IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S APPENDIX

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

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CERTIFICATE OF SERVICE

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

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Dr. Lewis Etcoff, a Forensic Neuropsychologist with experience in assessing brain damage and learning disabilities in capital murder defendants, conducted a detailed psychological evaluation of Chappell which included a personality test, an intelligence IQ test, an academic achievement test, an interview and review of police and school records. Trial Transcript, 3-16-07, Morning Session, pp. 20-138. The jury heard that Chappell was in special education in elementary school and was classified as "severely learning disabled" and "emotionally handicapped" and tested with low IQ scores and low verbal skills. Chappell felt worthless, inadequate, guilt-ridden, sensitive to humiliation, dependent and mistrustful. He concocted fantasies of his girlfriend, the victim, seeing other men and worked himself into a frenzy. Two of Chappell's siblings, older brother Willy and younger sister Mira, both testified that their mother had a drug problem. Trial Transcript, 3-19-07, pp. 239-63, 318-49. From all of this testimony counsel was able to successfully argue to the jury that, "[h]is mother was addicted to drugs and alcohol, and it's quite possible that she was using either drugs and/or alcohol while she was pregnant." Trial Transcript, 3-20-07, p. 91. The jury then found as a mitigating circumstance that Chappell was born to a drug, alcohol addicted mother" and "suffered a learning disability." The State did not argue against this mitigating evidence.

Judicial scrutiny of counsel's performance must be highly deferential. Strickland v. Washington, 466 U.S. 668, 688-90, 104 S.Ct. 2052 (1984). It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Id. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Id. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the

defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." Id.

There are "countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Harrington v. Richter, 131 U.S. 770, 131 S.Ct. 770, 788-89 (2011). "[R]elying on "the harsh light of hindsight" to cast doubt on a trial" that took place many years ago "is precisely what Strickland . . . seek[s] to prevent." Id., 131 S.Ct. at 779. Moreover, "an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for remote possibilities." Id. Rare are the situations in which the "wide latitude counsel must have in making tactical decisions" will be limited to any one technique or approach. Id. In a capital case, there are any number of hypothetical experts—specialists in psychiatry, psychology, ballistics, fingerprints, tire treads, physiology, or numerous other disciplines and subdisciplines—whose insight might possibly have been useful. Id. But counsel is entitled to formulate a strategy that is reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies. Id. Even if an expert theoretically could support a client's defense theory, a competent attorney may strategically exclude it, consistent with effective assistance, if such expert may be fruitless or harmful to the defense. Id. at 789-90.

In resolving this fetal alcohol claim previously when raised by Oram, this Court found that trial counsel David Schieck's performance was not deficient under Strickland and that there was no prejudice:

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

Findings of Fact, filed 11/16/12, p. 3. On appeal, the Nevada Supreme Court unanimously agreed and held that trial counsel David Scheick was not ineffective in failing to pursue this fetal alcohol syndrome:

> Chappell argues that the district court erred in denying his claim that trial counsel were ineffective for failing to obtain a P.E.T. scan where there was some evidence that his mother was addicted to drugs and alcohol. He contends that a scan could have revealed indicia of Fetal Alcohol Spectrum Disorders, which could cause physical, learning, and behavioral problems. We conclude that the district court did not err in denying this claim without conducting an evidentiary hearing. At the second penalty hearing, trial counsel introduced expert testimony that Chappell had a low IQ as well as cognitive deficits, which had been supported by psychological testing and Chappell's school records. As his cognitive deficits had been extensively documented and the jury nevertheless concluded that they were not sufficiently mitigating, Chappell failed to demonstrate that counsel were deficient in not obtaining a P.E.T. scan or that he would have benefited from a more thorough investigation.

Order of Affirmance, 6/18/15, p. 5. It is law of the case that Schieck's performance was not deficient in regards to Fetal Alcohol Syndrome and it would not have made a difference in the case. Oram can only be ineffective if it can be shown that Schieck was ineffective and it is law of the case that Schieck was not ineffective in failing to pursue Fetal Alcohol Syndrome. That conclusion does not change just because federal counsel has subsequently obtained federal funding to retain the experts that Oram wanted to retain. The experts' testimony is only potentially relevant to prejudice and cannot be utilized to judge Oram's performance in hindsight.

To fairly assess counsel's performance, "[t]he reviewing court must try to avoid the distorting effects of hindsight and evaluate the conduct under the circumstances and from counsel's perspective at the time." Foster v. State, 121 Nev. 165, 170, 111 P.3d 1083, 1086-87 (2005). There is no requirement that trial counsel be clairvoyant. St. Pierre v. State, 96 Nev. 887, 892, 620 P.2d 1240, 1243 (1980). What appears by hindsight to be a wrong or poorly advised decision of tactics or strategy is not sufficient to meet the defendant's heavy burden of proving ineffective counsel. "Judicial review of a lawyer's representation is highly deferential, and a defendant must overcome the presumption that a challenged action might be considered sound strategy." State v. LaPena, 114 Nev. 1159, 1166, 968 P.2d 750,

754 (1998), quoting from Strickland, 466 U.S. at 689, 104 S.Ct at 2052 (1984). The role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978), *citing* Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977).

The Indigent Defense Standards do not condone expenditure of public monies in post-conviction proceedings for every conceivable test and expert in an effort to find something somewhere that trial counsel neglected to do, especially when it would not have changed the outcome of the case. Instead, the Standards only require those experts and investigations which are "reasonably necessary or appropriate." ADKT 411, Standard 2-1(b)(1)(A). The Supreme Court has recognized that, "[t]here are any number of hypothetical experts – specialists in psychiatry, psychology, ballistics, fingerprints, tire treads, physiology, or numerous other disciplines and subdisciplines – whose insight might possibly have been useful," but which a reasonable defense counsel may elect to forego. Harrington v. Richter, 562 U.S. 86, 107, 131 S.Ct. 770, 789 (2011), *citing* Strickland, 466 U.S. at 691, 104 S.Ct. 2052. Oram's performance would have been constitutionally adequate even if he had filed no motions at all seeking to appoint additional psychological experts in light Schieck's retention and use of two such experts at trial.

Notably, there was no evidence presented at the evidentiary hearing as to the "prevailing professional norms" in death penalty cases in 2007 in Clark County for postconviction counsel's duty to seek additional psychological experts where trial counsel had already employed at least two such experts for trial. There was no showing that other Rule 250 qualified defense counsel were routinely filing more detailed and well-supported motions for appointment of experts at the time than what Oram did in this case. Providing more evidence or affidavits that Chappell's mother abused alcohol during her pregnancy is beating a dead horse. It would not have made a difference because it was undisputed that she

did drink during her pregnancy and this fact had already been conclusively found by the jury and established at trial:

> Judge Ellsworth**:** . . . [T]here was plenty of evidence that he was – his, you know, mother used alcohol when she was pregnant with him, that he had a learning disability, that his IQ was in the low to moderate range, you know, all of those things. And, of course, the jury found those mitigating factors; they just didn't feel that they outweighed the aggravators. So, I just don't see it and I don't –in this case I don't see that an evidentiary hearing is going to change that. So I'll deny that.

Transcript 10/19/12, pp. 11-12. Further investigation and belaboring of this uncontested point cannot constitute deficient performance. Certainly, in denying the motions for fetal alcohol experts this Court faulted Oram's motions as "non-specific" and "bare and conclusory," but that is not why the motions were denied. Instead, despite any shortcomings in the motions this Court accepted as true the allegation that Chappell did in fact suffer from Fetal Alcohol Syndrome and still found it did not amount to ineffective assistance of counsel:

> [T]his Court has determined that an evidentiary hearing and expansion of the record are unnecessary to resolve the claims in the petition. There is no demonstrable need or good cause for a P.E.T. scan or "full neurological exam" in light of a pre-existing neurological examination and mental health experts obtained by prior counsel. Even if brain imaging could reveal that Chappell suffers from fetal alcohol syndrome, which has no specific or uniformly accepted diagnostic criteria, *this Court has already accepted such allegations as true and found it would not have changed the outcome*, especially considering the jury found as a mitigating circumstances that Chappell was born to a drug and alcohol addicted mother.

Findings of Fact, filed 11/16/12, p. 5. The denial of this claim, unanimously affirmed on appeal, was not based on any deficiency in how it was raised by Oram, but was denied based upon the record and trial counsel Schieck's performance which has not changed.

Dr. Natalie Novick-Brown only testified as to what psychological evidence was generally available in 2007, not what reasonable attorneys in the Las Vegas legal community were doing at that time. Nor was her apparently free consultation services in Washington shown to be generally known and utilized by reasonable habeas counsel in Nevada in 2007. Oram, himself, testified at the evidentiary hearing that even with all his years of experience in litigating capital cases (which far exceeded that of anyone else in the courtroom), there

was nothing more he could have done to pursue the fetal alcohol syndrome issue. That should have been the end of the issue. It is outrageous that Oram in fact did pursue the Fetal Alcohol Syndrome issue vigorously and sought to retain additional experts, all to no avail, yet is still being criticized for not having done enough. If relief is granted on this issue, then the constitutionally minimal standard of attorney performance under Strickland has been set so high that arguably the most experienced capital defense lawyer in Clark County cannot attain it.

2. Strickland Prejudice

That a jury unanimously returned a death verdict for the second time when only one aggravating circumstance remained demonstrates the aggravated nature and death quality of this particular murder. When the death sentence was previously overturned, this Court was demonstrably wrong in its determination that additional mitigation evidence would have made a difference in the outcome of the case. Findings of Fact, 6/3/04. It did not make a difference. The testimony regarding Fetal Alcohol Syndrome is no different and would not have motivated the jury in this case to have voted for a sentence less than death. There is an apparent disconnect between the reality of the courtroom from a reasonable juror's perspective and that of this habeas court in gauging the likely effect that certain evidence would have had on the jury. Not once, but twice now, juries have spoken in this case and their unanimous voice has been for the death penalty, yet still, the courts do not listen.

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999), *citing* Strickland, 466 U.S. at 687. In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. *See* Wong v. Belmontes, 558 U.S. 15, 27, 130 S. Ct. 383 (2009) (per curiam); Strickland, 466 U.S., at 693, 104 S. Ct. 2052. Instead, Strickland asks whether it is

"reasonably likely" the result would have been different. Id., at 696, 104 S. Ct. 2052. The likelihood of a different result must be substantial, not just conceivable. Id., at 693, 104 S. Ct. 2052.

In the present case, the new testimony regarding Fetal Alcohol Syndrome failed to demonstrate prejudice because it is cumulative in kind and degree to what the jury already heard and considered. Under the Strickland standard, where the new evidence "would barely have altered the sentencing profile presented," there is no reasonable probability that the omitted evidence would have changed the sentence imposed and relief is unwarranted. Strickland v. Washington, 466 U.S. 668, 699-700, 104 S.Ct. 2052, 2071 (1984). There is no prejudice under Strickland where the new evidence is "merely cumulative" of the evidence actually presented. Wong v. Belmontes, 558 U.S. 15, 22-23, 130 S.Ct. 383, 387 (2009). In Wong v. Belmontes, the jury was "well-acquainted with Belmontes' background and potential humanizing features" such that "[a]dditional evidence on these points would have offered an insignificant benefit, if any at all." Id. The Court firmly rejected the simplistic "more-evidence-is-better" approach to assessing prejudice under Strickland. Id., 558 U.S. at 25, 130 S.Ct. at 389.

