your binder to page 19 -- to Exhibit 19, and tell me what you see there.
A I see my medical expert report for Mr. Chappell dated August 5th, 2016, slightly redacted.
Q Okay. And that redaction just pertains to the year of Mr. Chappell's birth?
A I think so.

Q Okay. Can you flip to Exhibit 20 in your binder. Is that a list of all the materials that you relied upon in coming to the opinion that you will testify to today?

A It is.

Q Okay. Is there anything that you weren't provided that you felt was necessary to come to an informed opinion on Mr. Chappell's case?

A No.

Q Okay. Doctor, what did the FPD ask you to do in this case?

A Asked me to evaluate Mr. Chappell for the possible presence of fetal alcohol spectrum disorder.

Q And for your work as a medical doctor, did the FPD pay you?

A Yes.

Q Okay. You didn't do this volunteer?

A Correct.

Q Okay. After performing your evaluation and looking at all the relevant materials, did you come to any form of diagnosis?

A I did.

Q And what was that diagnosis?

A That Mr. Chappell suffers from alcohol-related neurodevelopmental disorder which is a fetal alcohol spectrum disorder or FASD.

Q Thank you, Doctor. Where in the FASD spectrum does ARND fall?

A There are a number of diagnoses under that umbrella term. You might have talked about them already. Fetal alcohol syndrome which has prenatal alcohol exposure, growth deficiency, facial features and brain damage or dysfunction. There's partial FAS, but he has alcohol-related neurodevelopmental disorder, often called ARND, and that's where you have the prenatal alcohol exposure, and you have the central nervous system damage or dysfunction.

Q Okay. Do all of those diagnoses under the umbrella feature central nervous system deficits?

A Essentially they do. Originally, partial FAS, that was optional, but since then, partial FAS does really require the central nervous system dysfunction. So currently, yes.

Q Okay. And the central nervous system deficits dysfunctions, for purposes of a medical diagnosis, is it fair to say that they are brain damage?

A Yes.

Q Okay. What can this -- what type of practical real-world deficits do these brain injuries tell us?

A Drinking during pregnancy can have a lot of impacts on the developing brain in just about every area of the developing brain, and the way that plays out in life when it comes to testing, we'll often see a lower IQ, although not

typically in the intellectual disability range. We frequently see ADHD-like traits; learning disabilities, especially in math are prominent; early speech language; and then later language and social difficulties are prominent; sensory motor difficulties; clumsiness; poor handwriting; et cetera; and probably the most notorious domain that's affected by prenatal alcohol exposure are the executive functions.

Q And what are those executive functions?

A Those are the later developing, higher-order brain skills that essentially help us respond rather than react to situations.

Q Okay. Now, in evaluating Mr. Chappell you said that you relied upon the exhibits listed in Exhibit 20 of this binder.

A I did.

Q And those materials include Mr. Chappell's school grades, results of neuropsych testing, things like that?

A Yes.

Q Do those materials include a QEEG analysis and facial photographs?

A They did.

Q And did you also review the neuropsychological evaluation of Dr. Paul Connor before coming to your conclusion?

A Very much so.

Q Okay. Now, Doctor, are there set diagnostic criteria

for and FASD clinician such as yourself?

A Yes.

Q Okay. And what would have been in operation back in the 2007 penalty retrial?

A In 2007, there were a number of options. There were the institutes of medicine criteria or IOM criteria dating from 1996. There were University of Washington criteria dating from 1997. There were CDC criteria from 2004. There were a number.

Q Are there any substantive differences between the 1996 IOM, the 1997 University of Washington and the 2004 CDC diagnostic paradigms?

A Essentially, since the beginning of the fetal alcohol syndrome diagnosis in the '70s and '80s, it's always come down to, again, alcohol, face, growth and brain. And where those diagnostic criteria differ is in perhaps where the thresholds are set to meet each of those four criteria. There are some differences in terminology in terms of the diagnostic outcomes, but they essentially are really describing the same thing.

Q Okay. Can you explain to the Court a little bit of the history of FASD diagnosis pre1996. Were there guidelines in place, or was it just individual examiner discretion?

A No, there were -- there were guidelines. Essentially FAS was first described in '68, '72 thereabouts. Some predecessors of mine at University of Washington first called

it fetal alcohol syndrome. In the '70s and '80s, there were different guidelines for how to describe FAS, and then at that time, folks that didn't have the full presentation were called suspected fetal alcohol effects, but then by 1996, at the request of Congress, the institutes of medicine took those pre-existing FAS, fetal alcohol effects -- FAE -- criteria and developed what you see on the board there.

Q Now, all of those different methodologies from the '70s through 2007, were they looking at the same four diagnostic criteria?

A Yes.

Q What are those diagnostic criteria?

A History of confirmed maternal alcohol exposure; a history of growth deficiency, often most prominent in childhood; a set of cardinal facial features; and evidence of brain damage or dysfunction.

Q And you previously indicated that for ARND in particular the two factors that are present are the confirmed history of maternal alcohol exposure in utero and the CNS brain damage; correct?

A Yes.

Q Now, have you had a chance to read the State's opposition to prior postconviction counsel's motion for authorization to obtain expert services and payment of fees?

A Yes.

Q Okay. I'm going to ask you to turn to page 4 -- or I'm sorry, to Exhibit 4 in your binder and ask you to follow along with me as I read Footnote Number 2. Now, that states that the national task -- are you there? I'm sorry.

A Yes, I am.

Q Okay. That states that,

> The national task force on fetal alcohol syndrome and fetal alcohol effect has indicated that as of July 2004 there are no specific or uniformly accepted diagnostic criteria available for determining whether a person has fetal alcohol syndrome.

Do you see what I'm reading?

A I do.

Q Okay. Do you have an opinion as it relates to that argument?

A Well, I disagree with it.

Q Okay. Can you tell the Court why that argument is wrong.

A Well, they're claiming two things, that there is no specific and then no uniformly accepted diagnostic criteria, and that thus it's impossible to provide a definitive diagnosis of FAS. And so, essentially, as we just mentioned, since the '70s and '80s, diagnoses of fetal alcohol syndrome were valid and there were criteria to diagnose it.

As we've discussed, over time those four areas have perhaps been refined or codified more specifically through the development of additional diagnostic criteria, but certainly by the time of 2007 there were quite specific, very research-based, validated diagnostic criteria in place, and even by 2004, at the time of this document, as I mentioned, the University of Washington criteria from 1997 were highly specific, and, in fact, the CDC relied upon them in coming up with their own criteria.

So I would disagree with the lack of specific guidelines. I would also take issue with the uniformly accepted argument there which is essentially that in 1996 the law of the land in fetal alcohol spectrum disorders was the institutes of medicine criteria. So there was substantial agreement in 1996 that that would've been the criteria to use.

And since then, as is true in many areas of medicine, there are a number of different diagnostic criteria. There isn't universal agreement on which one is always the best to use, but that's again a pretty typical feature of medicine, a healthy aspect of science and scientific disagreement and doesn't at all invalidate the guidelines. It's just that we don't have the one true diagnostic set of guidelines.

Q So it's fair to say then that there's not one specific test that you can give someone to diagnose them with an FASD condition because this is why you need doctors and

psychologists to do it, to look at multiple different tests and come to an informed opinion?

A Right. It definitely is ideally an interdisciplinary approach where you're looking at many aspects and integrating them in a careful process of differential diagnosis to arrive at a diagnosis.

Q Now, you talked about how it's actually not uncommon in the field of medicine for there to be multiple different diagnostic paradigms. Can you give another example.

A Sure. You know, with cerebral palsy, there are different criteria with different epilepsy syndromes, so other brain diagnoses. There are often are, you know, institutes of medicine, CDC, or World Health Organization, perhaps a research group that wants their name on some diagnostic guidelines.

And I think maybe the difference is is that if you're used to working professionally with psychologists you may be used to the more monolithic DSM. There's the one book in which all the diagnoses are present, but in medicine, it's pretty common for there to be at least two or three different diagnostic criteria that often overlap substantially, but differ in the details.

Q Okay. And, you know, I know we've talked a little bit about, you know, '96 IOM, '97 University of Washington, 2004 CDC. This isn't something that was just known in, you know, University of Washington and its greater area. Were

these the medical paradigms that were operative throughout the country, in Nevada and elsewhere?

A Yes.

Q Okay. And a trained medical diagnostician would certainly utilize any one of them?

A Yes.

Q Now, Doctor, turning your attention to Mr. Chappell's case in particular, you know, I'm just going to run down the four different criteria that you talked about before and ask you for your conclusions and the testing you did in these areas. Did James exhibit a history of maternal alcohol consumption during his mother's pregnancy?

A Yes, a strong history.

Q Okay. And what information did you rely upon to come to that conclusion?

A Well, his birth mother is long deceased. So as is typical in these situations, we rely on the reports of people that were around at the time.

And I said strong for two reasons. One is that in a patient of his age it's unusual to have this many folks that remember her drinking during pregnancy, and there were four at least direct observers of her drinking pattern, and they described her drinking heavily, hard liquor typically, at least several drinks, visibly intoxicated, typically on the weekends, but possibly more, and there was also an incident mid pregnancy

where she was intoxicated and fell down the stairs.

And so we have four declarations from folks that directly observed this drinking, and then a number of other family members that were told by folks that would've known that she drank heavily during all of her pregnancies, but particularly we have confirmation that she drank during Mr. Chappell's.

Q And did those informant reports also indicate that Mr. Chappell's mother consumed drugs, nonalcohol during pregnancy?

A Yes. There were reports of heroin, cocaine and tobacco.

Q Did Mr. Chappell show evidence of brain damage? CNS dysfunction?

A He did.

Q And is that opinion largely based on the neuropsychological evaluation conducted by Dr. Connor?

A In large part, yes.

Q Did you see any other evidence of brain damage, CNS dysfunction in any other documents that you reviewed, any other materials related to Mr. Chappell?

A I did. We had reports from family members, friends, teachers, a probation officer that described patterns in early childhood, even birth to 3, of significant delays in speech and language. Entering school there were behavioral, but also

learning concerns described as slower, slower to process. He was referred for special supportive services at the end of first grade and then formally received special education services under emotionally impaired, but also learning disabled in fourth grade.

We have school grades and achievement scores that were declining over the elementary school years as the difficulty level increased. Then in terms of formal standardized testing, there was some stuff from the schools, but then we had Dr. Etcoff's report and testimony, and then, again, I said in large part Dr. Connor did a very thorough neuropsychometric evaluation.

Q Now I just want to break that down a little bit. You referred a lot to school records. Is that something that someone in your position in 1996 or 2007 would have looked at in trying to come to an FASD diagnosis?

A Yes.

Q Okay. Ideally if they were available?

A Right.

Q Okay. And you -- I think the one thing that you said was that you looked at the report of Dr. Etcoff, and I think you called it, I may be wrong here, but the much more comprehensive evaluation done by Dr. Connor. Why was his evaluation much more comprehensive than Dr. Etcoff's?

A In a -- when you suspect fetal alcohol spectrum

disorders, you really need to look broadly because of all those brain areas that can be damaged. So if you're just looking, for example, at IQ or maybe academic achievement testing, personality testing, you may miss a lot of areas of significant impairment and especially ones the alcohol is prone to damage.

Q Now, you've talked a little bit about, you know, areas in which Mr. Chappell was slower than other children. Did you -- and that I imagine goes sort of towards learning disabilities; is that fair to say?

A Yes.

Q Did you see any evidence in any materials you reviewed of adaptive delays?

A Yes. And those were extensive, and again lots of people, not just family members who might have motivations to play them up, but we had teachers. We had his former probation officer that described a young man who really struggled relative to his peers. Again, since a young age, he was more delayed and more disabled than his siblings were who also had their own issues.

He came to prominent school attention very early in his school career. He had a lot of social difficulties at school, tended to be on the outskirts of social activity, and then later was gullible and a follower and felt by a lot of his peers to be obviously different and in some need of protection.

He had prolonged hygiene issues and earned an

unfortunate nickname for being incontinent of urine at night and during the day into his teens. His peers described hygiene issues, unusual behaviors. One report that really stood out was that the gap between his maturity level and how he came off, that he was below his peers in elementary school but that that gap widened. As his peers became more mature and more sophisticated, he just seemed more immature and less able to take care of himself.

As we got into adolescence, he had a lot of school difficulties and dropped out of school. He got involved with substances. He had a lot of difficulty holding a job, and the jobs he had were fairly basic, basic jobs, and even as a young adult, he needed a lot of support from family, friends and romantic partner to be more functional. So he had extensive evidence of adaptive deficits, and they were adaptive deficits that are in a classic pattern that we see in our fetal alcohol syndrome clinic.

Q Okay. Now, you've mentioned that at a certain point there's evidence that Mr. Chappell got into substance abuse. Did these adaptive and intellectual deficits even predate his substance abuse?

A Oh, very much so.

Q Okay.

A We have reports of when he was 0 to 3 of being unusually delayed in speech, and then we mentioned the early

elementary school issues. So he had substantial evidence of childhood delays that precede his adolescent substance abuse.

Q Now, as part of your diagnostic process, Doctor, did you conduct an interview with Mr. Chappell?

A I did.

Q And when did that interview occur?

A May I refer to my notes?

Q Absolutely.

A It was --

Q Yeah.

A It was in 2016. Apologies. I believe it was August -- oh, sorry, July 11th, 2016.

Q Thank you. What are you looking at when you conduct an in-person interview of someone you suspect to have FASD?

A Well, I've already generally reviewed the records, and in this case, I already had the neuropsych testing, but it's still important to interview the client. I want to get their perspective, keeping my skeptic hat on because it's a forensic interview, but I want to know what they remember of their childhood, their experiences in school, social experiences. I want to know about their substance abuse history, mental health history. So those are the sorts of things I'm asking.

I'm looking for other medical causes. So I'm asking about other symptoms or other things that could potentially be

alternate explanations. I also do a mental status examination that gives me more of a qualitative sense of how the patient performs, and then I do a physical examination, and typically photographs are taken that I can use special software to analyze for facial features and such.

Q And you do that type of interview both in a clinical and in a forensic setting?

A Yes.

Q Okay. What did you learn from the interview with Mr. Chappell that's relevant to your diagnosis?

A Well, much of what we said corroborated what the other witnesses had recalled about his early childhood. The mental status examination, which is called the MoCA -- M, lower case O, C-A -- also found he failed it, and the areas that he struggled with were areas that lined up quite nicely with the more formal neuropsychometric testing. So it was useful to me to qualitatively see him have the sorts of impairments that Dr. Connor found.

Q And in your diagnostic process, you also examined a QEEG conducted by Robert Thatcher, Dr. Thatcher I should say; correct?

A That is correct.

Q And can you explain to the Court how a QEEG works.

A So a QEEG, you put electrodes on the outside of the skull. They measure electrical activity inside the brain, and

what puts the Q or quantitative into EEG is that that electrical signal data gets fed into a computer, and what's nice is it's compared against a large normative database of what typical brain electrical activity looks like, and through that comparison, Dr. Thatcher can identify abnormal brain electrical activity and even localize somewhat to different brain areas in terms of areas of concern and patterns of dysfunction.

Q And is it standard in FASD diagnostic practice for you to rely upon a QEEG conducted by another medical professional rather than conducting your own?

A I would certainly not conduct my own. That's not an area of my expertise, but indeed when it comes to neuroimaging or neurodiagnostic techniques, a clinician in FASD like myself would very much rely on other expert findings.

Q And so your area of expertise is interpreting results of neuroimaging testing rather than conducting that testing?

A Correct. I have been involved on some research on neuroimaging in fetal alcohol spectrum disorders. So I do definitely have a lot of experience with that, but I would not be the one to interpret the EEG myself.

Q Now, there are other neuroimaging techniques that are sometimes used in the field of FASD diagnosis; correct?

A Correct.

Q Is a PET scan sometimes used?

A Occasionally.

Q Okay. What is a PET scan?

A A PET scan is where you inject a radio labeled tracer that then the admissions of that tracer gets measured, and what that lets you do is look at the metabolic activity in the brain as it functions.

Q And are MRIs sometimes used to diagnose FASD?

A Yes.

Q How are MRIs conducted?

A So an MRI, you go in the scanner. Magnetic fields are used to look at the brain structures and density, and a standard clinical read MRI can look at the size and presence or absence of various brain structures, and then there's advanced techniques you can do to MRI to look at the volume of different brain regions or other aspects of how the brain functions.

Q Are any of these three techniques -- QEEG, PET and MRI -- are any of them more or less optimal for FASD diagnosis than the others?

A They each have their different functions. They each measure different things. So it would depend on what your concerns were, what was available to you. It is more common in just the clinical practice of medicine to have MRI results. That's commonly done, but there's been research on the others as well, and we do sometimes use them.

Q And now the QEEG did put out some relevant findings

here; correct?

A It did.

Q How did you rely upon those findings in coming to your diagnosis?

A For me, the main evidence of brain damage and dysfunction was the neuropsych testing, and that's common in clinical practice as well. When you have additional neurodiagnostic information, it's useful if it's convergent, if it provides additional evidence, and in this case, what Dr. Thatcher found was that the frontal lobes in the limbic areas of the brain were functioning abnormally.

So the areas of the brain that were involved actually mapped quite well with the functional deficits that Mr. Chappell has, and then there were some patterns of electrical activity described by Dr. Thatcher, and he described abnormal -- signs of abnormal connectivity, that the brain regions weren't talking to each other as well as they typically should, and also that areas of the brain weren't as functionally differentiated, meaning specialized as they should be. And those are actually patterns that we've absolutely seen in the research literature about how alcohol-affected brains work.

So, again, for me, I wouldn't use a QEEG alone if I didn't have the neuropsych testing, but in this case, since it matched the areas of dysfunction and it matched the research on

the alcohol-affected brain, I found it useful convergent evidence. In a forensic setting, it's nice too because you can't -- you know, it's not effort dependent. You can't fake a QEEG.

Q Okay. Now, turning to some of the other diagnostic criteria, you eventually diagnosed Mr. Chappell with ARND; correct?

A Yes.

Q And in some ways is it fair to say that that's a diagnosis of exclusion? You look for FAS, and if some of the FAS features aren't there, it could be ARND?

A I don't know exclusion. Generally I'm looking at those four areas independently and then seeing if they coalesce into a particular diagnosis or not.

Q I see.

A And you may have meant exclusion in terms of thinking about other nonalcohol-related diagnoses, and, yes, that is definitely a part of the process as well.

Q Okay. Sure. Really what I mean is you didn't see any evidence that Mr. Chappell had CDC quantifiable levels of growth deficiency; right?

A That's true.

Q Okay. And Mr. Chappell, when it came to the FAS facial irregularities, he did not meet the CDC diagnostic guidelines either?

A That's true.

Q Okay. Now, can you tell us a little bit about FAS facial irregularities, where they generally appear during the course of a pregnancy in relation to alcohol exposure.

A Right. You know, when it comes to folks that come to our clinic, the FAS clinic at least, only 9 percent of them end up with those classic facial features of fetal alcohol syndrome, whereas many more of them have the brain dysfunction, and that's thought to be because in the research, at least animal research, those facial features get created during a very narrow window early in pregnancy, perhaps about 19 to 20 days after fertilization.

And if you didn't drink alcohol on those days, you wouldn't be expected to have the facial features, and thus you wouldn't have a diagnosis of FAS, but unfortunately alcohol can damage the developing brain at any point during pregnancy. So with intermittent drinking patterns or other bad luck related, you know, issues, you can have all of the brain damage, but you lack the facial features because of that window was missed.

Q And so I guess to summarize then, your results indicated, and correct me if I'm wrong, your results indicated that you -- that Mr. Chappell did not meet the diagnostic criteria for FAS facial features or growth deficiency but did meet the diagnostic criteria under the 2004 CDC guidelines for maternal alcohol consumption and CNS dysfunction; correct?

A Yes.

Q And based upon those findings, what is your diagnosis?

A Alcohol-related neurodevelopmental disorder.

Q Okay. And is that diagnosis made to a reasonable degree of medical probability?

A It is.

Q Did you consider other possible explanations for Mr. Chappell's brain dysfunction?

A I did, and in my clinical but also sometimes forensic practice, it's extremely rare to see somebody where alcohol was the -- during pregnancy was the only risk factor, and for Mr. Chappell, we know that there was a family history of some family members that had some learning difficulties and substance abuse problems, and so there's the possibility of some genetic risk in those areas, although, you wonder too did they have the same environmental upbringing-type concerns? Could they also have been on the fetal alcohol spectrum? So some possible family history risks.

There was the prenatal exposure to other substances -- heroin, cocaine and tobacco -- and the issue there is that none of those are good either, but alcohol is definitely the more worrisome exposure in terms of being the most damaging to the developing brain. We know that his childhood and adolescence that there were a lot of adverse

childhood experiences, and those absolutely can affect your brain development, and in his case very likely contributed to some of the adaptive difficulties that he's had as well as some of his mental health and substance abuse issues.

We know that or we suspect that he had less than adequately treated mental health issues, and then unfortunately we know about the adolescent-onset significant substance abuse, and with that, the research is also clear that if you abuse substances in adolescence they can impact your cognitive functioning, but what is also seemingly clear is that with a prolonged period of abstinence that there should be some degree of recovery from those impacts.

And so when I put all of those other risk factors together, I didn't see a convincing alternate explanation for the life trajectory and outcomes that we have. I think that all of those other exposures likely compounded the syndrome that he was born with, but especially since we have those very early childhood and ongoing developmental concerns that precede some of his later risk factors, like the substance abuse, and because we have a pattern of brain dysfunction and even QEEG findings that fit a fairly classic fetal alcohol spectrum disorder pattern, and because his life history is unfortunately classic for folks on the fetal alcohol spectrum, I really felt that the prenatal alcohol damage was a primary cause for his outcomes.

Q Thank you. Doctor, in your opinion, based upon your, you know, training in this area, would this ARND have been diagnosed by a -- diagnosable by a qualified medical professional at the time of Mr. Chappell's 1996 trial or 2007 resentencing?

A Yes, at both of those times.

MR. WISNIEWSKI: Okay. No further questions, Your Honor.

THE COURT: Cross.

CROSS-EXAMINATION

BY MR. OWENS:

Q Doctor, when did the terminology ARND first come about?

A ARND was introduced by the Institute of Medicine criteria formally published in 1996 but discussed at meetings and such for a few years before.

Q This diagnosis that you're giving here, is that in the DSM?

A Yes, he does have a DSM diagnosis. The terminology is different, but he does meet the DSM-V criteria for neurodevelopmental disorder associated with prenatal alcohol exposure, and that's what DSM calls ARND.

Q It's my understanding that fetal alcohol syndrome wasn't always in the DSM; right?

A You know, DSM being primarily intended for a mental

health practitioner, not all of whom are medical doctors, has not really included the medical diagnosis of fetal alcohol syndrome, and even now, while it's included, it's -- they consciously chose not to address the medically diagnosed growth and facial feature impairments. So what DSM has chosen to do is essentially have an umbrella term, the ND-PAE, that can include FAS because you can have the facial features or not, but again since -- they wanted it to be used by mental health providers that wouldn't have the training necessarily to diagnose FAS.

Q But you're talking about the DSM version V that's in existence today, not DSM IV that was around in 2007, at the last penalty hearing; right?

A Correct. And when you had folks at that time, if someone was seeing them that was not a medical professional or expert in FAS, they would typically have diagnosed a client with cognitive disorder not otherwise specified, and that was how a psychologist, for example, might have described a patient like Mr. Chappell.

Q I think we heard that from Dr. Connor. He described it as somewhat of a catchall. So there'd be lots of types of diagnoses that might fit in there. It's not otherwise specified. So it's kind of like just, if it doesn't fit anything else, it's going to go into this NOS category?

A Right. And that's why, again, the fetal alcohol

spectrum is primarily a medical diagnosis. So at the time an expert in FASD would've used one of the medical diagnostic criteria and not what DSM had.

Q And today, the DSM though does specifically refer to this more of the alcohol -- and forgive me. I don't know the terminology. They're more specific about talking about fetal alcohol syndrome and recognizing it in DSM-V than they were in DSM-IV?

A That is true.

Q You said that you disagreed with the footnote in the BRIEF, that you disagreed with the argument, and that was in Exhibit 4. More specifically, what you're disagreeing with is the conclusions of the National Task Force on Fetal Alcohol Syndrome and Fetal Alcohol Effect in conjunction with the National Center on Birth Defects and Developmental Disabilities; isn't that what you really meant to say?

A With that and also how it was being used in the argument.

Q You're not disagreeing that the findings of those organizations were that there were at the time, which was 2004, no specific or uniformly accepted diagnostic criteria for fetal alcohol syndrome?

A I disagree with part of it. Yes, there were no uniformly accepted, although there were commonly accepted diagnostic criteria, namely institutes of medicine, but there

were other diagnostic criteria in place. I've mentioned the University of Washington criteria, and I very much disagree with the -- with their argument that they weren't a specific criteria.

Q So you're disagreeing with their argument, but you don't disagree that that actually was what their findings were in 2004?

A That may have been what they said, but I disagree with what they are saying because there very much were specific criteria for the fetal alcohol spectrum disorder that they actually adapted to generate the CDC criteria.

Q And, obviously, not all experts in your field would agree with you because there are several organizations here, two at least that have found otherwise?

A You know, I have the benefit of having two close colleagues that served on that scientific working group. I can tell you that those aspects of that report were highly controversial within that scientific working group, and certainly when it was published, I would say that the majority of the folks working in the field of fetal alcohol spectrum disorders disagreed with and were not happy with aspects of that report.

Q So fetal alcohol syndrome has been a developing field. You said it's been around for 40 years, but it's been developing. There's been numerous criteria and attempts to

clarify them and get more specific and disagreements even within some of your colleagues and boards. Until we get to today, it's more clear and more widely accepted and uniform than it was even just in 2007, 11 years ago?

A You know, as is the case in medicine and science, I expect there to be improvement. I expect there to be healthy scientific agreement, but it wouldn't be fair to imply that it wasn't a valid diagnosis in the '80s, '90s, 2000s; it absolutely was a recognized medical diagnosis. There have been refinements in specific thresholds for each of these four features. There have been refinements in diagnostic terminology but that doesn't invalidate it as a diagnosis.

Q But certainly being recognized in the DSM-V, well after this case was around, that gave it some greater recognition than it previously had, and it was more able to be used in court and became more popular; wouldn't you agree?

A I would say not within the medical community. Within the medical community, we've had effective diagnostic criteria for years. I think it has been helpful to mental health professionals to have it recognized in DSM-V. So if you're working as a psychologist or a counselor, it is -- it's great that it's in the DSM-V, but it's been an accepted medical diagnosis for a lot longer than that.

Q And that was in 2013 the DSM-V came out?

A I believe so.

MR. OWENS: That's all I have.

THE COURT: Redirect.

MR. WISNIEWSKI: Thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. WISNIEWSKI:

Q Doctor, I think you indicated this, but the DSM-V is a tool used by mental health professionals; correct?

A Yes.

Q Is it something that contains diagnostic criteria directly for medical issues?

A Many of the conditions in DSM-V can be considered medical conditions, but they are careful not to include diagnostic criteria that will require medical training to diagnose.

Q Sure. Things like, say, gout or pancreatic cancer, are they in the DSM-V?

A No.

Q So it's fair to say that there are different, you know, tools out there for medical professionals, such as yourselves -- such as yourself, to utilize in diagnosing a medical condition?

A Yes.

Q Okay. And that was the case back in the zeros and the '90s and the '80s and the '70s, even before that?

A Yes.

Q Okay. Now, Mr. Owens referred to the findings of the national task force, basically the people who authored that article. That article from 2004, did the 2004 article state the diagnostic criteria that are in use in 2007?

A That 2004 article did establish CDC diagnostic criteria for fetal alcohol syndrome.

Q Okay. So it's fair to say that that article actually helped develop community knowledge that would have been utilized by a competent medical professional in 2007?

A Yes.

Q Okay. And that 2007 field of knowledge, that was what was codified in the CDC guidelines that were also published in 2004?

A Yes.

Q Okay. And then finally, Doctor, I think Mr. Owens referred to FASD as a developing field. Doctor, is there any field of medicine where you know every single thing about anything?

A No.

MR. WISNIEWSKI: No further questions, Your Honor.

MR. OWENS: Nothing further.

THE COURT: I have a few questions if you don't mind.

THE WITNESS: Sure.

THE COURT: So based upon what you know of the reports, the history that was given of the maternal alcohol use

with Mr. Chappell, it sounded to me like what you were saying was her use of alcohol was pervasive. It was constant. So does it seem somewhat inconsistent that he doesn't have the facial criteria or the growth criteria based upon the history that you received?

THE WITNESS: So it's interesting. So I think what most of the observers were describing was that she was at least drinking on the weekends and drinking heavily and observed to be intoxicated. A number of folks mentioned that her daily substances of choice were more heroin or cocaine and that her alcohol use pattern was substantial and on the weekends. It may have been more often than on the weekends.

Either way, even if we had a daily alcohol exposure, there's enough, unfortunately, luck involved in how those facial features develop that it is certainly possible to have a mother who drank daily during pregnancy and not have the face of FAS, and we do see that all the time in clinic, but in her case, my impression of her drinking pattern was that it was heavy and episodic, at least weekly on the weekends.

THE COURT: I thought you said though the window was like a 19 day during --

THE WITNESS: Oh, good question. No. Sorry. I must have misspoke. It's on day 19 or 20.

THE COURT: Oh. Oh, I see.

THE WITNESS: It's a narrow one to two day window

during pregnancy.

THE COURT: I see. Okay. One to two days.

THE WITNESS: Yeah.

THE COURT: Oh, that does make a difference. Thank you for clarifying that. Okay. And that's the facial.

THE WITNESS: Right.

THE COURT: Now, my understanding from the prior testimony of Dr. Connor is that the growth --

THE WITNESS: Right.

THE COURT: -- happens later?

THE WITNESS: Right. Fetal growth, you know, in terms of weight and length is more influenced by second and especially third trimester exposures. And in his case, the tough part with Mr. Chappell is that we have next to no growth information. So I had a birth weight for him that was at the 16th percentile. So actually he does have a below average birth weight, but that 16th percentile birth weight alone is not enough to meet the growth criteria.

We also had one set of measurements from school at age 5, and there his weight was normal, but his height was at the I believe the fourth percentile. So he was short, but the cutoff would be third percentile. So he was close with the scant available growth data that we had, but I honestly didn't have enough growth data to feel confident putting him in a growth deficiency category.

THE COURT: Can FASD be treated?

THE WITNESS: Yes, and no. The damage is done unfortunately and can't be reversed. So it's more about managing and putting into place protective factors. We talk a lot in the field about primary disabilities, which is essentially the brain damage that you're born with, and then about secondary disabilities, which unfortunately Mr. Chappell had all of them, you know, dropped out of school, trouble with the law, trouble with substances, et cetera.

And so our work in the field is about trying to identify the disorder as early as possible so that early intervention and appropriate school special education supports can be put into place. We find it very important to reframe what can be enormously challenging behaviors to parents and teachers. We often use the phrase can't versus won't, and often it's a very therapeutic diagnosis when parents realize that the reason why all of the traditional discipline techniques are not working is because of brain damage not because they have a wilful kid; right?

So early diagnosis is important. Intensive special education services are important, and we do have research that shows that if you have enough protective factors in place, you really substantially reduce those secondary disabilities, those dysfunctional life outcomes, but you've still got brain damage, and you're still likely to need substantial supports into

adulthood.

THE COURT: Okay. Tell me what history you had of Mr. Chappell specifically, what drugs he was using in adolescence and for what period of time.

THE WITNESS: Right.

THE COURT: Do you know?

THE WITNESS: Yes. And do you mind if I refer to my notes?

THE COURT: Please.

THE WITNESS: Sure. We learned, and as always, these are a little inconsistent in terms of amounts and patterns but that I think starting in younger adolescence perhaps at 12 to 13 that he became involved with alcohol and marijuana. I believe those were his adolescent drugs of choice. He later got introduced to cocaine and crack, and that became a very prominent substance for him in his early 20s.

THE COURT: Okay. And, you know, obviously the research continues to evolve in those areas --

THE WITNESS: Yes.

THE COURT: -- of the effects on the brain and how long they last.

THE WITNESS: Right.

THE COURT: And was there any indication that he was using methamphetamine at all? Any reports of that?

THE WITNESS: Let me get to my source notes on that.

I have reports from family members and friends again about alcohol, marijuana, crack in later teens. And then I'm going to look -- apologies. I'm going to look at what he told me as well because I'm not remembering methamphetamine. He, again, marijuana and alcohol, cocaine, so, no. I mean, to my knowledge, there wasn't prominent use of methamphetamine.

THE COURT: I think that may have been by virtue of the fact of when this -- when this all happened, the '90s.

THE WITNESS: Right.

THE COURT: Late '90s. Okay. So is there any research indicating that either alcohol use beginning in adolescence or cocaine, crack cocaine results in permanent brain damage?

THE WITNESS: Yes. And the question is how permanent, but the research is clear that the developmental period of adolescence, because the brain is growing again and having another growth spurt, that it is a vulnerable time when it comes to substance abuse, and drinking has -- has led to decreased performance on a number of cognitive tasks, but also, again, it has shown resilience where if you have a prolonged period of abstinence that you have substantial recovery in those deficits.

Marijuana use during adolescence has possibly some impact on cognitive skills but also increases your mental health risks in adulthood if you start using marijuana in your

teens. And then cocaine, long-term cocaine use at least can cause impairment in a number of cognitive domains. And again, it's -- the evidence so far suggests that there is at least partial recovery from those if you've been abstinent for a while, but certainly at the time of heavy use you can expect to see some impairments.

THE COURT: Thank you.

Questions as a result of my questions?

MR. LEVENSON: One moment, Your Honor.

MR. WISNIEWSKI: Nothing. Thank you, Your Honor.

MR. OWENS: No questions.

THE COURT: Thank you for indulging my CLE attempts. I run the drug court. So sorry.

THE WITNESS: Okay. Good.

THE COURT: I used this opportunity to do that. It may not have been quite on point but thank you.

THE WITNESS: No, my pleasure. Thank you.

THE COURT: All right. He's excused. Do you have another witness? Do you wish to take a lunch break?

MR. LEVENSON: We do. Somehow our computer is in an update mode, and so it's doing it. We are at 82 percent. Yeah, I don't know what happened. We're going to ask for a backup, but if we can wait until after lunch, we will be ready to go.

THE COURT: Okay. One hour, is that good?

1:00 o'clock.

MR. LEVENSON: Yes, it is. Perfect.

THE COURT: We'll be in recess until 1:00. Thank you.

(Proceedings recessed 11:58 a.m. to 1:00 p.m.)

THE COURT: Good afternoon. Thank you all for being so prompt. I'm not used to that.

All right. This is the continuation of the evidentiary hearing.

If you'll call your next witness.

THE COURT RECORDER: It just has to --

THE COURT: Oh, it's not --

THE COURT RECORDER: It's on now.

THE COURT: My thanks to your off the record.

MR. WISNIEWSKI: Appreciated nonetheless.

THE COURT: All right. We are back on the record, and this is the continuation of the evidentiary hearing.

If you'll call your next witness.

MR. LEVENSON: We'd like to call Dr. Natalie Novick Brown.

NATALIE NOVICK BROWN

[having been called as a witness and being first duly sworn, testified as follows:]

THE CLERK: Thank you. Please be seated. State and spell your name for the record.

THE WITNESS: Natalie Novick Brown. N-o-v-i-c-k, separate word Brown, B-r-o-w-n.

THE COURT: You may proceed.

MR. LEVENSON: Thank you.

DIRECT EXAMINATION

BY MR. LEVENSON:

Q Dr. Brown, are you here today to testify about fetal alcohol spectrum disorder as it relates to James Chappell?

A I am.

Q And did you render an opinion about Mr. Chappell as it relates to this diagnosis?

A I did.

Q Before getting to those opinions, I'd like to spend a few minutes talking about how you became involved in Mr. Chappell's case. At the request of the office of the federal public defender, did you do a report in this case?

A I did.

Q And can you turn to Exhibit 10 in the exhibit binder in front of you. Take a look at that document, and tell me when you're done.

A Exhibit -- what was the number again, sir?

Q Number 10.

A 10. Okay. This is the functional and behavioral assessment report that I prepared on my evaluation of Mr. Chappell.

Q And if you will look at page 34 of that exhibit, is there a signature on that page?
A Yes, there is.
Q And is that your signature?
A It is.
Q Does this document look like a true and correct copy of the report you prepared in this case?
A Yes.
Q And are the statements in this report true and correct?
A They are.
Q In your capacity as a forensic psychologist, do you normally prepare reports such as this one in Exhibit 10?
A Yes, I do.
Q And was the report made at or near the time you received and reviewed the information it contains?
A Yes, it was.
Q Are you responsible for the generation, retention and storage of this type of report?
A I am.
Q When you look at attachment A to this report, it follows page 34. It would be page 35 of Exhibit 10. Is this a list of materials that you reviewed when originally working on the case?
A Yes.

Q And did you receive any additional information following your writing of this report?

A I did.

Q Can you look at Exhibit 11 of the binder. And is this list now a comprehensive list of all the materials you reviewed, those you reviewed in working on the report and those you reviewed after?

A It is.

Q And I'm sorry to make you do this, but if you can go back to Exhibit 10, could you look at page 39 and tell me is that your CV, the CV that was originally attached to this report?

A Yes. This is an outdated version of my CV.

Q I'm glad you asked me that. Can you look at Exhibit 12 in the binder in front of you, and can you tell me is that your updated CV?

A Yes, it is.

Q So, Dr. Brown --

MR. LEVENSON: First, Your Honor, if I may, is the State going to -- is the State on the same page as that Dr. Brown can be designated as an expert?

MR. OWENS: Yes.

MR. LEVENSON: Okay. So I'm going to shorten the questions, Your Honor, regarding the education and training. I'm going to speak about them, but I've narrowed it in half.

BY MR. LEVENSON:

Q How are you currently employed?

A I'm a clinical psychologist in solo practice in the Seattle, Washington area.

Q And where are you licensed?

A Licensed in the State of Washington, my home state. I'm also licensed in Oregon. I'm licensed in Alaska. I'm licensed in Florida, and I'm licensed in Arkansas.

Q Now, you said you have a solo practice. Does it consist of a forensic and a clinical practice?

A It does.

Q Can you talk about each parts of those practices.

A Sure. The clinical part of my practice involves psychotherapy, individual psychotherapy with adolescents and adults and a variety of issues, some including FASD. The forensic aspect of my practice, which is the larger part of my practice, involves psychological assessments, including risk assessments, competency assessments and mental state assessments.

Q Does any part of your practice involve FASD?

A Yes, about 30 percent roughly.

Q And when did you begin working in the field of FASD?

A In 1995, after finishing a fellowship in FASD.

Q Now, you said you're a licensed psychologist. Where did you go to school for your Ph.D.?

A University of Washington in Seattle. I began in 1990, finished in 1994 -- and that's roughly five years actually -- with a Ph.D. in clinical psychology.

Q At some point did you teach at University of Washington?

A Yes. I'm a clinical assistant professor on the staff at the University of Washington at the current time in the department of psychiatry and behavioral sciences, and I taught for a time. Now I only do research at the university.

Q At the University of Washington, did any of your work involve FASD?

A Yes, all of it actually.

Q Do you have any specialized training in FASD?

A After getting my Ph.D. in clinical psychology, I did a postdoctoral fellowship at the Fetal Alcohol and Drug Institute at the University of Washington.

Q Have you published any work, and where has that been published if you have?

A Yes. I've published 59 articles -- I counted them up -- since about, well, actually since the late '90s, and those articles and some book chapters as well have been published in peer-reviewed journals and also in books of course.

Q Have you been given -- have you given any trainings or workshops on FASD?

A Many.
Q And when did you start doing that?
A I did a few in 1990, but I began recording my workshops in 2005.
Q How many states would you say you've presented on FASD?
A Between 15 and 20, probably closer to 20 at this point.
Q Have you ever presented a workshop or training in Nevada on FASD?
A Yes, I did. In 2007, I was invited to speak at the federal public defender's conference, and so I presented on FASD assessment diagnosis, history and mitigation issues.
Q Have you ever testified before as an expert in FASD?
A Yes.
Q And you've been --
A Many times.
Q You've been designated as an expert on that topic?
A Yes, I have.
Q Have you testified in state court on that topic?
A I have and in federal court. I've also testified on FASD in military court as well.
MR. LEVENSON: Okay. So, Your Honor, at this point I know you don't -- you're not going to designate her, but we would like for her to testify. We are going to offer her as an

expert in the field of FASD and related matters.

THE COURT: All right. And the State has no objection --

MR. OWENS: No objection.

THE COURT: -- for her offering opinions, and so I'd be happy to hear those.

MR. LEVENSON: Thank you, Your Honor.

BY MR. LEVENSON:

Q Dr. Brown, did you create a PowerPoint to assist the Court today with the testimony?

A I did.

Q And can you talk a little bit about why you created a PowerPoint.

A To assist in my verbal testimony about FASD. FASD involves a lot of complex issues. So it helps to see some of the aspects of my evaluation as well as here -- here for me.

Q And can you turn to -- and I promise I'm almost done having you flip through the binder.

A Okay.

Q Can you look at Exhibit 22 in front of you, and can you tell me does that look to be a copy of the PowerPoint that the Court will be looking at today?

A Yes, it is.

Q Dr. Brown, did you work for free in this case?

A No, I didn't.

Q Does the fact that you were paid by our office, did that influence your diagnosis or opinions?

A No, it did not.

Q Okay. When you were contacted by our office, what were you asked to do on Mr. Chappell's case?

A I was asked to conduct a lifelong adaptive and behavior assessment of Mr. Chappell and respond to five specific referral questions.

Q So Dr. Connor has testified today, as you know, and Dr. Davies has testified today. What is your role in this case?

A Typically, in this case and in other cases as well, my role is to review all the records across the lifespan and rule out FASD, see if I can find any evidence that contraindicates FASD. In other words, I'm examining the null hypothesis.

Q Have you reviewed Dr. Connor's report?

A I have.

Q And have you reviewed Dr. Davies' report?

A Yes.

Q Have you ever been asked by defense counsel to diagnose someone with FASD and have to tell them that you could not?

A Yes. In fact in about a third of the cases there is that outcome.

Q About how many FASD forensic evaluations would you say you've done?

A Over 400.

Q So I want to talk a little bit generally about FASD before we talk about your referral questions. I'll give you a moment to get some water.

(Pause in the proceedings)

BY MR. LEVENSON:

Q So, Dr. Brown, turning now to the PowerPoint, what is the prevalence of FASD in the US population?

A Up until this year, we thought the prevalence was close to 5 percent in the population of the United States, and more recently, there have been some studies showing that it's from 2 to 10 percent, 2 percent reflecting FAS, and 10 percent reflecting all of the FASD conditions under the umbrella. So 10 percent is a huge number. 10 percent of the general population is thought to have an FASD.

There have been other studies that tend to corroborate that. An earlier study found more prevalence, more incidents in the adoptive and foster placement system where you would expect to find a higher rate and those rates were 6 to 17 percent of children in those systems had FASD conditions.

Q What about the juvenile justice system and the adult justice system population? How does that compare?

A Approximately a quarter in both systems, juvenile and

adult justice. The juvenile system, about 23 percent and a large study was conducted in the adult system and found 10 percent hard cases of FASD. There was actual diagnosis of all these individuals, and an additional 15 percent they could not confirm maternal drinking during the pregnancy, but everything else was consistent with a diagnosis of FASD.

Q Now, we normally talk about FASD in terms of alcohol abuse by a parent, by a mother. Are there studies to show the prevalence or the effects of drugs or cigarettes on a fetus?

A Yes. We started seeing studies on other substances in the late 1980s. We knew by 1996, for example, that other drugs of abuse carry the same kind of burden in terms of cognitive dysfunction and long-term developmental effects. So, yes. Some of those cognitive deficits in other drugs of abuse are quite significant, but nothing is as significant as alcohol. Of all the drugs of abuse, alcohol has the most -- the most effects, the most negative effects and the most far-reaching effects.

Q What about heroin specifically?

A Heroin we know from large meta-analytic studies, hundreds of studies actually, underlying studies, that heroin causes growth deficiency in the womb. So this causes microcephaly or underdevelopment of the brain. It also causes placental insufficiency, so not enough nutrients and oxygen getting to the fetus. It causes death, intrauterine death, and

it also causes prematurity. After birth, heroin causes ongoing cognitive deficits and adaptive deficits, similar to what you see in fetal alcohol impairment.

Q What about cigarette smoking?

A Surprisingly, cigarette smoking is extremely damaging during pregnancy, and most people still don't know this. It's again not as egregious as alcohol exposure, but it does cause many cognitive deficits that continue long term throughout the individual's lifespan.

Q Is there a correlation between FASD and getting into trouble with the law?

A A strong correlation, and in large part this is due to what is considered a universal deficit in FASD executive dysfunction. And executive dysfunction is the controlling mechanism in the brain housed in the frontal lobes. Executive skills control every important aspect about the thinking process and ultimately the behavior that's the outcome of that thinking process.

Q So, Dr. Brown, you're not a lawyer; correct?

A No, I'm not.

Q Have you conducted research into the intersection of law and psychology, and specifically law and FASD?

A Yes, I have in two general areas, how the brain damage in FASD causes the cognitive deficits that lead to long-term problems, adaptive problems and secondary

disabilities which are adverse outcomes including trouble with the law; and also how the cognitive deficits impair abilities required for waiving -- waiving rights, for example, and participating adequately in defense.

Q Have you ever testified in court about the intersection of law and psychology?

A Yes, I have.

Q And have you ever been designated as an expert in that field on the stand?

A Many times.

Q Do you have much interaction or did you at once have interaction with the ABA website?

A Yes. The ABA website was -- the case law on FASD that's now on the ABA website was started at the University of Washington back in the early 2000s, and a few years ago, the ABA took over that responsibility and now keeps -- keeps the case law part of the website up to date, summarizing the cases involved in FAS, FASD and also providing some litigation tips to attorneys as well.

Q Okay. Are there any studies with respect to FASD and getting into trouble with the law?

A Many. Yes.

Q I think -- I'm sorry. Well, actually let's look at this one slide. Do you know how far back the first mention of FASD was --

A Yes.

Q -- in case law?

A The first cases in FASD began in the '80s, and the case law on the website originally started by the Fetal Alcohol and Drug Unit includes the first Supreme Court case in 1990 that ruled on FASD. The Supreme Court at that time called FASD a well-known childhood impairment.

Q And by 1996 and 2007, what was -- were there a larger number of cases available for lawyers to look at regarding FASD?

A Yes. By '96, there were a number of cases where FAS, fetal alcohol syndrome, or fetal alcohol effects, which is one of the conditions under the umbrella at the time, figured prominently in mitigation and on one or two guilt-phase cases. And by 2007, hundreds of cases involved FASD conditions.

Q And again these were cases that you had helped. At one point you had helped that website. The University of Washington had taken care of that website and then turned it over to the ABA?

A Yes.

Q Okay. So now turning to the next question. Are there any studies with regard to FASD and getting in trouble with the law?

A Yes. Several studies in the '80s, more studies in the '90s. On the screen is one of the most famous studies.

This was known as or is known as the secondary disability study, and Dr. Ann Streissguth, who was my supervisor during my postdoctoral fellowship, spearheaded this study, but it was sponsored by the Centers for Disease Control, and the result of the study found a very large, a very high risk of trouble with the law in this population.

Q Can you talk a little bit about Ann Streissguth --

A Sure.

Q -- and I guess her work on FASD.

A Ann is retired now, but she was the first psychologist in the United States to begin to look at the developmental outcome of prenatal alcohol exposure. She began her work in the '70s, was one of the individuals on some of the first papers on FAS that came out in the '70s, and she was the leader of several grant studies that were provided by the federal government to examine the long-term effects of alcohol on, prenatal alcohol exposure on children as they were getting older and older. So she followed children for almost three decades and wrote extensively in peer-reviewed journals about what she was finding as far as their deficits were concerned.

Q It seems that you and Dr. Connor and Dr. Davies are all based in the Seattle area. Is there a reason for that? Besides the love of the northwest.

A No. Besides Seattle being a terrific place to live,

yes. Seattle, the University of Washington was one of the -- one of the sites back in the '70s, late '70s that was awarded federal grants for a long-term study of fetal alcohol spectrum disorder, and there were about four other locations around the United States, but the Seattle site was designated as the site for studying the long-term developmental and behavioral aspects of fetal alcohol exposure, prenatal exposure.

Q Talking just briefly about adaptive functioning problems, in a hypothetical situation, if multiple siblings are exposed to alcohol by the same mother, born at different times, would you expect each of the siblings to turn out the same way?

A No. The research has found that there are a variety of factors that go into whether or not an exposed child will actually develop an FASD. Birth order is one of those factors. So, for example, the later in the birth order a child is born, the greater the likelihood he or she will have an FASD, and the reason for that is the mother's body is kind of worn down from multiple pregnancies or prior pregnancies, and if the mother is abusing substances throughout that period of time, that also breaks down her metabolism and her system. So that impacts the vulnerability of the fetus.

There are other reasons as well. Environmental reasons go into why one child has an FASD and another does not. There might be differences in the environment. Twin studies

have been done to tease this apart.

Q Turning back to Mr. Chappell's case, did you review -- I think we talked about this -- you reviewed materials in working on this case; correct?

A Yes.

Q Can you talk about some of those materials that you reviewed and why you asked to review them.

A Yes. I asked to review all of the records that were available in 1996. I similarly asked to review all the records available, the additional records available in 2007, and, finally, I asked for all the records that were available since 2007, so three different sets of records.

In addition to record review, I also consulted with Dr. Connor regarding his test results and the neuropsych profile, test profile, and I consulted with Dr. Davies eventually to determine if he had diagnosed Mr. Chappell and wanted to know if there was a diagnosis, and, finally, I interviewed Mr. Chappell as well.

Q When you interviewed Mr. Chappell, did you have a temporary license here to practice in Nevada?

A Yes.

Q Okay. Were you provided all the materials that you needed in order to render a report in this case?

A I was.

Q So you were asked to answer five referral questions;

is that right?

A Yes.

Q So let's take a look at the first one. At the time of trial in 1996 and resentencing in 2007, what was known in the legal field about FASD and ARND? So we have talked a bit through Dr. Connor and Dr. Davies about the diagnostic criteria, but can you talk about what was known in the legal field or generally known about the two in '96 and 2007.

A The first publication that such a thing as FAS existed was in 1973 here in the United States. It had already been published in France in 1968, but in 1973, that's the first time medical professionals learned about FAS, and the publication was The Lancet, which is a highly regarded medical journal, and following that publication, there were a number of additional publications with the same findings that were published in the United States and internationally.

And, eventually, in 1977, the Surgeon General -- I'm sorry, the first nationwide warning was put into effect, and this was by the NIAAA, the National Institute on Alcohol Abuse and Alcoholism, and this warning was for the lay public and doctors, some medical professionals as well.

The first Surgeon General warning for the public was in 1981, and the Surgeon General warned that women should not drink alcohol if they were pregnant or might be pregnant, and the first time the diagnosis appeared in a medical treatise, in

the Merck manual in particular, was in 1982, and from that year on, each time the Merck manual was updated, there was more and more information about fetal alcohol syndrome and ultimately other conditions under the umbrella.

In 1988, the Congress passed a law mandating the warning labels on alcohol beverage containers, and this is significant, particularly in this case, because in the year or two preceding that law there was massive amount of publicity on television, in newspapers, radio because there was controversy. The alcohol beverage industry was lobbying against it, and so it was a huge political issue back then. So many people in the United States if not most people heard about fetal alcohol syndrome.

And then in 1989, a very popular book was published, *The Broken Cord*, which was written by a father with a child who had FAS, and because of the publicity around the warning labels, this book was immensely popular in the lay public. So by the end of the '90s, FAS was, if not a household word, pretty much close to it.

In 1991, Dr. Streissguth was invited to speak at the NIAAA -- or the NAACP, rather, legal defense fund annual meeting in Airlie, Virginia, and in that presentation, legal professionals from all over the United States heard about FAS and its implications for the criminal justice system.

In '96, actually two important things happened in

1996. Ann Streissguth published her secondary disabilities study which showed the long-term developmental effects of FASD, and the first government publication of the diagnostic criteria for FAS emerged. The Institute of Medicine published its diagnostic criteria, and I'm sure you've heard already about those criteria.

Prior to 1996, in fact, from 1980 on, the research society on alcoholism had published diagnostic criteria. So people were diagnosing FAS and FAE based on those diagnostic criteria which basically were the same as IOM criteria, only IOM went further and gave more detail to the criteria.

Then in subsequent years other events occurred. In 2004, the Centers for Disease Control published its diagnostic criteria on FAS, and this is distinguished from the IOM criteria in that it quantified the criteria. For example, cognitive deficits had to be at least one standard deviation below the mean.

In 2005, there was another Surgeon General warning to the public about drinking during pregnancy. This time the Surgeon General's warning, unlike the first one, focused almost exclusively on the brain damage and prenatal drinking and exposure.

And in 2006, SAMHSA published information on its website for criminal justice professionals, and actually the SAMHSA website had several different publications: One about

FASD in juvenile justice system, one about the adult justice system and how FASD conditions affected the critical abilities, cognitive abilities that went into trouble with the law, criminal offenses and also competency, problems with competency.

And then, finally, the Fetal Alcohol and Drug Institute listed the US cases, and this became the beginning of what the ABA eventually took over.

Q So for legal professionals, what was known in 1996 and 2007 about FAS?

A In 1996, legal professionals knew that FASD conditions involve -- occurred from something that happened before birth, that the conditions involved permanent brain damage and that the conditions involved either FAS with facial abnormalities or FAE, no facial abnormalities or fewer than the three required, but the brain damage was the same regardless of diagnosis. And legal professionals also knew that --

MR. OWENS: Judge, I'm going to object here if I could just take a minute. We're talking about what legal professionals know. I'm concerned that may be beyond the personal knowledge of this witness. It's my understanding, she was an expert on psychology and fetal alcohol syndrome, and now it sounds like we're talking about an expert in what lawyers know, and she said she's not a lawyer. So foundation, lack of personal knowledge. No objection to this coming in as what was

available in the psychological community, but we're talking about what was known by the legal professionals.

THE COURT: Well, there may be a difference between what was known or what was available to be known by legal professionals, and I think there is something to be distinguished there since when I was pregnant in 1985 my doctor said it was okay to drink occasionally. So, obviously, if it was known way before then that you shouldn't drink, doctors, medical doctors were still telling women it was safe to have the occasional drink while you were pregnant. So I think --

MR. LEVENSON: If we rephrase the question.

THE COURT: Yes.

BY MR. LEVENSON:

Q What was -- what was readily -- what was available to legal counsel at that time as opposed to what they actually knew?

A What was available to be known in 1996 was the fact that FASD conditions involved prenatal onset, permanent brain damage that caused lifelong developmental problems, behavioral problems, that FASD could manifest, in '96, in two different categories of diagnosis, FAS or FAE, which is now called ARND -- but the brain damage was the same regardless, and FAS -- FASD was associated with this pervasive central nervous system dysfunction or cognitive impairment which included significantly impaired executive functioning.

And, finally, in 1996, information about secondary disabilities, long-term life course outcomes was known because there were publications prior to the secondary disabilities publication in 1996.

Q Would you say this chart represents what was readily available in 1996 regarding all of the different chemicals that could go into the body during a mother's pregnancy?

A Yes. This chart is actually from the Institute of Medicine summarizing their research up to 1996 about what was known regarding the impact of various substances of abuse, and you can see over on the left alcohol causes a number of problems from mental retardation at the time, intellectual disability today, through other cognitive problems, behavioral problems.

And looking at the other substances of abuse that were known about back then in 1996, not much was known. However a little bit more was known about nicotine or cigarette smoking, and you see that there are effects that are negative on the cognitive functioning in terms of smoking cigarettes as well.

Q Was there anything known in 1996 about the use of methamphetamine by the mother?

A No.

Q Okay. And what about in 2007? Had the research or had the information expanded?

A Yes. Primarily because of the effects of alcohol being so devastating, a ton of research was done after in the late '90s and early 2000s on other drugs of abuse and also because other drugs of abuse were becoming more common in those years. So this chart summarizes what the research had found by 2007.

And if you see over again on the left, strong effects for almost every damaging aspect of prenatal exposure to alcohol. Some effects throughout the rest of these substances affect -- significant effects for nicotine again; opiates, where heroin is, some effects; marijuana surprisingly a lot of effects; and meth, there's still research on meth because meth is a relatively new substance of abuse. So the jury is still out essentially on methamphetamine although behavior appears to be affected, and if behavior is affected, then cognition must be affected.

Q The Court asked a question or brought up a good point about perhaps doctors were saying something different to patients in 1985, and you had said in your earlier testimony that you shouldn't -- it was known throughout the household or many households that one shouldn't drink during pregnancy. Would you say there's a difference between what was known about not drinking during a pregnancy versus what the effects of drinking during a pregnancy were? Is it a different basis of knowledge --

A Oh, certainly.
Q -- in the average citizen?
A Certainly. I think that the average citizen likely did not know in 1996 --
Q And in 2007?
A -- likely did not know about the pervasive impact on brain functioning of prenatal alcohol exposure, and the same goes for 2007. In fact, still today, more than 10 percent of the American population of women who are pregnant or could be pregnant are still drinking. So I think a lot of people either didn't know or chose not to pay attention to those effects.
Q So turning to the first referral question about at the time, what was, let's say readily available in the legal field about FASD and ARND, do you have an opinion as to that?
A Yes, I do.
Q And what is that opinion?
A By the time of Mr. Chappell's trial in '96 and also in 2007, there was a lot known about in the legal field and the lay public about the nature and causes of -- cause of FASD. There was information about the assessment of FASD, about how the brain damage affected the behavior in FASD and how those effects were long-term and manifested in secondary disabilities, including trouble with the law.
Q So let's look at the second referral question: At the time of trial in '96 and resentencing in 2007, what

evidence was available to counsel to suggest Mr. Chappell suffered from an FASD condition? In review of this referral question, what evidence were you looking for that would suggest that Mr. Chappell suffered from FASD?

A Information in two primary areas, information about whether or not he was exposed prenatally to alcohol or other drugs for that matter, and then --

THE COURT: Wait a second. Wait a second here.

THE WITNESS: Sure.

THE COURT: Oh, okay.

THE COURT RECORDER: I'm so sorry. I hate to interrupt.

THE COURT: I thought it was going to be a different note. The court recorder is asking you to please don't pound your hands or fingers on the desk because the microphone picks it up. So if you're for emphasis doing that, it's blasting in her ears.

THE COURT RECORDER: I apologize.

THE COURT: But also you tend to -- your voice is pretty low too. So speak up as well because this will all end up being transcribed.

THE WITNESS: Yes. Thank you.

THE COURT: All right.

THE WITNESS: Thank you.

THE COURT: You're welcome.

THE WITNESS: And if I do that again, pound me. Okay. All right.

BY MR. LEVENSON:

Q So you were looking for two specific things when you were looking at this referral question.

A Yes. Evidence of prenatal alcohol exposure and evidence of central nervous system dysfunction during the lifespan.

Q Can you talk briefly your definition of CNS dysfunction.

A Central nervous system dysfunction, pervasive cognitive deficits that have a catastrophic impact on adaptive functioning, and those cognitive deficits stem from structural brain damage essentially.

Q Did you review any evidence that suggested that Mr. Chappell suffered from an FASD syndrome?

A I did.

Q And what were those?

A In Mr. Chappell's interview with Dr. Etcoff, according to Dr. Etcoff's report, 1996 report, Mr. Chappell informed him that, in a social history questionnaire, that his mother possibly drank alcohol and used drugs during the pregnancy with him.

Q And was there a notation in that report about the mother drinking?

A There was. In the records that Dr. Etcoff had, the maternal aunt, Sharon Axam had confirmed maternal alcohol and drug use during the pregnancy.

Q Did you see any other evidence from -- in Dr. Etcoff's report that Mr. Chappell might have suffered from FASD?

A I saw abundant evidence in Dr. Etcoff's report that was consistent with prenatal alcohol exposure. There were a couple of other things that were consistent with Sharon Axam's report, however, that were important, and everything tied together. It was convergent evidence of prenatal exposure to alcohol and drugs for that matter.

For example, at the time of his mother's death in 1973, Mr. Chappell and his siblings had been placed with their maternal grandmother for a year. So from age about one and a half he had been living with his maternal grandmother, and this was in the testimony of William Moore, who was Mr. Chappell's juvenile probation officer.

And a third thing that was available in the 1996 records, in 1973 there was a newspaper article about Mr. Chappell's mother being run down or hit by a police car while she was walking in the wee hours of the morning on the highway, and that kind of behavior suggested -- which indicated very poor judgment suggested intoxication at the time.

So at the time of the trial in 1996 and resentencing,

counsel had confirmation of prenatal alcohol exposure and drug use during the pregnancy.

Q Did you also look at some declarations from family members and friends that we supplied to you?

A I did.

Q And do they offer any information regarding whether Mr. Chappell suffered from FASD?

A Yes. There were nine declarations that were not available in 1996 or 2007 but could have been obtained that indicated that the birth mother drank alcohol throughout the pregnancy with her son James, including in particular very heavy consumption on the weekends to the point of intoxication which is very dangerous for a developing fetus. There was information from all these independent sources that she used heroin and cocaine daily during the pregnancy and that she smoked at least a pack of cigarettes daily throughout the pregnancy.

Q And I was going to ask you about two of them, but I think you've already explained that. William Chappell Senior was one of those declarations that you reviewed?

A Yes.

Q And do you remember from your review of the records who that is?

A This is one of the two men who claim to be Mr. Chappell's father.

Q And then the second declaration I think that you said you got a lot of information from was Louise Underwood?

A Yes.

Q And who was she?

A A great aunt, Mr. Chappell's great aunt.

Q And they both had information about both alcohol and drug use during her pregnancy with Mr. Chappell?

A Yes. They indicated, as did others, the daily drinker -- not the daily but the heavy drinking periodically and regularly throughout the pregnancy, drinking to the state of intoxication. They indicated heroin use. Ms. Underwood indicated daily heroin use and also cocaine use and abuse of prescription pills. And Mr. Chappell wasn't quite as sure in terms of the heroin use. He indicated that he had heard she abused heroin. He was the only one who wasn't quite certain. The other declarants, the eight other individuals who weighed in on this topic had observed her using heroin.

Q So you've just described the first criteria that you're looking at which is the mother's prenatal use of drugs or alcohol. Did you find any evidence of CNS dysfunction in the materials that you reviewed?

A Abundant evidence.

Q And can you talk about that.

A Yes. Starting with the defendant's self-report, in 1996 he reported to Dr. Etcoff that he was placed in a special

school in second grade, implying special education. He recalled placement in special education in his junior high years into 10th grade, and he also recalled being pulled out of regular classes for specialized instruction in the basic academic courses -- math, reading and writing -- in junior high and high school.

Q Is special education a red flag to you?

A Yes, it is. And the earlier special education occurs in the school years the bigger red flag it is, in particular because typically it precedes anything that the defendant might have done to damage his own brain.

Q So you mentioned that this was a self-report by Mr. Chappell to Dr. Etcoff. Is a self-report alone something that you're going to take into account, or do you need confirming data?

A Never. In my forensic training we learn to never rely on self-report without corroboration by other independent sources of information. So that's what I do in my forensic assessments; I look for corroboration.

Q In this case did you have corroborating data about Mr. Chappell's special education?

A Yes --

Q And where did that --

A -- from more than one source.

Q Okay. Can you describe some of those sources and

what they said.

A Yes. In 1996, there were 41 pages of school records available. They were provided to Dr. Etcoff, and those school records alone showed multiple cognitive problems, not just a learning disability which was designated or determined to be severe by Dr. Etcoff, but chronic developmental delays and pervasive adaptive dysfunction, and the adaptive dysfunction involved multiple aspects.

I've got some examples on the screen here of social -- social behavior problems, and daily living skills are practical behavior problems. There were also communication problems.

Q So the Court has been asking of the other two experts --

MR. LEVENSON: If you don't mind, Your Honor, I'd like to ask Dr. Brown this question.

BY MR. LEVENSON:

Q It seems relevant here that there is evidence of CNS dysfunction or brain damage or brain dysfunction. Could these have been caused by Mr. Chappell's own alcohol use and/or drug addiction in his 13, 14, 15 and beyond?

A Certainly. When adolescents and teenagers use substances, there is potential for causing their own brain damage. The brain is still developing during those years and is susceptible to brain damage from substances, but these

school records show that these deficits were visible well before he started using substances. So something about his brain was abnormal well before he started doing anything that might have affected it.

Q Looking at the school records, can you talk about some of the special education flags that were evident if someone had reviewed the records?

A Yes. And this screen kind of summarizes why I said abundant evidence was available. The school records indicated he was actually referred for special education after he finished first grade. This is in 1977, and at the time, he had the numerous developmental disabilities and the adaptive problems, which I discussed, as well as learning disability.

Then when he was reassessed three years later in 1980 -- he was in fourth grade at that point -- multiple problems were found through testing, adaptive delay and socialization, attention control problems. He was easily distracted, and that's another cognitive issue, and the achievement deficits were quite significant by that point in time.

He in reading and listening comprehension he was one year behind, but two years behind in math, and math typically is the most impaired of all academic subjects for children with FASD because math involves more frontal lobe work, executive function work and working memory where information and problem

solving occurs, and so the school records in fourth grade had multiple cognitive problems, in fact enough cognitive problems by fourth grade to qualify him for central nervous system dysfunction in FASD had he been diagnosed back then.

Q And this is again repeating some of the issues that were found in the 1980s special education evaluation?

A Yes. And this is just a list summarizing what I said and -- but also noting that slow processing speed was another factor, another cognitive problem found. And when he was tested by Dr. Connor, Dr. Connor also found slow processing speed. Self-regulation deficits, self-regulation is another way of saying executive functioning, and, as I noticed, adaptive dysfunction in communication as well as social and daily living skills.

Q So as I understand your testimony, these school records actually do indicate executive functioning problems?

A Yes, as well as multiple problems in other cognitive domains.

Q Did the school have a specific description of this executive functioning problem?

A Yes. One of the school records refer to Mr. Chappell's executive control as brittle and --

Q And what does that mean to you?

A Brittle means fragile, impaired. So this is really important and relevant to the offense conduct. Even back in

fourth grade he was recognized to have impaired executive control over his behavior.

Q Did you make a chart of Mr. Chappell's school records?

A I did.

Q And can you explain what this is.

A This is actually a chart of his achievement testing, standardized achievement testing, and just looking at the gestalt of this chart, he had evidence of impairments, learning impairments as early as first grade, and the impairments continue throughout his school years. So they are chronic.

Q Where --

A I should also note there is one more important thing to know about this chart. When he was in first grade, he was one year older than his classmates. By the time he was in fourth grade, he was -- he was older than his classmates, and eventually, by the time he's in junior high and getting into high school, he's two to three years older than his classmates. So that implies, although it wasn't available in the records, some holding back or retention at some point.

Q So we talked about Dr. Etcoff's report, and we've talked about the school records. Is there anything -- we're turning back to Dr. Etcoff's report. Is there anything else in that report that would signify brain dysfunction?

A Several things, many things. Dr. Etcoff tested

Mr. Chappell and provided two tests to him and found significant discrepancies in the test results. In the IQ testing there was a significant discrepancy between verbal and performance IQ, and the same kind of discrepancies were found in the achievement testing as well. Mr. Chappell scored in the average range for reading and spelling, but in the moderately impaired range for arithmetic. And as I noted, this kind of relative deficiency in arithmetic is a red flag for FASD.

Q Can you talk about IQ splits and what that signifies to you with regard to brain dysfunction.

A Yes. IQ splits in any kind of discrepancy is pretty typical FASD. What it means is uneven brain functioning. Some areas -- when alcohol exposure occurs, whatever is developing in the brain at that point in time is damaged, and if there is not 24/7 alcohol assumption -- consumption, you tend to see this relative strengths and weaknesses in brain functioning in somebody with an FASD brain.

And this patchiness, this unevenness is what distinguishes an FASD brain from brains of individuals who might have other conditions, including traumatic brain damage or anything that could have -- like, a syndrome that could have caused brain damage at birth. And you see this also in his neuropsychological test profile, this patchiness, this up and down nature of the test scores.

Q So we're talking about the school records. We're

talking about Dr. Etcoff's report. What about trial testimony? Did you see any evidence in the trial testimony about CNS dysfunction?

A Well, before we --

Q Yes.

A Could we go back. I'm sorry.

Q Absolutely.

A There's something very important about Dr. Etcoff's report. He found -- Dr. Etcoff in his report found numerous cognitive and adaptive problems. I've already noted the cognitive problems, but down at the bottom there's something really important. Dr. Etcoff found or diagnosed in Mr. Chappell a receptive language disorder and arithmetic disorder, and he attributed those two disorders to neurological origin, i.e., brain damage. So here was the trial counsel's mental health expert telling them their client had brain damage essentially.

Q So I think, besides the school records and Dr. Etcoff's testing, you said that you had reviewed some trial testimony. What did you find in that?

A The testimony in 1996 from the maternal grandmother, Clara Axam, who raised the birth mother's children, she indicated that Mr. Chappell was slow compared to his siblings in terms of understanding and learning things, and this suggested cognitive impairment, which is consistent with

testing. She also testified that he had a speech delay and didn't begin speaking until he was three and a half which implies developmental delay in communication.

Q What is a normal age learning how to speak?

A Most toddlers by the age of 2 are speaking in short sentences, two or three word sentences to make their needs known. And she also testified about the defendant's special education services. She made an error. She said it didn't start until fifth grade, but actually the school records show he was receiving special education services throughout his school years from second grade on.

And then in 2007, Mr. Chappell's brother Willie Chappell Junior testified about Mr. Chappell's incontinence problem in childhood. Actually in his midteens he was still wetting the bed, and this is an adaptive delay in daily living skills or practical skills. And Mr. Chappell's younger sister Myra Chappell-King testified that other children would tease her older brother James for being slow, and again this is another suggestion of cognitive impairment.

Q So other than the witnesses at trial in '96 and 2007, did you review any declarations of people that were available both in '96 and 2007 that could have added to that information?

A Yes. Added significantly because the testimony wasn't really in-depth or comprehensive regarding Mr. Chappell's cognitive problems. So there were numerous

declarations about numerous cognitive problems in Mr. Chappell, including sensory integration, processing speed and attention control. Those are all considered cognitive problems, but those three cognitive problems are controlled by the frontal lobes of the brain. So they're aspects of executive functioning, and also lay witness evidence in the declarations regarding his adaptive function deficits in communication, daily living skills and socialization. So these declarations in and of themselves provided evidence from multiple people of central nervous system dysfunction.

Q So can we take them in turn. Do you remember what signs of sensory interrogation impairment -- am I saying that -- integration. I didn't think that was right. Integration. Sorry. Criminal lawyer. What signs of sensory integration impairment were found by the witnesses?

A Taking them one at a time?

Q Yes.

A May I refer to my report because there are a lot of examples?

THE COURT: Of course.

THE WITNESS: Thank you.

MR. OWENS: For the record, what page are you looking at?

THE WITNESS: I am looking at page 18. It starts on page 18.

MR. OWENS: Thank you.

THE WITNESS: Under sensory integration, a couple of witnesses provided information about Mr. Chappell's poor sense of direction, not being able to figure out where he was in relation to where he had been.

In terms of processing speed, numerous people, nine to be exact, talked about Mr. Chappell taking a longer time to learn and catch on to things, so longer to understand, needing more time to learn than anyone else. Several, many people used the term mentally slow to describe him.

Under attention control, six individuals described his short attention span, distractibility, difficulty focusing and his hyperactivity.

Under communication, eight witnesses indicated he spoke slowly or in a delayed manner. That's expressive communication. He took time to respond to questions. That's receptive communication. He used one word answers and simple phrases when he spoke. He misused words. He had a limited vocabulary and spoke like a child who was much younger. He easily got lost in conversations and couldn't keep up with peers during their conversations. Pronunciation problems. And he did not follow or understand his peers' jokes.

Under daily living skills, six witnesses indicated he needed assistance with everyday living tasks. He could not read well and often needed help in having things read to him or

filling out applications, like job applications and paperwork. He had a hard time keeping jobs and was usually unemployed. He did not shop for himself. Even when he was an adult, he was relying on his family for assistance with that. Poor personal hygiene. Wet the bed, as I said earlier, into his teenage years.

Totally dependent on his grandmother for his daily living tasks, and he could not figure out things on his own and needed help from friends and would go to them with problems and ask for their help. He never earned enough money to live independently on his own or take care of his family, and in terms of his relationship with Debbie Panos, the victim, he was responsible on her for their rent and expenses, paying the expenses, and his only responsibility in that relationship seemed to be taking care of the children or babysitting the children while she was at work.

And then getting to socialization, eight people, eight witnesses, talked about how immature he was and his poor ability to read people's emotions and nonverbal cues, how he interacted like a child with his own children. In childhood he was called a crybaby because he was so sensitive and did not talk much. And as an adult, he was not streetwise, very gullible, often the butt of jokes, and one person called him a social misfit.

BY MR. LEVENSON:

Q So all of these fall under the CNS dysfunction prong?
A Yes.
Q So we've talked about the mother's drinking and drug use, and we talked about the CNS dysfunction. So then I guess wrapping up the second referral question which is what was available at the time of trial that would have given counsel a suggestion that Mr. Chappell suffered from FASD; do you have an opinion as to that question?
A Yes. First of all, there was documented confirmation of the mother's prenatal alcohol use, and there was information regarding her drug use during her pregnancy with her son James. There was evidence from friends and family regarding her substance use during the pregnancy, and documented evidence of central nervous system dysfunction in the education records and in the testimony and declarations from friends and family.

There was uncontested evidence from Dr. Etcoff that at least two of Mr. Chappell's neurodevelopmental conditions -- communication disorder and arithmetic disorder -- stemmed from neurological origin which constituted a clear notice of brain damage.

Q So what does all of this say to you?
A And there was --
Q I'm sorry.
A There's more.
Q Sorry.

A So the next page, please. So had -- had trial counsel retained an expert in neuropsychology, like Dr. Connor, it is very likely that that expert had he or she tested Mr. Chappell would've found pervasive evidence of brain damage or neurocognitive dysfunction, as Dr. Connor did, which would have in 1996 qualified Mr. Chappell for a diagnosis of cognitive disorder not otherwise specified. At the time, that was a DSM-IV diagnosis for central nervous system dysfunction.

THE COURT: Didn't Dr. Etcoff diagnose him with that anyway?

THE WITNESS: No, he did not. Because he did not conduct much testing. He did screening only.

THE COURT: Okay.

BY MR. LEVENSON:

Q And then FAS is a medical diagnosis; correct?

A It is.

Q And so in 1996 and 2007, he could have -- could he have been diagnosed with ARND? As by a -- I'm sorry. ARND by a medical doctor?

A A medical doctor would have needed to diagnose ARND. So had Mr. Chappell been examined by a medical doctor like Dr. Davies in 1996, that doctor could have and likely would have diagnosed him with, at that time, fetal alcohol effect or ARND today. And then, finally, the results of my evaluation did not, could not rule out FASD. I found nothing inconsistent

in Mr. Chappell's life history with an FASD. It was all consistent.

Q Okay. So turning to the third referral question, how would FASD have affected Mr. Chappell's ability to control his actions on the day of the crime? First of all, were you given any information to read about the accounts the day of the crime?

A Yes. Mr. Chappell's testimony and the Nevada Supreme Court opinion.

Q Was there anything relevant in the Nevada Supreme Court opinion that you read that relates to this referral question?

A Yes. The opinion contained information about Mr. Chappell's mental state at the time of the offense. He was under, according to the opinion, he was under a state of extreme stress at the time.

Q And that was based on the Nevada Supreme Court's opinion?

A Yes.

Q Okay. What other material, if any, did you review that assisted in answering this third referral question?

A I looked at Dr. Connor's test results to inform me about Mr. Chappell's cognitive functioning, and there was in those test results there was evidence of pervasive deficits and six broad cognitive domains and three additional adaptive

domains, a quintessential central nervous system dysfunction in Mr. Chappell.

Q I'm assuming you've seen a lot of neurological or you've looked at a lot of neuropsychological assessments in your work?

A Not just the over 400 evaluations I've conducted, but also in my training a few hundred more, so many hundreds of evaluations.

Q How does Mr. Chappell's neuropsychological assessment compare to others that you have seen?

A One of the worst, one of the more pervasive and more extreme examples of central nervous system dysfunction.

Q Can you define adaptive dysfunction.

A Adaptive behavior is everyday behavior, and dysfunction -- adaptive dysfunction means everyday behavior is impaired, everyday behavior like communication skills, practical skills and socialization. And because executive functioning or dysfunction predicts adaptive dysfunction according to the FASD research, you would expect to find adaptive dysfunction in somebody with FASD, and results of the -- Dr. Connor's assessment of Mr. Chappell found such adaptive dysfunction. Moreover, that adaptive dysfunction involved childlike interpersonal skills and coping capacity which are directly relevant to the offense.

Q Did any testing suggest what age level Mr. Chappell

was coping at?

A Yes. The Vineland Adaptive Behavior Scale was administered to two of Mr. Chappell's friends and confirmed with another measure indicating the reliability of their responses, and his adaptive functioning was determined on the Vineland to be childlike according to both individuals who were -- who did the assessments at different times. So they were independent assessments.

Q In your line of work, how commonly used is the Vineland?

A It's the most commonly used adaptive assessment measure in the world. It's used beyond the United States, and it's used widely in schools and in the clinical setting as well as in a forensic setting. And in the FASD research, it was the most used. Almost no other measure was used in the FASD research. So the Vineland is the standard of care.

Q Can someone cheat on the Vineland? Can a reporter cheat on the Vineland?

A Someone can cheat on any test, and the way we determine whether or not -- typically, what the cheating on the Vineland would involve, people who have some kind of emotional investment in the defendant upgrading the nature of their observations and reporting better than how the person actually functioned. So if there is cheating, we typically see that improvement in adaptive skills.