The U.S. Supreme Court has characterized Fetal Alcohol Syndrome in a death penalty case as "weak evidence in mitigation" which would not have changed the outcome of the proceeding. Schiro v. Landrigan, 550 U.S. 465, 480-81, 127 S.Ct. 1933, 1943-44 (2007). Evidence that defendant "was exposed to alcohol and drugs *in utero*, which may have resulted in cognitive and behavioral deficiencies consistent with fetal alcohol syndrome . . . and may have been genetically predisposed to violence," did not result in Strickland prejudice in part because the sentencing court had in fact already heard and considered much of this same evidence in a proffer and "any additional evidence would have made no difference in the sentencing." Id.; *see also* Cullen v. Pinholster, 563 U.S. ___,131 S.Ct. 1388, 1409 (2011) ("There is no reasonable probability that the additional evidence Pinholster presented in his state habeas proceedings would have changed the jury's verdict. The 'new' evidence largely duplicated the mitigation evidence at trial."). Only when

evidence of fetal alcohol syndrome is entirely new and bears no relation to the type of evidence the jury already heard in mitigation, has the U.S. Supreme Court concluded that prejudice under Strickland has been shown. Rompilla v. Beard, 545 U.S. 374, 393, 125 S.Ct. 2456 (2005). Such is not the situation in the present case.

Further undermining the existence of any prejudice, Dr. Paul Connor testified at the evidentiary hearing that the diagnosis of Fetal Alcohol Syndrome was consistent with the symptoms which the prior psychological expert, Dr. Etcoff, already had accurately found and testified to at trial. Dr. Connor explained that what he and the other new experts could now do was to identify fetal alcohol syndrome as the etiology or causation of those symptoms of which the jury already heard. Of course, the prior habeas petition and subsequent appeal were both denied on the presumption that Chappell could in fact be diagnosed with Fetal Alcohol Syndrome so that label is nothing new. Findings of Fact, filed 11/16/12, p. 5 ("Even if brain imaging could reveal that Chappell suffers from Fetal Alcohol Syndrome . . . this Court has already accepted such allegations as true and found it would not have changed the outcome . . . .") In fact, Fetal Alcohol Syndrome was already well-known to the jury which had concluded that Chappell was born to a drug and alcohol addicted mother. Such a conclusion was possible despite the lack of specific expert diagnosis at the time precisely because fetal alcohol syndrome was such a "well-known childhood impairment," according to the testimony of Dr. Natalie Novick-Brown. She testified that there had been surgeon general warnings in 1981 and 2005 and an alcoholic beverage warning label in 1988 and such "massive publicity" on the issue that fetal alcohol syndrome had become a "household word."

Furthermore, it is not at all clear that the diagnosis and criteria for fetal alcohol syndrome that was testified to at the evidentiary hearing, was the same testimony that could have been developed by counsel with the experts available to him at the last penalty hearing. Although Dr. Julian Davies testified that he personally disagreed with the following article, he agreed that in 2004 the National Task Force on Fetal Alcohol Syndrome and Fetal Alcohol Effect in conjunction with the National Center on Birth Defects and Developmental

Disabilities, found there were no specific or uniformly accepted diagnostic criteria available for determining whether a person has fetal alcohol syndrome. Centers for Disease Control and Prevention, Nat'l Center on Birth Defects and Developmental Disabilities, Fetal Alcohol Syndrome: Guidelines for Referral and Diagnosis, (July 2004), (available at http://www.cdc.gov), p. 2-3. Additionally, "diagnostic criteria are not sufficiently specific [enough] to ensure diagnostic accuracy, consistency, or reliability." Id. at 2. Further, these Guidelines not only state that "it is easy for a clinician to misdiagnose" fetal alcohol syndrome, but that there currently exist no diagnostic criteria to distinguish Fetal Alcohol Syndrome from other alcohol-related conditions. Id. at 3. As the science behind Fetal Alcohol Syndrome has developed uniformity and accuracy in diagnosis, it has become the popular mental health ailment of the day for mitigating criminal liability, much the same way that Attention Deficit Disorder used to be. But that does not mean it was always so.

What is lost on federal counsel and other such career habeas attorneys who have never tried a capital case in their life, is that more evidence on Fetal Alcohol Syndrome would not have persuaded the jury in this case to vote for a non-death sentence. Oram testified that well-experienced capital litigators like himself and trial counsel David Schieck strategically focused on other issues related to lack of consent which actually stood a chance of avoiding the death penalty by undermining the sole aggravating circumstance of sexual assault. At best, additional evidence on Fetal Alcohol Syndrome would have served only to add a little more weight to a mitigator two prior juries had already found to be insufficient to overcome the death penalty. As was demonstrated by the prior reversal and renewed death sentence by another jury, simply adding more mitigation to the equation would have been inadequate to dissuade the jury from re-imposing the death penalty based on the record and egregious facts of this murder.

WHEREFORE, the State respectfully requests that the habeas petition be denied.

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DATED this 4th day of May, 2018.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of State's Post-Hearing Brief was made this 4th day of May, 2018, by Electronic Filing to:

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DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES MONTELL CHAPPELL,

Petitioner,

v.

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

Respondents.

Case No. C131341
Dept. No. V

POST-HEARING REPLY BRIEF

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

(Death Penalty Habeas Corpus Case)

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I. INTRODUCTION

Post-conviction counsel identified an issue in James Chappell's case: that Chappell may have suffered from fetal alcohol spectrum disorder (FASD). With this piece of information, counsel requested funding from this Court for FASD experts. However, sadly, counsel did nothing to support his request for funding, and this Court denied counsel's motions. But Chappell does indeed suffer from FASD, and neither this Court, nor the jury at Chappell's 2007 penalty retrial heard compelling evidence of the devastating impact FASD had on Chappell's life.

In his opening brief, Chappell focused his arguments on the two issues that this Court asked the parties to address (which are the same issues raised at the April 2018 evidentiary hearing): whether the performance of post-conviction counsel in 2012 was deficient, and whether Chappell was prejudiced as a result. Recognizing that this Court "appeared poised" to grant relief on this claim (State's Br. at 1), the State resorts to conclusory arguments unsupported by the record and contradicted by *uncontroverted* expert testimony. Because Chappell has satisfied his burden of proving that he received ineffective assistance of counsel, and because the State failed to adequately respond to any of the points raised in Chappell's opening brief, this Court should grant Chappell's petition.

II. ARGUMENT

Chappell has established the ineffectiveness of post-conviction counsel: he has shown both that counsel's performance fell below objective standards of reasonableness and that counsel's deficient performance prejudiced his case.

See Strickland v. Washington, 466 U.S. 668, 685–86 (1984); *Means v. State*, 120 Nev. 1001, 1011–13 & n.29, 103 P.3d 25, 31–33 & n.29 (2004).[1] Nothing in the State's brief undermines Chappell's arguments.

A. The State Failed to Respond to Chappell's Arguments Concerning Post-Conviction Counsel's Deficient Performance

In its brief, the State focuses much of its argument on trial counsel's performance at the penalty retrial in 2007. But this shift in focus is disingenuous in light of the fact that the State opposed undersigned counsel's offer to present the testimony of trial counsel at the recent evidentiary hearing. *See* Br. Ex. 5 at 3 (transcript of March 19, 2018 hearing: "So, yeah, I guess I'm opposed to it.").[2] This Court sustained the State's objection, emphasizing that the evidentiary hearing would be limited to testimony about the performance of post-conviction counsel in 2012. Br. Ex. 5 at 3–4. The State cannot accuse Chappell of failing to establish at the evidentiary hearing the ineffectiveness of trial counsel when the State previously objected to Chappell's offer to present testimony on this issue. *See NOLM, LLC v. County of Clark*, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004) (explaining judicial estoppel); *Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1993) (explaining doctrine of invited error).

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[1] In its post-hearing brief, the State incorrectly contends that Chappell must make this showing "by clear and convincing evidence." State's Br. at 3 (citing *Hogan v. Warden*, 109 Nev. 952, 860 P.2d 710 (1993)). The State has confused the standard of proof for claims of actual innocence (*Hogan*) with the standard for claims of ineffective assistance of counsel (*Means*), which is by a preponderance of the evidence.

[2] In the opening brief, Chappell attached "brief exhibits" 1 through 4. In this reply, Chappell attaches brief exhibits 5 through 7.

In any event, the State's arguments concerning trial counsel's ineffectiveness are meritless. Both trial counsel admit knowing in 2007 that Chappell's mother drank and used drugs while pregnant, and they both deny any strategic reason for failing to investigate or present to the jury evidence of FASD. *See* Br. Ex. 6; Ex. 94 (Decl. of David Schieck at ¶7); Br. Ex. 7; Ex. 108 (Decl. of Clark Patrick at ¶6). The State does not acknowledge these admissions, instead crafting new arguments unsupported by facts or law.

The State first asserts that trial counsel obtained the services of two mental-health experts and argues that, as a result, this Court cannot now fault counsel for failing to obtain an FASD expert. State's Br. at 3–4. But inquiries about counsel's effectiveness do not depend on whether counsel hired *any* expert. *See, e.g., Frierson v. Woodford*, 463 F.3d 982, 992 (9th Cir. 2006) (concluding that counsel's reliance on the opinion of a forensic psychiatrist to evaluate petitioner for brain dysfunction instead of a neurologist constituted deficient performance); *Caro v. Calderon*, 165 F.3d 1223, 1226 (9th Cir. 1999) (holding that counsel was ineffective despite hiring four experts when counsel failed to hire neurologist or toxicologist); *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 despite the hiring of four other experts). Counsel's decisions to forego additional investigation or experts must be reasonable under the circumstances. *See Duncan v. Ornoski*, 528 F.3d 1222, 1234–36 (9th Cir. 2008).

Here, as trial counsel admits, there was no reasonable basis for their failure to investigate FASD. The record contained a number of "red flags" indicating the need for further investigation into FASD, including evidence that Chappell's mother drank while pregnant, Hrg. Ex. 8; Ex. 265, and that Chappell experienced lifelong brain dysfunction, Hrg. Exs. 13, 15; Exs. 178, 182; 3/19/07 TT at 249, 326; 3/20/07 TT at 23–24. *See Fortenberry v. Haley*, 297 F.3d 1213, 1227 (11th Cir. 2002) ("[W]e have held assistance ineffective when counsel ignored 'red flags' that any reasonable attorney would have perceived to demand further investigation."); *see also Duncan*, 528 F.3d at 1236–38.

Moreover, and notwithstanding the State's assertions to the contrary, the testimony from two defense experts did nothing to bring FASD to the jury's attention. Neither of the experts was qualified to testify about FASD or brain damage, Ex. 85 at ¶16; 3/15/07 TT at 49–50, 52, and neither performed the tests necessary to assess neurological dysfunction, April 6, 2018 Hearing Transcript (HT) at 96–99; 3/15/07 TT at 52; Ex. 85 at ¶¶7, 12, 14. Counsel hired these experts to testify about psychological, not neurological, conditions, and counsel did not even properly prepare them to perform that work. 3/15/07 TT at 53, 63–68; 3/16/07 TT at 27–28, 84–86, 89–90, 102–08; Ex. 85 at ¶¶9, 10, 12.