What we do or what's done in the forensic setting to determine whether or not any cheating has occurred is administer another measure alongside the Vineland, the Behavior Rating Inventory of Executive Function, the BRIEF for short, which contains three reliability scales. And the two individuals who gave the Vineland results were administered the BRIEF, and in both cases, they provided reliable results on this other behavior rating measure. So that improves the confidence in the Vineland results.

And the other thing that improves confidence is these two independent measures resulted in almost the same findings or results. And then another aspect that supports the reliability of the Vineland is the fact that the -- all of the records and the declarations and the testing are consistent with those results, and the FASD research also is consistent with childlike functioning on the Vineland.

Q Can you talk a little bit about two of the reporters, Terry Wallace and James Ford and how they support what you're talking about.

A Yes. These were the former friends of Mr. Chappell. They knew him up to the time of his arrest, and in terms of interpersonal scores, Terry Wallace rated Mr. Chappell's behavior at around 11 years of age. That indicates Mr. Chappell functioned in a way that was equivalent to an 11 year old, and James Ford indicated functioning at the

16-year-old level. In terms of coping skills, they both rated him as equivalent to a 12 year old, so a child still in elementary school in terms of his ability to cope.

Q So in addition to Mr. Chappell's FAS -- FASD, is there anything in his life experiences that would have impacted his life trajectory?

A Yes. It's not just cognitive impairment that leads to secondary disabilities, like trouble with the law; it's also what happens during their childhood. So childhood adversity or traumas will affect, will have a negative impact on brain development during the developmental years. So if a child is exposed to a childhood adversity, there will be an interaction between the cognitive impairment he or she was born with and the damage that's created during the developmental years due to the adversity.

Q Did you review any reports supplied to you that would have supported this?

A I did.

Q And whose report did you look at?

A In 2016, Dr. Mandel analyzed or assessed Mr. Chappell's childhood years, reviewed all the records and so forth and concluded that Mr. Chappell was exposed to multiple adversities or traumas during his childhood beginning with his mother's heavy use of alcohol and drugs during the pregnancy before he was born. Then his mother died when he was a

toddler. He had no father involved in his life or father figure despite two men claiming to be his father.

He was raised in a neighborhood where there was violence, drugs and prostitution. His childhood was marked by abject poverty. He was physically abused by his maternal grandmother while he was growing up. His physical needs were neglected. His grandmother also neglected his emotional needs, and he had one person in his life who was in some small way nurturing, and that was an uncle who died during his childhood. So loss of that uncle was a trauma for him.

Q Is Dr. Mandel's report the type of report that you would normally rely on in making a -- in offering an opinion?

A It is.

Q So is there an interaction between Mr. Chappell's own FASD and the childhood traumas that affected him?

A There is. As I indicated, the combination of the brain damage a child is born with who's exposed to alcohol prenatally and childhood adversity is like a double whammy. It's an interaction that is traumatic and devastating for a child, and that's what leads to secondary disabilities.

Q Would you say that someone with FASD and childhood trauma are more likely to get in trouble?

A Far more likely.

Q Can you explain this chart.

A Yes. This is another chart from the secondary

disabilities study published in 1996, and what this chart shows is, if you look at the third set of bars in, trouble with the law. Individuals, adolescents and adults with FASD are at high risk of being arrested at least once in their lives, and the red bars reflect fetal alcohol effects equivalent to the ARND that Dr. Davies diagnosed Mr. Chappell with. And you also see there's a significant difference between those with FAE in 1996 and those with FAS. The green bars reflect FAS.

Q And why is that?

A This significant difference has to do with identification. Children with FAS have abnormal facial features, and that tells adults that there might be something wrong with the child, and typically young children with those abnormal faces are evaluated early in childhood, and they receive developmental disability services throughout the balance of their childhood and more protection during their childhoods as well. So that accounts for the significant difference between the two groups, two diagnostic groups.

Q How would stress affect Mr. Chappell's behavior on the day of the offense?

A Stress would, just like it does for everybody, stress increases problems, and if you have cognitive impairments, stress would exacerbate those cognitive impairments.

Q So, in general, do people with FASD have more problems coping with stress than someone perhaps without FASD,

and why?

A Yes. The research has found that those with FASD are hardwired prior to birth. So part of their brain damage involves damage to their stress response system. So at the time of birth, they are hyperreactive to stress, and that hyperreactivity continues throughout their life. Their brain does not -- it has an impaired capacity to modulate stress. So this hyperreactivity is an aspect of FASD that their executive control system cannot modulate if they have impaired executive functioning.

Q A couple minutes ago we were talking about Mr. Chappell's brittle executive controls or intellectual controls and self-regulation problems. Would those come into play here as well on the day of the crime?

A Yes. That characterization of his executive control as brittle was actually school staff recognizing that he didn't have intact control over his behavior and his emotions, and so it was prescient almost in terms of what they were seeing at the time, and that hyperreactivity and inability to control it has followed him throughout the balance of his life, and it manifested in other aspects of his other behaviors as well.

Q And those records talking about the brittle intellectual controls or ability to control his actions dated back all the way to the third or fourth grade?

A Yes.

Q Was there anything in Dr. Connors' report that would indicate that Mr. Chappell would have difficulty controlling his actions?

A Yes. In his test results, Dr. Connor -- and he may have testified about this -- found in terms of the executive function test Mr. Chappell did significantly more poorly in executive function tasks that did not involve a great deal of structure. When he was left to his own devices on problem solving, he did -- he did very poorly, significantly poorly.

And Dr. Connor averaged the testing and found that -- found the significant drop off based on the structure of the environment, the setting. The more structure that was provided, the better he did, but when there was not much structure, he was significantly impaired, and the adaptive testing or assessment shows that in everyday life, which is not structured at all, he is really impaired. His average adaptive scores are two standard deviations below the mean, which is equivalent to somebody with intellectual disability.

Q So let me just take a quick segue because you mentioned something I thought was interesting. We're talking about structured environments. With Mr. Chappell's FASD, how has he done in a structured environment? And I guess I'm speaking specifically about being in prison.

A Reviewing his records, he had a few writeups during the first few years he was in prison, but since about the mid

2000s, there have been no writeups.

Q So can you cure someone who has FASD?

A No. FASD stems from structural damage, and it's permanent.

Q But if someone's in a structured environment, could that be more helpful to them?

A Yes. What happens in FASD, if an individual practices behavior over and over again day by day by day and has a lot of rules for how he or she is to behave, they eventually learn those rules, and they eventually comply and don't get in trouble because they don't have to do much thinking for themselves. They're not given the opportunity for that.

Q And this is what you saw in Mr. Chappell's prison records?

A Yes.

Q So you were talking about Dr. Connors' testing revealing the drop off. Was there anything in the QEEG that would support that?

A Yes. The quantity of the EEG was consistent with that drop off. The test found frontal lobe damage, which confirms essentially the executive dysfunction in the neuropsychological testing, and the QEEG also found damage in the limbic system, and the networks connecting the executive system to the limbic system. That confirms that Mr. Chappell's

brain is -- the frontal lobes of his brain are unable to effectively control urges or strong feelings coming from the limbic system of his brain, and that is significant and directly relevant to the offense.

Q So when you're talking about Mr. Chappell's ARND and his inability to control his actions, are you saying that he can't plan events?

A No. I'm not saying that at all. People with FASD can plan. They can form intentions, but if their executive functions or their executive capacity is impaired, the outcome of the planning process, the cognitive process to get to intentionality and planning will be -- will be impaired as well or flawed. So impaired processing creates flawed judgment or flawed planning at the end.

And I don't mean any offense by this, but an analogy would be garbage in garbage out. So it's a processing problem that results in a real defective outcome.

Q Would you say that this impaired cognitive processing resulting in impulsive behavior is why he acts like a 12 year old?

A Yes.

Q So trying to wrap up this one section, are you saying that because Mr. Chappell was in a state of extreme distress on the day of the crime, whether that -- well, I'm sorry. Let me ask you this. Could the -- could the stress have been

self-induced stress as opposed to something that he was -- would he have the ability to contemplate what was a real stress and something that he has created in his mind as a stress?

A Certainly it could be self-induced.

Q And with some --

A But stress is stress, whether it's self-induced or somebody else induces it. If the person is in a state of stress, it's there, and it's affecting the cognitive processing.

Q Okay. So if he was in this state of extreme distress on the time of the crime, was his state of mind further undermined by his already impaired cognitive functioning?

A Yes. I'd flip it backwards though. I'd say you begin with it, the cognitive dysfunction, the brain damage and the fact that he can't -- he has impaired ability to reflect and to link cause and effect and foresee consequences and control his impulses. You add to that the hyperreactivity that he's born with and it's evidenced, by the way, in all of the domestic violence episodes he had with Debbie Panos prior to the offense. That all involved hyperreactivity and inability to control it. And then you add childlike coping. He copes like a child to anything that occurs in his environment. And then finally you add a state of extreme emotional disturbance. The combination of those things spells catastrophe for somebody with FASD.

Q So looking at that third referral question, how would his FASD or ARND specifically affect his ability to control his actions, do you have an opinion?

A I do.

Q And what is that opinion?

A Mr. Chappell's -- because Mr. Chappell's executive control over his behavior is significantly impaired due to his FASD and because he was under stress and in an unstructured environment at the time of the offense which diminishes anyone's executive control, it is likely that his ARND influenced his offense conduct at the time of the offense.

Q So it seems like the fourth referral question which is about his ability to influence his behavior over Deborah Panos, the victim in this case, do you have an opinion as to this question, and does it differ at all from your opinion on the third referral question?

A No. My opinion regarding this referral question is essentially the same. The same dynamics were at play in the prior domestic violence episodes.

Q Okay. So for the same reasons the executive functioning, the CNS dysfunction, the inability to control his actions would have -- would've been the same during this long relationship in any domestic -- in domestic abuse that happens?

A Yes. Except that the only difference was in the offense context, according to his testimony, he had discovered

what it appears he considered evidence of her having sexual contact with another man, and in the prior domestic violence incidents, I don't believe there was any such evidence.

Q So turning to the last referral question here: How would Mr. Chappell's FASD influence his drug addiction? I want to talk about whether there was any studies or evidence that talk about the correlation between FASD and eventual drug addiction. Were there any studies done in 1996 or 2007 that go into that?

A Yes. And this again goes back to the secondary disability study, and I should note that Dr. Streissguth and her colleagues published studies prior to '96 that involved some of these aspects, and by '96 and certainly by 2007, it was known that individuals with FASD were at high risk of developing substance abuse problems.

In 1996, researchers believed that the reason for that was genetic and also role modeling, being raised in environments where adults were drinking and using substances; however, by 2007, there was more research, important research showing -- neuroimaging research showing that during the -- during pregnancy alcohol exposure actually changes the wiring, the hardwiring in the brain to create what will eventually become a craving after birth.

These individuals when they reach adolescence and adulthood, they crave the same substances, the same effects

that they experienced before birth. So there's a biological craving that these people have in addition to genetics and role modeling and the role modeling they might have had, and so all of these elements are probably instrumental in creating this higher risk of substance abuse.

Q And is this evidence or these studies were available in 1996 and 2007?

A Not the hardwiring neuroimaging research was not available in '96, but it was available in 2007.

Q So turning to the last referral question, do you have an opinion regarding the correlation between FASD and addiction?

A I do.

Q And what's that opinion?

A Compared to individuals who are not exposed in utero to addictive substances, Mr. Chappell's FASD increased the likelihood he would develop a substance abuse problem.

MR. LEVENSON: No further questions, Your Honor.

THE COURT: Cross.

CROSS-EXAMINATION

BY MR. OWENS:

Q Doctor, at the beginning of your direct examination, counsel asked you about compensation for your work on this case; correct?

A Yes.

Q I'd like to ask how much you're being paid for all your work on this case, including your appearance here today.

A I'm being paid at the rate of $275 an hour, and initially my first invoice was for 32 hours. That was record review and report. That was 2016 by the way. In 2018, 56 more hours for interview and reviewing new records, a vast amount of new records, and also 16 hours for trial prep and appearing today.

Q Like Mr. Chappell, I have deficient math skills. Can you give me one dollar figure that you're being paid, estimated.

A I too am deficient in math skills, and I did not add it up. So 275 times -- let's see. 32 plus --

THE COURT: How many hours total? I have a --

THE WITNESS: 32, 56 and 16.

THE COURT: 32 plus 56 plus 16 is 104 hours, times -- 275?

THE WITNESS: 275.

THE COURT: $28,600.

BY MR. OWENS:

Q And that includes your appearance and testimony here today?

A Yes. And I should note I've also written off an abundant amount of hours for prep which I typically do. That's standard for me.

Q And do you share that money with the other two doctors who have testified here today?

A No. We each practice independently. We have no formal organization.

Q Do you know how much they're being paid for their work?

A I don't have a clue.

Q Might it be comparable to your 28,000?

A I really don't know.

Q Well, there's three of you that have come in here today to testify about fetal alcohol syndrome. Is that what our expectation should be for a defense team to present this kind of defense to a jury, is that they need to bring in three different experts?

MR. LEVENSON: I would object. She's not a legal expert, I think as Mr. Owens has pointed out. So I don't think she can answer that.

THE COURT: Sustained. I don't know that it has any relevance anyway.

BY MR. OWENS:

Q You noticed there was a correlation between fetal alcohol syndrome and getting in trouble with the law; correct?

A A strong one, yes.

Q That's true of many different psychological impairments; correct?

A I wouldn't say many. I would say some. Yes.

Q Including if the offender drinks alcohol or uses drugs themselves, that would put them in a category of correlating with a higher risk of getting in trouble with the law; is that correct?

A I would agree.

Q You said that fetal alcohol syndrome was -- or the US Supreme Court described it as a well-known childhood impairment, and that was in 1990; correct?

A Yes.

Q And that there has been not one, but two Surgeon General warnings, first in '81 and the second in 2005, which even indicated that it causes brain damage, and this was nationwide known. There was mass publicity, and fetal alcohol syndrome was a household word; is that correct?

A At the end of the '80s, yes.

Q So not just the jury in 2007 that sentenced Mr. Chappell to death, but also the one in 1996 that sentenced Mr. Chappell to death would've been quite familiar. Unless they're hiding under a rock or something, fetal alcohol syndrome would've been something quite familiar with them; right?

A [Unintelligible] --

MR. LEVENSON: I would -- I would -- I'm sorry, Your Honor. I would object because this witness can't talk about

what the jurors knew at that time.

MR. OWENS: And she's already testified about the population in general knows this. I'm not asking specifically these jurors, but one would expect these jurors to know based on her prior testimony that it was well known in the population.

THE COURT: Well, I think it's calling for some speculation. She's also though indicated that today there seem to be people who are unaware still. So I don't think it makes any difference to what we're looking at today.

MR. OWENS: Okay.

BY MR. OWENS:

Q Would you agree with me there is a difference between people being aware and people just disregarding what they already know?

A Certainly.

Q We see that with DUI; do we not?

A We do.

Q It's widely known that it's dangerous. People still engage in that behavior; correct?

A It's true.

Q So just because people may disregard the advice, you've already testified it is well known that it causes brain damage?

A Right.

Q You said that the information you have, which you've looked at the other doctors here, is that Mr. Chappell performs well in a structured environment, that being prison, but less well in a nonstructured environment, such as being out here in society; correct?

A I would agree, but I'd add one word. He performs relatively well in a structured environment and much less well in an unstructured environment.

Q And I would -- my next question would be is that not true of most criminals?

A I think most people without brain damage perform relatively well -- would perform adequately or well in both structured and nonstructured environments because there's nothing about their brains that impairs functioning in unstructured environments.

Q There's nothing about performing well or relatively well in a prison, in highly structured environment that's unique to fetal alcohol syndrome. That's true of a lot of people and a lot of different disorders?

A I agree.

Q Help me understand if I've misunderstood your testimony here. At one point I believe I heard you say that he was unable to control his impulses, and his brain was such that he lacked the capacity to control his impulses. Does that sound accurate?

A No. What I testified about was he was impaired in terms of control. I am not saying that it's not a black or white issue. His ability to control his impulses is impaired. The more factors in the environment that enter into that equation the more impairment he's going to exhibit. If he's in a structured environment, you're not going to see much evidence at all, if any at all, of that impairment because he doesn't have the requirement to think on his feet.

Q Okay. Thank you for that clarification. On the day of the murder -- and you've read a lot about the case. You're familiar that when he got out of jail he went to a friend's house and had a couple beers before heading over to the victim's trailer and committing the murder; correct?

A What I read, and I don't believe I read everything about the offense, but the material I read indicated he went to the Vera-something projects after he got out of jail, and while there, he was with a person or in an apartment and perhaps it was a friend. I don't know. And I don't recall him drinking two beers. And then he went to Debbie Panos's place.

Q Okay. Well, let's assume for a minute that there was evidence in the case that he drank two beers before heading over to Debbie Panos's house. We've already had testimony that the consumption of alcohol can affect your executive functioning. Can you tell me to what degree the murder in this case was impaired by his drinking those two beers versus what

was impaired as a result of his fetal alcohol syndrome?

MR. LEVENSON: Your Honor, I would object. It seems to call for an opinion by a toxicologist, how much two beers would affect someone. I'm not sure this is her expertise.

THE COURT: Do you feel like you can answer that question?

THE WITNESS: No, Your Honor, I don't.

THE COURT: All right. So sustained.

BY MR. OWENS:

Q But you do agree with me though that his -- if he did drink two beers that that could have an effect and impair his executive functioning skills and his ability to control his behavior; correct?

A Sure.

MR. OWENS: That's all I have.

MR. LEVENSON: Two quick questions, Your Honor.

REDIRECT EXAMINATION

BY MR. LEVENSON:

Q Dr. Brown, I just want to clarify. Some of the hours that you were talking about were travel time hours?

A Yes.

Q And were those hours you graciously gave us at half your rate?

A I did.

Q Okay. So I think we've discussed this before, but do

you find a difference between what laypeople knew about FASD versus what the actual effect of FASD was on a person? So when you said that the population knew about the mother's drinking, is that different in your mind than knowing the cause -- what FASD would cause a person's life trajectory to be?

A Absolutely. And it was for that very reason that the Surgeon General in 2005 added a lot of information about the brain damage that can occur from prenatal alcohol exposure because the lay public was not aware of the extent and severity of the brain damage.

Q And even reading that Surgeon General's warning, the whole public is not going to read that and understand it?

A Probably. Yes.

MR. LEVENSON: Thank you, Your Honor.

MR. OWENS: Nothing further.

THE COURT: I have a couple questions.

In preparing for your opinions and all, did you read the testimony from the 2007 penalty hearing which was the -- the trial wasn't -- it wasn't tried a second time, but the penalty hearing happened again in 2007. There was a second penalty hearing.

THE WITNESS: Right. I believe I -- I can't be sure. I believe I did, but it was a long time ago.

THE COURT: Because that's kind of -- that's what I'm interested in here, and maybe counsel will be able to help out

with that, but do you recall was there any testimony during that hearing that would indicate -- you know, anyone come in and say anything that would lead a jury, a lay jury to believe or think that Mr. Chappell had brain damage?

THE WITNESS: I don't recall anything, and I would -- I believe I would have recalled -- would recall it if there had been because I would've probably put it on one of my slides. So I don't believe so.

THE COURT: Okay. So next question is this: In 2012, was there sufficient information out in the domain of legal research and case law, medical materials readily available to lawyers that would've allowed counsel to make an argument as to the necessity or having experts on fetal alcohol syndrome testify? In other words, to convince a Judge that, hey, you should allow for us to explore this, in other words without actually hiring the experts and then having them do it, would there be enough out there at least preliminarily to say here's why you should allow this? To your knowledge, if you know.

THE WITNESS: And you said 2012?

THE COURT: Yes.

THE WITNESS: I know from personal experience the answer is, yes, and my personal experience involves a 2011 postconviction hearing where -- where information on FASD was provided, and the case has now gone back for resentencing based

on that information, and so I don't know if that answers your question, but --

THE COURT: But in that case, was expert testimony obtained as part of that?

THE WITNESS: Yes. I testified.

THE COURT: Okay.

THE WITNESS: And others.

THE COURT: So I'm saying -- I'm talking about before an expert is hired.

THE WITNESS: Oh, before.

THE COURT: So would there be enough for a lawyer to be able to in briefing to a Court to convince the Court this is why we need to have some experts? Look, because here's what's available to us now. We need based upon that and what information is publicly known about fetal alcohol syndrome to warrant that -- to warrant the retention of an expert at public expense.

THE WITNESS: Yes. And I've actually been involved in several cases where just that situation occurred, and then I was subsequently hired after -- after the determination was made to have experts examine the individual.

THE COURT: Okay. Questions as a result of my questions?

MR. LEVENSON: Yes. Two quick questions.

FOLLOW-UP EXAMINATION

BY MR. LEVENSON:

Q Dr. Brown, can you turn to back to your report, Exhibit 10, and look at page 36. It's the second page of materials that you reviewed, and again I know that a lot of this was reviewed in 2016. Can you look at the -- this last bullet point. Does that refresh your recollection about what if you reviewed the second penalty trial testimony?

A Yes, it does.

Q And it looks like you looked at Dr. Todd Grey, Benjamin Dean, Charles Dean, Fred Dean, Myra King, Billy Chappell Junior, Mirabella [phonetic] Rosales, Dr. William Denton and Dr. Lewis Etcoff; is that correct?

A Yes.

Q So you did read the mitigation -- the supposed mitigation case from that trial?

A I did. And I read all of these bullet points here in the report.

Q Dr. Brown, if trial counsel or -- in a hypothetical world, if a trial counsel or a postconviction counsel called you up and said to you I need just some advice on how to present FASD to a Court to get them to bring experts on someone like you, would you give that attorney advice on what to argue to the Judge?

A I would.

Q Would you do that free of charge?

A I would.

MR. LEVENSON: Thank you.

MR. OWENS: Nothing further.

THE COURT: May this witness be excused?

MR. LEVENSON: Yes, Your Honor.

THE COURT: Thank you for your testimony.

THE WITNESS: Thank you, Your Honor.

THE COURT: Did you have any further witnesses?

MR. LEVENSON: No.

THE COURT: Okay. So my question is do counsel wish to have additional briefing to summarize the arguments?

MR. LEVENSON: Yes. Two things, Your Honor. We would like to see a copy of the transcript, and we would like to do supplemental briefing for you based on the testimony today.

The second thing is, again, I'll raise this again. We feel an order to show an IAC claim -- we've had Mr. Oram up here. We've had the experts. We haven't heard from Mr. Schieck or Mr. Patrick who were the 2007 trial counsel. We did submit declarations in the amended petition. They state that there was no strategic reason for them not presenting FASD. We're fine with that, but if the Court wants to hear testimony from them, we would certainly be willing to bring them in to complete the Strickland analysis.

THE COURT: Did you want to say something?

MR. OWENS: Yes, just briefly. I'm opposed to further briefing. I guess if it would aid the Court, then I'd be happy to do whatever we need to aid the Court.

My concern in these capital cases is that there's already too much briefing, and I don't particularly find it helpful because it's hundreds of pages and tends to muddy the water more than help, but if Your Honor feels that it's helpful, we can certainly do more briefing. It's probably going to be a regurgitation of what we've already got in our briefs, and it's going to further delay. I would just prefer to argue and submit it to Your Honor, but I'll follow the Court's lead, and whatever the Court needs to help to make a decision we'll do.

THE COURT: Well, here is where I am with this, and so this may, you know, aid you in arguing whether you need the briefing or not. To me, I've been looking at not 1996. That's passed. That's, you know, decisions have been made. We had a retrial. Then Mr. Oram was appointed as postconviction, and so -- and we had a writ on that that Mr. Oram brought.

Now, the question to me is was Mr. Oram deficient as postconviction counsel, and because he's appointed, that's why you're allowed to criticize him as being ineffective, and that's -- that's kind of the narrow issue I'm looking at. Was Mr. Oram ineffective postconviction counsel for not basically doing the work that would've been necessary to show that, hey,

there is some need to demonstrate through the hiring of expert --

I mean, he could've called -- he could've called relatives of the defendant to get some of this information, and frankly, you know, he's getting paid by the hour. He's getting paid more than an investigator who would be retained because normally they're getting paid $50 an hour. Mr. Oram is getting, what, a hundred dollars an hour for postconviction work, and so he could've called some of these people to say, oh, you know --

It just seems to me like with some research he could have better argued the case that Schieck was ineffective and demonstrated because part of the burden is you just can't make these bare allegations. You've got to come with something, and he didn't come with anything, and then he also didn't convince the Court because he didn't do the work apparently necessary to do that, that these experts would shed light on that and bring the proof that would be necessary to show the second penalty phase attorneys weren't sufficient.

So that -- that's all I want for a briefing, and I'm kind of leaning that way. So if you -- if you want to brief that aspect of it, I just want to put it out there that that's what I'm looking at. That's the legal issue for me, and --

MR. OWENS: Well, as I said, I don't have any desire to do further briefing. If the federal public defender does,

then I will respond, but --

MR. LEVENSON: That's fine, Your Honor. We'll be glad to do briefing as soon as we get the transcript. If you give us a time limit, we will -- we will brief it for you.

THE COURT: Well, since -- what I'm saying, Mr. Owens, is that I'm inclined to say at this point, unless you would convince me otherwise, that I am finding Mr. Oram to be ineffective because he didn't do these things. So --

MR. OWENS: Well, I'm prepared to argue.

THE COURT: Okay. Why don't we argue then. If you don't want to do any further briefing, let's argue that.

MR. OWENS: In my mind, after Mr. Oram got done talking, we were done with the case. I've never thought an evidentiary hearing was necessary here, and that the three doctors, really all they had to testify about is the prejudice prong. Under Strickland, ineffective assistance of counsel, they have to show Mr. Oram was deficient and that there was prejudice. So the last three doctors have to do with the prejudice prong.

I don't even think we get there because under Strickland, if you fail to meet the deficient performance prong alone, case over. It doesn't matter how much prejudice they have, and I agree that prejudice is the tougher question, and we're going to disagree about the weight of fetal alcohol syndrome, and that's tough to know what effect this would have

had on the jury because they did hear some of that evidence. Certainly the three doctors have gone beyond Dr. Etcoff in explaining the ideology and giving more detail.

THE COURT: Well, refresh my recollection on that. That's why I asked the doctor, and I said maybe counsel can aid in that. Because I didn't -- you know, I read Dr. Etcoff's report. I didn't go back before this hearing and read the second penalty phase on the defense side mitigation. So I'm assuming he testified consistently with his report. And so there I don't really -- it's pretty amorphous.

And my concern is that the jury looks at -- and I'm looking at their special verdict form and what they find, you know, and they find these mitigating things -- wait a minute. I have that in here -- they find certain mitigators, but then say it doesn't outweigh, which of course is, you know, what they're allowed to do, but it makes me concerned that -- I can't find it now. I know it's in here because I looked at it earlier -- that --

MR. LEVENSON: It's Number 9. Are you looking at the special verdict?

THE COURT: Number 9. Okay. Yeah. Thank you. There it is. I was looking for the handwriting.

So suffered from substance abuse. So clearly that came out. He had no father figure in his life. That came out, and that was in Etcoff's report. That he was raised in an

abusive household, that, you know, came out as well, clearly. That he was a victim of physical abuse as a child, that he was born to a drug-alcohol-addicted mother and that he suffered a learning disability, and he was raised in a depressed housing area. So some of these things are things that Dr. Brown has talked about.

What I don't know is that he was born to a drug-alcohol-addicted mother, whether the jury -- whether they were really considering what that means in terms of fetal alcohol syndrome as opposed to just, wow, he had a tough life here, and how bad is it to have a mother who's drug and alcohol addicted and what that comes, you know, what that brings to you as a child, which is you're going to be neglected. You're not going to have the attention, the love, the nurturing, the bonding, all of those things.

That's why I asked was there anything that would, from that, from the mitigation testimony that was presented that would lead the jury to believe that he had an organic brain disorder which is caused by prenatal alcohol abuse by a mother that would affect him more than just, okay, well, lots of people are raised in abusive households, and they do fine --

MR. OWENS: Well, they had a lot of testimony from Dr. Etcoff.

THE COURT: -- those kinds of things.

MR. OWENS: And maybe perhaps the Court wants to go

back and reread what he said. I don't remember the exact verbiage that he used, but they did hear a great deal from Dr. Etcoff and another psychologist, Dr. Danton, about the effects on domestic violence and the cycle of domestic violence, and so you can see defense counsel's strategy.

I guess in my mind, the point I want to make is that fetal alcohol syndrome, it's not like this is a new issue that they're bringing to the case. In many capital cases they'll come up with something new in a successive habeas petition and say, hey, counsel and prior experts totally missed this issue. We don't have that here.

To some extent, there was evidence presented at trial because it was found as a mitigator, and to the extent that it was not presented, Mr. Oram recognized that, hey, I think the issue is bigger than what Mr. Schieck presented. Mr. Oram saw it as an issue and wanted to call and put on the kind of case that we've seen them do here today, but it's not like it's something the jury had no knowledge of. They did have some knowledge of it. So I think that's a significant difference.

More importantly, that all deals with prejudice and what would have influenced the jury because if they're hearing simply more mitigation along the lines of a defense that they already heard about, I think that has less weight than if it's something the jury didn't hear about at all. That might be something more significant.

But going back to the deficient performance, Strickland says that we cannot view Mr. Oram's performance in hindsight, and that's the real danger. The Strickland case itself said it's a real danger, and we need Judges who are going to be able to compartmentalize this in the mind and take everything that we heard from the three doctors and block it out and don't use that to judge Oram's deficient performance.

It really has nothing to do with Oram's performance which must be judged under the circumstances and law in effect at the time. So in other words, you can't say, well, the issue ultimately did have prejudice; therefore, it's more likely that Mr. Oram was deficient. No. It's he's judged under the standards at the time based on what was known in the case at the time, not in light of the kind of case that ultimately comes out which is why in the last appeal and the last habeas proceeding we stipulated and said basically accept it as true that he had fetal alcohol syndrome.

It doesn't make a difference because Mr. Oram did everything he could to try to get this defense going in the second or the prior postconviction proceeding and was shot down, and that was affirmed on appeal. That was correct under the circumstances known at the time. To me that's like law of the case that Oram's conduct and yours in ruling against the granting of the experts in the evidentiary hearing, that was sustained and a good decision under the law and the facts known

at the time.

So now that we just have some new facts, we're using hindsight to second guess ourselves. I don't think we can do that which is why I'm perplexed why we had an evidentiary hearing when it was denied before on the same issue and affirmed. To me it's a little counterintuitive to go back and probe the prejudice prong again when we know and it's the law of the case that under these circumstances at the time those were correct legal rulings, and that's been affirmed.

So Mr. Oram said, I don't know what else I could have done, and perhaps it's good that Dr. Brown is willing to take free calls and without any cost. She's going to consult with defense attorneys and let them know what the substance of her opinion might be in a given case and that they might be able to beef up their motions a little bit, but I don't think Mr. Oram certainly knew that, and I don't know that members of the defense bar are aware that they can go out there and do that. They don't have the kind of funding that the federal public defender's office has.

Remember, the denial of funding was sustained on appeal, and so it was $28,000 for this one doctor. I don't know about the others. Is it approaching 100,000 to put on this kind of defense? That's not going to be allowed in Nevada courts. Maybe they do that in federal court. Go for it. It's our tax dollars out of federal or state either way, but in

state court, Nevada Supreme Court doesn't expect that.

It's outstanding that Mr. Oram actually saw the issue, tried to get it on and didn't. And so I don't think his performance was deficient in any way, shape, or form to get this issue in more detail into his brief. He was shot down, affirmed on appeal. To me, it's all been law of the case, and after Mr. Oram's testimony even more so.

Everything else is prejudice prong that we can agree to disagree as to how much weight this would carry with a jury. I think habeas attorneys look at a case differently. Mr. Oram's a trial litigator. The more important issue was to defeat that sexual assault aggravator, and to pursue that, the ejaculation expert. That would've been, if there is such a thing, that was a critical issue because it undermines the sole aggravator. At that point in the case, they whittled all the aggravators down to one sexual assault aggravator which is phenomenal, good defense work. They don't see that in habeas.

All that fetal alcohol syndrome does is add more mitigation to the equation in a case where the jury already had some knowledge that this was fetal alcohol syndrome. They didn't -- I agree that they didn't have the full testimony that we've heard here today, but we know that it didn't matter in their weighing equation that he had this defect. They had the school records. They had Dr. Etcoff. They had Dr. Denton. They heard testimony along these lines and said it doesn't

outweigh even the one aggravator that we're down to.

So because fetal alcohol syndrome doesn't undermine that one aggravator, simply having more mitigation along the same lines of something the jury already heard isn't going to get them where they need to be on the prejudice prong, and certainly I don't see it on the deficient performance.

Are we really going to say Mr. Oram, with everything he did in this case and affirmed on appeal, that he was deficient in some way? You heard his qualifications. He's tried so many capital cases.

They don't try cases in federal court. They don't come -- this stuff doesn't go on in penalty hearings because it's not always effective with the jury. You run the risk. They don't have to worry about offending the jury but trial litigators do.

They can't put on three doctors like this without being aware of how this might affect a jury where it may look like he's just trying to escape responsibility. They're hearing about all the other facts of the terrible things this defendant did to the victim, and now we've got defense attorneys trying to parade doctors on that remove responsibility. His functioning was impaired so much that he really wasn't in control of himself.

A lot of that doesn't sound good to a jury who just convicted and found him guilty beyond a reasonable doubt, and

now they're being asked to say, well, it really wasn't that bad because he was just born that way. Maybe that plays with a jury. Maybe it doesn't. Trial litigators have to worry about that; habeas attorneys don't.

So in balancing and weighing the prejudice, I ask you to go back and try to put yourself in the shoes of the jury. And in a real capital case, how much would this really influence that jury? If you want to make an alternative ruling on the prejudice as to whether or not it would've affected the jury in this case, go ahead, but I think all we need is a ruling on the deficient performance prong.

And Mr. Oram picking up the phone and calling a couple witnesses to confirm evidence that we already knew, that the State has never contested at trial in the penalty hearing or here today, I've never disputed that he suffered from fetal alcohol syndrome. It's a nonissue to us, okay. We are not challenging on it. All they've done today is given a label to what the jury already knew. I think it was their Dr. Connor who said that they agree with Dr. Etcoff. He was giving the symptoms. They're giving an etiology for it. We're giving it a name. We're giving it a label and giving some more details to it.

Mr. Oram tried to get on the kind of case that they put on here today, and if he hadn't filed those motions, if he hadn't seen it as an issue, maybe we'd have something to talk

about, but how could we possibly say a trial litigator with his experience and everything he did do in recognizing this issue and trying to get those experts, how can we say he was deficient?

Picking up the phone, calling a couple more witnesses to confirm that, yeah, the mother was drinking, we knew that. The jury knew that. We never disputed that he was drinking. They've gone and got more witnesses to confirm that he was drinking, yeah. That doesn't do anything for the case.

THE COURT: Oh, she was drinking. Well, I'll read the -- I'll go back and read the trial, the second penalty phase of what came out in front of the jury. I guess because I -- I'm sorry. I don't recall.

But I don't -- I certainly don't want briefing that -- I don't want to wait for briefing until the transcripts because I've heard all of this testimony. To me we have to focus on the two prongs of Strickland. Was Mr. Oram ineffective? State's made good arguments there. And assuming for sake of arguendo for the second prong, if he was, then can you show that it would've resulted in -- it did result in prejudice, and there would've been a different outcome at the second penalty phase?

And so I don't think we need to wait for the transcripts of these experts because, to me, all the experts have said is that they believe that he had fetal alcohol

syndrome and why. So, I mean, that's -- that's fine, and I have a clear understanding of that testimony, but I don't need -- I don't think -- I don't think you need a transcript of their testimony about their reports to -- in order to do any further briefing you might wish to on the narrow argument that I'm looking at here.

MR. LEVENSON: The only thing I would say about that, Your Honor -- again, we're glad to do the briefing -- is that Dr. Brown did discuss what was available to -- what was available, not what was known we've clarified but what was available to the legal community in 2007, and I'd like to -- we can look at the report, but she had some very good testimony that I'd like to use in the briefing. If the Court doesn't wish to wait, that's fine, but if we can wait, I don't know how long it takes to --

THE COURT: It's hours. You know, we've been at this all day long.

MR. LEVENSON: Right.

THE COURT: And it would be -- it would be weeks, and so I just don't --

MR. LEVENSON: Can -- I would like to -- and that's fine. We can do the briefing. I just want to talk to my cocounsel because we have other cases. I just want to see what our availability is and how quickly we can do it, but I did want to, if I may, just argue a couple of points.

THE COURT: Yes.

MR. LEVENSON: It's not enough for Mr. Oram to recognize an issue. That's not what makes effective counsel. It was good that Mr. Oram recognized that there was a problem with the mother's drinking, and that was probably something called fetal alcohol spectrum disorder or FAS, and he asked for experts, but that's all he did, and I think what we've shown is there was a plethora of information available to him on the ABA website, by calling an expert, by talking to other people who had litigated FAS. There are lists, there's for habeas counsel who put a question on and asked for help.

Mr. Oram requested the information, and then he basically walked away. When he came into this court in 2012, he did not argue anything more about FAS. This Court didn't say I'm not going to hear argument. The Court did hear argument, and what Mr. Oram chose to do was argue something else.

We're not saying he shouldn't have argued the something else, but he needed to support what he asked for with something other than a bare-bones allegation in a fishing expedition which was the State pointed out to you and which you agreed with at the time, and I think that was correct. Mr. Oram just said FAS, give me money, and that's it. He didn't give you a list of experts. He didn't tell you how much it would cost, and he didn't tell you anything about FAS that

would've convinced you otherwise to go the next step, but we did.

We did argue to you about life trajectory. He could've gone on line. He could've in 2007 looked at law review articles. There was a 1990 case from the US Supreme Court. There was enough information out there available about FAS. I believe there was even a Nevada case that discusses FAS that he could've pointed this Court to, and I don't have that with me, but so he didn't do enough.

But even Mr. Oram said there was a difference between a mother who is addicted to alcohol and the effects that that has on the unborn fetus. That's the life trajectory. That's a very big difference. So did the jurors understand by writing down he was born to an alcohol-addicted mother have any idea about FAS? I don't think so. I know they didn't. They just knew that the mom drank. There was no connection, and Mr. Oram said the same thing. That wasn't enough for them to understand about FAS.

Under Mr. Owens' scenario, you would never have Strickland if everything the Court says on postconviction without any facts supporting it as law of the case. That's our job. That actually should have been postconviction counsel's job is to fill out with outside the record facts what he needed and why it mattered, and that's what we did on his behalf.

And I think Mr. Owens was making an argument that FAS

was kind of redundant. I don't think it's redundant at all. It explains a whole life trajectory. Mitigation evidence is to reduce the culpability of a defendant's actions. You have to present mitigation. Yes, the jurors found Mr. Chappell guilty, and then the next phase is, well, is there anything to reduce that culpability, and that's what the FAS was. That's what the FASD is, and that certainly goes to prejudice, but otherwise there would be no reason to have a mitigation phase or a punishment phase.