The State next argues that trial counsel had no duty to investigate FASD in 2007 because, the State insists, there is no evidence "what reasonable attorneys in the Las Vegas legal community were doing at that time." State's Br. at 8. But courts considering counsel's performance are not limited to local community standards.

See Padilla v. Kentucky, 559 U.S. 356, 366–67 (2010); *Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). And, in any event, the State's assertion simply is untrue: by 2007 attorneys throughout the country, including in Clark County, Nevada, had recognized the importance of FASD evidence in mitigation. *See, e.g., State v. Haberstroh*, 119 Nev. 173, 183 & n.22, 69 P.3d 676, 683 & n.22 (2003), *as modified* (June 9, 2003) (noting in case out of Eighth Judicial District Court that defendant had presented evidence in mitigation of partial fetal alcohol syndrome); *Rompilla v. Beard*, 545 U.S. 374, 392–93 (2005); *In re Brett*, 16 P.3d 601, 608 (Wash. 2001); *see also* HT at 149–50, 154–61 (testimony of Dr. Brown explaining availability of information about FASD to lawyers in 1996 and 2007).

The State's arguments concerning the performance of post-conviction counsel are equally unpersuasive.[3] First, the State asserts that post-conviction counsel "pursue[d] the Fetal Alcohol Syndrome issue vigorously." State's Br. at 9. But this bald statement conflicts with the State's own arguments in 2012 and ignores the record, recited in Chappell's opening brief, of counsel's performance. Counsel cannot submit motions containing only "'bare' or 'naked' claims for relief" and expect to be successful. *Hargrove v. State*, 100 Nev. 498, 502–03, 686 P.2d 222, 225 (1984); *see*

[3] The State points out multiple times the experience level of post-conviction counsel. State's Br. at 8, 12. But counsel's experience is not the appropriate inquiry. "In considering a claim of ineffective assistance of counsel, it is not the experience of the attorney that is evaluated, but rather, his performance." *LaGrand v. Stewart*, 133 F.3d 1253, 1275 (9th Cir. 1998); *see Williams*, 2018 WL 1240310, at *12–13 (concluding experienced counsel were ineffective in not recognizing, investigating, and presenting FASD evidence in mitigation).

Jaeger v. State, 113 Nev. 1275, 1285, 948 P.2d 1185, 1191 (1997) (Shearing, C.J., concurring). But that is exactly what post-conviction counsel did here. He submitted a bare and conclusory motion, and in doing so ignored abundant information in the record dispelling the State's assertion—conveniently abandoned now—that the request for expert funding was merely a "fishing expedition." *See* Hrg. Ex. 4 at 4–5 (State's opposition to motion for authorization to obtain expert services and payment of fees).

In the same vein, the State argues that post-conviction counsel did everything he could to raise the issue of FASD, but was "prevented from developing it further by this Court." State's Br. at 2; State's Br. at 8–9 (post-conviction counsel "pursue[d] Fetal Alcohol Syndrome issue vigorously and sought to retain additional experts, all to no avail"); *see also* HT at 213 (State arguing post-conviction counsel "did everything he could to try to get this defense going in the second or the prior postconviction proceeding and was *shot down*" (emphasis added)). However, this Court has already rejected the State's argument that it was error for this Court to deny post-conviction counsel's deficient funding request. *See* Hrg. Ex. 5 at 10.

Further, the State acknowledges that this Court faulted post-conviction counsel's motions as "non-specific" and "bare and conclusory" but insists that this was not the reason that this Court denied the funding requests. Rather, according to the State, this Court had accepted as true that Chappell suffered from FASD but did not find that evidence relevant in deciding Chappell's ineffective-assistance-of-counsel claim. State's Br. at 8. The State's argument, however, is circular. This

Court had no evidence before it, due to post-conviction counsel's ineffectiveness, in which to properly determine the relevance of FASD to Chappell's case and the prejudicial effect of not having this information before the jury. *See* HT at 161, 201–02 (Dr. Brown's testimony explaining the difference between the FASD label and knowledge about its devastating effects); HT at 211 (Court's comments concerning the difference between Chappell's "tough life" and brain damage).

The State alternatively contends that, even if counsel did not do everything he could in support of the motion for experts, his performance *still* was not deficient, "in light of [trial counsel's] retention and use of two [psychological] experts at trial." State's Br. at 7. But, as stated above, prior counsel does not render effective assistance simply by hiring experts in any field, but instead by investigating and pursuing reasonable litigation strategies through proper and informed experts. *See Frierson*, 463 F.3d at 992; *Mayfield v. Woodford*, 270 F.3d 915, 928 (9th Cir. 2001) (en banc); *Caro*, 165 F.3d at 1226.

B. The State's Arguments Concerning Prejudice Rely on an Incorrect Legal Standard, Misstate the Factual Record, and Ignore the Uncontroverted Expert Testimony

Retreating from its position at the conclusion of the evidentiary hearing, the State argues in its brief that no prejudice resulted from counsel's failure to present either this Court or the jury with FASD evidence. State's Br. at 9–12; *see* HT at 209–10 (State admitting "prejudice is the tougher question" and "that's tough to know what effect [FASD evidence] would have had on a jury"). But throughout its argument the State relies on an incorrect standard for prejudice. The test is not, as the State contends, whether the additional evidence would absolutely persuade

every juror to vote for life. State's Br. at 9–12. Instead, courts ask whether "there is a reasonable probability that at least one juror," hearing the additional mitigation evidence, "would have struck a different balance." *Wiggins v. Smith*, 539 U.S. 510, 537 (2003); *see Rippo v. State*, 132 Nev. Adv. Op. 11, 368 P.3d 729, 753 (2016), *reh'g denied* (May 19, 2016), *cert. granted, judgment vacated sub nom. on other grounds Rippo v. Baker*, 137 S. Ct. 905 (2017); *Haberstroh*, 119 Nev. at 184, 69 P.3d at 683 ("Of course, the weighing of aggravating and mitigating circumstances is not a simplistic, mathematical process.").

The State's prejudice argument consists of a single contention: FASD evidence was cumulative to other evidence presented at the 2007 penalty retrial. *See* State's Br. at 10, 12. This is a baseless argument. The jury in 2007 heard *nothing* about FASD. Over the course of the five-day penalty retrial, not one witness, lay or expert, mentioned brain damage or the effects of prenatal exposure to alcohol.[4] All the jury heard were statements about some of the symptoms Chappell had exhibited, which the experts tied to a personality disorder and drug addiction, *not* brain damage.[5] 3/16/07 TT at 38–40, 49–52, 54–57, 65–67, 70, 75, 118, 131–32; *see* HT at 97–98 (testimony from Dr. Paul Connor explaining difference between symptoms and cause). As Chappell explained in his opening

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[4] In its cross-examination of state post-conviction counsel, the State falsely stated that Dr. Etcoff "testified that there was a neurological basis for the problems in defendant's brain." HT at 31. While this was in Dr. Etcoff's report, the report was never admitted into evidence, and Dr. Etcoff never testified to such.

[5] Evidence of a defendant's personality disorder is usually considered to be aggravating, not mitigating of his moral culpability. *See Harris v. Pulley*, 885 F.2d 1354, 1381–83 (9th Cir. 1988) (noting that the "ordinary citizen" would not consider evidence of personality disorder as mitigation like other mental disorders).

brief, a significant difference exists between this testimony and FASD testimony that counsel should have presented: unlike individuals who develop drug addictions or psychological disorders as adults, Chappell because of his mother's actions was *born* already with a damaged brain, which had a devastating effect on his life trajectory. *See Williams*, 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).

The State also asserts that the jury heard "undisputed" testimony and "conclusively" found that Chappell's mother drank while pregnant. State's Br. at 7–8. Both of these assertions are baseless. It was defense counsel, not a witness, who suggested to the jury without any evidentiary support the *possibility* of prenatal exposure to alcohol. 3/20/07 TT at 91. *See Nevada Ass'n Servs., Inc. v. Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 94, 338 P.3d 1250, 1255–56 (2014) (explaining that counsel's argument is not evidence). And the State ignores the difference—which this Court recognized—between the jury's finding that "Chappell was born to a drug/alcohol addicted mother," Hrg. Ex. 9; Pet. Ex. 39, and organic damage to Chappell's brain before he was born:

> 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 it is to have a mother who's drug and alcohol addicted and what 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 --

HT at 211; *see also* HT at 38–39 (testimony from post-conviction counsel recognizing difference between jury's finding and FASD). Finally, even if one or more of the jurors had assumed that Chappell's mother had drank while pregnant, counsel failed to present any expert testimony explaining why this matters. As Dr. Brown explained *without contradiction*, the *label* of FASD was generally known in 2007, but not the details:

> Q: . . . [D]o 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 . . . because the lay public was not aware of the extent and the severity of the brain damage.

HT at 201–02; *see also* HT at 161 (explaining that the "average citizen" "did not know about the pervasive impact on brain functioning of prenatal alcohol exposure" and "still today, more than 10 percent of the American population of women who are pregnant or could be pregnant are still drinking"); HT at 158 (statement from this Court recognizing difference between what was known and what was "available to be known").

The State also attempts to minimize the mitigating value of FASD evidence, citing out of context a statement by the United States Supreme Court in *Schiro v. Landrigan*, 550 U.S. 465 (2007). State's Br. at 10. In *Schiro*, the Court referenced the "poor quality" of the petitioner's proposed mitigation evidence, which included

an allegation of maternal drinking. 550 U.S. at 480–81. But several facts distinguish *Schriro* from this case: (1) the petitioner in *Schriro* suggested that his mother's drinking *could* have caused FASD but provided no evidence of brain damage; (2) the petitioner prevented any testimony during the penalty phase about his mother's drinking; and (3) the trial court that sentenced the petitioner knew about his mother's drinking from an attorney proffer. *Id.* In contrast, courts considering properly presented claims concerning FASD, like the one presently made by Chappell, routinely note the mitigating value of FASD evidence. *See, e.g., Rompilla*, 545 U.S. at 392–93 (noting value of mitigation evidence, including petitioner's prenatal exposure to alcohol); *Williams*, 2018 WL 1240310, at *13 ("Because of trial counsel's omissions in this case, the jury was deprived of powerful evidence—that the petitioner suffered from organic brain damage and that FAS had impaired his judgment and his ability to control his behavior.").

Finally, the State suggests that an FASD diagnosis may have been unavailable in 2007. Ans. Br. at 11–12. The State's suggestion, however, conflicts with *uncontroverted* testimony from all three experts: If trial counsel had investigated FASD, they could have presented the jury in 2007 with the same evidence presented to this Court at the evidentiary hearing. The State's contention seems to rely entirely on the prosecutor's personal opinion of selected statements, divorced from the context of the article or surrounding literature as a whole, from a 2004 report from the Centers for Disease Control (CDC), *Fetal Alcohol Syndrome: Guidelines for Referral and Diagnosis* (July 2004) (available at https://www.cdc.gov/

ncbddd/fasd/documents/fas_guidelines_accessible.pdf). State's Br. at 11–12. Dr. Julian Davies testified about that report at the April hearing, explaining that it constituted a refinement of already existing, widely used, and well-established criteria. HT at 107–09. In any event, the State's reliance on this publication to challenge the possibility of an FASD diagnosis in *2007* makes little sense; the CDC published the article three years before Chappell's penalty retrial.

C. The Nevada Supreme Court Has Not Yet Decided the Arguments Chappell has Raised in these Proceedings

As it did at the conclusion of the evidentiary hearing, the State alleges that Chappell's arguments are barred based upon the doctrine of "law of the case." State's Br. at 6; *see* HT at 213–15. But the State fails to respond to the arguments on this point in Chappell's opening brief. The sole purpose of allowing petitioners to raise claims of ineffectiveness of post-conviction counsel is to allow reconsideration of improperly supported claims of ineffectiveness of trial counsel. *See Crump v. Warden, Nevada State Prison*, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997) (allowing petitioners to argue that ineffectiveness of post-conviction counsel prevented full consideration of claim concerning ineffectiveness of trial counsel); *accord Rippo*, 368 P.3d at 741–42.[6] And the Nevada Supreme Court has not yet considered Chappell's claim that ineffectiveness of post-conviction counsel prevented full consideration of his claim concerning trial counsel. *See Pellegrini v.*

[6] *Cf. Kenney v. Tamayo-Reyes*, 504 U.S. 1, 7–8 (1992) (noting it is "irrational to distinguish between failing to properly assert a claim in state court and failing in state court to properly develop such a claim"), *superseded by statute as stated in Willliams v. Taylor*, 529 U.S. 420, 432–33 (2000).

State, 117 Nev. 860, 888, 34 P.3d 519, 538 (2001) (explaining that law of the case applies to "issues previously determined"). Moreover, even if the law of the case doctrine did apply, it would not apply here because the facts Chappell has presented in this Court have never been considered by the Nevada Supreme Court. *See Geissel v. Galbraith*, 105 Nev. 101, 103, 769 P.2d 1294, 1296 (1989) (explaining that law-of-the-case doctrine only applies if "facts remain substantially the same"); *Hsu v. Clark County*, 123 Nev. 625, 630, 173 P.3d 724, 729 (2007) (law of the case doctrine does not apply when "subsequent proceedings produce substantially new or different evidence"). In short, the State's law of the case argument would expand the doctrine well past its limits and undermine decades of case law allowing these claims.

/ / /

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/ / /

III. CONCLUSION

For all the reasons stated, Chappell submits that he has adequately proven that post-conviction counsel was ineffective. Chappell therefore respectfully requests that this Court grant his Petition for Writ of Habeas Corpus, vacate his death sentence, and order a new penalty hearing.

DATED this 11th day of May, 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 11th day of May, 2018, a true and correct copy of the foregoing **POST-HEARING REPLY 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

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

JAMES MONTELL CHAPPELL,

Petitioner,

v.

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

Respondents.

Case No. C131341

Dept. No. V

EXHIBITS IN SUPPORT OF POST-HEARING REPLY BRIEF

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

(Death Penalty Habeas Corpus Case)

5. Recorder's Transcript, State v. Chappell, Eighth Judicial District Court Case No. 95C13141 (April 5, 2018)

6. Declaration of David M. Schieck (August 2, 2016)

7. Declaration of Clark W. Patrick (August 4, 2016)

CERTIFICATE OF SERVICE

In accordance with EDCR 7.26(a)(4) and 7.26(b)(5), the undersigned hereby certifies that on the 11th of May 2018, a true and accurate copy of the foregoing **EXHIBITS IN SUPPORT OF POST-HEARING REPLY 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 5

EXHIBIT 5

Electronically Filed
4/5/2018 2:31 PM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. JAMES MONTELL CHAPPELL, Defendant.	CASE NO. 95C131341 DEPT. NO. V

BEFORE THE HONORABLE CAROLYN ELLSWORTH, DISTRICT COURT JUDGE

MONDAY, MARCH 19, 2018

RECORDER'S TRANSCRIPT RE:
DEFENDANT'S MOTION FOR LEAVE TO CONDUCT DISCOVERY: EXHIBITS

APPEARANCES:

For the Plaintiff: STEVEN S. OWENS
Chief Deputy District Attorney

For the Defendant: BRAD LEVENSON
ELLESSE HENDERSON
Assistant Federal Public Defenders

RECORDED BY: LARA CORCORAN, COURT RECORDER

LAS VEGAS, NEVADA, MONDAY, MARCH 19, 2018, 9:16 A.M.

* * * * *

THE COURT: Case Number C131341, State of Nevada versus James Chappell.

MR. LEVENSON: Good morning, Your Honor.

THE COURT: Good morning.

MR. LEVENSON: Brad Levenson and Ellesse Henderson from the office of the Federal Public Defender on behalf of Mr. Chappell, who is in Ely State Prison today and waiving his appearance.

MR. OWENS: And Steve Owens for the State.

THE COURT: All right. Good morning. So we will waive his appearance today, Mr. Chappell's appearance. And this is defendant's motion for leave to conduct discovery.

MR. LEVENSON: Your Honor, before we begin that, we just had one quick housekeeping chore in anticipation of our April 6th hearing. We have four witnesses to be called at that hearing. When the Court ordered it back in October, you had directed limited hearing, which we understand. So we will be calling Chris Oram, post-conviction counsel, and our three experts from Washington.

Just out of an abundance of caution, we wanted to mention that in order for us to prove our ineffective assistance of counsel claim, there are two other parties, that would be David Schieck and Clark Patrick, who were counsel in 2007. We did submit declarations to this Court where both counsel stated they had no strategic reason for not presenting evidence of FASD, but we wanted to clarify from the Court whether you wanted to hear from them.

If the Court did want to hear from them, we would not be able to do it on

April 6th, because of the amount of evidence we're already presenting that day. We can revisit this at the end of the hearing on April 6th and you can tell us if you want to hear from them or we can certainly choose just a couple of hours on another date to have them come in, but I wanted just to clarify from the Court before we started our hearing.

THE COURT: Did you want to be heard on that part?

MR. OWENS: Well, yeah, our position all along was that no evidentiary hearing was needed. They originally said they wanted to call upwards of like 84 witnesses or something, and so now it's expanding beyond what we had – what the – Your Honor had originally ordered and I'm concerned about the slippery slope and where it stops and how many witnesses we call. And so – and they can't even appear on the 6th. So, yeah, I guess I'm opposed to it.

THE COURT: Well, basically, the only reason I wanted an evidentiary hearing at all in this case, and the only reason I felt there was any need to expand the record, was as to the allegation that Mr. Oram, as court-appointed, post-conviction counsel, regarding the second penalty phase, was ineffective himself. Now we're reaching back to why – you know, to Mr. Schieck's – Mr. Schieck, and who was the other?

MR. LEVENSON: Clark Patrick, Your Honor.

THE COURT: All right. So at this point I'm not inclined to allow that, but I might change my mind based upon what Chris Oram's testimony is and the testimony of the experts, but I – at the present time I don't want to say yes to that.

MR. LEVENSON: That's fine. We just again wanted to flag it for this Court.

THE COURT: Because really what I'm focusing on is did Mr. Oram,

when he did his petition, fail to address kind of the prejudice prong of Strickland, you know, by bringing forward evidence that would show that there was failure by prior counsel. So that's kind of my focus.

So let's – are you prepared now on the motion for discovery?

MR. LEVENSON: Yes, Your Honor.

THE COURT: Okay.

MR. LEVENSON: Ellesse Henderson will be arguing that today.

THE COURT: All right. Go ahead.

MS. HENDERSON: Good morning, Your Honor.

THE COURT: Good morning.

MS. HENDERSON: Thank you for setting this for a hearing. Because you already have our pleading and now our arguments, is there anything in particular you wanted me to address before getting started?

THE COURT: Well, it seems to me that as I go through your request for discovery that what you're focusing on, again, are not the things that I want to focus on for the hearing. And so any discovery, to me, has to be connected to the area of focus, otherwise you're just asking for discovery, to me, that seeks to go to the guilt phase and that's already been litigated.

MS. HENDERSON: This is separate from –

THE COURT: So tell me –

MS. HENDERSON: – the issue at the hearing, but it does relate to claims that are still pending. All the other claims in the petition are still pending at this time, and the discovery relates to some of those other claims.

THE COURT: Well, I understand that, but I'm not moved by those claims, as I think I've made fairly clear. That's why I'm limiting your – any

evidentiary hearing to this narrower scope. And it seems to me that what you're asking for in discovery are – goes back again to the guilt phase and those arguments, so relitigating things that have already been decided. So that's what I need you to address, as to why I would be wrong in that assumption.

MS. HENDERSON: Okay. They do go towards the guilt phase. You're correct, Your Honor. I can just briefly go over one of the discovery requests if you would like?

THE COURT: Well, if you're conceding that it all goes back to the guilt phase then I'm –

MS. HENDERSON: It is not solely related to guilt phase. These issues relate to guilt phase and penalty phase and post-conviction ineffectiveness. They're just not related to what is going to be discussed at the hearing on April 6.

THE COURT: All right. Well, if they're not related to the hearing then you don't need to do discovery, because the only point of discovery, right – so once I say I'm going to have a evidentiary hearing, you can apply to the Court for discovery, but I don't have to grant discovery except in the areas where I think it would be relevant, and I don't think it's – any discovery as to – so going to the vault, for example, and – no, I don't see that is relevant to our hearing that we're going forward on.

MR. LEVENSON: If I can interject, I think we're in this strange procedural posture, because in the last hearing we had, the State suggested we – that this was still pending and they asked to put it on calendar for argument. I think that's why we're here. The arguments we've made are the arguments we've made. If the Court wishes to move on, that's fine. We're not conceding anything, but I think we're here only because the State asked to put it on calendar and we had a

substitute DA in the Court last time.

THE COURT: Okay. Well, the minutes reflect, and that's my recollection as well, that you weren't prepared to argue them that – this motion and so that's why it got continued.

Mr. Owens.

MR. OWENS: I agree with everything the Court has already said on the matter, so I'll submit it.

THE COURT: All right. Well, so the motion is – for discovery is denied. And we were going to set the hearing, right?

MR. LEVENSON: I'm sorry?

THE COURT: Do we – have we set the hearing date?

MR. LEVENSON: Yes.

THE COURT: We have a firm date?

MR. LEVENSON: April 6th.

THE COURT: And it's April –

MR. LEVENSON: 6th, Your Honor –

THE COURT: – 6th.

MR. LEVENSON: – at 9 o'clock.

THE COURT: All right.

THE CLERK: And, yes, that's what we have, Your Honor.

And, counsel, could I just get your bar? Is it –

MS. HENDERSON: Ellesse, E-L-L-E –

THE CLERK: And it's – your bar is 14674C? Is that you?

MS. HENDERSON: Yes, yes it is.

THE CLERK: Okay. Thank you.

EXHIBIT 6

EXHIBIT 6

Declaration of David Michael Schieck

1. I, David Michael Schieck, hereby declare as follows:

2. I am a licensed attorney here in Nevada and have been since 1982.

3. I am the Special Public Defender (SPD) for Clark County, Nevada, having been appointed to the position on July 1, 2004. Part of my agreement in accepting the position was that I would be allowed to conclude those cases that were pending and where it would be detrimental to have substitute counsel. Mr. Chappell's case was one of those cases. After Mr. Chappell was granted a new penalty hearing and the appeal and cross appeal was decided, the office of the Special Public Defender was appointed.

4. In November 1999, while in private practice I was appointed by the Court to represent James Chappell in his initial state capital post-conviction habeas litigation. As a result of that litigation, Mr. Chappell was granted a new penalty trial by the Nevada Supreme Court in 2006.