As far as calling people, it wasn't that Mr. Oram needed to call family members or friends to confirm drinking. He had that already in the reports. What he needed to do was go more, go further, and all he had to do is look at what other evidence was needed to support FAS, and that's what Dr. Brown was talking about is all the other things family members and friends could've offered about Mr. Chappell growing up that shows brain impairment and shows what was -- what was going on in his life.

Mr. Oram had the juvenile records, and he had the school records, and that was a treasure trove of information that all he had to do was bring to the Court and point out different things to the Court that show why FAS, why it needed to be discussed and why there was a connection between FAS and his actions the day of the crime, his FAS in the domestic abuse. That's what mitigation evidence is.

So we will be glad to brief it. If the Court will just give us two to three weeks because of other caseload, we will go ahead and brief it for you.

THE COURT: All right. Three weeks for additional briefing.

And, Mr. Owens, do you have time you want to respond or --

MR. OWENS: I guess a week after that.

THE CLERK: So three weeks will be April 27th. A week after that will be May 4th.

MR. LEVENSON: And may we have a quick reply a week after that, Your Honor?

THE COURT: The 11th.

THE CLERK: The 11th, May 11th.

MR. LEVENSON: And just to clarify, Your Honor, are you asking for a briefing on both prongs or just the deficient performance prone?

THE COURT: Well, you may as well brief on both prongs, but, again, I don't want to hear about, like, 1996. I want to hear about Mr. Oram and 2007, his job as postconviction counsel.

MR. LEVENSON: 2012. 2010 to --

THE COURT: 2012, right. He's looking at the 2007 hearing.

MR. LEVENSON: Right.

THE COURT: But that's -- that's his job in 2012.

MR. LEVENSON: Okay.

MR. OWENS: And, Judge, do we really need a reply brief? I mean, you recall when they wanted an evidentiary hearing it was like 80 witnesses. I don't know how many pages. Do you want to put a limitation on it? Because if you don't, they tend to do overkill. Unless it's helpful to Your Honor, but, you know, I'm envisioning a brief that's a few pages. Theirs could very well be 100. I don't know. So we have to be careful about what we're asking for in the supplemental briefing and if there's going to be a reply on top of everything else that's been filed here. Again, if it's helpful -- I just -- I just don't know that it will be.

THE COURT: Well, I don't -- yeah. I'm not sure that you really do need a reply. I mean, this is the final briefing, and --

MR. LEVENSON: I think we will promise to respond only to things that we did not address in our brief that Mr. Owens brings out. It will be short. I mean, we don't have -- a week isn't much time for us to write. So.

THE COURT: I -- I mean, I don't want to see anything new that you didn't raise in the first -- in your first --

MR. LEVENSON: It'll be a true reply.

THE COURT: Okay. Because then I want to put it on for hearing and decision --

And when was the last date for the reply?

THE CLERK: The last date was the 11th.

THE COURT: The 11th, okay.

-- and the 21st.

THE CLERK: May 21st, 9:00 a.m.

(Proceedings concluded 3:11 p.m.)

-oOo-

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case.

Dana L. Williams
Transcriber

BREF
RENE L. VALLADARES
Federal Public Defender
Nevada Bar No. 11479
BRAD D. LEVENSON
Assistant Federal Public Defender
Nevada Bar No. 13804C
Brad_Levenson@fd.org
ELLESSE HENDERSON
Assistant Federal Public Defender
Nevada Bar No. 14674C
Ellesse_Henderson@fd.org
SCOTT WISNIEWSKI
Assistant Federal Public Defender
Nevada Bar No. 14675C
Scott_Wisniewski@fd.org
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-5819 (Fax)

Attorneys for Petitioner James Chappell

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

POST-HEARING BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

Date of Hearing: May 21, 2018
Time of Hearing: 9:00 a.m.

(Death Penalty Habeas Corpus Case)

Petitioner James Montell Chappell, by counsel, hereby files this post-hearing brief in support of his Post-Conviction Petition for Writ of Habeas Corpus filed

November 16, 2016. This brief is based on the attached points and authorities, as well as all other pleadings, exhibits, and evidence taken in this case.

DATED this 27th day of April, 2018.

Respectfully submitted
RENE L. VALLADARES
Federal Public Defender

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

/s/ Ellesse Henderson
ELLESSE HENDERSON
Assistant Federal Public Defender

/s/ Scott Wisniewski
SCOTT WISNIEWSKI
Assistant Federal Public Defender

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POINTS AND AUTHORITIES

I. ISSUES

At the conclusion of the April 6, 2018 evidentiary hearing, this Court requested briefing on the following two questions:

1. Was post-conviction counsel's performance deficient when he failed to present this Court with any support for the bare allegations in his Motion for Authorization to Obtain Expert Services?

2. Was Chappell prejudiced by the deficient performance of post-conviction counsel, which led to the denial of the Motion for Authorization to Obtain Expert Services?

II. SUMMARY OF THE ARGUMENT

As he does routinely in capital cases, post-conviction counsel in this case filed a motion for expert funding consisting entirely of bare allegations and conclusory statements. Counsel failed to plead with specificity his request for expert assistance, failed to explain how the requested experts would assist this Court in deciding Chappell's petition, and failed to support his motion with any of the wealth of evidence showing that expert services were necessary. This performance fell below objective standards of reasonableness and thus was deficient.

Counsel's deficient performance prejudiced Chappell by preventing this Court from considering, in 2012, Chappell's Fetal Alcohol Spectrum Disorder (FASD) and the impact this diagnosis would have had on his penalty retrial. Experts have now performed the testing that the deficient performance of post-conviction counsel prevented, diagnosing Chappell with Alcohol-Related Neurodevelopmental Disorder

(ARND), which falls under the FASD umbrella. This Court has heard unrebutted testimony explaining how Chappell's FASD affected his life, and his culpability in the instant offense. Had this information been available to the Court in 2012 and to the jurors during Chappell's penalty hearing in 2007, there is a reasonable probability that the results of the proceedings would have been different.

III. STATEMENT OF THE FACTS

Chappell currently is in the custody of the State of Nevada at Ely State Prison, pursuant to a state court judgment of conviction and sentence of death. Exs. 1, 6.[1] He was convicted of first-degree murder in 1996 and sentenced to death in 2007 after a penalty retrial. Id. The Nevada Supreme Court affirmed Chappell's conviction and sentence on direct appeal. Chappell v. State, 114 Nev. 1403, 972 P.2d 838 (1998); Chappell v. State, 125 Nev. 1025, 281 P.3d 1160 (2009) (unpublished table disposition).

During the initial state post-conviction proceedings following the penalty retrial, post-conviction counsel requested authorization of funding for experts, including an expert "to determine the possible effects of Fetal Alcohol Spectrum Disorder on Mr. Chappell" as well as experts to conduct both a Positron Emission Topography (PET) scan and neurological testing. Hrg. Ex. 3; Ex. 145. This Court denied the motion, explaining that Chappell had not demonstrated why experts were

[1] Throughout the brief, Chappell refers to the exhibits filed with the November 2016 petition as "Ex." Those exhibits presented at the April 6, 2018 evidentiary hearing are referred to as "Hrg. Ex." And those exhibits attached to this Brief are referred to as "Br. Ex."

warranted. Hrg. Ex. 6; Ex. 9. The Nevada Supreme Court affirmed. Chappell v. State, No. 61967, 2015 WL 3849122 (Nev. June 18, 2015).

Undersigned counsel was subsequently appointed to represent Chappell, and Chappell filed the pending petition. In his petition, Chappell argues both that trial counsel were ineffective in not presenting any evidence of FASD and brain damage, and that post-conviction counsel was ineffective in not properly litigating the FASD issue in 2012.

This Court granted an evidentiary hearing on Chappell's FASD claim, and, on April 6, 2018, Chappell presented the testimony of prior state post-conviction counsel and three experts: neuropsychologist Paul Connor, Ph.D., medical doctor Julian Davies, M.D., and psychologist Natalie Brown, Ph.D. At the conclusion of the hearing, this Court explained its initial impressions of the evidence:

> It just seems to me that with some research [post-conviction counsel] could have better argued the case that [trial counsel] was ineffective and demonstrated—because part of the burden is you just can't make these bare allegations. You've got to come with something. And he didn't come with anything. And then he also didn't convince the Court because he didn't do the work apparently necessary to do that, that these experts could shed light on that and bring the proof that would be necessary to show that the second penalty-phase attorneys weren't sufficient. So that's all I want for briefing. And I'm kind of leaning that way.
>
> . . .
>
> I'm inclined to say at this point, unless [the State] would convince me otherwise, that I'm finding [post-conviction counsel] to be ineffective because he didn't do these things.

IV Hearing Recording (HR) at 2:46:20–2:47:13, 2:47:50–2:48:05, Chappell v. Filson, No. C131341 (8th J.D.C., April 6, 2018).[2]

IV. ARGUMENT

A. Chappell's Post-Conviction Counsel Was Ineffective in Not Properly Litigating FASD

Chappell was entitled to effective assistance of counsel at all stages in his case, including post-conviction proceedings. See Strickland v. Washington, 466 U.S. 668, 685–86 (1984); Crump v. Warden, Nevada State Prison, 113 Nev. 293, 302–03, 934 P.2d 247, 252–53 (1997); NRS 34.820(1)(a). Chappell's counsel did not provide this required level of representation.

Chappell has made both showings required by Strickland to demonstrate that his counsel was ineffective. See e.g., Rippo v. State, 132 Nev. __, 368 P.3d 729, 741-42 (2016), judgment vacated sub nom on other grounds, Rippo v. Baker, 137 S. Ct. 905 (2017) (assessing post-conviction counsel's performance under the Strickland standard). First, he has "show[n] that counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688; see Johnson v. State, 402 P.3d 1266, 1273 (Nev. 2017). He made this showing "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Kimmelman v. Morrison, 477 U.S. 365, 384 (1986).

[2] All further references to "HR" are to the April 6, 2018 evidentiary hearing recording, with the Volume and the time codes referring to the time stamp on that recording.

Second, Chappell has shown that counsel's deficient performance prejudiced his case. Strickland, 466 U.S. at 692; see Johnson, 402 P.3d at 1273. In other words, he has shown that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

1. Post-conviction counsel performed deficiently in not properly investigating, researching, and pleading the Motion for Authorization to Obtain Expert Services

In 2012, Chappell's post-conviction counsel submitted to this Court a bare and conclusory motion requesting experts, including an expert on FASD. Hrg. Ex. 3; Ex. 145. Counsel admitted to routinely filing similar requests in capital cases. II HR at 9:30:30–9:30:36; see Transcript of Status Conference at 2–3, Nevada v. Hover, No. 10-C263551-1 (8th J.D.C., Jan. 17, 2108) (attached hereto as Br. Ex. 1); Hover v. State, No. 63888, 2016 WL 699871, at *2 (Nev. Feb. 19, 2016) (unpublished disposition) (attached hereto as Br. Ex. 2).[3] But the bare and conclusory nature of the request in Chappell's case was particularly problematic: abundant information was readily available to counsel showing that Chappell's mother abused drugs and alcohol while pregnant and that her drug and alcohol abuse caused permanent brain damage to Chappell. Post-conviction counsel failed to bring any of this information to this Court's attention, despite hearing repeatedly from the State and this Court that he had not adequately supported his motion. This failure was objectively unreasonable.

[3] Chappell cites this unpublished decision not as precedential or persuasive authority, see NRAP 36(c)(3), but instead as evidence of post-conviction counsel's pattern of practice.

See Williams v. Stirling, No. 6:16-CV-01655-JMC, 2018 WL 1240310, at *12–13 (D.S.C. Mar. 8, 2018) (concluding trial counsel's failure to recognize, investigate, and present FASD evidence in mitigation constituted deficient performance); ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.8 (2003) (directing counsel in capital cases to present "claim[s] as forcefully as possible, tailoring the presentation to the particular facts and circumstances").

a. Post-conviction counsel failed to plead with specificity the motion for expert services

In February 2012, concurrently with a supplemental brief in support of the post-conviction petition, counsel filed three six-page motions, two for experts and one for an investigator. Hrg. Ex. 3; Exs. 44, 97, 145. Counsel dedicated one paragraph of one motion to his request for an expert "to determine the possible effects of Fetal Alcohol Spectrum Disorder on Mr. Chappell." Hrg. Ex. 3 at 4; Ex. 145 at 4. Counsel's argument, in its entirety, consisted only of two general statements about FASD and a single vague statement about drug and alcohol use by Chappell's mother:

> Fetal Alcohol Spectrum Disorders are a group of disorders that can occur in a person who's [sic] mother drank alcohol during pregnancy. The effects can include physical problems and problems with behavior and learning. There was evidence that Mr. Chappell's mother may have been addicted to drugs and alcohol. A proper investigation should have been conducted to determine whether James was born to a mother who was ingesting narcotics and/or alcohol during her pregnancy. There is no indication in the voluminous file that counsel investigated the possibility of fetal alcohol syndrome.

Id. Even the lone statement counsel provided that was specific to Chappell is flawed. Counsel pled that Chappell's mother may have been addicted to drugs and alcohol,

despite knowing not only that Chappell's mother was addicted to drugs and alcohol, but also that she actually used drugs and alcohol during her pregnancy with Chappell. II HR at 9:30:36–9:30:58, 9:22:57–9:23:07, 9:23:22–9:23:34; Hrg. Exs. 8, 9; Exs. 39, 265.

Counsel also requested experts to conduct neurological testing and perform a PET scan. Hr. Ex. 3. But counsel did not connect these two requests to his motion for an FASD expert, and they suffer from the same deficiency as the first: counsel failed to include any of the available information showing that he was not simply going on a "fishing expedition," as argued by the State. Specifically, in his request for a PET scan, counsel relied entirely on the fact that trial counsel "never had the defendant's brain properly analyzed." Id. at 3–4. Similarly, in his request for a neurological examination, counsel said only that ten years had passed since the previous neurological examination, and he wished to "determine any additional issues that may be raised on [Chappell's] behalf." Id. at 4.[4]

The conclusory nature of counsel's requests evidences the lack of investigation counsel did before filing the motion. Counsel even admitted at the April 2018 hearing that, in preparing his request for expert services, he did not contact any of Chappell's family members or friends, II HR at 9:23:08–9:23:22, Chappell's juvenile probation officer, id. at 9:24:00–9:24:06, or any experts, id. at 9:26:20–9:27:46.

[4] The examination conducted ten years prior was not, in fact, a neuropsychological evaluation, as pointed out by the doctor that did the exam, as well as by Dr. Connor at the April hearing. II HR at 10:59:21–10:59:32; Ex. 85 at ¶7.

None of the conflicting excuses counsel gave for this failure to investigate is persuasive. First, counsel testified that any efforts to contact family members would have been "fruitless" because, as he explained it, he already had "proof" that Chappell's mother had abused drugs and alcohol during her pregnancies. II HR at 9:23:22–9:23:35. But any "proof" in counsel's possession that Chappell's mother drank while pregnant is meaningless, as counsel did not present any of this proof to this Court in support of his motion, instead stating simply that Chappell's mother "may have been addicted to drugs and alcohol." Hrg. Ex. 3 at 4 (emphasis added); Ex. 145 at 4 (emphasis added).

When it was pointed out to counsel that he could have asked other questions of family members about Chappell, in addition to questions about his mother's drinking, counsel agreed but then blamed this Court for denying funds to hire an investigator, II HR at 9:23:35–9:23:52. See Hall v. Washington, 106 F.3d 742, 750 (7th Cir. 1997) ("[W]here it appears from trial testimony that a witness might be willing to speak on behalf of one's client, or a defendant provides the names of possible mitigation witnesses, or individuals call to volunteer their testimony, counsel must at least take the time to contact those witnesses and determine for himself whether their testimony would be helpful."); see also, e.g., IV HR at 1:55:00–2:00:36 (describing evidence provided by family members of Chappell's brain damage, including evidence of impairments in adaptive functioning, attention control, communication, daily living skills, and socialization). As this Court pointed out, however, counsel did not need an investigator simply to contact relatives:

> [H]e could have called relatives of the defendant to get some of this information, and, frankly, he's getting paid by the hour. He's getting paid more than an investigator who would be retained. Because normally they're getting paid $50 an hour, while [post-conviction counsel] is getting $100 an hour for post-conviction work. So he could have called some of these people . . . .

IV HR at 2:45:50–2:46:21. Other courts generally agree that lack of funding does not excuse a failure to make even rudimentary attempts to obtain information. See Ward v. Hall, 592 F.3d 1144, 1159–61 (11th Cir. 2010) (affirming district court's conclusion that lack of funding did not excuse failure to obtain and present affidavits and testimony); Dowthitt v. Johnson, 230 F.3d 733, 758 (5th Cir. 2000) ("Dowthitt's arguments that lack of funding prevented the development of his claim are . . . without merit. Obtaining affidavits from family members is not cost prohibitive."); Gutierrez v. Dretke, 392 F. Supp. 2d 802, 8921 (W.D. Tex. 2005) ("Petitioner's complaint about limited funding for investigative expenses incurred during his state habeas corpus proceeding does not excuse the failure of petitioner's state habeas counsel to contact petitioner's family members and others possessing personal knowledge of the matters central to petitioner's unexhausted claims herein.").

Counsel's attempts to explain away his failure to call experts also is unpersuasive. Counsel recognized in general the benefits of expert testimony: "I would think that an expert would be able to give, shed much more light—I've often argued that we as lawyers saying 'Okay, this is what that means'—I cannot articulate fetal alcohol like I'm sure the next witnesses are going to be able to do." II HR at 9:45:35–9:45:52. But counsel failed to recognize that an initial expert consultation also would have aided Chappell in persuading this Court that authorization of

funding was necessary; counsel in fact admitted to not knowing what an expert consultation would even produce. Id. at 9:26:20–9:27:46. See Duncan v. Ornoski, 528 F.3d 1222, 1235 (9th Cir. 2008) (criticizing attorney for not consulting expert and emphasizing the "importan[ce]" of "counsel . . . seek[ing] the advice of an expert when he has no knowledge or expertise about the field"); Dugas v. Coplan, 428 F.3d 317, 328–32 (1st Cir. 2005) (concluding that attorney's failure to consult with experts in investigating potential defenses was deficient); see also IV HR at 2:42:00–2:42:27 (testimony of Dr. Brown, wherein she notes her availability for initial, no-cost consultations); see also Br. Ex. 4 at 22: FASD Experts, Our Services, https://web.archive.org/web/20110912232331/http://fasdexperts.com:80/Hours.shtml (archived Sept. 11, 2011) (Dr. Brown's FASD website providing information about obtaining "an initial no-charge consultation").[5]

Counsel's final post hoc explanation for his failure to investigate is perhaps the most problematic: He thought an expert consultation was unnecessary because he believed this Court would grant his motion with just the scant information he provided. II HR at 9:27:22–9:27:35 ("I would've thought that what I had done was going to get me what I wanted."). In other words, counsel made an unreasonable decision to forego any investigation in the mistaken belief that this Court would grant the bare and conclusory motion. See Wiggins v. Smith, 539 U.S. 510, 523 (2003) (directing courts to focus ineffectiveness inquiry on whether decision not to

[5] The Internet Archive, also known as the "Wayback Machine," allows users free access to archived versions of web pages, as they appeared at various points over the previous two decades.

investigate "was itself reasonable") (emphasis in original); Strickland, 466 U.S. at 690–91. This was not "a strategic decision, but rather an abdication of advocacy." Austin v. Bell, 126 F.3d 843, 848–49 (6th Cir. 1997); see Hinton v. Alabama, 134 S. Ct. 1081, 1088 (2014); Williams v. Taylor, 529 U.S. 362, 395 (2000).

In sum, counsel failed to argue with any specificity why experts were necessary, failed to cite to the record where evidence already existed to support his request for funding, and failed to obtain any information to support his motion. Instead, as he admitted doing "ad nauseum" in all of his capital cases, II HR at 9:30:29–9:30:35, counsel submitted a bare bones request for funds in the mistaken belief that this Court would ignore its deficiencies. See, e.g., Ex. 44 (in motion for investigator relying solely on "seriousness of Mr. Chappell's conviction and his sentence of death").[6] As this Court emphasized at the 2018 hearing, IV HR at 2:46:35–2:46:40, petitioners cannot simply "make bare allegations; [they] need to come with something." See Jaeger v. State, 113 Nev. 1275, 1285, 948 P.2d 1185, 1191 (1997) (Shearing, C.J., concurring) ("[T]he guarantees of due process do not include a right to conduct a fishing expedition."); Hargrove v. State, 100 Nev. 498, 502–03, 686 P.2d 222, 225 (1984) (explaining that "'bare' or 'naked' claims for relief, unsupported by any specific factual allegations" do not entitle movant to relief). The district court therefore did not err in denying habeas relief on this ground."). Because Nevada law

[6] This Court has recognized this as counsel's pattern in capital cases—submitting bare requests for funding without providing this Court with any support for those requests. See Br. Ex. 1 at 2–3; Br. Ex. 2 at 2 (in case with same counsel explaining that he had "conceded in the district court that the defense expert witness did not request the scan or conclude that it was necessary to diagnose Hover but sought testing merely because Hover was 'facing a death sentence.'").

makes clear that conclusory allegations are insufficient, see Hargrove, 100 Nev. at 502–03, 686 P.2d at 225, counsel's performance in pleading his motion in a conclusory manner was deficient. See Chambers v. Armontrout, 907 F.2d 825, 828–32 (8th Cir. 1990) (concluding that performance was deficient when counsel spotted self-defense issue but did not provide court with readily available information supporting argument); In re Brett, 16 P.3d 601, 608 (Wash. 2001) (concluding counsel was ineffective for spotting FASD issue but presenting it in deficient fashion).

b. Post-conviction counsel missed several opportunities to correct the misconception caused by his deficiently pleaded motion that the request for FASD expert was merely a "fishing expedition"

Between February 15, 2012, when counsel filed the Motion for Authorization to Obtain Expert Services, and November 16, 2012, when this Court entered its findings of fact and conclusions of law, counsel received ample notice from both this Court and the State that his motion was deficient, and counsel thus had several opportunities to rectify the problems. Counsel failed to take advantage of those opportunities.

(1) Counsel failed to reply to the arguments in the State's response

The State's response to the motion for experts, predictably, characterized counsel's request as a "fishing expedition." Hrg. Ex. 4 at 4–5. Relying on Hargrove, 100 Nev. at 502, 686 P.2d at 225, the State urged this Court to deny all three expert requests because they were "unsupported by any specific factual allegations that would, if true, have entitled [Chappell] to relief." Id. at 3 (internal quotation marks omitted). The State also pointed out that counsel had "fail[ed] to explain" what a PET

scan would accomplish. Id. at 3–4. Similarly, the State asked this Court to deny Chappell's request for a neurological examination. Id. at 4.

After receiving the State's response, counsel failed to correct the characterization that his motion was merely a "fishing expedition," though he could easily have done so by bringing the ample support for his requests to this Court's attention. Counsel, in fact, neglected even to file a reply to the State's opposition. II HR at 9:15:25–9:16:04.

When confronted with the absence of a reply in support of the motion, counsel insisted at the April hearing that he had more fully supported his requests for experts in his Reply to State's Response to Supplemental Brief in Support of Defendant's Writ of Habeas Corpus (attached hereto as Br. Ex. 3). II HR at 9:15:25–9:16:04. Counsel was mistaken because the arguments counsel made in that reply addressed the merits of Chappell's post-conviction petition, not the Motion for Authorization to Obtain Expert Services.

In any event, even considering the merits-based reply in the context of counsel's request for an expert, it does nothing to cure the deficiencies in counsel's motion; in fact, it is deficient for exactly the same reasons. First, instead of providing specific support from the record explaining the likelihood that Chappell suffers from FASD, counsel again minimized the evidence supporting his argument, repeating the statement that "Chappell's mother may have been addicted to drugs and alcohol." Br. Ex. 3 at 12 (emphasis added). Second, counsel again failed in the critical task of explaining to this Court why the absence of testimony regarding FASD at trial

mattered in this case. Counsel instead simply cited to a statement made in a footnote of a 1993 Nevada Supreme Court opinion, State v. Haberstroh, 119 Nev. 173, 183 n.22, 69 P.3d 676, 683 n.22 (2003), as modified (June 9, 2003), and contended in a conclusory manner that the State's merits-based argument "disregards [this] reasoning and discussion." Br. Ex. At 13.

(2) Post-conviction counsel during oral argument in 2012 ignored this Court's invitation to more fully support his motion

This Court on October 19, 2012, heard arguments on Chappell's petition and on the pending motions. During the course of the hearing, this Court provided counsel with several opportunities to more fully support his Motion for Authorization to Obtain Expert Services. Counsel failed to take advantage of these opportunities. Instead, counsel declined even to mention his requests for an FASD expert, a PET scan, and a neurological examination. II HR at 9:17:42–9:17:46; see generally Hrg. Ex. 5; Ex. 45.

During the April 2018 hearing, counsel attempted to proffer a post hoc explanation for abandoning his request in 2012 for an FASD expert, testifying that he was forced to argue only about the sexual-assault aggravator, "out of an act of desperation," after this Court said it was denying the petition. II HR at 9:16:46–9:17:40; see also id. at 9:27:45–9:27:59 ("[W]hen I came into the Court, the Court started on page 1 and basically said 'I've reviewed all this Mr. Oram' and I think by page 2 saying 'I'm going to deny this writ.'") A review of the transcript of the 2012 hearing, however, reveals that counsel's 2018 testimony misstates both this Court's comments and counsel's own arguments at that hearing.

Turning first to this Court's comments in 2012, the transcript directly conflicts with counsel's testimony in 2018. True enough, this Court began the 2012 hearing by explaining that it was "inclined" to deny the petition and motions. Hrg. Ex. 5 at 3; Ex. 45 at 3. But this Court did not say, or even imply, that, as a result, any further argument on the petition or motions would be fruitless. Just the opposite—this Court explained that it wanted to hear arguments narrowly tailored to what it saw as the deficiencies in the motions and petition:

> So just let me tell you so you can kind of tailor your arguments, I suppose, that I read everything, that I'm not persuaded that there was ineffective assistance or that your other assignments of error, you know, like attacking the constitutionality, et cetera, of the—or of the death penalty scheme in Nevada, or that it's cruel and unusual punishment, those things, I'm not persuaded by any of those arguments.
>
> Moreover, I don't see that an evidentiary hearing—and normally I grant them, as you know; we've had many, but I don't see in this case that an evidentiary hearing is going to add anything to what I already have before me. I don't think an evidentiary hearing is warranted in this particular case and so I would be inclined to deny the petition as well as all the motions.
>
> So, go ahead.

Hrg. Ex. 5 at 2–3 (emphases added); Ex. 45 at 2–3 (emphasis added).

Counsel ignored this Court's prompts to explain what an evidentiary hearing and expert testimony would add to the paper record, instead essentially resting on the papers he had filed, which this Court had already said were insufficient: "I recognize that the Court will have read everything. I don't have much to add, although I would be able to argue it this morning. I'm prepared to argue for an hour, if need be, because I—but I would be regurgitating every single thing that is in these." Hrg. Ex. 5 at 3 (emphasis added); Ex. 45 at 3 (emphasis added). In response to further

prompting from this Court to explain what counsel "expect[ed] to happen in an evidentiary hearing" and describe "[w]hat evidence . . . would come out in an evidentiary hearing that would change or add to what we have already," counsel simply summarized two of the claims in the petition. Hrg. Ex. 5 at 4–7; Ex. 45 at 4–7. This Court at no point expressed a desire for counsel to cease arguing before discussing directly the requests for expert funding. But counsel nevertheless concluded:

> Your Honor, I'm not sure, because it's so lengthy and because I sort of heard the Court's—what I perceive to be the Court's ruling. And another thing I want to make sure that I'm not doing is if the Court's mind is made up, I'm not here to waste the Court's time if I cannot dissuade you from that decision. I recognize that and I know that you have read everything and that obviously then we would appeal it. So I'm not sure if you want to hear argument or if you're saying, Mr. Oram—

Hrg. Ex. 5 at 8; Ex. 45 at 8. This Court then requested to hear from the State, and counsel provided no additional argument. Hrg. Ex. 5 at 8; Ex. 45 at 8.

Counsel further misstated the emphasis he placed in 2012 on attacking the sexual-assault aggravator. The 2012 transcript reveals that counsel did not decide to argue for this Court's authorization of a pre-ejaculate expert in the belief that it was the most important issue; counsel did not even argue that motion. Counsel briefly mentioned the absence of a pre-ejaculate expert in 2007, but he did <u>not</u> connect that argument to his motions for experts in the post-conviction proceedings. In fact, his argument about the absence of a pre-ejaculate expert in 2007 actually undermined his 2012 motion:

> I think a reasonable attorney had been looking at that situation would have called—<u>you don't even need to call experts</u>, just start with the high schools. Call a health

> teacher in here and say can a woman get pregnant without the man ejaculating, and the answer is going to be yes every single time.

Hrg. Ex. 5 at 6 (emphasis added); Ex. 45 at 6 (emphasis added).

Moreover, as counsel pointed out during cross-examination, his abandonment of his request for an FASD expert was not based on any belief that the issue was unimportant:

> Q: So, as a trial litigator, one who actually goes into court and has to convince a jury, you saw the more important issue being those that focus on undermining that [sexual-assault] aggravator rather than something—just presenting new mitigation evidence.
>
> A: Mr. Owens, I wouldn't say that. I know as a capital litigator that if there are no aggravators, you cannot sentence my client to death. I see it as a very important issue, but I saw other issues as important here too. I felt that they're important. When we talk about the experts that I asked for, I didn't feel, as I'm sitting here, I know the Court disagreed with me, I know the Supreme Court disagreed with me, but as an advocate I felt that what I was asking for was important.
>
> Q: So, you don't put all your eggs in one basket and focus on one issue?
>
> A: No, sir.

II HR at 9:34:37–9:35:22; see also id. at 9:46:45–9:46:52 (testimony of post-conviction counsel, wherein he states that he did not believe FASD issue was "frivolous").

Thus, when read together with the 2012 transcript, counsel's "explanation" for abandoning his request for experts "resembles more a post hoc rationalization of counsel's conduct than an accurate description of [his] deliberations" during the 2012 hearing. Wiggins, 539 U.S. at 526–27. Counsel was instructed to provide this Court with support for his motions and explain what he hoped experts and an evidentiary

hearing would provide. Counsel failed to do this, and thus his performance fell below objective standards of reasonableness.

(3) Counsel did not seek reconsideration of this Court's oral decision by buttressing the specificity of his factual proffer or object to the findings of fact and conclusions of law, which rested on the "bare and conclusory" nature of counsel's motion

At the end of the 2012 hearing, this Court denied Chappell's petition along with the motions for an evidentiary hearing, an investigator, and experts, explaining that counsel had made no "showing as to what [the experts] would've changed." Hrg. Ex. 5 at 11; Ex. 45 at 11. This Court's Findings of Fact and Conclusions of Law was even more explicit, labeling counsel's motions for experts and an investigator as "bare and conclusory" and noting that counsel had "fail[ed] to make any specific allegation as to what these experts and investigators would uncover that could possibly change the outcome of [Chappell's] case." Hrg. Ex. 6 at 5; Ex. 9 at 5. Counsel did not file an opposition to the Findings of Fact or move for reconsideration, II HR at 9:19:48–9:19:59, neglecting to take advantage of this final opportunity to bring to this Court's attention the relevance of FASD to this case. See Tener v. Babcock, 97 Nev. 369, 370, 632 P.2d 1140, 1140 (1981)) (permitting rehearing before entry of notice of entry of order); Soffar v. Dretke, 368 F.3d 441, 478 (5th Cir.) (concluding counsel was ineffective for failing to "take advantage of . . . opportunities" to improve defense), amended on reh'g in part, 391 F.3d 703 (5th Cir. 2004); ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.11.L (2003) ("Counsel at every stage of the case should take advantage of all

appropriate opportunities to argue why death is not suitable punishment for their particular client.").

c. Information was readily available to support post-conviction counsel's motion for expert services and persuade this Court that an FASD expert was warranted

Compounding the deficiencies in counsel's performance in 2012 was his failure to utilize the abundance of evidence, both in the record and readily available from extra-record sources, showing that Chappell's mother abused drugs and alcohol while pregnant, that Chappell had exhibited symptoms of brain damage his entire life, and that FASD was directly relevant to Chappell's offenses. Counsel had a duty to investigate readily available sources of evidence. And counsel admitted that he had requested an FASD expert in an attempt to "unearth more" about the potential effect of FASD on Chappell. II HR at 9:20:00–9:20:23. But counsel failed to realize that he could have easily "unearth[ed]" ample evidence simply by making phone calls, sending letters or emails, or reviewing his case file, in order to to convince this Court that an expert was necessary. See Turner v. Duncan, 158 F.3d 449, 456–57 (9th Cir. 1998), as amended on denial of reh'g (Nov. 24, 1998) (reversing denial of habeas relief when attorney failed to support defense with readily available evidence); Hall, 106 F.3d at 749–50.

(1) Counsel failed to submit to this Court any readily available evidence of drug and alcohol use by Chappell's mother

Ample evidence was available to counsel in 2012 confirming that Chappell's mother abused drugs and alcohol while pregnant. In the record that post-conviction counsel received from trial counsel, Hrg. Ex. 2, was a social history questionnaire,

which noted that Chappell's mother had used drugs and alcohol while pregnant, Hrg. Ex. 8; Ex. 245; evidence from trial testimony in 1996 that Chappell's mother was an alcoholic and heroin addict; and evidence that a court had removed Chappell and his siblings from their mother's custody when Chappell was one year old, 10/22/96 TT at 37–38. Dr. Brown characterized this as "abundant" evidence of maternal drinking. IV HR at 1:38:40–1:38:52.

At least nine witnesses were available to corroborate this evidence of drug and alcohol abuse. IV HR at 1:40:16–1:42:27. Among those available witnesses was Louise Underwood, Chappell's great aunt, who reported that Chappell's mother "had a terrible substance abuse problem":

> Shirley first began abusing pills during her late teenage years. She then progressed to drinking alcohol, sniffing powder cocaine, smoking freebase cocaine, and eventually shooting heroin by the time she became pregnant with James. I personally saw Shirley taking pills, drinking alcohol, and abusing cocaine, but she did not shoot heroin in my presence. Shirley abused these substances throughout her pregnancy with James, and I continued to frequently see her intoxicated. Shirley did not change her drug habits during her pregnancy with James. I continued to see track marks all over her arms. Shirley's eyes remained squinted, and she usually seemed like she was just waking up when I saw her at various times of the day or night. Shirley's speech was often slurred throughout her pregnancy.
>
> Shirley abused alcohol less frequently than she did heroin and cocaine during her pregnancy with James. However, I observed her drinking two to three times a week during her pregnancy. Shirley usually drank several glasses of hard liquor in one sitting, and followed each swig with a beer chaser. Shirley also usually drank until she was intoxicated and abused other drugs along with the alcohol.

Ex. 330 at ¶¶20, 21; IV HR at 1:41:25–1:42:16. William Richard Chappell, Sr., a man who potentially had fathered Chappell, reported that Chappell's mother "was a heavy

drinker," who "drank alcohol throughout her entire pregnancy with James," smoked one to one and a half packs of cigarettes each day, and abused heroin. Ex. 74 at ¶¶6, 7, 8; Hrg. Ex. 10 at 11; Ex. 88 at 11. Similarly, James Wells, a second potential father, reported that, while pregnant with Chappell, Chappell's mother "abused drugs on a daily basis." Ex. 60 at ¶4; Hrg. Ex. 10 at 11; Ex. 88 at 11. Chappell's sister, Myra Chappell-King, recalled hearing adults in her life relate that her mother was addicted to heroin and alcohol and abused those substances during all of her pregnancies except the first. Ex. 64 at ¶3; Hrg. Ex. 10 at 11–12; Ex. 88 at 11–12. And William Earl Bonds, a friend of Chappell's mother, related that:

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

Ex. 71 at ¶6; Hrg. Ex. 10 at 12; Ex. 88 at 12.

(2) Counsel failed to include in his motion any readily available evidence of Chappell's brain damage

Post-conviction counsel received from prior counsel several records evidencing Chappell's lifelong brain dysfunction. None of these records, however, were presented to this Court. For example, the file from trial counsel includes forty-one pages of Chappell's school records, which show chronic developmental delays, referrals for special-education services, a severe learning disability, and pervasive adaptive

dysfunction throughout Chappell's childhood and early adolescence. Hrg. Ex. 15; Ex. 182. The file also included a report from psychologist Lewis Etcoff—which the jurors in 1996 and 2007 did not see as it was never admitted into evidence. Hrg. Ex. 13; Ex. 178. In his report, Dr. Etcoff noted several signs of brain damage: a significant split between verbal IQ and performance IQ,[7] a severe learning disability, attention-deficient/hyperactivity disorder, developmental delays, and adaptive problems. Hrg. Ex. 13; Ex. 178. Dr. Etcoff even opined that Chappell's problems had a "neurological origin" (though, again, counsel in 1996 and 2007 failed to relate this information to jurors). Hrg. Ex. 13 at 12; Ex. 178 at 12. Finally, counsel had the transcripts of testimony at the 1996 trial and 2007 penalty rehearing. These transcripts include the testimony of Clara Axam, Chappell's maternal grandmother, who described Chappell as a "slow" child, who did not understand and learn things as quickly as other children did. 3/20/07 TT at 23. She also testified Chappell's speech was delayed and that Chappell was placed in special-education classes. Id. at 23–24; see IV HR at 1:53:48–1:54:12 (Dr. Brown's testimony, wherein she notes that Chappell did not begin speaking until age four). Chappell's siblings also testified, explaining that Chappell had trouble "dealing with his urine," and that other children teased Chappell for being "slow." 3/19/07 TT at 249, 326.

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[7] See Poindexter v. Mitchell, 454 F.3d 564, 579 (6th Cir. 2006) ("the incongruity between verbal and performance scores suggested an incongruity between [petitioner's] cognitive capacities and behavioral responses, such that in a stress situation, [the petitioner] was likely to act out in a far more primitive manner than the situation would warrant."); People v. Superior Court, Tulare County (Vidal), 28 Cal. Rptr. 3d 529, 543 (2005) (greater than 10-15 points disparity between verbal and performance IQ is "an indication of neurological insult, meaning that [petitioner] had a very specific deficit that was almost certainly brain based").

In addition to the information already in the record, Chappell's friends and family could have provided a wealth of additional information showing that Chappell for his entire life has exhibited signs of brain damage. This information includes a diagnosis of a learning disability, trouble with executive control (including sensory integration, processing speed, and attention control), problems communicating, struggles with daily-living skills, and trouble socializing. Hrg. Ex. 10 at 17–23; Ex. 88 at 17–23.