5. The Special Public Defender's office represented Mr. Chappell through his penalty re-trial in 2007. At the re-trial, Deputy Special Public Defender Clark Patrick was second chair.

6. The Special Public Defender also represented Mr. Chappell on his state direct appeal from his penalty re-trial.

7. During my representation of Mr. Chappell in the initial state post-conviction proceeding, I had information that his mother drank and used illegal drugs while she was pregnant with him. I had no strategic reason for failing to fully investigate, develop, and present evidence during the post-conviction proceeding or the penalty re-trial that Mr. Chappell may have suffered from Fetal Alcohol Spectrum Disorder based upon this information.

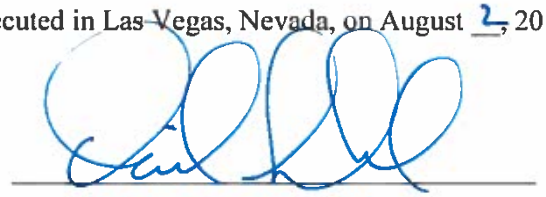
8. Dr. Lewis Etcoff, a psychologist/neuropsychologist, testified at Mr. Chappell's 1996 trial. In 2007, I asked Dr. Etcoff to testify at Mr. Chappell's penalty re-trial. I had no strategic reason for failing to request that Dr. Etcoff, or some other qualified expert, perform a full neuropsychological battery upon Mr. Chappell.

9. Before he testified in 2007, I should have had Dr. Etcoff review Mr. Chappell's 1996 trial testimony, review lay witness declarations that I had presented at Mr. Chappell's initial post-conviction habeas litigation, re-interview Mr. Chappell, and/or to review Mr. Chappell's prior criminal history, including his domestic violence batteries against Deborah Panos. I think it would also have been helpful to have Dr. Etcoff conduct collateral interviews with Mr. Chappell's family and friends while they were in Las Vegas to testify at the second penalty hearing, before Dr. Etcoff testified.

10. I was aware early in my representation that Mr. Chappell suffered from an addiction to drugs and alcohol. I did not have a strategic reason for failing to fully investigate, develop, and present evidence, through an expert on addiction, that addiction likely affected Mr. Chappell's behavior throughout his life.

11. I should have interviewed and arranged to have testify, William Moore, Mr. Chappell's Lansing, Michigan parole officer. I had no strategic reason for failing to read into the record at Mr. Chappell's 2007 penalty re-trial the testimony of Mr. Moore.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and that this declaration was executed in Las Vegas, Nevada, on August 2, 2016.



David Michael Schieck

THE COURT: It's easier to remember when your bar number is 45, like mine. Yeah, and I'm not 85, no. All right. Thank you.

MR. LEVENSON: Thank you, Your Honor.

MS. HENDERSON: Thank you.

MR. OWENS: Thanks.

PROCEEDING CONCLUDED AT 9:24 A.M.

* * * * * * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-video recording of this proceeding in the above-entitled case to the best of my ability.

_____

LARA CORCORAN
Court Recorder/Transcriber

EXHIBIT 7

EXHIBIT 7

Declaration of Clark W. Patrick

1. I, Clark W. Patrick, hereby declare as follows:

2. I am a licensed attorney here in Nevada and have been since 2005.

3. I am a Chief Deputy Special Public Defender at the Clark County Special Public Defender Office (SPD).

4. The SPD represented Mr. Chappell through his penalty re-trial in 2007. At the re-trial, Special Public Defender David Schieck was first chair counsel, and I was second chair counsel. At the time, I was not a Chief Deputy.

5. Mr. Chappell's penalty retrial in 2007 was my first capital case. Thus, I was not then Rule 250 qualified.

6. During my representation of Mr. Chappell in the initial state post-conviction proceeding, I had information that his mother drank and used illegal drugs while she was pregnant with him. I had no strategic reason for failing to fully investigate, develop, and present evidence during the post-conviction proceeding or the penalty re-trial that Mr. Chappell may have suffered from Fetal Alcohol Spectrum Disorder based upon this information.

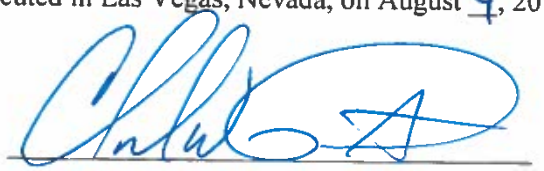
7. Dr. Lewis Etcoff, a psychologist/neuropsychologist, testified at Mr. Chappell's 1996 trial. In 2007, I asked Dr. Etcoff to testify at Mr. Chappell's penalty re-trial. I had no strategic reason for failing to request that Dr. Etcoff, or some other qualified expert, perform a full neuropsychological battery upon Mr. Chappell.

8. Before he testified in 2007, I should have had Dr. Etcoff review Mr. Chappell's 1996 trial testimony, review lay witness declarations that I had presented at Mr. Chappell's initial post-conviction habeas litigation, re-interview Mr. Chappell, and/or to review Mr. Chappell's prior criminal history, including his domestic violence batteries against Deborah Panos. I think it would also have been helpful to have Dr. Etcoff conduct collateral interviews with Mr. Chappell's family and friends while they were in Las Vegas to testify at the second penalty hearing, before Dr. Etcoff testified.

9. I was aware early in my representation that Mr. Chappell suffered from an addiction to drugs and alcohol. I did not have a strategic reason for failing to fully investigate, develop, and present evidence, through an expert on addiction, that addiction likely affected Mr. Chappell's behavior throughout his life.

10. I should have interviewed and arranged to have testify, William Moore, Mr. Chappell's Lansing, Michigan parole officer. I had no strategic reason for failing to read into the record at Mr. Chappell's 2007 penalty re-trial the testimony of Mr. Moore.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and that this declaration was executed in Las Vegas, Nevada, on August 4, 2016.



Clark W. Patrick

RTRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

THE STATE OF NEVADA,	)	
	)	CASE NO. 95-C-131341-1
Plaintiff,	)	
	)	DEPT. NO. V
vs.	)	
	)	
JAMES MONTELL CHAPPELL,	)	
	)	
Defendant.	)	
_____	)	

BEFORE THE HONORABLE CAROLYN ELLIS, DISTRICT COURT JUDGE

WEDNESDAY, MONDAY, MAY 21, 2018

RECORDER'S TRANSCRIPT OF HEARING:
SUPPLEMENTAL BRIEFING

APPEARANCES:

FOR THE STATE:	STEVEN S. OWENS, ESQ. Chief Deputy District Attorney
FOR THE DEFENDANT:	BRADLEY D. LEVENSON, ESQ. ELLESSE D. HENDERSON, ESQ. SCOTT WISNIEWSKI, ESQ. Federal Public Defender's Office

RECORDED BY: SANDRA PRUCHNIC, COURT RECORDER
TRANSCRIPTION BY: VERBATIM DIGITAL REPORTING, LLC

LAS VEGAS, NEVADA, MONDAY, MAY 21, 2018

[Case called at 9:49 A.M.]

THE COURT: Good morning. And this was the final argument on the Post Conviction Petition for Writ of Habeas Corpus. I received additional briefing from both sides, so the defense's additional supplemental briefing, the State's Opposition and Reply, which I've read.

As well, I think I told you last time, that I wanted to read the testimony at the -- that second penalty hearing. Particularly, I was interested after reading the briefing and reading Dr. Etcoff's testimony, which I have also done. So, make your final argument.

MR. LEVENSON: If we could make appearances, Your Honor.

THE COURT: Yes, of course.

MR. LEVENSON: Brad Levenson, Scott Wisniewski and Ellesse Henderson on behalf of Mr. Chappell, who's in Ely State Prison, and who has waived his appearance today.

THE COURT: Thank you.

MR. OWENS: And Steve Owens for the State.

THE COURT: Thank you.

MR. LEVENSON: Does the Court have anything specific they would like to us focus on this morning?

THE COURT: No. Do you want to hear my feelings on it?

MR. LEVENSON: Yes, Your Honor.

THE COURT: And remember, I think that was a subject of discussion. When I say these things, it's really to let you know how to argue. It's not my -- you know, it's not me saying this is what I'm going to do. It's sort of more to target or to give you the opportunity to address my concerns.

So, obviously, I asked you to narrow the issue and only focus on was the most recent post-conviction counsel ineffective in not, you know, giving the Court enough information for the appointment for it to appoint the experts that you have now retained.

And was that counsel ineffective in not pursuing. That is a line, you know, because it really does start with was the Court given enough information to agree to appoint counsel.

Now, the State's position is, basically, that the information that was given at the penalty phase was the same in some ways. I mean, it -- vis-à-vis, what was Mr. Chappell's intellectual functioning at the time, and that etiology of that intellectual functioning is not as important because the jury got the testimony from Dr. Etcoff based upon many of the same things that we heard from the expert witnesses who testified at the evidentiary hearing. And that's why I wanted to -- particularly to read that.

Now, I didn't really think a whole lot of the

State's arguments that are -- that might be looked at as personal attacks on defense counsel and your, you know, sort of the Ivory Tower argument, you've never tried a capital case. I don't know whether you have, frankly, or not. But that's really not the point and not probably not appropriate in arguments.

So really, I discount all that. I don't listen to those kind of attacks. You know, I have myself, as a former prosecutor, tried several capital cases. And so I'm just looking at what was the evidence and what was, under Strickland, doing the analysis under that.

And so when I read the testimony of Dr. Etcoff, it's interesting because he starts out and he talks about his background and, in fact, at the time, he said that he -- you know, as a neuropsychologist, that he would, in fact, opine on whether somebody has an organic brain injury, and he deduces this from certain testing, et cetera.

And that, of course, he looked at -- although he did not have the family history background, which we have some more of, and although, I think it was presented, his opinions were not -- excuse me, so the record's clear, it was presented at this, in part, at the second penalty phase, but he wasn't given any of that information because really, he wasn't asked to do anything more from the time of the first penalty hearing.

So while he was never asked, ultimately, whether he had an opinion as to whether Mr. Chappell had brain damage, he certainly did testify that he believed he was intellectually disabled, and that he was incapable of -- because he functioned at a very low intellectual level, I believe, even in his overall IQ functioning, at 91.

So that 91 percent out of -- or 91 people out of 100 would be functioning higher than he was and that this is backed up by not only his testing, but also by the reports of his school records, which he had evaluated in the same way that the experts had, and those go back to the second grade. And that that's all consistent with his intellectual functioning and his testing.

So as I look at it, I think the jury did have the type of evidence before them. While maybe they didn't have -- from Dr. Etcoff, they didn't have what's the etiology of brain impairment, that really doesn't -- it doesn't matter. I mean, it doesn't matter why somebody has a brain injury or base intellectual functioning a little lower than most of the population, it's what does the jury hear.

Now, you know, I read Dr. Etcoff's testimony, and I guess, I don't necessarily find it surprising. While he tells the jury that, yes, he functioned on this very low level and he has all of these disorders that are associated with that, that the description he gives of the defendant's interview and

what he told him was so horrific, frankly, it doesn't surprise me that the jury would have said, you know, okay, so he has a brain injury. We don't care.

And that may be borne out, in fact, by the fact that they found all these mitigating circumstances. And so I -- given that, and having post-conviction counsel look at the record, that he chose to focus more on his trying to get that last -- the only remaining basis for seeking the death penalty at that point was the sexual assault. I don't know that that makes it to the point where he's ineffective.

And then I have to look at Strickland's second factor. So even assuming he was ineffective in not making a bigger push for getting experts that you got, would it have made a difference?

And I -- I initially thought maybe so, just because the experts were persuasive. But then when I read Dr. Etcoff's testimony, that the jury did get, they had the same type of testimony. The only thing that was different, really, was what caused this? And it's very clear -- it was very clear to the jury that all of these deficits occurred -- you know, were occurring when Mr. Chappell was in the second grade. It was already present in the second grade.

And there was also testimony by Dr. Etcoff that his drug and alcohol abuse didn't start until he was 14 years of age. And yet, we had the testimony from Dr. Etcoff, not only

the school record testimony from the second grade, but also of the forward.

So then we have the high school psychologist who saw him when he was about 16 years and 7 months, as I recall. But so I think that the jury did have that, and so I don't see that it -- we've met either prong of Strickland, when I look at it. So, go ahead.

MR. LEVENSON: So you've given me a lot to unpack. And I'd like to certainly address both prongs. If I may, we brought a chart. If I can approach our chart, and I'm going to turn it and give you that ten-foot radius.

THE COURT: Okay. We've already established from the last time, I don't see well.

THE CLERK: Oh, I can't see that.

MR. LEVENSON: All good?

THE CLERK: You might want to bring it closer.

MR. LEVENSON: You need it closer?

THE COURT: Yeah, a little bit so I'm not squinting. Mr. Owens, if you have any interest in seeing this, you may move.

THE CLERK: And this has not been premarked, Your Honor.

MR. LEVENSON: So we'd like to mark this as Exhibit 24, which would be the next in line. We also have a poster that was marked as Exhibit 21 at the hearing that actually

should have been marked Exhibit 23.

THE CLERK: Yes, it was -- we figured it was marked incorrectly. So this will be collective as one exhibit?

MR. LEVENSON: Right, there's two posters. We would like to mark this Exhibit 24.

THE CLERK: Okay.

MR. LEVENSON: And I can give Mr. Owens a copy of it.

MR. OWENS: I just took the picture, so I got it.

MR. LEVENSON: Can I approach this?

THE COURT: Yes. You may, actually.

THE MARSHAL: You need a microphone here, Counsel.

(Pause in the proceedings)

MR. LEVENSON: So the first poster is sources used by post-conviction counsel versus sources available. And there's a lot of blank real estate here, Your Honor, because post-conviction counsel really didn't do anything that he should have done.

And the Court made a comment about this. I realize that the Court was speaking after hearing the evidence and the Court has now said that she's had some time to think about it, but I think what the Court said was pretty interesting, is that Counsel did absolutely nothing in 2012 to convince this Court that FAS experts were needed.

And so I just want to go through some of the

materials that were available. There were school records that were in Counsel's file that Counsel never used. In the next chart we're going to talk about what was in those sources. There was caselaw dating back from the 1990s. There was a U.S. Supreme Court case that talked about the importance of FASD.

There was information on the ABA website that Dr. Brown testified to that was originally on the University of Washington website, then it was on the ABA website. And that website had information for legal counsel about how to litigate FASD.

So all Counsel needed to do was go on that website. Now, Counsel, actually knew, and he says in his testimony, he knew the team of experts that we hired. He says at one point, the people that you have out in the hallway I knew about because I had tried to hire them before in another case. And that case was Donte Johnson, and that was a 2009 case.

So Counsel was aware of Dr. Brown and Dr. Connor and Dr. Davies. Counsel had before them trial testimony from 1996, and trial testimony from 2007, that would have given him information that could have supported his Motion for Funding that he didn't use.

The jury findings themselves are informative because they talk about that counsel -- or I'm sorry, that

Mr. Chappell's mother -- that Mr. Chappell was born to a drug and alcohol addicted mother. So that was a finding that he could have proffered to this Court.

And then you have some 15 or 20 lay witnesses that Counsel could have called. He could have just picked up the telephone and talked to them about James Chappell, about the mother's drinking, about the mother's drug use, about his adaptive deficits, anything. All he had to do was pick up the telephone, or write them a letter and say, are you available to talk, but he didn't do that.

So what does that mean that he had all these sources? Well, what could we have a found? And this goes -- a lot of this goes to deficient performance. I disagree completely that this juror -- jury heard anything about brain damage because they didn't. Dr. Etcoff said on page 123 of his testimony in 2007, I did not do -- the question is, James was given an IQ test, neuropsychological testing and a few other tests, personality tests?

This is from Mr. Patrick.

Not neuropsychology. Just IQ achievement and personality.

He says, not neuropsychology. Dr. Etcoff, in 1996, was never asked to perform a neuropsychological evaluation. He's a neuropsychologist. I agree with that. He's a neuropsychologist, but he wasn't asked to do brain testing.

So the jurors never heard -- and this is the question that the Court posited at the hearing -- did the jurors hear anything about a neurological disorder or brain damage related to Mr. Chappell? Not even talking about FASD, just brain damage.

And the answer is, no. No one said neuropsychology, neurology, brain damage, brain dysfunction, no one said it. Dr. Etcoff didn't say it. Dr. Danton didn't say it. Dr. Danton actually said, personality testing, based on something Dr. Etcoff said.

Now, in Dr. Etcoff's report, it said there's a neurological connection to Mr. Chappell's problems. But Dr. Etcoff's report was not in evidence, never in evidence; not in 1996, not in 2007. Jurors never saw it. Dr. Etcoff never testified about it.

Now, why was there no discussion about brain damage? Because no one asked him to do anything about it. He was a neuropsychologist. They asked him to do a criminal responsibility evaluation, and that's what he did. He looked at some school records. He talked to the client. He wasn't given any other information, he says in 2007. There's other information I needed, but I wasn't given.

So what has Dr. Etcoff testified to? He says, yes, James was in a special education class. Well, we know that he was learning disabled because the jurors actually found

that. He says on page 36 of his testimony, socially, he's in a bad way. I don't think that's really -- I don't think an expert really needed to tell you that socially he's in a bad way, but that's what he says.

A school psychologist saw him. That's correct. Your Honor mentioned that. But at some point, Dr. Etcoff quotes from that report and says, I have no idea what that means, Counsel.

THE COURT: Well, it was just that one -- I know what you're referring to, but it was just one about --

MR. LEVENSON: It's on page 37. He's talking about the psychologist wrote that he seems to -- little hope of succeeding in life, especially as it relates to academic achievement.

THE COURT: Let me find that. No.

MR. LEVENSON: Page 37 towards the bottom.

THE COURT: The part he's talking about, I think that he means -- I don't have a clue as to what means. It says, you know, he does not appear to have any coping skills -- and this he's quoting in the report -- "to deal with problems he encounters and tries to endure whatever comes his way by first pointing action".

I think that's what he was saying. What is first pointing action?

MR. LEVENSON: But that whole --

THE COURT: I don't know what it means either.

MR. LEVENSON: -- that whole -- that whole six lines is -- is the entire amount of discussion about what the school psychologist saw in James Chappell.

He said he was learning disabled. He had problems in math, he had low self-esteem, was not very bright. He says the duller you are, the fewer normal experience you have. That was -- that's how he saw James Chappell, as a very -- as a person who was not smart, who didn't make good life choices. It was, basically, a personality disorder and drug addiction was what Dr. Etcoff was focused on.

And as we pointed out in our brief, drug addiction -- I'm sorry, a personality disorder is not mitigating evidence. It's more aggravating. So he saw James as too emotional and not logical. He called him paranoid.

So this is not the evidence that Your Honor heard. I watched Your Honor listen to Dr. Brown and Dr. Davies and Dr. Connor. They are much more articulate than I am, but what they explained to you and what the jurors would have heard --

THE COURT: Excuse me a minute while I sign this order.

MR. LEVENSON: Absolutely.

THE COURT: Because I want to give you my full attention.

[Pause in the proceedings]

THE COURT: Continue.

MR. LEVENSON: They portray him as a person who was drug addicted and not too bright, who had a personality disorder, who had a tough life. Well, the jurors, the jurors found that, absolutely found that on some of the special verdict forms. They talk about he was raised in an abusive household. He was a victim of physical abuse.

But, Your Honor, these are widgets. I said this when I asked for a hearing for our client. These are widgets that are in a vacuum. So didn't they know? What did the jurors not understand about this -- about James Chappell?

They didn't understand that James Chappell's mother drank and took drugs to such an extent that she was falling down drunk during her pregnancy. And the result of this is he's born with brain damage through no fault of his own and that impacted his entire life trajectory.

So not only is he born with brain damage, he's born into this abusive household, his mother is killed. There's abject poverty. And as Dr. Brown, and I believe Dr. Connor talked about, you had this double whammy. Because he's impacted with FASD, he can't control -- he has less control of his emotions. He doesn't know how to deal with society, and all of these things are the root cause. Not the etiology, it's basically what created this person that

eventually committed the crime.

THE COURT: But isn't that what Dr. Etcoff says in his testimony? That because he is so intellectually impaired in functioning that he has lesser ability to control his decision-making, he -- you know, in any every way. That's what he keeps -- that's what he talks about. That's the focus to me of his testimony, is because he is intellectually disabled, essentially.

MR. LEVENSON: Well, I --

THE COURT: Most people understand that if your IQ is that low, it's because something's wrong with your brain and he was already having these issues in the second grade. They, you know, they ended up in the fourth grade, they decided that they had to put him in the specialized classes, and they also recognized that maybe he needed some additional therapeutic counseling because of these other issues.

And it was brought out by defense counsel, that it appears he didn't get that. So --

MR. LEVENSON: So what we've learned about FASD is it's not just IQ. I mean be, the doctors talked about you can have -- in the case of Mr. Chappell you had IQ splits. You have some IQ, which was in the normal range, and some IQ which is very impaired.

So it's not just that he wasn't bright, and so something's wrong with his brain, it's that he was born with

holes in his brain. We had testimony about how his brain wiring was unsuccessful, because his mother was drinking. So it's a very different story.

It would have explained his relationships with other people. It would have explained why he could not keep a job. It would have explained the low grades. It would have explained the fact that he was socially awkward, that he couldn't hold a job, that he had difficulty with people, that he had a bad relationship with Debbie Panos because he didn't understand how to have a relationship.

These are all mitigating. I know that Mr. Owens said in his briefing that mitigation is a double-edged sword. But in this case, James Chappell took responsibility for his crime. Now, we said he blacked out, but he never said he didn't kill Ms. Panos.

And so bringing out evidence to the jurors that this was completely involuntary. this had nothing with Mr. Chappell, he was born this way. He was born to have massive problems in his life. And you compound all the other things that happened to him, he didn't stand a chance.

It's not excusing it, it's explaining it. It's reducing his culpability for the crime that he committed. And it's not that 12 jurors had to find this evidence to be changing, life changing. They had to find that just one person, one person on the jury would have listened to this

evidence and would have made a different decision.

I go back to Your Honor's watching the experts that were here. They were compelling. And what they told Your Honor was very, very different than what was explained in court. No one talked about the things that they talked about. No one talked -- they humanized this client. They explained why he was less responsible for this crime because he was so impaired. Based on his mother's drinking, it's completely involuntary.

We don't know if the jurors thought well, this guy took drugs so his -- so that was impacted. I know at one point, Dr. Etcoff says that crack can make you psychotic, but this wasn't because James Chappell was on crack want. He certainly wasn't on crack when he was -- before the age of 13. Dr. Etcoff, in my view --

THE COURT: No, but -- but he may have been on crack the day this occurred. You know, so I mean, that just adds on to it.