(3) Counsel failed to present this Court with any of the readily available information about FASD and its relevance to Chappell's offenses

In 2012, a wealth of information was available explaining FASD and its relevance to criminal proceedings, i.e., that prenatal exposure to alcohol impacts brain functioning, leading to a substantially higher likelihood of criminal behavior. IV HR at 1:22:31–1:35:57. But in the Motion for Authorization to Obtain Expert Services, counsel provided this Court with only two vague statements about FASD: "Fetal Alcohol Spectrum Disorders are a group of disorders that can occur in a person who's [sic] mother drank alcohol during pregnancy. The effects can include physical problems and problems with behavior and learning." Hrg. Ex. 3; Ex. 145. These statements did nothing to explain to this Court the relevance of Chappell's prenatal exposure to alcohol to the crime for which he was convicted or the history of domestic violence, which was introduced as evidence against him during both the guilt and penalty phases of his trial.

Peer reviewed literature going back decades has found a link between prenatal alcohol exposure, its resultant brain damage, and criminal behavior. In 1996, more

than a decade before Chappell's post-conviction proceedings, The Centers for Disease Control published perhaps the most well-known of those studies, Streissguth et al., Understanding the Occurrence of Secondary Disabilities in Clients with Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects (FAE), Final Report to the Centers for Disease Control and Prevention (CDC), August, 1996, Seattle: University of Washington, Fetal Alcohol & Drug Unit, Tech. Rep. No. 96-06 (1996). See IV HR at 1:17:49–1:19:26. Among the findings in this study was that the brain damage seen in individuals with FASD leads to trouble with the law. Id.

Information was also readily available from traditional legal resources. A Westlaw search returns a number of articles published before February 2012, explaining the link between criminal activity and the brain damage caused by FASD. See, e.g., Beth Caldwell, Appealing to Empathy: Counsel's Obligation to Present Mitigating Evidence for Juveniles in Adult Court, 64 Me. L. Rev. 391, 421 (2012) (noting that FASD "impacts cognitive functioning, can result in a wide range of developmental and mental health disorders, and can impact decision-making"); Christopher Fanning, Defining Intellectual Disability: Fetal Alcohol Spectrum Disorders and Capital Punishment, 38 Rutgers L. Rec. 1, 11 (2011) ("[P]eople with FASD are known to have difficulty understanding social cues, reduced social judgment, an inability to consider the consequences of their actions, poor impulse control, and problems understanding or conforming to social norms."); Sharon G. Elstein, Children Exposed to Parental Substance Abuse: The Impact, 34-Feb. Colo. Law. 29, 30–31 (2005) (reporting that "[p]renatal alcohol exposure has long-term

effects on a child's cognitive abilities" and "can lead to behavior management problems, and emotional and social problems as a child grows up"); Judith A. Jones, Fetal Alcohol Syndrome-Contrary Issues of Criminal Liability for the Child and His Mother, 24 J. Juv. L. 165, 172–74 (2004) (discussing link between FASD and criminal behavior); Kathryn Page, Ph.D., The Invisible Havoc of Prenatal Alcohol Damage, 4 J. Center for Families, Child. & Cts. 67, 75–80 (2003) (describing "predisposition" in individuals with FASD "to nonproductive or even criminal behavior"). A search of relevant case law returns numerous pre-2012 published opinions noting the relevance of FASD diagnoses in criminal proceedings. See, e.g., Rompilla v. Beard, 545 U.S. 374, 392–93 (2005) (capital trial in 1984); Hurst v. State, 18 So. 3d 975, 1010–13 (Fla. 2009); In re Brett, 16 P.3d at 608; see also Sullivan v. Zebley, 493 U.S. 521, 533–34 n.13 (1990) (describing fetal alcohol syndrome as a "well-known childhood impairment"). A list of some of these cases was also available to counsel on the American Bar Association website. IV HR at 1:16:32–1:17:47.

Finally, a simple Internet search by post-conviction counsel would also have revealed information helpful to this Court's determination of the relevance of FASD in Chappell's case. For example, the National Organization on Fetal Alcohol Syndrome had available factsheets on FASD for the general population, NO-FAS, FASD: What Everyone Should Know, https://web.archive.org/web/20110727131448/http://www.nofas.org/MediaFiles/PDFs/factsheets/everyone.pdf (archived July 27, 2011), and for people working in the criminal justice system, NO-FAS, FASD: What the Justice System Should Know, https://web.archive.org/web/20110727130012/

http://www.nofas.org/MediaFiles/PDFs/factsheets/justice.pdf (archived Feb. 27, 2011). See Br. Ex. 4 at 2-3. Both of these factsheets note the lifelong difficulties faced by individuals with FASDs, including problems with judgment and reasoning, social immaturity, and difficulties with impulse control. Other resources would have provided counsel with similar information. Centers for Disease Control, FASD—Secondary Conditions, https://web.archive.org/web/20111204023232/https://www.cdc.gov/ncbddd/fasd/secondary-conditions.html (archived Dec. 4, 2011) (noting that individuals "with FASDs are at a higher risk for having interactions with police, authorities, or the judicial system" because of trouble controlling emotions and understanding motives of others); The Asante Centre for Fetal Alcohol Syndrome, Legal Resources, https://web.archive.org/web/20110322190909/http://www.asantecentre.org/legal.html (archived March 22, 2011) (providing list of resources on FASD and the law for criminal practitioners); Wikipedia, Fetal Alcohol Spectrum Disorder, https://web.archive.org/web/20110213105621/https://en.wikipedia.org/wiki/Fetal_alcohol_spectrum_disorder (archived Feb. 13, 2011) (describing consequences of prenatal exposure to alcohol, including learning disabilities and problems with impulse control, communication, and judgment). See Br. Ex. 4 at 4-11.

d. Conclusion

The State asserted at the 2018 evidentiary hearing that post-conviction counsel "did everything he could to get this defense going." IV HR at 2:54:40–2:54:51. This not only is untrue, but it also conflicts with what the State argued in 2012. Hrg. Ex. 4 at 4–5. Post-conviction counsel did little more than recognize the possibility of

a boilerplate FASD claim, like he does "ad nauseum" in all of his capital cases. II HR at 9:30:28–9:30:35 ("I [raise FASD] almost, what I would call ad nauseum; now that I've gone through I, just can't stop saying 'fetal alcohol.'"). But an attorney does not provide effective representation by spotting an issue, pleading it in a conclusory way, then abandoning it. See IV HR at 2:46:35–2:47:13 ("[Y]ou can't just make these bare allegations. You've got to come with something. And he didn't come with anything. And then he also didn't convince the Court because he didn't do the work apparently necessary to do that . . ."); see also Moore v. Johnson, 194 F.3d 586, 618 (5th Cir. 1999); Chambers, 907 F.2d at 828–32; In re Brett, 16 P.3d at 608. Instead, attorneys have a duty to investigate and effectively present the issues they intend to raise. Counsel's failure to do so here constituted deficient performance.

2. Chappell was prejudiced by counsel's deficient performance

Post-conviction counsel's failure to properly litigate his request for FASD funding prejudiced Chappell. See Strickland, 466 U.S. at 694; State v. Powell, 122 Nev. 751, 759, 138 P.3d 453, 458 (2006). The jury heard nothing about Chappell's FASD or brain damage. But, as several courts have noted, evidence of FASD is "powerful," Williams, 2018 WL 1240310, at *14; see, e.g., Rompilla, 545 U.S. at 393, and there's a reasonable probability that presenting this evidence would have changed the result of Chappell's penalty proceeding.

At the April hearing, the State insisted that Dr. Etcoff's testimony in 2007 had put the jury on notice of Chappell's FASD. IV HR at 2:48:55–2:49:04, 2:52:27–2:52:45. This simply is false—nothing that the jury heard in 2007 referenced FASD or brain damage.

As Dr. Etcoff himself admits, he is not qualified to assess FASD:

> I am not an expert in Fetal Alcohol Spectrum Disorder. I knew even less about FASD in 1996. While I cannot remember that defense counsel asked me about FASD, I believe if I had been asked by either set of defense counsel about such a diagnosis, I would have informed counsel that they needed to retain an expert with knowledge [of] Fetal Alcohol Syndrome and Fetal Alcohol Effects.

Ex. 85 at ¶16 (emphasis added). Moreover, Dr. Etcoff did not perform a neuropsychological examination, which was required to assess brain damage. Ex. 85 at ¶¶7, 12, 14; 3/16/07 TT at 78, 123; II HR at 10:59:21–10:59:32. For that matter, Dr. Etcoff was not even hired to assess Chappell for FASD or brain damage. Rather, he was hired to conduct a criminal psychological evaluation. Ex. 85 at ¶ 7. And Dr. Etcoff was not even provided the documents or access to witnesses that he admits were necessary to perform that narrow evaluation. Ex. 85 at ¶¶9, 10, 12; 3/16/07 TT at 27–28, 84–86, 89–90, 102–08. See Yun Hseng Liao v. Junious, 817 F.3d 678, 690–95 (9th Cir. 2016) (concluding that counsel was ineffective in not asking expert to perform sleep study).

Moreover, the only explanations Dr. Etcoff provided for Chappell's behavior (leading up to and at the time of the crime) were a potential personality disorder, 3/16/07 TT at 49–52, 65–67, 118, and Chappell's "voluntary" drug use, id. at 38–40, 54–57, 66–67, 70, 75, 118, 131–32. But drug use is a completely inadequate explanation for Chappell's symptoms; Chappell exhibited signs of brain damage his entire life, long before his own drug use could have affected his brain. IV HR at 1:45:10–1:45:53; Hrg. Ex. 19 at 26–29; Ex. 89 at 26–29. The difference between these explanations and the actual explanation is substantial: Chappell may have "chosen"

to use drugs, but he did not choose to be born to a mother who abused drugs and alcohol while pregnant, causing irreversible brain damage and "hardwiring" Chappell for the problems he experienced throughout his life (including addiction) See Williams, 2018 WL 1240310, at *13–14 (concluding petitioner was prejudiced by counsel's failure to present evidence of FASD in addition to evidence of petitioner's mental illnesses); see also 3/16/07 TT at 69–76 (cross-examination of Dr. Etcoff, wherein the State criticizes Dr. Etcoff's testimony concerning Chappell's impaired "free will," which was not connected to any concrete cause).

Experts have now done the testing, prepared the reports, and presented the testimony that counsel in 2007 should have. Dr. Connor performed a neuropsychological evaluation over the course of two days. II HR at 10:29:40–10:30:01; Hrg. Ex. 17; Ex. 87. The results of that evaluation included several indications of FASD. For example, Chappell's intelligence testing revealed "splits" in intelligence over different domains, which is consistent with unequal brain development seen in individuals exposed to alcohol in utero. II HR at 10:33:10–10:34:33; Hrg. Ex. 17 at 5–6; Ex. 87 at 5–6. Those results were consistent with results of prior intelligence tests. II HR at 10:34:32–10:36:15. The results of academic testing, both current and prior, also were consistent with FASD; Chappell consistently has performed poorly in mathematics, which, because of its abstract nature, generally is difficult for individuals with FASD. Id. at 10:36:25–10:37:00; Hrg. Ex. 17 at 7; Ex. 87 at 6. Chappell also exhibits "considerable difficulties" in executive functioning, such as planning and problem solving. Hrg. Ex. 17 at 8–9; Ex. 87 at 8–9. Finally, Chappell

has substantially impaired adaptive functioning, displaying child-like coping skills and performing poorly on low-structure tasks. II HR at 10:40:05–10:49:44; Hrg. Ex. 17 at 9–10; Ex. 87 at 9–10. In sum, Chappell displayed deficits in nine domains of functioning, well above the three domains needed for a diagnosis of FASD. II HR at 10:37:12–10:40:05, 10:49:44–10:57:50; Hrg. Ex. 17 at 11–12; Ex. 87 at 11–12.

Dr. Davies diagnosed Chappell with ARND (which the State does not dispute). III HR at 11:10:30–11:57:11; Hrg. Ex. 19; Ex. 89. In diagnosing Chappell with ARND, Dr. Davies relied on extensive evidence both of maternal drinking and of brain damage, including the results of Dr. Connor's neurological evaluation and the results of a Quantitative EEG. Hrg. Ex. 19 at 3–4; Ex. 89 at 3–4. Dr. Davies also considered other potential causes of Chappell's brain damage: drug and alcohol abuse, genetic risks, prenatal drug exposure, environmental contaminants, and childhood trauma. III HR at 11:38:16–11:40:46; Hrg. Ex. 19 at 26–29; Ex. 89 at 26–29. None of these differential diagnoses, however, adequately explains all of Chappell's symptoms. III HR at 11:38:16–11:40:46; Hrg. Ex. 19 at 26–29; Ex. 89 at 26–29.

Dr. Brown confirmed that this diagnosis was consistent with all the material she reviewed, along with Dr. Connor's report and her own interview of Chappell. IV HR at 1:08:44–1:09:29; Hrg. Ex. 10 at 3; Ex. 88 at 3. She then explained the effect that ARND had on Chappell's life, including his actions toward the victim. IV HR at 2:03:40–2:26:30; Hrg. Ex. 10 at 24–34; Ex. 88 at 24–34. Because of ARND and his childhood traumas, Chappell's coping skills at the time of the homicide were equivalent to those of a twelve-year-old child. IV HR at 2:03:40–2:24:10; Hrg. Ex. 10

at 24–33; Ex. 88 at 24–33. Chappell also exhibited significant dysfunction in executive skills, such as planning and problem solving. IV HR at 2:05:55–2:08:30; Hrg. Ex. 10 at 25, 28–30; Ex. 88 at 25, 28–30. And, because of the way that alcohol affected the formation of his hypothalamic-pituitary-adrenal system, Chappell was "hard-wired" to be hyper-reactive to stress. Hrg. Ex. 10 at 32; Ex. 88 at 32. In combination, these factors substantially impair Chappell's ability to plan, make rational decisions, and control his behavior and emotions. IV HR at 2:03:40–2:24:08; Hrg. Ex. 10 at 24–33; Ex. 88 at 24–33.

Dr. Brown added that Chappell's ARND likely contributed to his own drug addiction; prenatal exposure to alcohol and drugs actually changes the structure of the brain, she explained, "hard-wiring" individuals with FASD with a biological craving for addictive substances throughout their lives. IV HR at 2:24:08–2:26:30; Hrg. Ex. 10 at 33–34; Ex. 88 at 33–34.

Jurors have not heard this testimony—which was so compelling that the State admitted "it's tough to know what effect it would have on a jury." IV HR at 2:48:45–2:48:55. There is a reasonable probability that at least one of the jurors—who found only one aggravating factor and seven mitigating factors—would not have voted for death had FASD been presented. See Williams, 529 U.S. at 397–98 (instructing courts to "evaluate the totality of the available mitigation evidence" in determining prejudice); Williams, 2018 WL 1240310, at *14 (considering that "prosecutor put forward only one aggravating factor" in determining that petitioner was prejudiced by lack of FASD evidence).

The jury's findings in 2007 that "Chappell was born to a drug/alcohol addicted mother" and "suffered a learning disability," Hrg. Ex. 9; Ex. 39, do not undermine the prejudicial effect of counsel's deficient performance. As this Court, post-conviction counsel, and Dr. Brown all pointed out, II HR at 9:45:05–9:46:09, III HR at 2:36:07–2:38:09, 2:49:03–2:52:26, there is a difference between knowing that Chappell's mother was addicted to drugs and alcohol and knowing that because of her addiction Chappell's mother permanently damaged the brain of her unborn child, impacting his entire life trajectory. See Williams, 2018 WL 1240310, at *6, *12–14 (D.S.C. Mar. 8, 2018) (concluding that evidence of mother's alcoholism did not negate prejudice from counsel's failure to investigate and present evidence of petitioner's FASD). None of the jurors could have known, without expert testimony, of the devastating consequences of that diagnosis. See IV HR at 2:36:07–2:38:09. Similarly, without experts to explain the consequences of FASD in Chappell's life and criminal offenses, simply learning that he had a learning disability as a child is unlikely to have had much effect on the jury's deliberations. See Williams, 2018 WL 1240310, at *6, *12–14 (concluding trial counsel were ineffective for not presenting expert testimony on FASD despite fact that counsel had developed and presented evidence of petitioner's "difficulty in school").

B. The Law-of-the-Case Doctrine Does Not Bar Consideration of Chappell's Claim Which is Based on a Substantially Different Factual Record

At the end of the 2018 evidentiary hearing, the State argued that Chappell's claim is barred by the law-of-the-case doctrine. IV HR at 2:54:57–2:55:39, 2:56:48–2:56:56. The State miscomprehends Nevada law—"Under the law of the case

doctrine, issues previously determined by [the Nevada Supreme Court] on appeal may not be reargued as a basis for habeas relief." Pellegrini v. State, 117 Nev. 860, 888, 34 P.3d 519, 538 (2001) (emphasis added). But the Nevada Supreme Court has not yet ruled on Chappell's claim that post-conviction counsel was ineffective. See Chappell, 2015 WL 3849122, at *2; see also Pellegrini, 117 Nev. at 888, 34 P.3d at 538 (concluding that law of the case did not bar consideration whether procedural bars applied). Indeed, it was precisely the ineffectiveness of post-conviction counsel—counsel's failure properly to support his motion and create an adequate appellate record—that led to the Nevada Supreme Court's decision. Accepting the State's argument would consequently lead to either of two absurd results—shielding from habeas review any deficient investigation that led to an inadequate appellate record or requiring that counsel argue their own ineffectiveness on appeal. Contra United States v. Del Muro, 87 F.3d 1078, 1080 (9th Cir. 1996) (holding that counsel cannot provide conflict-free representation while also arguing own ineffectiveness). There can accordingly be no rational dispute that Chappell's present claim of FASD was previously adjudicated.

V. CONCLUSION

As demonstrated in Chappell's petition, the evidentiary hearing, and this post-hearing brief, Chappell is entitled to relief. Chappell respectfully requests this Court grant his petition, vacate his death sentence, and order a new penalty proceeding.

DATED this 27th day of April, 2018.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

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

/s/ Ellesse Henderson
ELLESSE HENDERSON
Assistant Federal Public Defender

/s/ Scott Wisniewski
SCOTT WISNIEWSKI
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

In accordance with the Rules of Civil Procedure, the undersigned hereby certifies that on this 27th day of April, 2018, a true and correct copy of the foregoing **POST-HEARING BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS**, was filed electronically with the Eighth Judicial District Court. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

Steven S. Owens,
Chief Deputy District Attorney
steven.owens@clarkcountyda.com

/s/ Sara Jelinek
An Employee of the Federal Public
Defenders Office

EXHS

RENE L. VALLADARES
Federal Public Defender
Nevada Bar No. 11479
BRAD D. LEVENSON
Assistant Federal Public Defender
Nevada Bar No. 13804C
Brad_Levenson@fd.org
ELLESSE HENDERSON
Assistant Federal Public Defender
Nevada Bar No. 14674C
Ellesse_Henderson@fd.org
SCOTT WISNIEWSKI
Assistant Federal Public Defender
Nevada Bar No. 14675C
Scott_Wisniewski@fd.org
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-5819 (Fax)

Attorneys for Petitioner James Chappell

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

EXHIBITS IN SUPPORT OF POST-HEARING BRIEF IN SUPPORT OF WRIT OF HABEAS CORPUS

Date of Hearing: May 21, 2018
Time of Hearing: 9:00 a.m.

(Death Penalty Habeas Corpus Case)

1. Recorder's Transcript, State v. Hover, Eighth Judicial District Court Case No. 10-C263551-1 (January 25, 2018)

2. Decision, State v. Hover, Nevada Supreme Court Case No. 63888 (February 19, 2016)

3. Reply to State's Response to Supplemental Brief in Support of Defendant's Writ of Habeas Corpus, Chappell v. State, Eighth Judicial District Court Case No. C131341 (June 30, 2012)

4. Miscellaneous Archived Web Pages

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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 27th of April 2017, a true and accurate copy of the foregoing **EXHIBITS IN SUPPORT OF POST-HEARING BRIEF IN SUPPORT OF WRIT OF HABEAS CORPUS** was filed electronically with the Eighth Judicial District Court and served by Odyssey EFileNV, addressed as follows:

Steven S. Owens,
Chief Deputy District Attorney
steven.owens@clarkcountyda.com

/s/ Sara Jelinek
An Employee of the Federal Public Defenders Office

EXHIBIT 1

EXHIBIT 1

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CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. GREGORY LEE HOVER, Defendant.	CASE NO. 10-C263551-1 DEPT. NO. V

BEFORE THE HONORABLE CAROLYN ELLSWORTH, DISTRICT COURT JUDGE

WEDNESDAY, JANUARY 17, 2018

RECORDER'S TRANSCRIPT RE:
STATUS CHECK: BRIEFING SCHEDULE

APPEARANCES:

For the Plaintiff: JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney

For the Defendant: KAREN A. CONNOLLY, ESQ.

RECORDED BY: LARA CORCORAN, COURT RECORDER

LAS VEGAS, NEVADA, WEDNESDAY, JANUARY 17, 2018, 9:32 A.M.

* * * * *

THE COURT: Case Number C263551, State of Nevada versus Gregory Hover. Good morning.

MS. CONNOLLY: Thanks, Your Honor. I have submitted to you yesterday a ex-parte motion for payment with excess fees in excess of the statutory maximum, and I attached – the reason it took me awhile is I attached to that an updated letter from Dr. Miora, dated December 19th, who was the doctor way back when, and she's recommending MRI, FMRI, PET scan, all of those. So that was just submitted yesterday. I have an extra copy here if you want to take a look at it.

THE COURT: No, I don't really want to see things that are – I mean, I haven't seen it. I haven't laid eyes on it, okay.

So my understanding was that we – it was on today to set a briefing schedule, but that you were planning on filing a motion for some additional –

MS. CONNOLLY: Well, what happened was, when we were last here, to refresh your recollection, at the trial when counsel had request [sic], they didn't have any – and now I got the letter from the doctor, then I had to find a medical imaging center that would do all the tests that I wanted, and I needed to get an updated letter from Dr. Miora, which I just got on the 19th.

THE COURT: Okay.

MS. CONNOLLY: So that's why it's taken me awhile to get it all together to present to your motion, and then I need get the funds authorized. Once I get the funds authorized – so that's the process I've been going through.

THE COURT: All right. So I'll look at all of that when I go back to chambers after calendar. But it – I mean, the reason it was originally denied when a

request was made ex parte by Mr. Oram was because there was nothing – no basis for it. And when I asked what the basis for wanting an MRI was – it was not a PET scan, it was an MRI, he asked for an MRI – he said because it's a death penalty case, and that's not a reason, that's like not – nothing there. And so I said, well, no, that's denied without prejudice; you need to tell me what you hope to accomplish.

I mean, we know he has a brain in his head, so I need something from somebody that says there's a purpose to this, other than just expending funds. So now apparently you have you that. So I assume if that's there, I'll be granting that.

And now, given that, and maybe your communication with doctors and what not, what do you think in terms of a briefing schedule?

MS. CONNOLLY: I would think – I think we need to set it for 90 days for a status check, because once all the tests – he's going to get transported from Ely to the get testing done. Once the testing gets done, I have to have him examined again by Dr. Miora. She's retired, so it has been a little bit difficult – and she's in another state – to get communication with her. But once all the testing is done, then I have to get it to her to analyze it, and then depending on if she finds there's something or not. So I would ask just maybe just to set on status check in 90 days and hopefully by then all the tests and the imaging will have been done.

MR. VANBOSKERCK: Submit it, Your Honor.

THE COURT: Okay. My only concern, when you say this doctor is now retired, are we –

MS. CONNOLLY: I think she's semi-retired, but works predominantly on capital cases. She does still work on those, so.

THE COURT: Okay.

MS. CONNOLLY: If I need to get a new doctor –

THE COURT: Is she an –

MS. CONNOLLY: – because she's not receptive –

THE COURT: Is she a young retiree?

MS. CONNOLLY: If she's not receptive, then I'll have to – and then I have to get funds authorized to hire somebody else to come in and analyze the results. So it's kind of a torturous process, but we try and get through it as quickly as –

THE COURT: What I don't want to happen is that this person is retired, is elderly, is not in good health, and either passes away or becomes unable to assist you and now we have to start over.

MS. CONNOLLY: Well, the reason – I want to stay with her because she was involved and she's already done all the initial interviewing with Mr. Hover. And so I don't want somebody else to have to come in and do that all over again.

THE COURT: Okay.

MS. CONNOLLY: So we've got – I've got that part done, now I need to get the imaging and testing done and then get it back to her to finish her analysis.

THE COURT: And you think that it's going to be 90 days before she can accomplish that?

MS. CONNOLLY: I don't know. I'm – with trying to logistically get him, I don't if we do it there or they transport. We did have – I know the Court mentioned that the Federal Public Defender has some problems with the prison, getting it set up. My office has spoken to the prison. We didn't anticipate there would be any issues, so hopefully it will go smoothly, but how – I – hopefully within 90 days.

THE COURT: All right. So 90-day status check and – for – to set a briefing schedule.

MS. CONNOLLY: Hopefully, yes.

THE COURT: All right.

THE CLERK: So continue this one 90 days? That will be April 18th, 9 a.m.

THE COURT: All right. Thank you.

MR. VANBOSKERCK: Thank you, Your Honor.

MS. CONNOLLY: Thank you.

THE COURT: You're welcome.

PROCEEDING CONCLUDED AT 9:37 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.

Lara Corcoran

LARA CORCORAN
Court Recorder/Transcriber

EXHIBIT 2

EXHIBIT 2

2016 WL 699871
Unpublished Disposition
Only the Westlaw citation is currently available.
This is an unpublished disposition. See Nevada Rules of Appellate Procedure, Rule 36(c) before citing.
Supreme Court of Nevada.

Gregory Lee HOVER, Appellant,
v.
The STATE of Nevada, Respondent.

No. 63888.
|
Feb. 19, 2016.

Attorneys and Law Firms

Christopher R. Oram

Oronoz & Ericsson

Attorney General/Carson City

Clark County District Attorney

ORDER OF AFFIRMANCE

***1** This is an appeal from a judgment of conviction in a death penalty case. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Appellant Gregory Hover and Richard Freeman kidnapped, sexually assaulted, robbed, and murdered Prisma Contreras outside of Las Vegas, Nevada. Ten days later, Hover broke into the home of Julio and Roberta Romero in Las Vegas, Nevada. He bound and shot Julio, forced Roberta to retrieve certain property, shot her, and left the home with jewelry and bank cards. Julio died as a result of his injuries; Roberta survived. Hover and Freeman also robbed the slot areas of three Las Vegas grocery stores. Lastly, while in pretrial detention, Hover attacked his cellmate with scissors.

A jury found Hover guilty of conspiracy to commit kidnapping; five counts of conspiracy to commit robbery; conspiracy to commit sexual assault; conspiracy to commit murder; five counts of burglary while in possession of a deadly weapon; three counts of first-degree kidnapping with the use of a deadly weapon; four counts of robbery with the use of a deadly weapon; two counts of robbery with the use of a deadly weapon, victim 60 years of age or older; sexual assault with the use of a deadly weapon; two counts of murder with the use of a deadly weapon; firstdegree arson; two counts of burglary; attempted murder with the use of a deadly weapon; and battery by a prisoner with the use of a deadly weapon. The jury sentenced Hover to death for each murder conviction and the district court imposed numerous consecutive and concurrent sentences for the remaining convictions. In this appeal, Hover alleges numerous errors during the guilt and penalty phases of trial.

Guilt phase issues

Juror challenges

Hover raises several challenges to district court decisions during voir dire.

First, Hover contends that the district court erred in denying his challenges of prospective jurors whom he contends were predisposed toward a death sentence. We discern no abuse of discretion. *See Weber v. State,* 121 Nev. 554, 580, 119 P.3d 107, 125 (2005) (reviewing a district court's decision whether to excuse potential jurors for abuse of discretion). Despite the jurors' preference for harsher punishments, they acknowledged that Hover was innocent until proven guilty and that they would listen to all the evidence presented, follow the court's instructions, and fairly consider all possible penalties. *See id.* (providing that reviewing court must inquire " 'whether a prospective juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." ' (quoting *Leonard v. State (Leonard II),* 117 Nev. 53, 65, 17 P.3d 397, 405 (2001) (internal quotes omitted))). Moreover, the challenged prospective jurors were not ultimately empaneled and Hover does not allege that any juror actually empaneled was unfair or biased. *See Blake v. State,* 121 Nev. 779, 796, 121 P.3d 567, 578 (2005) ("If the jury actually seated is impartial, the fact that a defendant had to use a peremptory challenge to achieve that result does not mean that the defendant was denied his right to an impartial jury.").

***2** Second, Hover contends that the district court erred in granting the State's challenge to a potential juror. We discern no abuse of discretion. *See Weber,* 121 Nev. at 580, 119 P.3d at 125. The record established that the juror's views would " 'prevent or substantially impair the performance of [her] duties as a juror in accordance with

[her] instructions and oath." ' *Id.* (quoting *Leonard II*, 117 Nev. at 65, 17 P.3d at 405). In particular, despite the beyond a reasonable doubt standard, the potential juror stated that she would require proof of a defendant's guilt beyond any doubt in order to impose the death penalty. *See Browning v. State*, 124 Nev. 517, 526, 188 P.3d 60, 67 (2008) ("The focus of a capital penalty hearing is not the defendant's guilt, but rather his character, record, and the circumstances of the offense.").

Third, Hover argues that the district court erred in denying his objection pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986) to the State's use of a peremptory challenge. We conclude that Hover failed to demonstrate a prima facie case of discrimination as required under *Batson*. *See Ford v. State*, 122 Nev. 398, 403, 132 P.3d 574, 577 (2006) (providing that "the opponent of the peremptory challenge must make out a prima facie case of discrimination"). Under the totality of the circumstances, the strike of one African–American juror while another African–American juror remained on the panel, did not establish an inference of discrimination in this case. *See Watson v. State*, 130 Nev., Adv. Op. 76, 335 P.3d 157, 166 (2014) (providing that to establish a prima facie case, "the opponent of the strike must show 'that the totality of the relevant facts gives rise to an inference of discriminatory purpose' " (quoting *Batson*, 476 U.S. at 93–94)). Thus, the burden did not shift to the State to proffer a race-neutral reason for the strike. *Ford*, 122 Nev. at 403, 132 P.3d at 577 (providing that once a prima facie case of discrimination is established "the production burden then shifts to the proponent of the challenge to assert a neutral explanation for the challenge"). Nevertheless, the State proffered several race-neutral reasons for striking the juror that were not belied by the record. Therefore, the district court did not abuse its discretion in denying Hover's challenge.

Positron emission tomography (PET) scan

Hover argues that the district court abused its discretion in denying his motion to obtain a PET scan because funding was available and the district attorney did not object to the testing. *See State v. Second Jud. District Court*, 85 Nev. 241, 245, 453 P.2d 421, 423–24 (1969) (reviewing denial of motion seeking payment of defense expenses for an abuse of discretion). We disagree for two reasons. First, Hover did not request a PET scan below but instead requested a Magnetic Resonance Imaging (MRI) scan.[1] The district court cannot be faulted for failing to order a scan that was not requested. Second, Hover did not meet his burden of demonstrating that either scan was necessary. *See Gallego v. State*, 117 Nev. 348, 370, 23 P.3d 227, 242 (2001), *abrogated on other grounds by Nunnery v. State*, 127 Nev., Adv. Op. 69, 263 P.3d 235 (2011). Counsel conceded in the district court that the defense expert witness did not request the scan or conclude that it was necessary to diagnose Hover but sought testing merely because Hover was "facing a death sentence."[2] *See Jaeger v. State*, 113 Nev. 1275, 1285, 948 P.2d 1185, 1191 (1997) (Shearing, C.J., concurring) ("[T]he guarantees of due process do not include a right to conduct a fishing expedition."). The district court cannot be faulted for denying a request that was not made nor supported by some basis for the request.

Cross-examination of DNA analyst

***3** Hover also contends that the district court abused its discretion in preventing him from cross-examining the DNA analyst about errors in other cases.[3] The record indicates that the analyst had worked at the lab at the time when significant errors were revealed. Therefore, Hover claims that the district court abused its discretion in concluding that the events of which Hover complained were irrelevant without conducting an evidentiary hearing. *See Patterson v. State*, 129 Nev., Adv. Op. 17, 298 P.3d 433, 439 (2013) ("[A]n abuse of discretion occurs whenever a court fails to give due consideration to the issues at hand."); *see Collman v. State*, 116 Nev. 687, 702, 7 P.3d 426, 436 (2000) ("The decision to admit or exclude evidence rests within the trial court's discretion, and this court will not overturn that decision absent manifest error."). We agree that the district court should have allowed the consideration of this matter but conclude that the error was harmless. *See Valdez v. State*, 124 Nev. 1172, 1189, 196 P.3d 465, 476 (2008) ("If the error is of constitutional dimension, then ... [this court] will reverse unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict."). There is no indication that the witness was involved in any of the prior cases where errors were shown to have occurred. Therefore, her conclusions would not have been significantly undermined by the prohibited cross-examination. Moreover, while her conclusions were arguably powerful, there was substantial evidence of Hover's guilt notwithstanding that evidence. Hover repeatedly implicated himself in the sexual assault and murder of Contreras in statements that were consistent with physical evidence. In addition, cell phone records placed Hover in the area where Contreras' body was found, surveillance video showed a car like Hover's following Contreras' Jeep, Freeman's fingerprint was found on a matchbook at the scene, and surveillance video showed Hover and Freeman purchasing bleach and disposing of clothing shortly after the murder.

Cross-examination of Marcos Ramirez

Hover contends that the district court improperly limited his cross-examination of Marcos Ramirez, who he was accused of attacking in pretrial detention, to preclude questioning about prior arrests and convictions for violent crimes. We discern no abuse of discretion. *See Collman*, 116 Nev. at 702, 7 P.3d at 436. The district court permitted Hover to ask whether Ramirez told Hover about his prior record during their detention and Ramirez acknowledged that he told Hover about his three convictions for domestic violence.[4] That prior conduct therefore was relevant to establishing Hover's defense. *See Daniel v. State*, 119 Nev. 498, 515, 78 P.3d 890, 902 (2003) ("[E]vidence of specific acts showing that the victim was a violent person is admissible if a defendant seeks to establish self-defense *and was aware of those acts*."). On the other hand, whether Ramirez had been arrested for coercion and a probation violation alleging battery with a deadly weapon was not relevant because prior arrests did not demonstrate that he had committed prior acts of violence. *See Daniel*, 119 Nev. at 512–13, 78 P.3d at 900 ("An arrest shows only that the arresting officer thought the person apprehended had committed a crime.... An arrest does not show that a crime in fact has been committed, or even that there is probable cause for believing that a crime has been committed.").

Witness' outburst

***4** Hover contends that the district court erred in denying his motion for mistrial based on Roberta Romero's outburst during her testimony. We disagree. Given the brevity of the outburst, in relation to both Roberta's testimony and the entirety of the guilt—phase testimony, the swift manner in which the district court addressed it, and the fact that statements were not translated for the jury, the outburst likely did not unduly influence the jury. *See Johnson v. State*, 122 Nev. 1344, 1358–59, 148 P.3d 767, 777 (2006) (providing that an isolated incident of the victim's brother passing out in response to a crime scene photograph did not render the penalty hearing fundamentally unfair). Therefore, the district court did not abuse its discretion in denying the motion for a mistrial. *See Rose v. State*, 123 Nev. 194, 206–07, 163 P.3d 408, 417 (2007).

Bad act testimony

Hover argues that the district court erred in permitting the State to elicit testimony about uncharged ATM robberies on the ground that he opened the door to that evidence. We discern no plain error. *See Nelson v. State*, 123 Nev. 534, 543, 170 P.3d 517, 524 (2007) (reviewing unobjected to error for plain error affecting substantial rights). The initial discussion about the ATM robberies occurred during defense questioning. Although it may have been unnecessary for the State to refer to the ATM robberies on redirect, the comment was brief and the State did not elicit further testimony about the robberies. Therefore, Hover failed to demonstrate that the State's comment prejudiced his substantial rights. *See id.* at 543, 170 P.3d at 524 (requiring that appellant demonstrate that error which is apparent from "a casual inspection of the record" was prejudicial).

Impermissible impeachment

Hover contends that the State impermissibly impeached its own witness by eliciting testimony that her prior conviction for child molestation involved consensual sexual contact with a 15–year–old when the witness was herself 19 years old. We agree. Although a party may " 'remove the sting' " of impeachment by questioning its own witness about the existence of prior convictions, *United States v. Ohlers*, 169 F.3d 1200, 1202 (9th Cir.1999) (quoting F.R .E. 609 advisory committee's note to 1990 amendment), a witness may not be impeached by questioning about the sentence imposed or the facts underlying the conviction, *see Jacobs v. State*, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975) (providing that sentence imposed on witness is not relevant to impeachment); *Plunkett v. State*, 84 Nev. 145, 147, 437 P.2d 92, 93 (1968) (providing the circumstances underlying prior convictions are not relevant to impeachment). Nevertheless, this error was harmless. *See Valdez*, 124 Nev. at 1189, 196 P.3d at 476 (explaining that errors that are not of a constitutional nature do not warrant reversal unless they "substantially affect [ed] the jury's verdict"). The witness' testimony, which chiefly described the January 28, 2010 robbery, was detailed and corroborated by other evidence.

Improper identification

***5** Hover contends that the district court erred in permitting Detective Karl Lorson to testify that Freeman was not the perpetrator depicted in the three surveillance videos and that the perpetrator of the robberies was the same individual. We conclude that the district court did not abuse its discretion in permitting Detective Lorson to testify that Freeman was not in the surveillance videos. Detective Lorson had two opportunities to observe Freeman prior to viewing the surveillance footage. During those instances, he observed Freeman's physique and facial features. Thus, there is a reasonable basis for concluding that he could more likely correctly recognize

Freeman or indicate that it was not Freeman in the video. *See Rossana v. State,* 113 Nev. 375, 380, 934 P.2d 1045, 1048 (1997) (providing a lay witness's opinion testimony "regarding the identity of a person depicted in a surveillance photograph" is admissible "if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury." (internal quotation marks omitted)). However, the district court erred in permitting Detective Lorson to testify that, though the surveillance videos did not depict Freeman, the videos all depicted the same perpetrator. Detective Lorson's testimony did not establish that he had a reasonable basis to more likely correctly determine that the same perpetrator was shown in all three videos. However, the error did not affect Hover's substantial rights, *see Nelson,* 123 Nev. at 543, 170 P.3d at 524, as there was substantial evidence besides this testimony which indicated that Hover robbed the three grocery stores.

Hover's admission to a correctional officer

Hover argues that the district court erred in admitting testimony about a statement he made to a corrections officer in violation of *Miranda v. Arizona,* 384 U.S. 436 (1966). We disagree. Hover was in custody when he admitted to slashing Ramirez.[5] See *Taylor v. State,* 114 Nev. 1071, 1082, 968 P.2d 315, 323 (1998). However, the corrections officer's query about whether Hover had sustained injuries was not an "interrogation" under *Miranda,* in that it was not reasonably likely to elicit an incriminating response from Hover. *Rhode Island v. Innis,* 446 U.S. 291, 301 (1980). Therefore, the district court did not err in denying the motion to suppress.