MR. LEVENSON: Right. And drug --

THE COURT: And --

MR. LEVENSON: I'm sorry, Your Honor. I didn't mean to cut you off.

THE COURT: I mean, I think it was clear from Dr. Etcoff's testimony that, yes, he wasn't taking crack cocaine until he was, I think, 18, is when he started using

crack cocaine. And yes, okay, so you layer that on top, and that's what I thought Dr. Etcoff's testimony was saying. You layer that on top of a person who is so severely intellectual impaired, you know, and --

MR. LEVENSON: So I would also -- I would point this Court to, I believe, it's Exhibit 85, which is Dr. Etcoff's Declaration, where Dr. Etcoff says, I wasn't asked to do a neuropsychological evaluation. The things that Dr. Connor found were different and could have supported my testimony.

Dr. Etcoff was completely ripped in cross-examination. I mean, he was talking about free will, that James Chappell had free will, he had lesser free will because he was intelligent, but nevertheless, he had free will. That basically puts aside the fact this guy has FASD, and brain impairment, and can't make decisions like the rest of us. He is not --

THE COURT: I think your experts testified that somebody that has fetal alcohol syndrome loses free will. I mean --

MR. LEVENSON: But it's impacted. It's an impacted free will.

THE COURT: Yes, but --

MR. LEVENSON: And the only -- and the only thing that Dr. Etcoff was able to point that to was lower IQ

scores, and that does not portray the full picture of what was going on here. I mean, Your Honor asked they question at the hearing; did the jurors know about organic brain damage? And my answer is they did not know about organic brain damage. It wasn't discussed. I don't even think it was inferred.

And certainly, Dr. Etcoff was not acting as a neuropsychologist. He was making a criminal responsibility evaluation for purposes of mitigation. That's very different than asking a neuropsychologist to come in and test for brain damage, which was not done here until 2016. And post-conviction counsel should have known that.

Just based on the testimony in 2007, by Dr. Etcoff, where he says I didn't do brain test, I wasn't acting as a neuropsychologist. So for Mr. Oram to come in here and say, I just want to update what's going on here, ten years later, and see what's going on with his brain, no one testified to any brain damage back then.

Can I have just a moment, Your Honor?

(Mr. Wisniewski/Mr. Levenson conferring)

MR. LEVENSON: I'll rest. And Mr. Wisniewski would like to do rebuttal after Mr. Owens has his argument.

THE COURT: Mr. Owens?

MR. OWENS: I don't have anything more to add. I think I said everything that I can in the briefs. My main

point is none of this would have made a difference to this jury. They said whatever deficiency he has in his brain, and the low IQ, that did not -- beyond a reasonable doubt did not mitigate, the outweigh the aggravating circumstance that they found. That's been my point all along. And counsel was not ineffective because they did pursue this, just in a slightly different way. And so I'll submit it.

THE COURT: Rebuttal? I mean, I don't know what we're going to rebut from this, but that --

MR. Post-conviction Well, very little to rebut about that, Your Honor. I mean, that is not the arguments he's made in his briefing previously. That's more closely in line with the argument that he made in 2012, which really goes more towards establishing deficient performance of Mr. Oram.

Now, this is following very close with Mr. Levenson. He obviously, knows the record of, you know, probably almost as well as Your Honor, but what I think --

THE COURT: Well, I assume you would know it better than I do.

MR. WISNEIWSKI: Well, you never know. You're quoting straight from the pages of me. But ultimately, Judge, I think just the one argument that we want to make at this point is, what is the difference -- excuse me? Is what is the difference between a sentence of life in prison and

death? The justification as to why death should be handed down is because someone who's engaged in an act so evil, so purposeful that society says no, it's not just a matter of incapacitating you. It's not just a matter of keeping you away from everyone else in society. It's that you have to be affirmatively punished because you made a choice to be evil.

And what all of the evidence that you heard at the hearing back in April established was that Mr. Chappell had a substantially diminished ability to make rational choices. It wasn't a diminution that was caused by an intellectual disability. An intellectual disability is something which negatively impacts your brain's processing power. Your ability to think from step A, not to step B, but from step A to step E.

And that's what an intellectual disability is. What you heard testimony about from the three doctors was that this was an adaptive disability. And that's something wholly different that Dr. Etcoff did not really talk about at all. Adaptive dysfunction is something which impacts your ability to handle a stimulus, to internalize emotions, and that's something that James Chappell doesn't have, through no fault of his own.

It's something which came into play not just on the night that he killed Ms. Panos, but all throughout his relationship with her. The second penalty jury, they heard

testimony about the fact that this was a relationship of abuse. That was something that was certainly aggravating to a reasonable jury, and which was explained by the testimony that you heard on April 6th.

It all boils down to these doctors presented information which showed that Mr. Chappell didn't have the ability to make a rational choice here. And Dr. Etcoff talked about intellectual functioning, nothing about adaptive functioning, stress control, things of that nature.

And if the Court has any other questions, any areas of concern, I'm happy to address them.

THE COURT: All right. So on page 65, he actually expressly did talk about adaptive skills. If you're not bright, you have less free will because you have fewer adaptive skills. If you have a personality disorder, everything you perceive is distorted, then you have fewer opportunities to step outside the way you -- your -- that's a typo -- your distorted view of life, and you sort of do the same thing every time. When someone looks at you a certain way, you get mad, then you feel angry. And then if you have a drink, you pick a fight.

So there are -- if you have friends, you have -- if the more comfortable and more normal your life has been, the more adaptive and better off you are at making tough decisions as they come along. The duller you are

intellectually, the fewer normal experiences you've had with your life, the more you're addicted to dangerous drugs, et cetera, et cetera. You just go through all of these variables and more likely it is that you cannot, and your free will is much more limited.

So, did he say, specifically, he had fetal alcohol syndrome and that's why he was so intellectually disabled, but he has these adaptive issues? No, he didn't say that. But is it in a meaningful way different? Were the experts that I heard better witnesses than Dr. Etcoff? Yeah, probably. But is -- but that's -- I don't think that that is what Strickland's about.

Is it, you know, that we keep bringing him back and saying, you know, this witness is better than that witness, and that's what my concern is.

MR. Post-conviction And, you know, Judge, the one thing that you say here that I think is especially relevant is that this line that, if you have less free will, you have fewer adaptive skills. What this rambling statement of Dr. Etcoff boils down to is that there's a one-to-one correspondence between diminished intellectual functioning and diminished adaptive ability. And what did you hear from Dr. Connor?

That FASD doesn't work like that. It's not that you have lower adaptive functioning because you have lower

intellectual ability. It's that FASD is fundamentally an adaptive disorder. Yes, sometimes it has an intellectual component, but Dr. Connor also testified that he's had patients who test above 100 on standard IQ testing and they still have that substantially diminished adaptive capability, which makes them incapable of functioning in the real world, and which for purposes of court hearing, makes them less culpable than someone, regardless of their IQ level.

The second penalty jury heard testimony that Mr. Chappell's IQ was somewhere in the range, I believe, it was 86. That's not anywhere ID, but his adaptive functioning level was so low that that is something that was not brought out by Dr. Etcoff and was only -- and was only brought out by the people that you heard. And that and that's the difference, Your Honor, between what happens when you perform a neuropsychological evaluation and just a mere psychological criminal responsibility evaluation as Dr. Etcoff did.

A neuropsych value is going to notice that brain damage. It's going to look for the clues to try to explain it away. Dr. Etcoff may have been a neuropsychologist, but he didn't do that type of testing.

THE COURT: I guess, that's the thing. I mean, I don't know that you can explain it away. I mean, you can say this is -- this person has brain damage and so because of that, his brain doesn't function like a normal person to

process information and stop you from acting in a certain way. And his -- the IQ testimony was, it was verbal IQ score of 71, and his performance IQ was 91.

And then he goes on, he says, Meaning, his overall intellectual abilities were lower than 91 out of 100 percent -- out of 100 people his age. That's -- that puts it in a pretty big -- pretty good perspective, you know.

MR. Post-conviction I mean, we're not --

THE COURT: Only nine other people function worse than you do? That's pretty --

MR. WISNIEWSKI: I think the difference that we want to really bring out is, that what Dr. Etcoff did is conflate the idea of intellectual functioning and adaptive functioning. And what these experts brought out to you is that there's a fundamental difference between intellectual functioning and adaptive functioning.

Yes, in the fourth grade, Mr. Chappell was sent to special education classes, but what else was happening is that still at age 14 he was still wetting the bed. At the -- at nine or ten, he was still sucking his thumb. That's adaptive functioning. That's something that was not brought out to the jury. And yes, probably in psychological terms --

THE COURT: No, actually, he did --

MR. WISNEIWSKI: -- there is --

THE COURT: -- he brought that out. He brought it

out that that was mentioned -- the bedwetting and the finger sucking even at a grade two level, which he said is not normal for that age.

So, I mean, I think it was pretty -- all -- a lot of these things were brought out. And, I guess, that's my point that you're -- now you're saying, well, these experts said the same thing in a better way. Yes. And -- but does that mean that we start over again? And I just don't think it does under the Strickland analysis.

So, I'm denying your Petition. The State will prepare the Findings of Fact, Conclusions of Law.

MR. OWENS: Thank you, Your Honor.

MR. LEVENSON: Your Honor, can we have the exhibits moved in as court's exhibits --

THE COURT: Yes.

MR. LEVENSON: -- so they would move up with the record?

THE CLERK: They're all marked as defendant's exhibits, FYI.

THE COURT: Yes. They're admitted as defendant's exhibits. And so court's exhibits don't necessarily go up with the record.

THE CLERK: And if I could inquire, does anything in this need to be sealed? There's nothing --

THE COURT: I don't think there is anything that I

recall that with personal identifiers or that would require a seal.

THE CLERK: Okay. So --

MR. LEVENSON: Your Honor, as to the other issues --

THE CLERK: So, I'm sorry, real quick, 1 through 24 --

MR. LEVENSON: 4.

THE CLERK: -- I believe, was the last one remarked. I'm sorry, I'm remarking a new list, so I just want to confirm some of the 1 through 24.

MR. LEVENSON: Exactly.

THE COURT: And those were all exhibits to the evidentiary hearing.

MR. LEVENSON: Correct. As to the other claims, this Court has said that they were denied. I know that Mr. Owens is going to be writing a detailed Findings of Fact. Does the Court have an opinion -- are they just denied or were they denied for the --

THE COURT: For the reasons and arguments stated in the State's Opposition to the Petition. So I did consider all of those and that's why I wanted to focus on the issues that I asked you to please focus on for the evidentiary hearing and supplemental briefing, et cetera. So if -- I know that it is the practice of the District Attorney Office

to run the proposed Findings of Fact, Conclusions of Law past defense, and so they'll do that in this case. Thank you.

MR. WISNIEWSKI: Thanks, Judge.

THE COURT: I just do want to say that I appreciate all of the briefing, all of the hard work that went into this, and, you know, you do a great job.

THE CLERK: Where are the other boards?

MR. LEVENSON: Right here.

THE CLERK: Oh, I'm sorry. Thank you.

(Hearing concluded at 10:29 A.M.)

* * * * *

ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual proceedings in the above-entitled case to the best of my ability.