Gruesome photographs

Hover contends that the district court erred in admitting unduly prejudicial autopsy photographs. He further contends that a photograph depicting a feminine pad near the victim, which was introduced during the penalty phase of trial, was inflammatory because it suggests that he sodomized Contreras. We conclude that this claim lacks merit. The district court enjoys broad discretion in matters related to the admission of evidence, *Byford v. State,* 116 Nev. 215, 231, 994 P.2d 700, 711 (2000), including the admission of "photographs ... as long as their probative value is not substantially outweighed by their prejudicial effect," *Libby v. State,* 109 Nev. 905, 910, 859 P.2d 1050, 1054 (1993), *vacated on other grounds,* 516 U.S. 1037 (1996). Although the autopsy photographs are gruesome, they were relevant in that they assisted the medical examiner in testifying about Contreras' cause of death, the manner in which she received the injuries, and the condition of her body when it was discovered. As to the photograph that was introduced during the penalty phase of trial, Hover failed to show that the district court abused its discretion. The district court concluded that the photograph was admissible because it constituted physical evidence that corroborated the testimony that Contreras was sodomized which "would have been even more painful than sexual assault through intercourse vaginally." The pain inflicted on Contreras during Hover's crimes against her was relevant to establishing an aggravating circumstance alleged by the State. *See* NRS 200.033(8).

Freeman's bad act evidence

***6** Hover argues that the district court erred in denying him the opportunity to introduce evidence that Freeman possessed child pornography and had committed prior crimes involving knives because the evidence could have shown that Freeman was more culpable in the sexual assault and murder. We discern no abuse of discretion, *see Ramet v. State,* 125 Nev. 195, 198, 209 P.3d 268, 269 (2009) (reviewing district court's decision to admit or exclude for an abuse of discretion), because evidence that Freeman possessed child pornography or had committed other crimes with knives was not admissible to prove or refute the allegation that Hover sexually assaulted Contreras, *see* NRS 48.045(2) ("Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith.").

Insufficient evidence of kidnapping for Julio Romero

Hover argues that the State failed to produce sufficient evidence to support his conviction for kidnapping Julio Romero because there was no evidence that Julio had been moved for any purpose beyond the completion of the robbery and therefore the kidnapping was merely incidental to the robbery. We disagree. The evidence established that Hover moved Julio from the front door to another bedroom where he was taped to a chair and shot. Hover had taken Julio's wallet from the kitchen, but no evidence suggests that anything of value was taken from the bedroom in which Julio was found. Therefore, the movement was not necessary to complete the robbery. *See Mendoza v.. State,* 122 Nev. 267, 275, 130 P.3d 176, 181 (2006) (explaining that to be a separate crime when arising from the same conduct as a robbery, a kidnapping must involve (1) "movement or restraint [that has] independent significance from the act of robbery itself," (2) "create a risk of danger to the victim substantially exceeding that necessarily present in the crime of

robbery," or (3) "involve movement, seizure or restraint substantially in excess of that necessary to its completion"); *see also Wright v. State,* 94 Nev. 415, 418, 581 P.2d 442, 444 (1978) (setting aside a kidnapping conviction because "the movement of the victims appear[ed] to have been incidental to the robbery and without an increase in danger to them"), *modified on other grounds by Mendoza,* 122 Nev. at 274, 130 P.3d at 181. Further, Hover's statements to his cellmate indicated that Julio was bound and murdered before Hover searched the home for valuables. Because the restraint had an "independent significance from the act of robbery," *Mendoza,* 122 Nev. at 276, 130 P.3d at 181, and the evidence satisfies the elements of kidnapping, *see* NRS 200.310(1), sufficient evidence supports Hover's conviction for kidnapping. *See Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *McNair v. State,* 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Brady/Giglio evidence

Hover contends that the State failed to disclose evidence related to whether Ramirez received a benefit for his testimony in violation of *Brady v. Maryland,* 373 U.S. 83 (1963) and *Giglio v. United States,* 405 U.S. 150 (1972). We disagree. Nothing in the record suggests that Ramirez's guilty plea agreement or sentence was premised on any benefit from the State in exchange for his testimony at Hover's trial. Therefore, the district court did not err in denying this claim. *See Mazzan v. Warden,* 116 Nev. 48, 66, 993 P.2d 25, 36 (2000) (employing de novo standard of review for *Brady* challenges raised in the district court).

Prosecutorial misconduct

***7** Hover identifies two arguments by the prosecutor that he contends constitute prosecutorial misconduct. Prejudice from prosecutorial misconduct results when "a prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process." *Thomas v. State (Thomas I),* 120 Nev. 37, 47, 83 P.3d 818, 825 (2004). The challenged comments must be considered in context and " 'a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone." ' *Hernandez v. State,* 118 Nev. 513, 525, 50 P.3d 1100, 1108 (2002) (quoting *United States v. Young,* 470 U.S. 1, 11 (1985)). Because Hover failed to object, his claims are reviewed for plain error affecting his substantial rights. *See* NRS 178.602; *Gallego,* 117 Nev. at 365, 23 P.3d at 239.

First, Hover contends that the State's argument that Hover committed the crimes as a result of racial animus was not supported by the evidence. *See Rice v. State,* 113 Nev. 1300, 1312, 949 P.2d 262, 270 (1997) (noting that a prosecutor has a duty to refrain from making statements that cannot be proved at trial), *abrogated on other grounds by Rosas v. State,* 122 Nev. 1258, 1265 n. 10, 147 P.3d 1101, 1106 n. 10 (2006). We disagree. Evidence introduced at trial showed that Hover told Ramirez that he "killed some Mexicans." Further, the evidence *clearly* demonstrates that Hover levied his most violent actions against Latino victims. Therefore, he failed to demonstrate that the district court plainly erred.

Second, Hover argues that the State impermissibly shifted the burden of proof when it argued that "[t]he only person who doesn't believe that—or doesn't state that Gregory Hover is guilty of Count 31 is [defense counsel] Christopher Oram." We disagree. When read in context, the challenged comment contends that, given the consistent accounts from Ramirez, the officers on the scene of the jail assault, and Hover's own admission, it was not unreasonable for the correctional officers to decide not to collect video of the incident. Thus, the observation that defense counsel was the only individual who—believed it was necessary to obtain the video was a proper response to Hover's argument that there was insufficient evidence to convict because prison staff failed to collect video evidence. *See Miller v. State,* 121 Nev. 92, 99, 110 P.3d 53, 58 (2005) (requiring that prosecutor's comments must be considered in context in which they were made). While the comment could also be taken as disparaging of the defense's argument, *see Butler v. State,* 120 Nev. 879, 898, 102 P.3d 71, 84 (2004) (providing that a prosecutor may not disparage legitimate defense tactics), it did not shift the burden of proof. Therefore, Hover failed to demonstrate that the district court plainly erred.

Juror misconduct

Hover argues that the district court erred in denying his motion for a mistrial based on juror misconduct. He asserts that removing the offending juror was not sufficient to address the misconduct. We discern no abuse of discretion. *See Viray v. State,* 121 Nev. 159, 164, 111 P.3d 1079, 1083 (2005) (recognizing district court's discretion to address juror misconduct); *Meyer v. State,* 119 Nev. 554, 563–64, 80 P.3d 447, 455 (2003) (providing that a defendant must establish that juror misconduct occurred and was prejudicial in order to prevail on a motion for mistrial). Juror 8 engaged in misconduct by conducting research on the proceedings and contesting the district court's instruction on the law. See *Valdez,* 124 Nev. at 1186, 196 P.3d at 475 ("A jury's

failure to follow a district court's instruction is intrinsic juror misconduct."); see *also Meyer,* 119 Nev. at 565, 80 P.3d at 456 ("[O]nly in extreme circumstances will intrinsic misconduct justify a new trial."). However, the jury did not permit juror 8 to share the results of his research and quickly informed the court of his actions. No other juror learned the results of that research. Therefore, Hover failed to demonstrate a "reasonable probability or likelihood that the juror misconduct affected the verdict." *Meyer,* 119 Nev. at 564, 80 P.3d at 455; *see also Zana v. State,* 125 Nev. 541, 548, 216 P.3d 244, 248 (2009) (noting that court should consider (1) how long the jury discussed the extrinsic evidence, (2) when the discussion occurred relative to the verdict, (3) the specificity or ambiguity of the information, and (4) whether the issue involved was material).

Jury instructions

***8** Hover contends that the district court erred in giving several instructions during the guilt phase of trial. Specifically, he contends that the implied malice instruction does not use language a reasonable juror would understand, the premeditation instruction does not sufficiently differentiate the elements of first—and second-degree murder, the equal and exact justice instruction confused the jury, and the reasonable doubt instruction impermissibly minimized the burden of proof. We discern no abuse of discretion. *See Crawford v. State,* 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (noting district court's broad discretion to settle jury instructions). This court has upheld the language used in the implied malice instruction, *see Leonard v. State,* 117 Nev. 53, 78–79, 17 P.3d 367, 413 (2001) (the statutory language of implied malice is well established in Nevada and accurately informs the jury of the distinction between express and implied malice); *Cordova v. State,* 116 Nev. 664, 666, 6 P.3d 481, 483 (2000) (the substitution of the word "may" for "shall" in an implied malice instruction is preferable because it eliminates the mandatory presumption); the premeditation instruction, *see Byford v. State,* 116 Nev. 215, 236–37, 994 P.2d 700, 714–15 (2000); and the equal and exact justice instruction, *see Thomas v. State,* 120 Nev. 37, 46, 83 P.3d 818, 824 (2004); *Daniel v. State,* 119 Nev. 498, 522, 78 P.3d 890, 906 (2003); *Leonard v. State,* 114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998). In addition, the district court gave Nevada's statutory reasonable doubt instruction as set forth in and mandated by NRS 175 .211, and we have repeatedly upheld the constitutionality of that instruction. *See, e.g., Chambers v. State,* 113 Nev. 974, 982–83, 944 P.2d 805, 810 (1997); *Evans v. State,* 112 Nev. 1172, 1191, 926 P.2d 265, 277 (1996); *Lord v. State,* 107 Nev. 28, 40, 806 P.2d 548, 556 (1991), *limited on other grounds by Summers v. State,* 122 Nev. 1326, 1331, 148 P.3d 778, 782 (2006).

Penalty phase issues

Freeman's bad act evidence

Hover argues that the district court erred in denying him the opportunity to introduce evidence of Freeman's bad acts and upbringing to present a proportionality argument. We discern no abuse of discretion. *See Ramet,* 125 Nev. at 198, 209 P.3d at 269. As "[t]he focus of a capital penalty hearing is ... [the defendant's] character, record, and the circumstances of the offense," evidence related to Freeman's upbringing and prior record were not relevant to determining Hover's sentence. *See Browning,* 124 Nev. at 526, 188 P.3d at 67; *see also* NRS 48.025(2) ("Evidence which is not relevant is not admissible."). Further, the district court was not required to allow evidence related to Freeman's background because proportionality of sentences between similarly situated defendants is not constitutionally mandated. *See Pulley v. Harris,* 465 U.S. 37, 44 (1984) (rejecting claim that appellate court must review proportionality of a defendant's sentence against similarly situated defendants).

Testimony of Freeman's attorney

***9** Hover contends that the district court erred in denying his request to introduce the testimony of Freeman's attorney to describe the terms of Freeman's guilty plea agreement. We disagree. Because Freeman's guilty plea agreement was admitted into evidence during the penalty phase of trial, testimony about the contents of that agreement was not necessary. *See* NRS 48.035(2) ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence.").

Prosecutorial misconduct

Hover contends that the State engaged in several instances of prosecutorial misconduct during the penalty phase of trial.

First, Hover argues that the State improperly asserted that he had been stalking Contreras because there was no evidence supporting this statement. We disagree. Witnesses to whom Hover described the rape and murder of Contreras realized from his description of the events

that he had been infatuated with her. As there was some evidence introduced at trial which supported the State's argument, *see Rice,* 113 Nev. at 1312, 949 P.2d at 270 (noting prosecutor's duty to refrain from making statements that cannot be proved at trial), the district court did not abuse its discretion in overruling the objection to the comment.

Second, Hover contends that the State improperly implied that Hover intended to sexually assault Roberta but could not because he did not have time.[6] We disagree. The State's comment does not overtly suggest that Hover planned to sexually assault Roberta. Therefore, the district court did not plainly err in concluding that the statement was too "amorphous" to imply a plan on Hover's part that was not borne out by the evidence. *See Patterson,* 111 Nev. at 1530, 907 P.2d 987 (providing that plain error must be "so unmistakable that it reveals itself by a casual inspection of the record").

Third, Hover argues that the State improperly suggested that Hover's disposal of a firearm before committing the charged crimes indicated that he had committed other uncharged crimes. We disagree. The State's argument is supported by evidence introduced at the penalty hearing. In particular, witnesses testified that Hover had approached an individual on whom he was supposed to serve process while brandishing a firearm and Hover, Freeman, and Pamela Lindus had robbed an elderly man at an ATM. Therefore, Hover failed to demonstrate that the district court abused its discretion in overruling the objection.

Jury instructions

Hover argues that: (1) the instruction concerning weighing aggravating and mitigating circumstances did not conform to the beyond-a-reasonable-doubt standard of *Johnson v. State,* 118 Nev. 787, 802, 59 P.3d 450, 460 (2002); the "moral culpability" language in the instruction defining mitigating circumstances was not broad enough to define mitigating circumstances; and the instructions failed to define "felony involving the use or threat of violence to the person of another." Hover did not object to the instructions below and we conclude that the district court did not plainly err in instructing the jury. *See Valdez,* 129 Nev. at 1190, 196 P.3d at 477 (reviewing unobjected—to error for plain error affecting substantial rights). As to the weighing of aggravating and mitigating circumstances, the instruction here comports with our decision in *Nunnery v. State,* 127 Nev., Adv. Op. 69, 263 P.3d 235, 253 (2011), that the weighing of aggravating and mitigating circumstances is not a factual determination and thus it is not subject to the proof beyond a reasonable doubt standard. As for the "moral culpability" language in the mitigation instruction, considering the instruction as a whole we are not convinced that the jury was reasonably likely to understand the instruction to limit its ability to consider "any aspect of [the defendant's] character or record as a mitigating circumstance regardless of whether it reflected on his moral culpability," *Watson,* 130 Nev., Adv. Op. No. 76, 335 P.3d at 173, particularly where one or more of the jurors found many mitigating circumstances that related to Hover's background and character and were unrelated to the crime. And lastly, the phrase "felony involving the use or threat of violence" does not use words with "technical legal meaning" and is commonly understood; it therefore needed no further definition. *See Dawes v. State,* 110 Nev. 1141, 1146, 881 P.2d 670, 673 (1994).

Constitutionality of the death penalty

***10** Hover argues that the death penalty violates the Eighth Amendment of the United States Constitution's prohibition against cruel and unusual punishment because it does not sufficiently narrow the class of persons eligible for the death penalty. He further contends that the death penalty is cruel and therefore violates the Nevada Constitution's prohibition against cruel or unusual punishments. Similar arguments have been previously rejected by this court. *See, e.g., Thomas v. State (Thomas II),* 122 Nev. 1361, 1373, 148 P.3d 727, 735–36 (2006) (reaffirming that Nevada's death penalty statutes sufficiently narrow the class of persons eligible for the death penalty); *Colwell v. State,* 112 Nev. 807, 814–15, 919 P.2d 403, 408 (1996) (rejecting claims that Nevada's death penalty scheme violates the United States or Nevada Constitutions). Therefore, no relief is warranted on this claim.

Cumulative error

Hover contends that the cumulative effect of errors warrants reversal of his convictions and sentences. "The cumulative effect of the errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." *Hernandez,* 118 Nev. at 535, 50 P.3d at 1115. However, a defendant is not entitled to a perfect trial, merely a fair one. *Ennis v. State,* 91 Nev. 530, 533, 539 P.2d 114, 115 (1975). Based on the foregoing discussion of Hover's claims, we conclude that any error in this case, when considered either individually or cumulatively, does not warrant relief.

Mandatory review

NRS 177.055(2) requires that this court review every death sentence and consider whether (1) sufficient evidence supports the aggravating circumstances found, (2) the verdict was rendered under the influence of passion, prejudice or any arbitrary factor, and (3) the death sentence is excessive. First, sufficient evidence supported the aggravating circumstances found regarding each murder—Hover had been convicted of more than one count of murder; Hover had been convicted of numerous crimes involving the use or threat of violence; Contreras' murder occurred in the flight after Hover committed burglary while in possession of a firearm, first-degree kidnapping with the use of a deadly weapon, and robbery with the use of a deadly weapon; Hover subjected Contreras to nonconsensual sexual penetration before he murdered her; Hover mutilated Contreras' body after killing her; Julio's murder occurred during or in the flight after Hover committed burglary while in possession of a firearm, robbery with the use of a deadly weapon, and first-degree kidnapping with the use of a deadly weapon; and Julio was murdered to prevent Hover's arrest. Second, nothing in the record indicates that the jury reached its verdict under the influence of passion, prejudice, or any arbitrary factor. And third, considering the plethora of violent crimes Hover committed during his two-week spree, which included kidnapping, rape, armed robbery, burglary, two murders, and attempted murder and the evidence in mitigation, we conclude that his sentence was not excessive.

***11** Having considered Hover's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

CHERRY, J., dissenting:

***11** In my view, the district court abused its discretion in denying Hover's motion for transportation to undergo medical imaging. And I agree with the majority that the district court erred in limiting the crossexamination of the DNA analyst, permitting Detective Karl Lorson to testify that the surveillance videos depicted the same perpetrator, and allowing the State to impermissibly "remove the sting" of its own witness' prior conviction, but in contrast, I believe those errors affected Hover's substantial rights. I therefore dissent.

Medical imaging

The district court must order payments of reasonable amounts for expert services incidental to an indigent defendant's defense when those services are "proper and necessary." *State v. Second Jud. District Court*, 85 Nev. 241, 245, 453 P.2d 421, 423–24 (1969). For instance,

> when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in the evaluation, preparation, and presentation of the defense.

Ake v. Oklahoma, 470 U.S. 68, 83 (1985). Attendant to this obligation is to provide for medical testing, including imaging, that is necessary to assist the psychiatrist in preparing a defense. Accordingly, I disagree with the majority's conclusion that the district court did not abuse its discretion in denying the motion for medical imaging to assist in preparing Hover's defense. Hover's motion indicated that funding was available. As the district court did not have a significant interest in assuring that funding for indigent defendants' court-appointed expenses were protected, the defense's failure to file a more robust pleading detailing why the expenses were necessary and proper should not have proved fatal. Further, I am not convinced that appellate counsel's argument that the district court failed to order a PET scan (when an MRI scan was requested below) should significantly undermine Hover's assertion of error on appeal. Both scans are routinely used to diagnose neurological conditions. *See* Mayo Clinic Staff, Tests and Procedures, MRI, Definition (August 17, 2013), *available at* http://www.mayoclinic.org/tests_procedures/mri/basics/definition/prc_20012903; Mayo Clinic Staff, Tests and Procedures, Positron emission tomography (PET) scan, Definition (May 6, 2014) *available at* http://www.mayoclinic.org/tests_procedures/petscan/basics/definition/prc_20014301. Counsel's failure to recognize a meaningful distinction between the procedures that are outside counsel's area of expertise should not preclude this court from meaningfully reviewing the district court's order.

***12** Moreover, I cannot say that the error in denying this motion was harmless. The record does not indicate that Hover had a significant criminal history prior to the instant offenses. Although he had abused drugs several

years before the instant offenses, the record reveals no prior crimes of violence. Shortly before the instant spree, Hover's wife reported that he began behaving bizarrely and she urged him to seek professional help. He then engaged in repeated and seemingly out-of-character episodes of brutal and callous violence. In light of this evidence, I cannot say that the failure to permit this testing did not have a "substantial and injurious effect or influence in determining the jury's verdict" or sentence. *Knipes v. State*, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008) (quotation marks and citations omitted). As this psychological evidence could undermine evidence related to Hover's ability to premeditate and deliberate as well as mitigate his conduct, I would reverse his convictions for first-degree murder (Counts 9 and 21), attempted murder (Count 25), and his death sentences.

DNA analyst

I agree with the majority that the district court abused its discretion in prohibiting the proposed cross-examination of the State's DNA analyst. However, I disagree with the majority's conclusion that the error did not contribute to the verdict beyond a reasonable doubt. *See Valdez v. State*, 124 Nev. 1172, 1189, 196 P.3d 465, 476 (2008) ("If the error is of constitutional dimension, then ... [this court] will reverse unless [it is shown], beyond a reasonable doubt, that the error did not contribute to the verdict ."). The expert's testimony that both Hover and Contreras' DNA was present on a condom found at the crime scene was the most decisive evidence of Hover's involvement in Contreras' rape and murder. *See Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 62 (2009) ("Modern DNA testing can provide powerful new evidence unlike anything known before."); *see also* Kimberly Cogdell Boies, *Misuse of DNA Evidence is not Always a "Harmless Error": DNA Evidence, Prosecutorial Misconduct, and Wrongful Conviction*, 17 Tex. Wesleyan L.Rev. 403, 406–07 (2011) (providing that "juries are more likely to convict when the prosecution presents DNA evidence," despite the fact that "DNA has the same likelihood for human error as do other types of evidence" (citations omitted)). Although there was other evidence presented that supported the verdicts, it was not nearly as powerful as the unchallenged DNA evidence. For example, the cell tower location evidence could not pinpoint Hover's location at the time of the murder, nor could it even indicate that the tower Hover's call routed through was the closest to him. *See* Alexandra Wells, *Ping! The Admissibility of Cellular Records to Track Criminal Defendants*, 33 St. Louis U. Pub.L.Rev. 487, 494 (2014) (noting that "cell signals go to the tower with the strongest signal, which is not always the cell tower geographically closest to the cell phone"). And Hover's jailhouse confession must be viewed with suspicion, not solely because it is testimony of a jailhouse informant, *see* Russell D. Covey, *Abolishing Jailhouse Snitch Testimony*, 49 Wake Forest L.Rev. 1375, 1376–77 (2014) ("[N]o evidence is more intrinsically untrustworthy than the allegations of a jailhouse snitch."), but also because the informant was the victim of one of Hover's alleged crimes. The remaining evidence, which consisted of surveillance video showing similar cars, physical evidence that implicated Richard Freeman, a cryptic comment by Hover about a dream, and surveillance video showing Freeman and Hover making purchases at Wal–Mart, was not so powerful that the unchallenged DNA evidence did not contribute to the verdicts on Contreras' sexual assault and death. Accordingly, I would reverse Hover's convictions for conspiracy to commit kidnapping, robbery, sexual assault, and murder (Counts 1 through 4); burglary while in possession of a deadly weapon (Count 5); first-degree kidnapping with the use of a deadly weapon (Count 6); robbery with the use of a deadly weapon (Count 7); sexual assault with the use of a deadly weapon (Count 8); murder with the use of a deadly weapon (Count 9); and first-degree arson (Count 10).

Identification from surveillance videos and improper impeachment

***13** I agree with the majority that the district court erred in permitting Detective Lorson to testify, based on his observation of the surveillance videos, that the perpetrator of the robberies was the same individual and that the State improperly "removed the sting" of impeachment from Pamela Lindus' testimony by introducing the facts underlying her conviction for child molestation. But in my opinion, the prohibited identification affected Hover's substantial rights, *see Nelson v. State*, 123 Nev. 534, 543, 170 P.3d 517, 524 (2007) (reviewing unobjected—to error for plain error affecting substantial rights), and the improper impeachment was not harmless, *see Valdez*, 124 Nev. at 1189, 196 P.3d at 476. Detective Lorson and Lindus provided the only testimony that implicated Hover in the robbery of Tohme. Tohme could not identify Hover as the perpetrator. Further, Hover's ex-wife, who had years to observe him and had identified him as the perpetrator in the other surveillance videos, could not identify him as the perpetrator of the robbery and burglary. Therefore, it was likely that Detective Lorson's testimony strongly influenced the jury's verdict on the charges related to the Tohme incident. *See U.S. v. Gutierrez*, 995 F.2d 169, 172 (9th Cir.1993) (observing that expert testimony of a police officer may "carr[y] an

aura of special reliability and trustworthiness" (quotations omitted)). The only remaining admissible evidence linking Hover to the Tohme robbery was Lindus' testimony. In informing the jury that Lindus had engaged in a prohibited sexual relationship between two teenagers, the State clearly cast Lindus and her testimony in a less objectionable light than it would have been had jury been left with the mere fact that Lindus had been convicted of child molestation. Therefore, I cannot conclude that inclusion of unfairly bolstered testimony by Lindus and inadmissible identification by Detective Lorson did not have an substantial effect on the jury's verdicts of conspiracy to commit robbery (Count 28); burglary while in possession of a firearm (Count 29); and robbery with the use of a deadly weapon, victim 60 years of age or older (Count 30).

Consequently, I would reverse Hover's convictions relative to the Contreras' kidnapping, sexual assault, and murder (Counts 1–10); Julio's murder (Count 21); Roberta's attempted murder (Count 25); the Tohme robbery (Counts 28–30); and his death sentences.[7]

All Citations

Slip Copy, 2016 WL 699871 (Table)

Footnotes

1 An MRI scan generates detailed images of the organs and tissues of the body. A PET scan employs a radioactive tracer drug to reveal how the tissues and organs are functioning.

2 In his reply brief, Hover asserts that the psychological expert indicated that a scan was necessary, however he does not cite to the record where such an assertion was made.

3 Hover also contends that cross-examination about the lab's prior errors in DNA identification would expose bias on the part of the analyst or department. It is unclear how the lab's prior errors could influence the analyst in such a way as to lead to a "personal and sometimes unreasoned judgment." Merriam–Webster's Collegiate Dictionary 110 (10th ed.1995).

4 Ramirez testified that he had one felony conviction for third-offense domestic violence. *See* NRS 200.485 (providing that, under certain circumstances, first and second domestic violence offenses are punishable as misdemeanors and the third offense is punishable as a felony).

5 Corrections Officer Roger Cole testified that he "asked [Hover] if he had any injuries and he state that, no. And then he told me that he had sliced the [Ramirez]'s back. [Ramirez] stood up, took the scissors from [Hover], and cut his hand."

6 During penalty phase opening arguments, the prosecutor stated that the evidence would show "why and how Roberta was shot and what was going to happen to her had that phone call from Mr. Freeman come into that home and caused the defendant to leave early."

7 I also conclude that there was a reasonable likelihood that the jury misunderstood the moral culpability language in the mitigating circumstances instruction. *See Watson v. State,* 130 Nev., Adv. Op. 76, 335 P.3d 157, 176 (2014) (Cherry and Saitta, JJ., dissenting in part). However, as I would reverse Hover's murder convictions, it is unnecessary to address errors that occurred during the penalty hearing.

EXHIBIT 3

EXHIBIT 3

SUPP
CHRISTOPHER R. ORAM, ESQ.
Nevada State Bar #004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563

ORIGINAL

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

REPLY TO STATE'S RESPONSE TO SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT'S WRIT OF HABEAS CORPUS.

COMES NOW, Defendant, JAMES CHAPPELL, by and through his counsel of record, CHRISTOPHER R. ORAM, ESQ., hereby submits his Reply to the State's Response to the supplemental brief in support of Defendant's Writ of Habeas Corpus (Post-Conviction).

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CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

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This Supplement is made and based upon the pleadings and papers on file herein, the Points and Authorities attached hereto, and any oral arguments adduced at the time of hearing this matter.

DATED this 30th day of July, 2012.

Respectfully submitted:

CHRISTOPHER R. ORAM, ESQ.
Nevada Bar #004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563

Attorney for Petitioner
JAMES CHAPPELL

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

STATEMENT OF THE CASE

The Statement of the Case stands as enunciated in Mr. Chappell's Supplemental Brief. This Reply was originally due on July 26, 2012. However, it should be noted that Chief Deputy District Attorney Steve Owens gave the undersigned until Monday, July 30, 2012, to file this Reply. [1]

STATEMENT OF THE FACTS

The Statement of the Facts stands as enunciated in Mr. Chappell's Supplemental Brief.

ARGUMENT

I. STANDARD OF REVIEW FOR INEFFECTIVE ASSISTANCE OF COUNSEL.

This argument stands as enunciated in Mr. Chappell's Supplemental Brief.

II. MR. CHAPPELL RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE THIRD PENALTY PHASE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In the instant case, penalty phase counsel failed to properly investigate and prepare for the penalty phase. There are multiple instances identified by Mr. Chappell included in this section.

1. Failure to obtain a P.E.T. Scan
2. Failure to test Mr. Chappell for the effects of fetal alcohol syndrom and/or being born to a drug addicted mother
3. Failure to properly prepare the expert witnesses: Dr. Etcoff, Dr. Grey, and Dr. Danton
4. Failure to present mitigation witnesses to the jury
5. Failure to obtain an expert regarding pre-ejaculation fluids
6. Failure to present lay witnesses

Pretrial investigation is a critical area in any criminal case and the failure to accomplish the investigation has been held to constitute ineffective assistance of counsel. In Jackson v.

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[1] The State argues that Mr. Chappell is procedurally barred from raising claims (State's Response pp. 7-10). However, the State does not specify which of Mr. Chappell's arguments they believe to be procedurally barred. Within the body of the State's Response, the State does not identify any individual arguments they believe to be time barred. In fact, with the exception of argument eight (State's Response VIII, pp. 29), the State does not claim that any individual argument is time barred. Mr. Chappell would respectfully request that the Court order the State to response specifically to any arguments they believe are time barred so that Mr. Chappell may be given an opportunity to properly respond. However, perhaps argument eight is the only issue the State believes is time barred. In that event, Mr. Chappell has adequately responded.

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LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

Warden, 91 Nev. 430, 537 P.2d 473 (1975), the Nevada Supreme Court held,

> It is still recognized that a primary requirement is that counsel...conduct careful factual and legal investigation and inquiries with a view towards developing matters of defense in order that he make informed decisions on his clients behalf both at the pleadings stage...and at trial. Jackson, 92 Nev. at 433, 537 P.2d at 474.

Federal courts are in accord that pretrial investigation and preparation are key to effective assistance of counsel. See, U.S. v. Tucker, 716 F.2d 576 (1983). In U.S. v. Baynes, 687 F.2d 659 (1982), the federal court explained,

> Defense counsel, whether appointed or retained is obligated to inquire thoroughly into all potential exculpatory defenses in evidence, mere possibility that investigation might have produced nothing of consequences for the defense does not serve as justification for trial defense counsels failure to perform such investigations in the first place. The fact that defense counsel may have performed impressively at trial would not have excused failure to investigate claims that might have led to complete exoneration of the defendant.

Counsel's complete failure to properly investigate renders his performance ineffective.

> [F]ailure to conduct a reasonable investigation constitutes deficient performance. The Third Circuit has held that "[i]neffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice when s/he [sic] has not yet obtained the facts on which such a decision could be made." See U.S. v. Gray, 878 F.2d 702, 711 (3d Cir.1989). A lawyer has a duty to "investigate what information ... potential eye-witnesses possess[ ], even if he later decide[s] not to put them on the stand." Id. at 712. See also Hoots v. Allsbrook, 785 F.2d 1214, 1220 (4th Cir.1986) ("Neglect even to interview available witnesses to a crime simply cannot be ascribed to trial strategy and tactics."); Birt v. Montgomery, 709 F.2d 690, 701 (7th Cir.1983) . . . ("Essential to effective representation . . . is the independent duty to investigate and prepare.").

A. FAILURE TO PRODUCE TESTIMONY FROM JAMES FORD AND IVORY (IVRI) MORRELL

During the original post-conviction, counsel alleged that trial counsel had been ineffective for failure to produce several mitigation witnesses. Specifically, post-conviction counsel complained that James C. Ford and Ivory Morrell (friends of James Chappell) were not called to testify. At the conclusion of the post-conviction hearings, the district court granted the writ in part and denied the writ in part. The district court concluded that Mr. Chappell received ineffective assistance of penalty phase counsel for the failure to call mitigation witnesses. This decision was upheld on appeal from the first post-conviction. Thereafter, post-conviction counsel represented Mr. Chappell at the second penalty phase. Interestingly enough, neither James C.

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TEL. 702.384-5563 | FAX. 702.974-0623

Ford nor Ivory Morrell testified during the second penalty phase.

In the State's Response, the State claims counsel was not ineffective for failing to present these two mitigation witnesses and investigating potential witnesses while the defendant lived in Arizona (State's Response pp. 1). First, the State argues defense counsel presented ample evidence of Mr. Chappell's relationship with his wife and upbringing to be deemed effective. The State simply enunciates facts adduced at the second penalty phase and contends this satisfies counsel's responsibilities in presenting mitigating evidence. However, the State made a similar argument in an effort to oppose Mr. Chappell's original post-conviction proceedings. During the original post-conviction proceedings, the State argued original trial counsel was effective and presented ample mitigation evidence. However, post-conviction counsel argued there were numerous potential mitigation witnesses that were not presented to the jury. In essence, the State makes the identical argument in opposition to the instant petition as they did in the original petition.

However, the State's position before this Court is directly contradicted by the concerns of the prosecutor during the second penalty hearing. Here, Mr. Chappell claims his attorney's were ineffective for failing to call the very mitigation witnesses that the Nevada Supreme Court deemed ineffective assistance of counsel. During the second penalty phase the prosecution was so concerned with the failure to present mitigation witnesses the prosecution actually made a record of this significant concern.

The prosecutor stated,

> I went back and reviewed the court's order which was the basis for the reversal of the penalty phase and the reason why we were in the proceeding, the decision by Judge Douglas, I believe, confirmed by the Supreme Court in the order of affirmance that the defense failed to call certain witnesses that would have made a difference in the outcome of the original case.
>
> There were eight or nine witnesses that were detailed in the briefs and the decision. For the record, my notation on that would indicate that would be Shirley Serrelly, James Ford, Ivory Morrell, Chris Bardo, David Greene, Benjamin Dean, Claira Axom, Barbara Dean, and Ernestine Harvey. Of those nine names the defendant only called two of them, by my understanding. There were five of them that were not called, no affidavits were submitted, no letters were written in, no testimony was given in summary by third parties (16 ROA 3803-3804).

During the second penalty phase, the prosecution was obviously concerned regarding the

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failure of defense counsel to present numerous mitigation witnesses. Yet, the State now argues that defense counsel provided effective assistance of counsel. The State's position is in direct contradiction to the prosecutor's position during the second penalty phase.

Next, the State argues defense counsel introduced Marabel Rosales, a mitigation investigator, to summarize the potential testimony of the mitigation witnesses. Apparently, the State believes that the failure to call available live witnesses to the stand can be substituted for the unemotional testimony of an investigator who would summarize the mitigation witnesses potential testimony. First, this fails to consider the fact that witnesses in the penalty phase provide emotion for the jury to consider during their deliberation process. The jury was facing a life or death decision. For the State to argue that an emotionless investigator equals the passionate pleas for life, is meritless. Jurors are not computers. The death penalty is undoubtedly the most emotional decision a jury ever decides in the United States. This is why the prosecutor voiced such concern to the district court during the second penalty phase.

The State argues that defense counsel's failure to present the mitigation witnesses were reasonable strategic decisions (State's Response pp. 14). In Doleman v. State, 112 Nev. 843, 848, 941 P.2d 278, 280 (1996), the Nevada Supreme Court held that reasonable strategic decisions on the part of defense counsel are virtually unchallengeable. The State contends that the failure to call available mitigation witnesses is a strategic choice which is unchallengeable. Again, the State's argument is belied by logic. According to defense counsel, the decision was made to relieve the witnesses of their duties pursuant to a subpoena because of concerns that the witnesses may have difficulty with their employment status. Therefore, defense counsel chose to permit the witnesses to leave rather than present them to the jury in an effort to spare Mr. Chappell's life. Notably, defense counsel called a few witnesses out of order, in the State's case in chief. However, no attempts were made to put on these mitigation witnesses out of order. Had defense counsel requested that the mitigation witnesses be called out of order, this issue would not be ripe for review. Defense counsel's concern for the employment status of these extremely important mitigation witnesses pales in comparison to the necessity to save Mr. Chappell's life. Defense counsel had a duty to Mr. Chappell not the employment concerns of these witnesses.

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The State claims that Mr. Chappell failed to produce any convincing theory as to why these witnesses live testimony would change the outcome of the proceedings (State's Response pp. 15). On appeal from post-conviction, the Nevada Supreme Court determined that Mr. Chappell should receive a new penalty phase based in part on the failure to call available mitigation witnesses. Here, defense counsel (who had been post-conviction counsel) made the same identical mistake that cause reversal. Therefore, Mr. Chappell has provided overwhelming evidence that the Nevada Supreme Court would find a new penalty phase mandated given the repeat of these errors. The State's contention that Mr. Chappell has not provided a convincing theory of why the live witnesses testimony would have changed the outcome is belied by the law of the case. Why did Mr. Chappell receive a new penalty phase for the failure to call the mitigation witnesses and thereafter defense counsel again failed to present the mitigation witnesses. The error is identical. Mr. Chappell is entitled to a new penalty phase.

Is it important to remember that Mr. Ford was Chappell's best friend in Michigan. Ivory Morrell had been close friends with Mr. Chappell and Debra in Michigan and had stayed in contact with them in Arizona. This leads to Mr. Chappell's next contention.

Counsel was ineffective for properly investigating the defendant's past and his relationship with Debra while living in Arizona. In the supplemental petition, Mr. Chappell raises this contention. Mr. Chappell filed a motion for authorization to obtain an investigator and for payment of fees simultaneously with his supplemental petition. Mr. Chappell requested resources for an investigator to assist in these endeavors. The State has opposed the motion. Ironically, in the State's Response, the State claims "a defendant who alleges a failure to investigate must demonstrate how a better investigation would have benefitted his case and changed the outcome of the proceedings" Molina v. State, 120 Nev. 185, 87 P.3d 533 (2004) (State's Response pp.15).

Citing United States v. Porter, 924 F.2d 395, 397 (1st Cir. 1991), the State argues that Mr. Chappell should have alleged with specificity what the investigation would have revealed and how it would have changed the outcome of the trial (State's Response pp. 15). The State concludes that Mr. Chappell has made bear allegations which do not warrant relief (State's Response pp. 15) (citing, Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Here, upon

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information and belief, there was limited investigation into Mr. Chappell's relationship, while living in Arizona. Mr. Chappell desires an evidentiary hearing to question counsel as to what efforts were made to investigate the relationship and background of the couple in Arizona. Mr. Chappell specifically requested that the Court provide an investigator to assist in the investigation of Arizona. The State opposed the motion and now claims that Mr. Chappell is making bare allegations without specific information. It is true that Mr. Chappell has been unable to investigate this matter because he has not been authorized to send an investigator to begin the appropriate task. It is grossly unfair for the State to preclude Mr. Chappell the funds to investigate and then claim he has failed to present any specifics regarding an investigation that the State has thwarted. The State's argument proves that Mr. Chappell should be entitled to an evidentiary hearing and reasonable funding for an investigation.

The Nevada Supreme Court in Doleman v. State, 112 Nev. 843 921 P.2d 278 (1996) concluded:

> We conclude that the failure of Doleman's trial counsel to reasonably investigate the potential testimony of certain witnesses at Doleman's penalty hearing constituted ineffective assistance of counsel. In this case, the court found that trial counsel's failure to call witnesses from an institution where the convicted individual had attended school, who would have testified as to the convicted individual's ability to function in structured environments and adhere to institutional rules, constituted a violation of the reasonable effective assistance standard.

Defense counsel's failure to investigate the facts can render a result "unreliable"Buffalo v. State, 111 Nev. 1139, 901 P.2d 647 (1995).

In the instant case, the defense failed to properly present mitigation witnesses and investigate in violation of the fifth, sixth, eighth and fourteenth amendments to the United States Constitution.

B. FAILURE TO OBTAIN AN EXPERT

The sole aggravator found by the jury was that the murder was committed during the commission of a sexual assault. Nevada law requires that at least one aggravating circumstance be proved beyond a reasonable doubt in order for a defendant to be death eligible. Without the sexual assault aggravator, Mr. Chappell could not be sentenced to death. Mr. Chappell was not

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charged with sexual assault. Interestingly enough, if the State reasonably believed that Mr. Chappell had committed sexual assault, it is curious why they chose not to charge him with such a serious crime. Instead, Mr. Chappell was given notice that the State intended to seek the death penalty against him based on a single aggravating circumstance, sexual assault.

Dr. Sheldon Green performed the autopsy on Ms. Panos. A sexual assault kit was taken by the crime scene analyst with negative results (15 ROA 3673). Ms. Panos was fully clothed when she was discovered. This couple had a long and turbulent relationship. The couple lived in Michigan, Arizona and Nevada. Each time, Ms. Panos assisted Mr. Chappell in relocating. Often, the couple would have fights and split up. However, reconciliation was always inevitable. Some witnesses testified that Ms. Panos was attempting to flee the grip of Mr. Chappell. However, a careful review of the record provides a somewhat different story. Each time witnesses claimed that Ms. Panos was fleeing, Ms. Panos then enabled Mr. Chappell to come and reconcile the relationship. Originally, the couple lived in Michigan. However, Ms. Panos' parents moved to Tucson, Arizona. Eventually, Ms. Panos made arrangements to assist Mr. Chappell in reuniting and living together in Arizona (13 ROA 3054). Ms. Panos and Mr. Chappell continued to have children together. In fact, Mr. Chappell left Arizona for a period of time and Debra begged him to return to Arizona (15 ROA 3644). During the lengthy relationship, there were numerous alleged incidents of domestic violence. Yet, each and every time Ms. Panos continued to reconcile the relationship.

In the State's response, the State continuously ignores the dynamic of this lengthy relationship. The State would have this Court believe that Ms. Panos was trying to flee Mr. Chappell and begin a new life. However, the facts of the relationship dictate otherwise. It appears that there was a cyclical aspect to the relationship. Unfortunately, in relationships of domestic violence it is not uncommon to find reconciliation even after acts of domestic violence.

These facts are necessary to establish, in part, that no sexual assault occurred. The Nevada Supreme Court found evidence of sexual assault based on five factors. The most important factor, was the conclusion that Mr. Chappell had lied to the police when he claimed consensual sexual contact with Debra, but denied ejaculation. The State and the supreme court

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then concluded that Mr. Chappell must have lied because semen matching his DNA was recovered. (Order of Affirmance, 10/20/ 2009, pp. 3-4). A brief analysis of these factors is necessary to establish the necessity for an expert. First, the State has continuously argued that Ms. Panos was curled up in a fetal position and highly fearful when she found out that Mr. Chappell had been released from jail. However, the facts clearly show that Ms. Panos then left the safety of her friends home and went directly back to her apartment where she surely would have known that Mr. Chappell would go. It makes no sense that a person so highly fearful of Mr. Chappell would leave the safety and comfort of a friends home to proceed back to a place of great danger. It makes much more sense that the pattern of the relationship was continuing. Ms. Panos would again consider reconciliation (no matter how unwise) with Mr. Chappell.

Next, the State would contend that Ms. Panos had told Mr. Chappell the relationship was over. Perhaps, this is true. However, that assertion was made by this couple ad nauseam. The relationship was constantly over and reconciliation constantly occurred. It is much more consistent that the pattern was continuing at the time that Ms. Panos left the security of a safe house and proceeded back to the trailer where she knew that Mr. Chappell would proceed. The State contends that Ms. Panos was in the process of moving so that Mr. Chappell could not find her. This also before. At one point, when the relationship was over, Mr. Chappell moved back to Michigan and Ms. Panos begged him to return. While working at the police department in Arizona, Ms. Panos was a victim of domestic violence. Ms. Panos quit her job and proceeded to Las Vegas wherein she again assisted Mr. Chappell to reconcile and continue their lengthy relationship in Las Vegas.

Therefore, the factors relied upon by the State all seem to be easily countered. However, the most devastating fact in proving sexual assault was proof that Mr. Chappell had lied. In fact, the Nevada Supreme Court dedicated the fact that semen was located even though Mr. Chappell had denied ejaculation, as a significant factor in proving sexual assault. At trial and in the second penalty phase, counsel stood idly by and let this ridiculous fact stand as proven. This fact is contradicted by every health teacher in high school. Taken to it's logical conclusion, one can believe that a women cannot get pregnant unless a male ejaculates. Every teenager in the United

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States is strongly advised to avoid this type of scientific misconception. Unfortunately, both the State, the defense and the Nevada Supreme Court have accepted this archaic belief as true. Even though science is in direct contradiction to this fact. Mr. Chappell admitted a sexual encounter with Ms. Panos shortly before the murder. Hence, Mr. Chappell could have been telling the truth that a sexual encounter occurred, he did not ejaculate, and semen was found.

Dr. Roger Harms, M.D., drafted an article, "Birth Control: Can Pre-ejaculation Fluid Cause Pregnancy?". In the beginning of the article, Dr. Harms first word is "yes". Dr. Harms concludes, "pre-ejaculation fluid may contain sperm, which means that a women can get pregnant even when ejaculation doesn't occur within the vagina". Countless studies have come to the same obvious conclusion. Actually, it is bizarre that this argument and establishment of this well known fact is necessary. However, the State seems to blatantly ignore science.

If Mr. Chappell had informed authorities that he had not had a sexual encounter with Ms. Panos, clearly the Court could determine that he was lying.

The very fact that this assertion is not obvious is proof of ineffective assistance of counse,l for failing to present an expert on this issue. In the State's response, they claim that there was overwhelming evidence of sexual assault. The State also proceeds to outline how Dr. Gray testified that there was no physical evidence that would support a finding of sexual assault (State's Response pp. 16) (13 ROA 3223-6). The State admits that Dr. Danton testified that Ms. Panos would use sex to calm Mr. Chappell down, when he was angry (State's Response pp. 16) (14 ROA 3330).

The State concludes that counsel made a strategic choice to call certain witnesses (State's Response pp. 16). What strategic reason would defense counsel have for not calling a witness to contradict this miconception. However, what appeared to be obvious, is being used against Mr. Chappell as evidence that he committed sexual assault.

Next, the State argues that Mr. Chappell fails to demonstrate how an expert witness would have benefitted his case (State's Response pp. 17) (citing, Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S.Ct. 2052 (1984) and State v. Molina, 120 Nev. at 192, 87 P.3d at 538). Here, Mr. Chappell can clearly show how the expert would have benefitted his case. If

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Mr. Chappell's attorneys had called an expert to establish that an individual can have sexual intercourse, not ejaculate, and leave semen, than the State would not have been able to conclude that Mr. Chappell was lying. Mr. Chappell respectfully demands funding for an expert so that the record properly reflects that Mr. Chappell's statement to the police is not just possible, but probable. Mr. Chappell has a right to present an expert to correct the record. If Mr. Chappell's attorneys had presented this testimony, the State would not be able to continue to assert that he had lied to the police even though the State's assertion is belied by science. Without this aggravating circumstance, Mr. Chappell is not death eligible.

In essence, Mr. Chappell's testimony and statement to the police is much more consistent with reality than the arguments made by the State. Mr. Chappell had consensual sex with his wife. Ms. Panos dressed herself. Unfortunately, Mr. Chappell went into a rage, having found a letter he believed to be a love letter, and stabbed his wife to death. All parties appear to agree that Mr. Chappell stabbed his wife to death. However, sexual assault was not a part of this case.

Defense counsel's performance for failure to obtain an expert to prove the obvious was deficient. But for the deficiency, the result of the penalty phase would have been different because the aggravating circumstance could not be proven beyond a reasonable doubt. See, Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Mr. Chappell received ineffective assistance of counsel in violation of the sixth and fourteenth amendments to the United States Constitution.

C. FAILURE TO OBTAIN A P.E.T. SCAN

In the instant case, Mr. Chappell had an extremely low IQ. It appears that Mr. Chappell's mother may have been addicted to drugs and alcohol. A proper investigation should have included whether Mr. Chappell was born while his mother was ingesting narcotics and/or alcohol during her pregnancy. It does not appear from the record that fetal alcohol syndrome was investigated. During closing argument, defense counsel argued Mr. Chappell's mother was addicted to drugs and alcohol and was quite possibly using drugs and/or alcohol while she was pregnant (16 ROA 3788). In Haberstroh v. Nevada, 119 Nev. 173, 69 P.2d 676 (2003), the Nevada Supreme Court reversed Mr. Haberstroh's sentence of death for a new penalty phase. In

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the decision, the Nevada Supreme Court noted that mitigation evidence which had not been offered at the first sentencing hearing, should be offered at a new hearing which included "evidence that he suffers from partial fetal alcohol syndrome, mild neuropsychological impairment, a low average IQ, personality disorder, and that he grew up with alcoholic parents and suffered physical and emotional abuse" 69 P.3d at 683. The Court's decision in Haberstroh is important because it recognizes the substantial impact of fetal alcohol syndrome at sentencing and provides support for an argument that the failure to develop such evidence would be prejudicial.

In the instant case, Mr. Chappell is similarly situated to Mr. Haberstroh. Counsel utterly failed to present evidence of fetal alcohol syndrome or even investigate the possibility that the syndrome existed in this case. Counsel should have been aware of this potential mitigation based on counsel's argument that Chappell's mother was possibly using alcohol and/or drugs at the time of pregnancy. Additionally, all of Mr. Chappell's siblings were involved with controlled substances. In direct contradiction to the Nevada Supreme Court's concerns in Haberstroh, the State concludes in their response,

> Considering that the jury found that the defendant was born to a drug, alcohol addicted mother, defendant fails to demonstrate that obtaining a PET scan and/or brain imaging even if these tests would have revealed that the defendant did have fetal alcohol syndrome would have led to a more favorable outcome at his penalty hearing. Thus, defendant fails to meet his burden under Strickland and this claim must fail (State's Response pp. 19).

The State's entire conclusion disregards the reasoning and discussion by the Nevada Supreme Court in Haberstroh.

In the matter of the personal restraint of James Leroy Brett, 142 Wn.2d 868, 16 P.3d 601 (Washington, 2001), the Washington Supreme Court reversed the first degree murder conviction and death sentence based upon ineffective assistance of counsel. The Washington Supreme Court held that trial counsel was ineffective based on 1) trial counsel knew or should have known that petitioner had significant medical and mental conditions; 2) substantial medical and psychiatric opinion was available; 3) counsel failed to conduct a reasonable investigation into the medical and mental conditions; and 4) the reference hearings expert legal testimony established that

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counsel, by failing to take any meaningful steps to develop petitioner's defense deprived petitioner of effective assistance of counsel. Id. In Brett, the Washington Supreme Court explained,

> We agree with the Ninth Circuit's approach in Caro, which is consistent with Strickland, and find it analogous to the present case. Here, defense counsel did almost nothing. The only expert sought by counsel to evaluate Brett's fetal alcohol effect was a psychologist wholly unqualified to render a medical diagnosis of Brett. Dr. Stanulis informed defense counsel of this fact immediately. However, neither Dane nor Foster moved for the appointment of a qualified expert. 16 P.3d 601, 608. (Citing, Caro v. Calderon, 165 F.3d 1223 (9th Cir.), Cert denied, 527 U.S. 1049, 119 Sup. Ct. 2414, 144 L. Ed. 2d. 811 (1999).

Mr. Chappell was denied effective assistance of counsel when counsel knew or should have known of the possibility/probability that fetal alcohol syndrome existed yet did nothing to establish this fact. In Caro, the Ninth Circuit stated,

> Counsel have an obligation to conduct an investigation which will allow a determination of what sort of experts to consult. Once that determination has been made, counsel must present those experts with information relevant to the conclusion of that expert. Caro, 165 F.3d at 1226 (HN 6). See also, Bloom v. Calderon, 132 F.3d 1267, 1277 (9th Cir. 1997), Cert. denied, 523 U.S. 1135, 140 L. Ed. 2d 1104, 118 Sup. Ct. 1856 (1998).

It was incumbent upon Mr. Chappell's counsel to request funding for brain imaging and/or a PET scan. It was incumbent upon Mr. Chappell's counsel to investigate the possibility of fetal alcohol syndrome. Mr. Chappell received ineffective assistance of counsel and specifically requests funding to analyze Mr. Chappell for the presence of fetal alcohol syndrome and requests permission for brain imaging.

D. FAILURE TO PROPERLY PREPARE EXPERT WITNESSES PRIOR TO PENALTY PHASE

For the purposes of this Reply, subsections "D" and "E" have been joined together.

E. FAILURE TO PROPERLY PREPARE A LAY MITIGATION WITNESS

For the purposes of this Reply, subsections "D" and "E" have been joined together.

In Mr. Chappell's supplemental brief, he provides analysis for each of the experts that were unprepared to testify based upon ineffective assistance of counsel. Additionally, Mr. Chappell outlined the failure to properly prepare Mr. Benjamin Dean, a lay mitigation witness.

In the State's response, they provide limited analysis regarding each of the witnesses that

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Mr. Chappell complained about. In sum, the State argues,

> Moreover, defendant fails to show a reasonable probability that the result of his penalty hearing would have been any different had the above witnesses testified differently. In fact, defendant fails to allege what exactly would have been different about the witnesses testimony if there had been more preparation. Defendant cannot meet either prong of Strickland by a preponderance of the evidence (State's Response pp. 20).

As was previously noted in subsection B, the defense failed to present expert testimony to rebut the presumption that semen cannot be present unless ejaculation occurs. Dr. Luis Etcoff was reduced to testifying that Mr. Chappell's story was "bogus". During cross-examination, Dr. Etcoff admitted that Mr. Chappell's story regarding consensual sex made no sense. Dr. Etcoff admitted that Mr. Chappell's story that he did not ejaculate, was unfounded based upon the location of semen. A review of Dr. Etcoff's testimony reveals that he had limited knowledge of the facts of the case. Obviously, if the defense had an expert to establish that semen could be present without ejaculation, Dr. Etcoff would not have been admitting that Mr. Chappell's story was "bogus". Everyone seemed to accept that semen could not be present unless the defendant ejaculated.

Dr. Grey also testified that he had not seen the DNA report. On cross-examination, Dr. Grey admitted he had not seen the report which discussed the presence of sperm. On cross-examination the following question and answer occurred:

> Q: But that would be conclusive that there was ejaculation?
> A: Yes (13 ROA 3230).

Dr. Grey had not been properly prepared for cross-examination. The defense had failed to present expert testimony establishing the obvious. Dr. Grey even admitted that the presence of sperm is conclusive proof of ejaculation. It appears consistently throughout the trial that everyone had forgotten basic health.

On cross-examination, Dr. William Danton concluded that one scenario could feasibly be sexual assault. Dr. Danton admitted that he had only met Mr. Chappell for two hours on the night before his testimony (March 15, 2007) (15 ROA 3321). Mr. Danton admitted that he had limited knowledge of the facts of the case. Mr. Danton admitted that he did not have enough data and testing had not been conducted to determine whether Mr. Chappell had blacked out. These are

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but a few examples of the failure to properly prepare the experts.

More importantly, the cross-examination of the experts further compounded the misplaced idea that semen must equate to ejaculation. Hence, Mr. Chappell must have lied when he said he had consensual sex without ejaculation. Here, had the defense properly prepared their experts and hired an expert regarding the presence of semen without ejaculation, the result of the penalty hearing would have been different because sexual assault would not have been found.

Mr. Benjamin Dean was contradicted extensively with his own affidavit. An evidentiary hearing should be held to determine whether defense counsel presented the affidavit to Mr. Dean prior to testimony. It is of concern that Mr. Dean did not appear to testify consistently with his affidavit. In Jackson v. Warden, 91 Nev. 430, 537 P.2d 473 (1975), the Nevada Supreme Court held,

> It is still recognized that a primary requirement is that counsel...conduct careful factual and legal investigation and inquiries with a view towards developing matters of defense in order that he make informed decisions on his clients behalf both at the pleadings stage...and the trial. Jackson, 92 Nev. at 433, 537 P.2d at 474.

In the instant case, counsel's performance fell below a standard of reasonableness. Had counsel properly prepared for the penalty phase, the result would have been different. Mr. Chappell has met both standards enunciated in Strickland, 466 U.S. 668, 104 Sup. Ct. 2052 (1984), as outlined above.

F. MR. CHAPPELL'S PRO PER WRIT

The State addressed Mr. Chappell's pro per claim regarding the failure to object to two PSI reports. Mr. Chappell's pro per claims have all been adopted by counsel. Mr. Chappell objects to counsel's failure to object to the PSI reports. The issue stands as submitted.

III. MR. CHAPPELL RECEIVED INEFFECTIVE ASSISTANCE OF PENALTY PHASE TRIAL COUNSEL AND APPELLATE COUNSEL FOR FAILURE TO OBJECT TO THE CUMULATIVE VICTIM IMPACT PANEL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This argument stands as enunciated in Mr. Chappell's Supplemental Brief.

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IV. PENALTY PHASE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO IMPROPER PROSECUTORIAL ARGUMENTS DURING THE PENALTY PHASE IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This arguments stands as enunciated in Mr. Chappell's Supplemental Brief.

V. PENALTY PHASE COUNSEL AND PENALTY PHASE APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE SEVERAL INSTANCES OF IMPROPER PROSECUTORIAL ARGUMENT WHICH SHOULD HAVE BEEN RAISED SIMULTANEOUSLY IN MR. CHAPPELL'S APPEAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

During the cross-examination of Dr. Etcoff, testimony was elicited that Mr. Chappell had complained he had been arrested for a domestic violence incident in front of his children (15 ROA 3541-3542). The prosecutor questioned Dr. Etcoff stating:

> Q: Because it probably marked his otherwise sterling reputation he had with his children at that point to see the police for the tenth time taking their father off in handcuffs (15 ROA 3542).

Defense counsel objected and the court sustained the objection. This issue was not raised on appeal.

In the instant case, there was no evidence that Mr. Chappell was arrested ten times in front of this children. However, undoubtedly the jury would have believed the prosecutor. Interestingly enough, the State argues in response that "further, defendant argues that there is no evidence in the record that he was arrested ten times. This is false" (State's Response pp. 25). Unfortunately, the State has chosen to take Mr. Chappell's complaint out of context. Mr. Chappell specifically complained that there was no evidence that his children had observed him arrested on ten occasions. On page forty of the supplemental brief, Mr. Chappell made it abundantly clear stating, "in the instant case there is no evidence that Mr. Chappell was arrested ten times in front of this children". The State simply responded by establishing that Mr. Chappell may have been arrested numerous times, failing to address Mr. Chappell's specific complaint that there was no evidence his children had seen him arrested on ten occasions. It is obviously disturbing to an average juror to believe that Mr. Chappell's children would have consistently observed him arrested, based upon his criminal activities. The State recognizes that the assertion

was blatantly false and outrageous prosecutorial misconduct. Hence, the State fails to address the issue in it's entirety, choosing to explain some irrelevant fact in order to substantiate the misconduct.

Next, the State argues that the arguments of counsel are not evidence, citing to Randolph v. State, 117 Nev. 970, 984, 36 P.3d 424, 433 (2001). First, the prosecutor's question is not the argument of counsel. Next, the prosecutor does not have carte blanche permission to make any unfounded and outrageous assertion and simply conclude that the arguments of counsel are not evidence. At this rate, the State would argue that the prosecutor could announce that the defendant must be guilty because he refused to testify. Would the State simply respond by stating that the arguments of counsel are not evidence? Surely, the State could find some defense for their prosecutor's misconduct. Here, the very fact that the State will not respond to the outrageous statement proves acknowledgment of the misconduct.

First, it is improper for a prosecutor to elude to facts outside of the record which deny the defendant a right to a fair hearing. Agard v. Portuondo, 117 F.3d 696, 711 (2nd Cir. 1997)(holding that alluding to facts that are not in evidence is prejudicial and not at all probative)(cert. granted on other grounds, 119 Sup. Ct. 1248 (1999). The Nevada Supreme Court has frequently condemned prosecutors from eluding to facts outside of the record. See, EG, Guy v. State, 108 Nev. 770, 780, 839 P.2d 578, 585 (1992)(cert. denied, 507 U.S. 109 (1993); Sandburn v. State, 107 Nev. 399, 408-409, 812 P.2d 1279, 1286 (1999); Jimimez v. State, 106 Mev. 769, 772, 801 P.2d 1366, 1368 (1990); Collier v. State, 101 Nev. 473, 478, 705 P.2d 1126, 1129 (1985).

It appears that the State concedes misconduct by failing to address the issue. Mr. Chappell was not arrested ten times in front of his children. The Statement was false. The statement was designed to deny Mr. Chappell a right to a fair hearing. There is no room for a prosecutors sarcasm wherein a gross exaggeration of such highly prejudicial information is presented to the jury. The statement also violated NRS 48.045(2) because it presented facts in such a way as to imply that evidence of other crimes, wrongs or acts were present in Mr. Chappell's history. A reasonable juror would conclude that the prosecutor was wholely accurate in the statement. The issue should have been raised on direct appeal and undoubtedly the Nevada Supreme Court

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would have reversed based on this error combined with the cumulative errors that occurred in the second penalty phase.

Thereafter, during closing argument, the prosecutor described how Mr. Chappell "chose evil" (16 ROA 3778). The prosecutor also described Mr. Chappell as a "despicable human being" (16 ROA 3779). Neither comments were objected to at the penalty phase nor raised on appeal.

The Nevada Supreme Court has long recognized that a prosecutor has a duty not to ridicule or belittle the defendant. See. Earl v. State, 111 Nev. 1304, 904 P.2d 1029, 1033 (1995), Jones v. State, 113 Nev. 454, 937 P.2d 55, 62 (1997). In U.S. v. Weatherless, 734 F.2d 179, 181 (4th Cir. 1984), the Court stated that it was beneath the standard of a prosecutor to refer to the accused as a "sick man". (Cert denied, 469 U.S. 1088 (1984)). Court have held it improper for a prosecutor to characterize defendants as "evil men". See, People v. Hawkins, 410 N.E. 2d 309 (Illinois 1980). A prosecutor referring to the defendant as a maniac exceeded the bounds of propriety. People v. Terrell, 310 NE 2d 791, 795 (Illinois Ap. Ct. 1994). Improper for a prosecutor to refer to the defendant as "slime". Biondo v. State, 533 South 2d 910-911 (FALA 1988). Reversing conviction where prosecutor referred to the defendant as "crud". Patterson v. State, 747 P.2d 535, 537-38 (Alaska, 1987). Condemning prosecutor's remarks referring to the defendant as a "rabid animal". Jones v. State, 113 Nev. 454, 468-69 937 P.2d at 62.

In the State's response, the State concludes that referring to Mr. Chappell as a "despicable human being" was warranted an not improper (State's Response pp. 27). Mr. Chappell disagrees. Mr. Chappell received ineffective assistance of penalty phase and appellate counsel for failure to raise these issues on direct appeal in violation of the sixth, eighth and fourteenth amendments to the United States Constitution.

VI. MR. CHAPPELL RECEIVED INEFFECTIVE ASSISTANCE OF PENALTY PHASE COUNSEL AND APPELLATE COUNSEL FOR FAILURE TO OBJECT TO IMPROPER IMPEACHMENT IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. Chappell called Fred Scott Dean as a mitigation witness. Mr. Dean was important to Chappell's mitigation because he had known Mr. Chappell throughout his life (15 ROA 3696-

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3697). Mr. Dean admitted that he had been convicted of federal drug trafficking and drug possession (State and Federal convictions) (15 ROA 3701). However, on cross-examination, the prosecutor elicited the following testimony from Mr. Dean:

Q: How long were you prison for?
A: Twelve years.
Q: That's a long time.
A: Yes sir.
Q: What kind of charges?
A: Like I said drug possession, and the other one was interstate drug trafficking.
Q: Were there other charges that were dismissed as part of your deal there?
A: There was no pretty much deal. That was just - - it was plead to the lesser charge versus the charge that I was charged with. Yes.
Q: So you plead to a lesser charge?
A: Yes.
Q: And the lesser charge was?
A: 12-30 - well, it was 20-30 the judge sentenced me to 12-30.
Q: And that was a drug charge?
A: Yes sir.
Q: What was the more serious charge that was reduced/
A: I was trying to think of how they titled it, possession of drugs over 65 grams.
Q: Was this cocaine?
A: Yes sir.
Q: 65 grams is a lot of cocain.
A: Yes sir.
Q: So this was drug trafficking or this was trafficking quantity?
A: Yes sir.
Q: And the minimum sentence would have been a lot more severe if you hadn't done the deal?
A: When you say deal, what do you mean by that?
Q: Taking the lesser plea.
A: I would have been worse, yes sir (15 ROA 3702).

NRS 50.095 impeachment by evidence of conviction of a crime:

> 1. The purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is admissible but only if the crime was punishable by death or imprisonment for more than 1 year under the law under which the witness was convicted.

In the State's response, they concede that the prosecutor's questioning of Mr. Dean was improper (State's Response pp. 28). However, the State argues that the error does not warrant reversal. Again, the State appears to contend that no matter how many improper arguments the prosecutor makes, none of it constitutes reversal. Apparently, the prosecutor has cart blanche rights to trample on the constitution of the United States. At some point, blatant errors must be punished. Prosecutors by nature enforce punishment upon others. Yet, here the State seems to

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feel that they have an absolute right to commit misconduct and then simply argue that their misconduct would not change the result of the proceedings. The State simply ignores a long line of federal cases that have consistently frowned upon prosecutor's committing gross acts of misconduct. Noticeably absent is any effort to explain how the prosecutor could have provided such an improper line of questioning. Simply permitting this type of misconduct encourages prosecutors within this State to continue this behavior even when a human being is facing life or death.

Without any ramification, the rules of evidence and the constitution begin to erode away. Usually, the State can explain the actions of the prosecutor or perhaps claim a simple mistake. Whereas in the instant case, the State simply informs this Court that the prosecutor shouldn't have presented misconduct, but the Court will do nothing about it. It was a violation of Mr. Chappell's constitutional rights and rendered the proceedings unfair. Mr. Chappell received ineffective assistance of counsel in violation of the sixth and fourteenth amendments to the United States Constitution for failure to address these issues at the second penalty phase or on appeal. Mr. Chappell is entitled to a new penalty phase based upon this error. Additionally, this Court should consider this admitted error along with the numerous errors which occurred in this case as cumulative error and reverse Mr. Chappell's sentence of death.

VII. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN ALLOWING THE ADMISSION OF EVIDENCE OF SEVERAL BAD ACTS THUS VIOLATING APPELLANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS AND WARRANTING REVERSAL OF HIS PENALTY PHASE.

During the State's case in chief, Ladonna Jackson was called as a witness. Ms. Jackson knew Mr. Chappell from the Vera Johnson Housing project (13 ROA 3198). Over defense counsel's object, Ms. Jackson was allowed to testify that Mr. Chappell made money "by stealing" (13 ROA 3203). Defense counsel objected and the court overruled the objection. The State is required to place the defendant on notice of evidence to be used at the penalty phase. There is no indication in the record that Mr. Chappell was on notice that Ms. Jackson would provide her opinion that Mr. Chappell was a thief. See, Nunnery v. State, 127 Nev. Adv. Op. 69(October 27, 2011).

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TEL. 702.384-5563 | FAX. 702.974-0623

In the State's Response, they fail to address the merits of Mr. Chappell's argument. Instead, the State chooses to claim that the issue should have been raised on direct appeal and is therefore barred pursuant to NRS 34.810 (1)(b)(2) (State's Response pp. 29). Mr. Chappell specifically complained that his appellate counsel was ineffective for failing to raise the issue on appeal (Supplemental Brief pp. 45). Mr. Chappell had a right to effective assistance of appellate counsel on direct appeal. Apparently, the State believes that Mr. Chappell did not have a right to effective assistance of counsel on direct appeal which is in violation of clearly established federal case law. The State refuses to address the issue proving the meritorious assertions listed in Mr. Chappell's supplement. Based on the State's failure to address the merits, Mr. Chappell is entitled to a reversal of his sentence of death.

VIII. THE DEATH PENALTY IS UNCONSTITUTIONAL

This argument stands as enunciated in Mr. Chappell's Supplemental Brief.

IX. MR. CHAPPELL'S DEATH SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, AND A RELIABLE SENTENCE, BECAUSE THE NEVADA CAPITAL PUNISHMENT SYSTEM OPERATES IN AN ARBITRARY AND CAPRICIOUS MANNER. U.S. CONST. AMENDS. V, VI, VIII AND XIV; NEV. CONST. ART. I SECS. 3, 6 AND 8; ART IV, SEC. 21.

This argument stands as enunciated in Mr. Chappell's Supplemental Brief.

X. MR. CHAPPELL'S CONVICTION AND DEATH SENTENCE ARE INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, TRIAL BEFORE AN IMPARTIAL JURY AND A RELIABLE SENTENCE BECAUSE THE PROCEEDINGS AGAINST HIM VIOLATED INTERNATIONAL LAW. U.S. CONST. AMENDS. V, VI VIII AND XIV; NEV. CONST. ART. I SECS. 3, 6 AND 8; ART IV, SEC. 21.

This argument stands as enunciated in Mr. Chappell's Supplemental Brief.

XI. CHAPPELL'S CONVICTION AND SENTENCE ARE INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEE OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS, EFFECTIVE ASSISTANCE OF COUNSEL AND RELIABLE SENTENCE BECAUSE THE JURY INSTRUCTIONS GIVEN AT TRIAL WERE FAULTY AND WERE NOT THE SUBJECT OF CONTEMPORANEOUS OBJECTION BY TRIAL COUNSEL, NOT RAISED ON DIRECT APPEAL BY APPELLATE COUNSEL, NOT RAISED BY PENALTY PHASE APPELLATE COUNSEL, AND NOT RE-RAISED BY PENALTY PHASE COUNSEL.

This argument stands as enunciated in Mr. Chappell's Supplemental Brief.

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

XII. MR. CHAPPELL RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BASED UPON CUMULATIVE ERROR.

This argument stands as enunciated in Mr. Chappell's Supplemental Brief.

XIII. MR. CHAPPELL IS ENTITLED TO AN EVIDENTIARY HEARING.

This argument stands as enunciated in Mr. Chappell's Supplemental Brief.

CONCLUSION

Based on the foregoing, Mr. Chappell would respectfully request that this Court grant this writ.

DATED this 30th day of July, 2012.

Respectfully submitted by:

CHRISTOPHER R. ORAM, ESQ.
Nevada Bar #004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563

Attorney for Petitioner
JAMES CHAPPELL

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

ROC
CHRISTOPHER R. ORAM, ESQ.
Nevada State Bar #004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563

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

RECEIPT OF COPY of the above and foregoing **REPLY TO THE STATE'S RESPONSE TO THE SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT 'S WRIT OF HABEAS CORPUS (POST-CONVICTION)** is hereby acknowledge this _____ day of July, 2012.

CLARK COUNTY DISTRICT ATTORNEY

_____
200 Lewis Avenue
Las Vegas, Nevada 89155

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

EXHIBIT 4

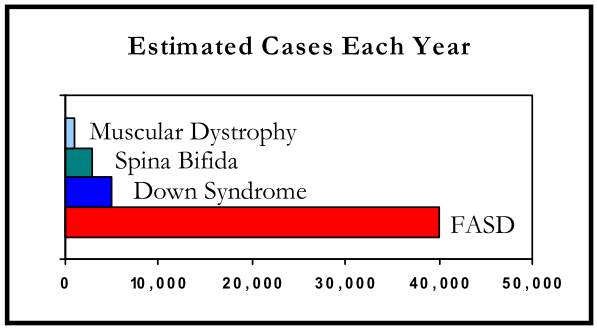
EXHIBIT 4

National Organization on Fetal Alcohol Syndrome

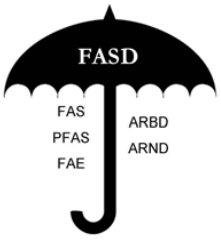
Helping children & families by advocating for the prevention and intervention of Fetal Alcohol Spectrum Disorders, the leading known cause of mental retardation & birth defects.

FASD: What Everyone Should Know

Alcohol use during pregnancy is the leading known preventable cause of mental retardation and birth defects in the United States.



FASD affects an estimated 40,000 infants each year - more than Spina Bifida, Down Syndrome and Muscular Dystrophy combined.



Fetal Alcohol Spectrum Disorders (FASD) is an umbrella term describing the range of effects that can occur in an individual whose mother drank alcohol during pregnancy. These effects can include physical, mental, behavioral, and/or learning disabilities with possible lifelong implications. The term FASD is not intended for use as a clinical diagnosis.

FASD includes conditions such as:

- Fetal alcohol syndrome (FAS)
- Partial fetal alcohol syndrome (PFAS)
- Alcohol-related neurodevelopmental disorder (ARND)
- Alcohol-related birth defects (ARBD)

Fetal alcohol effects (FAE) * *obsolete terminology*

What Are the Effects of FASD?

The effects of FASD vary among affected individuals. Outcomes associated with FASD can include:

- Specific facial characteristics
- Growth deficits
- Mental Retardation
- Heart, lung, and kidney defects
- Hyperactivity & behavior problems
- Attention & memory problems
- Poor coordination or motor skill delays
- Difficulty with judgment and reasoning
- Learning disabilities

"Of all the substances of abuse (including cocaine, heroin and marijuana), alcohol produces by far the most serious neurobehavioral effects in the fetus."

Institute of Medicine, 1996.

Normal Brain Severe FAS-Affected Brain

Harwood, Am. J. Med, Genet. 2002

- **FASD also takes an enormous financial toll on affected families and society as a whole.** Fetal Alcohol Syndrome (FAS), the most severe and least common effect under the FASD umbrella, costs the United States $5.4 billion annually in direct and indirect costs. This is only a small portion of the total societal costs associated with FASD.

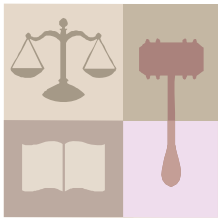
How Can FASD Be Prevented?

While there is no cure for FASD, it is 100 percent preventable when pregnant women abstain from alcohol. Good reproductive care before knowledge of pregnancy would also assist in prevention of FASD to a great extent.

900 17th Street ▪ Suite 910 ▪ Washington, DC 20006 ▪ Phone: 202-785-4585 ▪ 1-800-66-NOFAS ▪ Fax: 202-466-6456 ▪ E-mail: info@nofas.org

National Organization on Fetal Alcohol Syndrome
Helping children & families by fighting the leading known cause of mental retardation & birth defects

FASD: What the Justice System Should Know



Alcohol abuse and pregnancy are common among women in the criminal justice system.

- An estimated 70 to 85 percent of inmates need substance abuse treatment.
- Approximately one in four women is either pregnant or postpartum when she enters prison.

The Justice System can help to prevent Fetal Alcohol Spectrum Disorders (FASD) among the incarcerated population by offering educational workshops on FASD and addiction counseling for women inmates.

Behavioral impairments due to FASD make affected individuals more likely to get in trouble with the law

- Sixty-one percent of adolescents and 58% of adults with FASD have been in legal trouble.
- Thirty-five percent of those with FASD over the age of 12 had been incarcerated at some point in their lives.

Many individuals with FASD will never socially mature beyond the level of 6 year-old child.

Other factors that may place persons with FASD at risk for involvement with the criminal justice system include:

- Difficulties in impulse control;
- Intellectual deficits;
- Poor judgment skills; and
- A history of abuse and/or neglect.

Problems individuals with FASD may encounter when dealing with police include:

- Being persuaded by the police (even inadvertently) to admit to crimes which they did not commit;
- Taking responsibility for crimes committed by others in order to win the favor of more sophisticated companions or to please the police;
- Consenting to searches of themselves or their possessions in circumstances in which non-disabled sophisticated individuals would not;
- Panicking during encounters with the police, running away or resisting arrest;
- Saying that they understand their legal rights when in fact they do not; and
- Making potentially incriminating statements about how serious any misconduct may have been.

The Justice System can help FASD-affected individuals by:

- Educating judges, lawyers and parole officers about the characteristics and behaviors of persons with FASD;
- Establishing screening, analysis, and treatment procedures for those with FASD who enter the juvenile justice or adult criminal justice system;
- Establishing/utilizing alternative sentencing programs for persons with FASD who have committed non-violent offenses; and
- Offering referral information for the children of incarcerated women who may have been prenatally exposed to alcohol.

900 17th Street ▪ Suite 910 ▪ Washington, DC 20006 ▪ Phone: 202-785-4585 ▪ 1-800-66-NOFAS ▪ Fax: 202-466-6456 ▪ E-mail: information@nofas.org

Centers for Disease Control and Prevention
CDC 24/7: Saving Lives. Protecting People. Saving Money through Prevention.

Secondary Conditions

Fetal alcohol spectrum disorders (FASDs) often lead to other disorders, called "secondary conditions." Secondary conditions are problems that a person is not born with, but might get as a result of having an FASD. These conditions can be improved or prevented with appropriate treatments (/web/20111204023232/https://www.cdc.gov/ncbddd/fasd/treatments.html) for children and adults with FASDs and their families.

Following are some of the secondary conditions that have been found to be associated with FASDs.[1, 2]

Mental Health Problems

Several studies have shown an increased risk for cognitive disorders (e.g., problems with memory), mental illness, or psychological problems among people with FASDs.

The most frequently diagnosed disorders are:

- Attention problems, including attention-deficit/hyperactivity disorder (ADHD)
- Conduct disorder (aggression toward others and serious violations of rules, laws, and social norms)
- Alcohol or drug dependence
- Depression

Other psychiatric problems, such as anxiety disorders, eating disorders, and posttraumatic stress disorder, have also been reported for some patients.

Disrupted School Experience

Children with FASDs are at a higher risk for being suspended, expelled, or dropping out of school. Difficulty getting along with other children, poor relationships with teachers, and truancy are some of the reasons that lead to their removal from the school setting. Many children with FASDs remain in school but have negative experiences because of their behavioral challenges.

In a 2004 study, disrupted school experience was reported for 14% of school children and 61% of adolescents and adults with FASDs. About 53% of the adolescents with FASDs had been suspended from school, 29% had been expelled, and 25% had dropped out.

Trouble with the Law

Teenagers and adults with FASDs are at a higher risk for having interactions with police, authorities, or the judicial system. Difficulty controlling anger and frustration, combined with problems understanding the motives of others, result in many people with FASDs being involved in violent or explosive situations. People with FASDs can be very easy to persuade and manipulate, which can lead to their taking part in illegal acts without being aware of it. Trouble with the law is reported overall for 14% of children and 60% of adolescents and adults with FASDs.

Inappropriate Sexual Behavior

People with FASDs are at higher risk for showing inappropriate sexual behavior, such as inappropriate advances and inappropriate touching. If the person with an FASD is also a victim of violence, the risk of participating in sexually inappropriate behavior increases. Inappropriate sexual behaviors increase slightly with age from 39% in children to 48% in adolescents and 52% in adults with FASDs.

Alcohol and Drug Problems

Studies suggest that more than a third of people with FASDs have had problems with alcohol or drugs, with more than half of that requiring inpatient treatment.

Dependent Living and Problems with Employment Over 21 Years

Adults with FASDs generally have difficulty sustaining employment or living independently in their communities.

Related Pages

- Healthy Pregnancy

(https://web.archive.org/web/20111204023232/http://www.cdc.gov/ncbddd/pregnancy_gateway/default.htm)
- Developmental Disabilities (https://web.archive.org/web/20111204023232/http://www.cdc.gov/ncbddd/dd/default.htm)
- Birth Defects (https://web.archive.org/web/20111204023232/http://www.cdc.gov/ncbddd/birthdefects/index.html)
- Alcohol and Public Health (https://web.archive.org/web/20111204023232/http://www.cdc.gov/alcohol/index.htm)
- CDC's National Center on Birth Defects and Developmental Disabilities (https://web.archive.org/web/20111204023232/http://www.cdc.gov/ncbddd/index.html)

References:

1. Streissguth, A.P., Bookstein, F.L., Barr, H.M., Sampson, P.D., O'Malley, K., Young, J.K. Risk factors for adverse life outcomes in fetal alcohol syndrome and fetal alcohol effects. *Developmental and Behavioral Pediatrics*. 2004;5(4):228-238.
2. Streissguth, A.P., Barr, H.M., Kogan, J. & Bookstein, F. L., 'Understanding the Occurrence of Secondary Disabilities in Clients with Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects (FAE),' Final Report to the Centers for Disease Control and Prevention (CDC), August, 1996, Seattle: University of Washington, Fetal Alcohol & Drug Unit, Tech. Rep. No. 96-06, (1996).

Page last reviewed: October 6, 2010
Page last updated: October 6, 2010
Content source: Centers for Disease Control and Prevention, National Center on Birth Defects and Developmental Disabilities, Division of Birth Defects and Developmental Disabilities

Centers for Disease Control and Prevention 1600 Clifton Rd. Atlanta, GA 30333, USA
800-CDC-INFO (800-232-4636) TTY: (888) 232-6348, New Hours of Operation 8am-8pm ET/Monday-Friday
Closed Holidays - cdcinfo@cdc.gov

print
close

Legal Resources

Strengthening the Case: Prenatal Alcohol Exposure Is Associated With Increased Risk for Conduct Disorder

Elizabeth R. Disney, William Iacono, Matthew McGue, Erin Tully and Lisa Legrand
Pediatrics 2008; 122;e1225-21230
On line at www.pediatrics.org/cgi/content/full/122/6/e1225

Supreme Court of BC Decision on CLBC IQ Eligiblity Criteria for an Adult with FASD

This is the Supreme Court of BC judgement on the recent case Faulman vs. Community Living B.C. as represented by the Ministry of Children and Family Development. In this decision, Justice Chamberlist found that CLBC does not have the authority to adopt IQ related criteria to determine eligibility for service provision in the absence of clearly defined legislation.
A copy of the judgment can be read here.
Click here to read a recent Globe & Mail Article about the recent decision.

Family Sues Insurance Company on behalf of Child Exposed to Alcohol In Utero.

This is a judgement on a recent case in New Zealand whereby the family of a child exposed to alcohol in utero claims that an Accident & Rehabilitation and Compensation Insurance company should assume cost for rehabilitation and compensation for the child based on a personal injury accident claim. A copy of the proceedings of the Appeal shows judgement in favor of the insurance company and a decision that injury suffered to a child as a result of exposure to alcohol in utero does not consitute "personal injury which is caused by an accident" according to law.
A copy of the judgement can be read here.

If they are sick, why do we jail the mentally ill?

An article written by Andre Picard about the unfair incarceration of those with mental illness which appeared in the Globe & Mail on November 17, 2005.
Click here for the pdf.

Fetal Alcohol Syndrome: You and Your Child's Lawyer

In this paper, David Boulding provides useful information and tips for parents and caregivers who are engaging lawyers on behalf of their children implacted with FASD.
Click here to read the article.

The U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration Centre for Substance Abuse Prevention have created a document titled *Fetal Alcohol Spectrum Disorders: When Your Child Faces the Juvenile Justice System.* Although created with the U.S. justice system in mind, it provides some tips that would be helpful in other countries.
Click here to read the document.

A Lawyer's Brief on Fetal Alcohol Spectrum Disorder

In this paper, David Boulding provides some useful tips for lawyers in understanding their clients with FASD.
Click here to read the article.

With the same goal in mind, The U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration Centre for Substance Abuse Prevention have also written and made available a document titled *Fetal Alcohol Spectrum Dosrders and Juvenile Justice: How Professionals Can Make a Difference.*
Click here to read the document.

Saskatoon Court of Appeal Finds Juvenile Should be in Custody

A youth court judge placed too much emphasis on rehabilitation and not enough on public safety when she sentenced a teenage gang member with an alcohol-related brain defect to probation instead of custody, the Saskatchewan Court of Appeal has ruled. This article briefly touches on the importance of appropriate community supports for offenders with FAS.
Click here to read the article.

Fetal Alcohol Spectrum Disorder - A Need for Closer Examination by the Criminal Justice System

A report by Timothy E. Moore, and Melvyn Green, Clinical Report (2004). A discussion of the impact of FASD on the Criminal Justice System. Click here to read this report.

Fetal Alcohol Spectrum Disorders and the Justice System (Section 9)

This document written by H. Rae Mitten, LL.M is from a submission to the First Nations and Metis Justice Reform Commission Final Report, Volume II (Jan. 2004) and is a thorough examination of FASD within the legal / justice system. Click here to read the article.

FAS/FAE Legal Issues Resource Center Activity Report

The Fetal Alcohol and Drug Unit at the University of Washington School of Medicine has made available their activity report for the period of January 15, 2003 to July 15, 2003. It is a wonderful resource for people interested in what's happening in the field of FAS and legal issues. The report also contains interesting information about current judicial opinions in the US.
Click here to read the article.

More FAS Offenders Declared Unfit to Stand Trial

A growing number of accused offenders with fetal alcohol syndrome is being found unfit to stand trial, and that is raising questions about how the justice system treats people with FAS.
Click here to read this news article from the CBC.

FAS/E Individuals and the Police - Medical Information Card

According to Fetal Alcohol and Drug Unit at the University of Washington School of Medicine, more than half of all individuals with FAS/FAE get in trouble with the law. Individuals with FAS/FAE can do themselves considerable harm if they respond to police officers in an inappropriate manner. Therefore, the Unit developed a Medical Information card for the wallet which they advise all individuals with FAS/FAE to carry and hand to any law enforcement official with whom they speak. Visit their website to find out more about the cards, including how to print your own and tips to make

sure they are used properly.
Click here for the website.

Fetal Alcohol Syndrome and the Criminal Justice System

This is a publication written by J. Conry and D. Fast (2000) and published by the BC FAS Resource Society and Law Foundation of BC. This book discusses the implications of FASD on the Criminal Justice System. To find out how to order this book, visit our store.

Also available at our store is a video series - **Understanding the Offender with FAS**

Video 1 - "Talking with Victor" (43 min)
Video 2 - "A Judge's Perspective - with Judge Cunliffe Barnett" (56 min)
Video 3 - "Mistakes I Have Made - with Lawyer David Boulding" (28 min)

Identifying Fetal Alcohol Syndrome Among Youth in the Criminal Justice System

This study laid the foundation for the popular publication Fetal Alcohol Syndrome and the Criminal Justice System (Conry & Fast). The study determined the prevalence of FAS/FAE among youth who were remanded for a forensic psychiatric/psychological assessment and found that this group was disproportionately represented in the juvenile justice system.
Click here for the study.

Mistakes I Have Made With FAS Clients

In this paper, David Boulding admits his mistakes as a lawyer with FAS clients. However, his intention is not just to confess, but to show that there is hope to change how lawyers, clients, police, judges, probation officers, prison guards, and family members work with FAS clients.
Click here for the pdf.

www.CrimeTimes.org Articles

The US-based Crime Times publishes articles linking brain dysfunction to disordered, criminal or psychopathic behaviour. They make all of their articles available via the web and several are particularly relevant to the legal concerns of individuals with FAS (or ARND):

Alcohol's Legacy: High Crime Rate Seen in FAS/FAE (Vol. 3, No. 1 , 1997, Page 5) A study by Ann Streissguth and colleagues, conducted for the Centers for Disease Control and Prevention, followed 415 individuals with FAS or FAE, and determined the number of subjects who experienced trouble with the law.

Fetal Alcohol Syndrome: The Cost to Society (Vol. 1, No. 1-2 , 1995, Page 3) Each baby born with Fetal Alcohol Syndrome (FAS) costs society $4 million or more during its lifetime, and it's estimated that FAS costs the United States $6 billion annually. But even these figures, researchers say, may be huge underestimates:

FAS Crime Link: More Evidence Seen (Vol. 6, No. 1, 2000 Page 7) Psychologist Josephine Nanson reported that as many as half of young offenders appearing in provincial court in Saskatchewan are affected by Fetal Alcohol Syndrome (FAS). A new study by another group of Canadian researchers, D. K. Fast and colleagues, als so reports a high incidence of FAS and FAE (Fetal Alcohol Effects, a milder form of FAS) among youth in the criminal justice system.

FAS/E and the Criminal Justice System Resources

The Fetal Alcohol And Drug Unit at the University of Washington hosts many valuable resources on their website regarding FAS/E and the criminal justice system, including Fetal Alcohol Syndrome: An Effective Capital Defense. This article (originally published in the California Attorneys for Criminal Justice Forum) was written by a lawyer to help other lawyers to understand how to better defend a client with FAS.
Click here to read the article.

Judge Says Jails Used to House 'Disabled' - Vancouver Province Article (Feb. 25, 2003)

"Victoria - A B.C. Supreme Court Judge says that a huge proportion of criminals suffer from a mental disorder, addiction or both, and giving them long jail sentences won't help." Click here to read the article.

Fetal Alcohol Spectrum Disorder - FASD Guidebook for Police Officers

Many specialists suggest that a significant number of individuals who come into contact with the criminal justice system have FASD. Only medical professionals are qualified to diagnose FASD, but law enforcement officers must be aware of FASD, its characteristics and behaviours. This is necessary so they can identify and deal effectively and appropriately with clients who come into contact with the law as victims, suspects or witnesses. Published by the Royal Canadian Mounted Police, this document addresses this necessity.
Click here for the pdf.

The Several Languages of Law

The various people who work in the criminal legal system often speak in a technical way using words that persons not trained in law find confusing and hard to understand. This technical use of language makes it difficult for parents and caregivers of persons with Fetal Alcohol Syndrome to communicate with the several parts of the criminal law system.
David Boulding translates criminal legal language into plain English by examining the role of each speaker and then isolating the language unique to that speaker.
Click here for the pdf.

The Criminalization of Fetal Alcohol Syndrome

Caron Byrne BA MSc MD wrote this discussion paper to address why many persons with Fetal Alcohol Syndrome (FAS) or Fetal Alcohol Effects (FAE) end up in the criminal system.
Click here for the pdf.

Special Study on Mentally Disordered Accused and the Criminal Justice System

This paper represents the first part of a Special Study geared toward examining mentally disordered persons who come into contact with the justice system. The objective of the study is to examine how developments both in mental health care and in the justice system's policies over the past two decades have affected the need for and feasibility of data collection relating to mentally disordered accused in the court system.
This paper is intended to provide background information for possible data collection initiatives and future research addressing the interplay between the health and justice systems when a mental disorder becomes a factor in legal proceedings. The second part of this study will be a study addressing the feasibility of collecting information on this population in the court system.
Click here for the webpage.
Click here for the pdf.

Fetal Alcohol Syndrome: Implications for Correctional Service

This is a report writtenby Fred. J. Boland, Rebecca Burill, Michelle Duwyn and Jennifer Karp, for the Correctional Service of Canada, Research Branch (1998). This report explores FAS and it's implications within the corrrectional system in Canada and ends with several recommendations for change. Click here to view this report.

Specialized Assessment and Program Pilot Project for Young Offenders with FASD
March 14 2003 - March 31 2005
FINAL REPORT JUNE 2005

This report describes the implementation of the Specialized Assessment and Program Pilot Project for Young Offenders with FASD. It includes an overview of the project which may be relevant to other agencies interested in developing a similar project. Following completion of this Pilot Project, the project partners have continued to deliver the services through funding provided by the BC Ministry of Children and Family Development. The program continues to evolve in response to new learning and the needs of young people and their families.

Fetal alcohol spectrum disorder

From Wikipedia, the free encyclopedia

Fetal Alcohol Spectrum Disorders (FASD) describes a continuum of permanent birth defects caused by maternal consumption of alcohol during pregnancy, which includes, but is not limited to fetal alcohol syndrome (FAS).[1][2] Approximately 1 percent of children are believed to suffer from fetal alcohol spectrum disorder.[3]

Over time, as it became apparent through research and clinical experience that a range of effects (including physical, behavioral, and cognitive) could arise from prenatal alcohol exposure, the term Fetal Alcohol Spectrum Disorders, or FASD, was developed to include Fetal alcohol syndrome (FAS) as well as other conditions resulting from prenatal alcohol exposure.[4] There are a number of other subtypes with evolving nomenclature and definitions based on partial expressions of FAS, including **Partial Fetal Alcohol Syndrome** (PFAS), **Alcohol-Related Neurodevelopmental Disorder** (ARND), **Alcohol-Related Birth Defects** (ARBD), and **Fetal Alcohol Effect** (FAE).

The term Fetal Alcohol Spectrum Disorders is not in itself a clinical diagnosis but describes the full range of disabilities that may result from prenatal alcohol exposure. Currently, Fetal Alcohol Syndrome (FAS)[5][6][7] is the only expression of prenatal alcohol exposure that is defined by the International Statistical Classification of Diseases and Related Health Problems and assigned ICD-9 and ICD-10 diagnoses.

Contents

Diagnostic systems

The original syndrome of Fetal Alcohol Syndrome (FAS) was reported in 1973, four FASD diagnostic systems that diagnose FAS and other FASD conditions have been developed in North America:

- The Institute of Medicine's guidelines for FAS, the first system to standardize diagnoses of individuals with prenatal alcohol exposure,[7]
- The University of Washington's "The 4-Digit Diagnostic Code," which ranks the four key features of FASD on a Likert scale of one to four and yields 256 descriptive codes that can be categorized into 22 distinct clinical categories, ranging from FAS to no findings,[1]
- The Centers for Disease Control's "Fetal Alcohol Syndrome: Guidelines for Referral and Diagnosis," which established consensus on the diagnosis FAS in the U.S. but deferred addressing other FASD conditions,[8] and
- Canadian guidelines for FASD diagnoses, which established criteria for diagnosing FASD in Canada and harmonized most differences between the IOM and University of Washington's systems.[9]

Each diagnostic system requires that a complete FASD evaluation include assessment of the four key features of FASD, described below. A positive finding on all four features is required for a diagnosis of FAS, the first diagnosable condition of FASD that was discovered. However, prenatal alcohol exposure and central nervous system damage are the critical elements of the spectrum of FASD, and a positive finding in these two features is sufficient for an FASD diagnosis that is not "full-blown FAS." Diagnoses are described in a following section.

Epidemiology

Approximately 1 percent of children are affected by fetal alcohol spectrum disorder; the majority of these children fail to receive a proper diagnosis of fetal alcohol spectrum disorder. One study found that 6 out of 7 first grade age children failed to receive a diagnosis and another study found that of 40 new born babies with obvious fetal alcohol syndrome 100 percent left the hospital without a diagnosis.[3]

Key features of FASD

Each of the key features of FASD can vary widely within one individual exposed to prenatal alcohol. While consensus exists for the definition and diagnosis of FAS across diagnostic systems, minor variations among the systems lead to differences in definitions and diagnostic cut-off criteria for other disgnoses across the FASD continuum. (The central nervous system (CNS) damage criteria particularly lack clear consensus.) A working knowledge of the key features is helpful in understanding FASD diagnoses and conditions, and each are reviewed with attention to similarities and differences across the four diagnostic systems.

Growth deficiency

In terms of FASD, growth deficiency is defined as significantly below average height, weight or both due to prenatal alcohol exposure, and can be assessed at any point in the lifespan. Growth measurements must be adjusted for parental height, gestational age (for a premature infant), and other postnatal insults (e.g., poor nutrition), although birth height and weight are the preferred measurements.[1] Deficiencies are documented when height or weight falls at or below the 10th percentile of standardized growth charts appropriate to the patient's population.[10]

Criteria for FASD are least specific in the IOM diagnostic system ("low birth weight..., decelerating weight not due to nutrition..., [or] disproportional low weight to height" p. 4 of executive summary),[7] while the CDC and Canadian guidelines use the 10th percentile as a cut-off to determine growth deficiency.[8][9] The "4-Digit Diagnostic Code" allows for mid-range gradations in growth deficiency (between the 3rd and 10th percentiles) and severe growth deficiency at or below the 3rd percentile.[1] Growth deficiency (at severe, moderate, or mild levels) contributes to diagnoses of FAS and PFAS, but not ARND or static encephalopathy.

Growth deficiency is ranked as follows by the "4-Digit Diagnostic Code:"[1]

- Severe – Height and weight at or below the 3rd percentile.
- Moderate – Either height or weight at or below the 3rd percentile, but not both.
- Mild – Either height or weight or both between the 3rd and 10th percentiles.
- None – Height and weight both above the 10th percentile.

In the initial studies that discovered FAS, growth deficiency was a requirement for inclusion in the studies; thus, all the original patients with FAS had growth deficiency as an artifact of sampling characteristics used to establish criteria for the syndrome.[*citation needed*] That is, growth deficiency is a key feature of FASD because growth deficiency was a criterion for inclusion in the original study that determined the definition of FAS. This reinforces assertions that growth deficiency and FAS facial features are less critical for understanding the disability of FASD than the neurobehavioral sequelae to the brain damage.[7]

FAS facial features

Several characteristic craniofacial abnormalities are visible in individuals with FAS,[11] but these may be mild or even non-existent in other FASD conditions.[1]

Refinements in diagnostic criteria since 1975 have yielded three distinctive and diagnostically significant facial features known to result from prenatal alcohol exposure and distinguishes FAS from other disorders with partially overlapping characteristics.[12][13] The three FAS facial features are:

- A smooth philtrum – The divot or groove between the nose and upper lip flattens with increased prenatal alcohol exposure.
- Thin vermilion – The upper lip thins with increased prenatal alcohol exposure.
- Small palpebral fissures – Eye-width shortens with increased prenatal alcohol exposure.

Measurement of FAS facial features uses criteria developed by the University of Washington. The lip and philtrum are measured by a trained physician with the Lip-Philtrum Guide,[14] a 5-point Likert Scale with representative photographs of lip and philtrum combinations ranging from normal (ranked 1) to severe (ranked 5). Palpebral fissure length (PFL) is measured in millimeters with either calipers or a clear ruler and then compared to a PFL growth chart, also developed by the University of Washington.[15]

All four diagnostic systems have agreed upon this method for determining FAS facial feature severity rankings. Ranking FAS facial features is complicated because the three separate facial features can be affected independently by prenatal alcohol.[1][16]

Central nervous system damage

Central nervous system (CNS) damage is the primary key feature of any FASD diagnosis. Prenatal alcohol exposure, a teratogen, can damage the brain across a continuum of gross to subtle impairments, depending on the amount, timing, and frequency of the exposure as well as genetic predispositions of the fetus and mother.[7][17] While functional abnormalities are the behavioral and cognitive expressions of the FASD disability, CNS damage can be assessed in three areas: **structural**, **neurological**, and **functional** impairments.

All four diagnostic systems allow for assessment of CNS damage in these areas, but criteria vary. The IOM system requires structural or neurological impairment for a diagnosis of FAS, but also allows a "complex pattern" of functional anomalies for diagnosing PFAS and ARND.[7] The "4-Digit Diagnostic Code" and CDC guidelines allow for a positive CNS finding in any of the three areas for any FASD diagnosis, but functional anomalies must measure at two standard deviations or worse in three or more functional domains for a diagnoses of FAS, PFAS,

and ARND.[1][8] The "4-Digit Diagnostic Code" also allows for an FASD diagnosis when only two functional domains are measured at two standard deviations or worse.[1] The "4-Digit Diagnostic Code" further elaborates the degree of CNS damage according to four ranks:

- Definite – Structural impairments or neurological impairments for FAS or static encephalopathy.
- Probable – Significant dysfunction of two standard deviations or worse in three or more functional domains.
- Possible – Mild to moderate dysfunction of two standard deviations or worse in one or two functional domains *or* by judgment of the clinical evaluation team that CNS damage cannot be dismissed.
- Unlikely – No evidence of CNS damage.

Structural

Structural abnormalities of the brain are *observable*, *physical* damage to the brain or brain structures caused by prenatal alcohol exposure. Structural impairments may include microcephaly (small head size) of two or more standard deviations below the average, or other abnormalities in brain structure (e.g., agenesis of the corpus callosum, cerebellar hypoplasia).[7]

Microcephaly is determined by comparing head circumference (often called occipitofrontal circumference, or OFC) to appropriate OFC growth charts.[10] Other structural impairments must be observed through medical imaging techniques by a trained physician. Because imaging procedures are expensive and relatively inaccessible to most patients, diagnosis of FASD is not frequently made via structural impairments except for microcephaly.

Neurological

When structural impairments are not observable or do not exist, neurological impairments are assessed. In the context of FASD, neurological impairments are caused by prenatal alcohol exposure which causes general neurological damage to the central nervous system (CNS), the peripheral nervous system, or the autonomic nervous system. A determination of a neurological problem must be made by a trained physician, and must not be due to a postnatal insult, such as a high fever, concussion, traumatic brain injury, etc.

All four diagnostic systems show virtual agreement on their criteria for CNS damage at the neurological level, and evidence of a CNS neurological impairment due to prenatal alcohol exposure will result in a diagnosis of FAS or PFAS, and functional impairments are highly likely.[1][7][8][9]

Neurological problems are expressed as either hard signs, or diagnosable disorders, such as epilepsy or other seizure disorders, or soft signs. Soft signs are broader, nonspecific neurological impairments, or symptoms, such as impaired fine motor skills, neurosensory hearing loss, poor gait, clumsiness, poor eye–hand coordination, or sensory integration dysfunction. Many soft signs have norm-referenced criteria, while others are determined through clinical judgment.

Functional

When structural or neurological impairments are not observed, all four diagnostic systems allow CNS damage due to prenatal alcohol exposure to be assessed in terms of functional impairments.[1][7][8][9] Functional impairments are deficits, problems, delays, or abnormalities due to prenatal alcohol exposure (rather than hereditary causes or postnatal insults) in observable and measurable domains related to daily functioning, often referred to as developmental disabilities. There is no consensus on a specific pattern of functional impairments due to prenatal alcohol exposure[7] and only CDC guidelines label developmental delays as such,[8] so criteria (and FASD diagnoses) vary somewhat across diagnostic systems.

The four diagnostic systems list various CNS domains that can qualify for functional impairment that can determine an FASD diagnosis:

- Evidence of a complex pattern of behavior or cognitive abnormalities inconsistent with developmental level in the following CNS domains – Sufficient for a PFAS or ARND diagnosis using IOM guidelines[7]
  - Learning disabilities, academic achievement, impulse control, social perception, communication, abstraction, math skills, memory, attention, judgment
- Performance at two or more standard deviations on standardized testing in three or more of the following CNS domains – Sufficient for an FAS, PFAS or static encephalopathy diagnosis using 4-Digit Diagnostic Code[1]
  - Executive functioning, memory, cognition, social/adaptive skills, academic achievement, language, motor skills, attention, activity level
- General cognitive deficits (e.g., IQ) at or below the 3rd percentile on standardized testing – Sufficient for an FAS diagnosis using CDC guidelines[8]
- Performance at or below the 16th percentile on standardized testing in three or more of the following CNS domains – Sufficient for an FAS diagnosis using CDC guidelines[8]
  - Cognition, executive functioning, motor functioning, attention and hyperactive problems, social skills, sensory integration dysfunction, social communication, memory, difficulties responding to common parenting practices
- Performance at two or more standard deviations on standardized testing in three or more of the following CNS domains – Sufficient for an FAS diagnosis using Canadian guidelines
  - Cognition, communication, academic achievement, memory, executive functioning, adaptive behavior, social skills, social communication

Ten Brain Domains

A recent effort to standardize assessment of functional CNS damage has been suggested by an experienced FASD diagnostic team in Minnesota.[18] The proposed framework attempts to harmonize IOM, 4-Digit Diagnostic Code, CDC, and Canadian guidelines for measuring CNS damage viz-a-viz FASD evaluations and diagnosis. The standardized approach is referred to as the Ten Brain Domains and encompasses aspects of all four diagnostic systems' recommendations for assessing CNS damage due to prenatal alcohol exposure. The framework provides clear definitions of brain dysfunction, specifies empirical data needed for accurate diagnosis, and defines intervention considerations that address the complex nature of FASD with the intention to avoid common secondary disabilities.[19]

The proposed Ten Brain Domains include:[19]

- Achievement, adaptive behavior, attention, cognition, executive functioning, language, memory, motor skills, sensory integration or soft neurological problems, social communication[19]

The Fetal Alcohol Diagnostic Program (FADP)[18] uses unpublished Minnesota state criteria of performance at 1.5 or more standard deviations on standardized testing in three or more of the Ten Brain Domains to determine CNS damage. However, the Ten Brain Domains are easily incorporated into any of the four diagnostic systems' CNS damage criteria, as the framework only proposes the domains, rather than the cut-off criteria for FASD.

Prenatal alcohol exposure

Prenatal alcohol exposure is determined by interview of the biological mother or other family members knowledgeable of the mother's alcohol use during the pregnancy (if available), prenatal health records (if available), and review of available birth records, court records (if applicable), chemical dependency treatment

records (if applicable), or other reliable sources.

Exposure level is assessed as **Confirmed Exposure**, **Unknown Exposure**, and **Confirmed Absence of Exposure** by the IOM, CDC and Canadian diagnostic systems. The "4-Digit Diagnostic Code" further distinguishes confirmed exposure as *High Risk* and *Some Risk*:

- High Risk – Confirmed use of alcohol during pregnancy known to be at high blood alcohol levels (100 mg/dL or greater) delivered at least weekly in early pregnancy.
- Some Risk – Confirmed use of alcohol during pregnancy with use less than High Risk or unknown usage patterns.
- Unknown Risk – Unknown use of alcohol during pregnancy.
- No Risk – Confirmed absence of prenatal alcohol exposure.

Confirmed exposure

Amount, frequency, and timing of prenatal alcohol use can dramatically impact the other three key features of FASD. While consensus exists that alcohol is a teratogen, there is no clear consensus as to what level of exposure is toxic.[7] The CDC guidelines are silent on these elements diagnostically. The IOM and Canadian guidelines explore this further, acknowledging the importance of significant alcohol exposure from regular or heavy episodic alcohol consumption in determining, but offer no standard for diagnosis. Canadian guidelines discuss this lack of clarity and parenthetically point out that "heavy alcohol use" is defined by the National Institute on Alcohol Abuse and Alcoholism as five or more drinks per episode on five or more days during a 30 day period.[20]

"The 4-Digit Diagnostic Code" ranking system distinguishes between levels of prenatal alcohol exposure as *High Risk* and *Some Risk*. It operationalizes high risk exposure as a blood alcohol concentration (BAC) greater than 100 mg/dL delivered at least weekly in early pregnancy. This BAC level is typically reached by a 55 kg female drinking six to eight beers in one sitting.[1]

Unknown exposure

For many adopted or adult patients and children in foster care, records or other reliable sources may not be available for review. Reporting alcohol use during pregnancy can also be stigmatizing to birth mothers, especially if alcohol use is ongoing.[8] In these cases, all diagnostic systems use an unknown prenatal alcohol exposure designation. A diagnosis of FAS is still possible with an unknown exposure level if other key features of FASD are present at clinical levels.

Confirmed absence of exposure

Confirmed absence of exposure would apply to planned pregnancies in which no alcohol was used or pregnancies of women who do not use alcohol or report no use during the pregnancy. This designation is relatively rare, as most patients presenting for an FASD evaluation are at least *suspected* to have had a prenatal alcohol exposure due to presence of other key features of FASD.[1][8]

Diagnosis

While the four diagnostic systems essentially agree on criteria for Fetal Alcohol Syndrome (FAS), there are still differences when full criteria for FAS are not met. This has resulted in differing and evolving nomenclature for other conditions across the spectrum of FASD, which may account for such a wide variety of terminology. Most individuals with deficits resulting from prenatal alcohol exposure do not express all features of FAS and fall into

other FASD conditions.[7] The Canadian guidelines recommend the assessment and descriptive approach of the "4-Digit Diagnostic Code" for each key feature of FASD and the terminology of the IOM in diagnostic categories, excepting ARBD.[9]

Fetal Alcohol Syndrome or FAS is the only expression of FASD that has garnered consensus among experts to become an official ICD-9 and ICD-10 diagnosis. To make this diagnosis or determine any FASD condition, a multi-disciplinary evaluation is necessary to assess each of the four key features for assessment. Generally, a trained physician will determine growth deficiency and FAS facial features. While a qualified physician may also assess central nervous system structural abnormalities and/or neurological problems, usually central nervous system damage is determined through psychological, speech-language, and occupational therapy assessments to ascertain clinically significant impairments in three or more of the Ten Brain Domains.[19] Prenatal alcohol exposure risk may be assessed by a qualified physician, psychologist, social worker, or chemical health counselor. These professionals work together as a team to assess and interpret data of each key feature for assessment and develop an integrative, multi-disciplinary report to diagnose FAS (or other FASD conditions) in an individual.

Other FASD diagnoses

Other FASD conditions are partial expressions of FAS, and here the terminology shows less consensus across diagnostic systems, which has led to some confusion for clinicians and patients. A key point to remember is that other FASD conditions may create disabilities similar to FAS if the key area of central nervous system damage shows clinical deficits in two or more of the Ten Brain Domains. Essentially, growth deficiency and/or FAS facial features may be mild or nonexistent in other FASD conditions, but clinically significant brain damage of the central nervous system is present. In these other FASD conditions, an individual may be at greater risk for adverse outcomes because brain damage is present without associated visual cues of poor growth or the "FAS face" that might ordinarily trigger an FASD evaluation. Such individuals may be misdiagnosed with primary mental health disorders such as ADHD or Oppositional Defiance Disorder without appreciation that brain damage is the underlying cause of these disorders, which requires a different treatment paradigm than typical mental health disorders. While other FASD conditions may not yet be included as an ICD or DSM-IV-TR diagnosis, they nonetheless pose significant impairment in functional behavior because of underlying brain damage.

Partial FAS (PFAS)

Previously known as Atypical FAS in the 1997 edition of the "4-Digit Diagnostic Code," patients with Partial Fetal Alcohol Syndrome have a confirmed history of prenatal alcohol exposure, but may lack growth deficiency or the complete facial stigmata. Central nervous system damage is present at the same level as FAS. These individuals have the same functional disabilities but "look" less like FAS.

The following criteria must be fully met for a diagnosis of Partial FAS:[1][7][9]

1. Growth deficiency – Growth or height may range from normal to deficient[10]
2. FAS facial features – Two or three FAS facial features present[15]
3. Central nervous system damage – Clinically significant structural, neurological, *or* functional impairment in three or more of the Ten Brain Domains[19]
4. Prenatal alcohol exposure – Confirmed prenatal alcohol exposure

Alcohol-Related Neurodevelopmental Disorder (ARND)

Alcohol-Related Neurodevelopmental Disorder (ARND) was initially suggested by the Institute of Medicine to replace the term FAE and focus on central nervous system damage, rather than growth deficiency or FAS facial features. The Canadian guidelines also use this diagnosis and the same criteria. While the "4-Digit Diagnostic

Code" includes these criteria for three of its diagnostic categories, it refers to this condition as static encephalopathy. The behavioral effects of ARND are not necessarily unique to alcohol however, so use of the term must be within the context of confirmed prenatal alcohol exposure.[21] ARND may be gaining acceptance over the terms FAE and ARBD to describe FASD conditions with central nervous system abnormalities or behavioral or cognitive abnormalities or both due to prenatal alcohol exposure without regard to growth deficiency or FAS facial features.[21][22]

The following criteria must be fully met for a diagnosis of ARND or static encephalopathy:[1][7][9]

1. Growth deficiency – Growth or height may range from normal to minimally deficient[10]
2. FAS facial features – Minimal or no FAS facial features present[15]
3. Central nervous system damage – Clinically significant structural, neurological, *or* functional impairment in three or more of the Ten Brain Domains[19]
4. Prenatal alcohol exposure – Confirmed prenatal alcohol exposure

Fetal Alcohol Effects (FAE)

This term was initially used in research studies to describe humans and animals in whom teratogenic effects were seen after confirmed prenatal alcohol exposure (or unknown exposure for humans), but without obvious physical anomalies.[6] Smith (1981) described FAE as an "extremely important concept" to highlight the debilitating effects of brain damage, regardless of the growth or facial features.[23] This term has fallen out of favor with clinicians because it was often regarded by the public as a less severe disability than FAS, when in fact its effects can be just as detrimental.[24]

Alcohol-Related Birth Defects (ARBD)

Formerly known as Possible Fetal Alcohol Effect (PFAE),[6] Alcohol-Related Birth Defects (ARBD) was a term proposed as an alternative to FAE and PFAE[25] The IOM presents ARBD as a list of congenital anomalies that are linked to maternal alcohol use but have no key features of FASD.[7] PFAE and ARBD have fallen out of favor because these anomalies are not necessarily specific to maternal alcohol consumption and are not criteria for diagnosis of FASD.[21] The Canadian guidelines recommend that ARBD should not be used as an umbrella term or diagnostic category for FASD.[9]

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External links

- Center for Disease Control's page on Fetal Alcohol Spectrum Disorders (FASDs) (https://web.archive.org/web/20110213105621/http://www.cdc.gov/ncbddd/fasd/index.html)
- The FASD Trust (https://web.archive.org/web/20110213105621/http://www.fasdtrust.co.uk/)
- Whitecrow Village FASD Society (https://web.archive.org/web/20110213105621/http://www.whitecrowvillage.org/)
- SAMHSA Fetal Alcohol Spectrum Disorders Center for Excellence (https://web.archive.org/web/20110213105621/http://fasdcenter.samhsa.gov/)
- U.S. Congressional Caucus on FASD (https://web.archive.org/web/20110213105621/http://www.house.gov/pallone/fasd_caucus/welcome.shtml)
- NOFAS-UK (https://web.archive.org/web/20110213105621/http://www.nofas-uk.org/)

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Categories: Alcohol abuse | Congenital disorders | Mental retardation | Disability | Teratogens | Syndromes

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BREF

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
STEVEN OWENS
Chief Deputy District Attorney
Nevada Bar #004352
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES MONTELL CHAPPELL,
#1212860,

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: 95C131341

DEPT NO: V

STATE'S POST-HEARING BRIEF

DATE OF HEARING: April 6, 2018
TIME OF HEARING: 9:00 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 State's Post-Hearing Brief.

This Brief is made and based upon all the papers and pleadings on file herein and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

INTRODUCTION

Following the evidentiary hearing on April 6, 2018, this Court appeared poised to grant Chappell what would become his third penalty hearing on an issue that has been previously denied and affirmed on appeal. The current habeas petition is untimely and successive, which means it is procedurally barred absent a showing of good cause and prejudice. As good cause, the defense has alleged postconviction counsel Chris Oram was

ineffective in how he raised the issue of trial counsel David Schieck's ineffectiveness regarding Fetal Alcohol Syndrome. This is not a case where Oram altogether overlooked or failed to raise the issue. Rather, he identified and briefed this very issue but was prevented from developing it further by this Court, which decision was unanimously affirmed on appeal. Now, it is alleged that this claim failed previously due to some fault of Oram in how he raised it and that testimony of Fetal Alcohol Syndrome would have changed the outcome of the case. Such an allegation ignores the prior rulings in this case and the facts of the crime which have motivated two different juries to vote for death.

FACTS OF THE CASE

In 1996, Chappell was convicted of Burglary, Robbery, and Murder and was sentenced to death for sexually assaulting and then stabbing to death his ex-girlfriend, Deborah Panos, in her own home. The two had a long history of domestic violence. Just three months before the murder, Chappell sat on the victim's chest and held a knife to her throat for which he was arrested and went to jail resulting in a violation of his probation. Lisa Larsen testified she received a message directly from Chappell to tell Debbie "that when he got out, that she wasn't going to have any kind of life or anything . . . she wouldn't have any friends." Dina Freeman-Richardson twice overheard Chappell threaten Deborah that he would "do an OJ Simpson on your ass." Chappell himself admitted writing a letter to Deborah threatening that "One day soon I'll be at that front door, and what in God's name will you do then." Because of Chappell's threats and past violence, Deborah told him that their relationship was over and before he got out of jail she began the process of moving to a place where he could not find her.

Deborah was curled up in the fetal position, fearful, and crying when she found out that Chappell unexpectedly had been released early from jail. True to his word, Chappell came looking for Deborah upon his release and raped and murdered her. He admitted to breaking in to Deborah's home through a window, having sex with her, and being angry because he suspected she had been unfaithful to him while he was in jail. Deborah was able to telephone her children's daycare facility seeking help and fearfully asked the woman to

call her back with an excuse so she could get away from him, but that did not happen. Chappell remembered squeezing Deborah's throat and holding a knife over her, but then claimed he "blacked out" and then was standing over her body. When he left the scene, Deborah had been sexually assaulted, beaten, and then repeatedly stabbed to death.

1. Deficient Performance Under Strickland

To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in Strickland). A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one. Strickland, 466 U.S. at 697. Because the current petition is procedurally barred, the defense must establish Oram's ineffectiveness by clear and convincing evidence. Hogan v. Warden, 109 Nev. 952, 860 P.2d 710 (1993) (quoting Sawyer v. Whitley, 505 U.S. 333, 336, 112 S.Ct. 2514 (1992). The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. Strickland, 466 U.S. at 688.

In the present case, even though postconviction counsel Chris Oram did in fact assert trial counsel David Schieck's failure to seek additional psychological evaluations specifically to address Fetal Alcohol Syndrome, Defendant still faults Oram for not trying hard enough. David Schieck had not one, but two, psychological experts evaluate Chappell and testify at the penalty hearing regarding his mental health issues. Dr. William Danton, a Clinical Psychologist, testified to the relationship between Chappell and the murder victim and how that fit in with a "circle of domestic violence." Trial Transcript, 3-15-07, Morning Session, pp. 49-105. He testified that Chappell was diagnosed with a borderline personality disorder and had great instability in relationships and extreme sensitivity to abandonment due to the death of his mother and absence of his father.