Julie Lord

JULIE LORD, INDEPENDENT TRANSCRIBER
VERBATIM DIGITAL REPORTING, LLC

OBJ

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DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES MONTELL CHAPPELL,

Petitioner,

v.

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

Respondents.

Case No. C131341
Dept. No. V

OBJECTION TO STATE'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW

(Death Penalty Habeas Corpus Case)

Petitioner James Montell Chappell submits the following Objection to the State's Proposed Findings of Fact, Conclusions of Law (FFCL). This Objection is made and based on the following points and authorities and the entire file herein.

DATED this 8th day of June, 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

MEMORANDUM OF POINTS AND AUTHORITIES

On April 6, 2018, this Court held an evidentiary hearing on Chappell's petition for writ of habeas corpus. Six weeks later, on May 21, 2018, this Court heard argument and denied the petition. Following its denial, this Court requested the State prepare the findings of fact and conclusions of law (FFCL). On May 31, 2018, the State forwarded its proposed FFCL to undersigned counsel. The State's proposed FFCL contains three factual errors. Undersigned counsel pointed out these factual errors to the State, and the State declined to change its proposed FFCL.

First, the State erroneously asserts that post-conviction counsel complained of trial counsel's "failure to seek additional *psychological* evaluations specifically to address Fetal Alcohol Syndrome." Proposed FFCL at 4 (emphasis added). Post-conviction counsel said nothing about obtaining psychological evaluations to test for FASD. Instead, post-conviction counsel complained of trial counsel's failure to obtain a *neurological* evaluation and brain imaging. Hrg. Ex. 3 at 4; Ex. 145 at 4; Br. Ex. 3 at 12–14; *see* HT at 97–98 (explaining difference between psychological evaluation and neuropsychological evaluation).

Second, the State says—incorrectly—that this Court rejected Chappell's FASD claim in 2012 based solely "upon the record," not because of any deficiency in how post-conviction counsel raised the claim. Proposed FFCL at 7. In contrast to the State's assertion, this Court in its oral ruling explained that it was denying counsel's motion for funding and the petition because 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 written 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.

Third, the State incorrectly summarizes testimony from post-conviction counsel at the April 6 hearing, stating that he had "testified that well-experienced capital litigators like himself and trial counsel . . . strategically focused on issues related to lack of consent." Proposed FFCL at 7. Post-conviction counsel in fact testified during cross-examination that the FASD issue was "important" and denied having a strategic reason for failing to pursue that important claim. HT at 28. And nothing in counsel's 2018 testimony explained his failure to more fully support his 2012 motion. In addition, trial counsel both denied having any strategic reason for failing to investigate or present to the jury evidence of FASD. Br. Ex. 6; Ex. 94 (Decl. of David Schieck at ¶7); Br. Ex. 7; Ex. 108 (Decl. of Clark Patrick at ¶6).[1]

Based upon the above, Chappell respectfully requests this Court remove from the FFCL the State's three incorrect factual statements. By making this request, Chappell in no way waives any arguments made in support of his petition for writ of habeas corpus or any other challenges to the FFCL.

---

[1] The State cannot assert strategic reasons for trial counsel's performance in light of: (1) the uncontroverted evidence from counsels' declarations that there was no strategic reason for their failures; and (2) the State's objection to calling trial counsel at the April 2018 hearing.

DATED this 8th day of June, 2017.

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 8th day of June, 2018, a true and correct copy of the foregoing **OBJECTION TO STATE'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW**, 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

FFCO

DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES CHAPPELL, Petitioner, -vs- THE STATE OF NEVADA, Respondent.	)	CASE NO: 95C131341 DEPT NO: V

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This Cause came on for hearing before the Honorable CAROLYN ELLSWORTH, District Judge, on the 4th day of January, 2017, the petitioner was not present, represented by BRAD D. LEVESON, Assistant Federal Public Defender, and the respondent was represented by STEVEN B. WOLFSON, District Attorney, by and through STEVEN S. OWENS, Chief Deputy District Attorney. The Court set a briefing schedule and continued the matter. Thereafter, on the 7th day of August, 2017, the petitioner was not present, represented by BRAD D. LEVESON, Assistant Federal Public Defender, and the respondent was represented by STEVEN B. WOLFSON, District Attorney, by and through STEVEN S. OWENS, Chief Deputy District Attorney. The Court continued the matter to review all of the documents. On the 9th day of October, 2017, the petitioner was not present, represented by BRAD D. LEVESON, Assistant Federal Public Defender, and the respondent was represented by STEVEN B. WOLFSON, District Attorney, by and through STEVEN S. OWENS, Chief Deputy District Attorney. The Court set the matter for a Status Check to set an Evidentiary Hearing. Thereafter, an Evidentiary Hearing was set via email between Counsel and the Court to be held on the 6th day of April, 2018. On the 6th day of April, 2018, the petitioner was not present, represented by BRAD D. LEVESON, Assistant Federal Public Defender, and the respondent being represented by STEVEN B. WOLFSON, District Attorney, by and through STEVEN S. OWENS, Chief Deputy District Attorney. The Court

allowed for additional briefing on whether or not post-conviction counsel was ineffective. Thereafter, on the 21st day of May, 2018, the petitioner not being present, represented by BRAD D. LEVENSON, Assistant Federal Public Defender, and the respondent being represented by STEVEN B. WOLFSON, District Attorney, by and through STEVEN S. OWENS, Chief Deputy District Attorney, the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now makes the following findings of fact and conclusions of law:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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. Chappell v. State, 114 Nev. 1403, 972 P.2d 838 (1998). On appeal, the Nevada Supreme Court affirmed the defendant's convictions and sentence of death. Id. Remittitur issued on October 26, 1999.

Chappell filed a first post-conviction petition for writ of habeas corpus which was granted in part as to a new penalty hearing, but was denied in all other respects. The Nevada Supreme Court affirmed on April 7, 2006 (Order of Affirmance, SC# 43493). Remittitur issued on May 2, 2006. A new penalty hearing was conducted in March of 2007, at which a new jury again returned a verdict of death which was affirmed on appeal (Order of Affirmance, SC# 49478). Remittitur issued on June 8, 2010. A second post-conviction petition for writ of habeas corpus was denied by written findings filed on November 16, 2012. On appeal, the Nevada Supreme Court affirmed on June 18, 2015 (Order of Affirmance, SC# 61967). Remittitur issued on November 17, 2015.

Next, Chappell proceeded to federal court where he filed a federal habeas petition on March 23, 2016, and the federal public defender was appointed. After amending the petition, Chappell sought and obtained on November 1, 2016, a federal order granting a stay of federal proceedings to allow exhaustion of claims in state court. Chappell then filed the instant habeas petition in state court on November 16, 2016. The State filed a Response on April 5, 2017, followed by Chappell's Reply on July 5, 2017. An evidentiary hearing was

held on April 6, 2018, which was followed by post-hearing briefs from both parties. This Court orally denied the petition on May 21, 2018.

Most of the claims in the instant petition were already raised on direct appeal or in a previous habeas petition, or should have been raised on direct appeal or in a previous habeas petition. Accordingly, they are barred from being presented again or are waived. The one exception is claims of ineffective assistance of prior post-conviction counsel Chris Oram, which might constitute good cause to overcome the bars. However, after an evidentiary hearing on that issue, this Court concludes that there was no ineffectiveness of prior post-conviction counsel sufficient to overcome the procedural bars and the petition must be dismissed.

Under NRS 34.726(1), "a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the appellate court of competent jurisdiction . . . issues its remittitur," absent a showing of good cause for delay. In State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 233, 112 P.3d 1070, 1075 (2005), the Nevada Supreme Court noted that "the statutory rules regarding procedural default are mandatory and cannot be ignored when properly raised by the State." This Court finds the instant petition barred because it was filed more than one year from issuance of Remittitur on June 8, 2010, following the direct appeal of the most recent judgment of conviction after the second penalty hearing.

NRS 34.810(1)(b)(2) maintains that "[t]he court shall dismiss a petition if the court determines that . . . [t]he petitioner's conviction was the result of a trial and the grounds for the petition could have been . . . [r]aised in a direct appeal or a prior petition for a writ of habeas corpus or post-conviction relief . . . unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner." *See also* NRS 34.724(2) (stating that a post-conviction petition is not a substitute for the remedy of a direct review); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) disapproved of on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999) (explaining that "claims that are

appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings"). NRS 34.810(2) requires the district court to dismiss "[a] second or successive petition if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." This Court finds the instant petition barred because it is successive to the prior post-conviction petition litigated by Chris Oram in 2012.

The State affirmatively pleaded laches in this case pursuant to NRS 34.800. A petition may be dismissed if delay in the filing of the petition prejudices the State in responding to the petition, unless the petitioner shows that the petition is based upon grounds of which the petitioner could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred; or prejudices the State in its ability to conduct a retrial of the petitioner, unless the petitioner demonstrates that a fundamental miscarriage of justice has occurred in the proceedings resulting in the judgment of conviction or sentence for delay in filing the petition. NRS 34.800(1). A period exceeding 5 years between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction creates a rebuttable presumption of prejudice to the State. NRS 34.800(2). This Court finds the instant petition barred because it is filed more than five years since the last penalty hearing and affirmance on appeal and the presumption of prejudice has not been rebutted.

As good cause, Chappell has alleged prior post-conviction counsel Chris Oram's ineffectiveness in raising the issue of penalty phase counsel David Schieck's failure to pursue Fetal Alcohol Syndrome in mitigation. A claim of ineffective assistance of counsel may serve to excuse a procedural default if counsel was so ineffective as to violate the Sixth Amendment. Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). 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 limited evidentiary hearing was conducted on April 6, 2018, at which prior post-conviction counsel Chris Oram testified as well as three expert witnesses on Fetal Alcohol Syndrome.

After listening to the testimony and reviewing the trial court record, this Court finds that Oram's performance in raising the Fetal Alcohol Syndrome issue in prior post-conviction proceedings was not deficient. Chris Oram did in fact assert trial counsel David Schieck's failure to seek additional evaluations specifically to address Fetal Alcohol Syndrome, even though Schieck had 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.

Dr. Lewis Etcoff, a Forensic Neuropsychologist with experience in assessing brain damage and learning disabilities in capital murder defendants, conducted a detailed psychological evaluation of Chappell which included a personality test, an intelligence IQ test, an academic achievement test, an interview and review of police and school records. Trial Transcript, 3-16-07, Morning Session, pp. 20-138. The jury heard that Chappell was in special education in elementary school and was classified as "severely learning disabled" and "emotionally handicapped" and tested with low IQ scores and low verbal skills. Chappell felt worthless, inadequate, guilt-ridden, sensitive to humiliation, dependent and mistrustful. He concocted fantasies of his girlfriend victim seeing other men and worked himself into a frenzy. While the jury did not hear testimony of the etiology of brain impairment, it did hear

this evidence of brain impairment. It does not matter why someone has brain impairment, it matters what the jury hears. Further, two of Chappell's siblings, older brother Willy and younger sister Mira, both testified that their mother had a drug problem. Trial Transcript, 3-19-07, pp. 239-63, 318-49. From all of this testimony, counsel was able to successfully argue to the jury that, "[h]is mother was addicted to drugs and alcohol, and it's quite possible that she was using either drugs and/or alcohol while she was pregnant." Trial Transcript, 3-20-07, p. 91. The jury then found as a mitigating circumstance that Chappell was born to a drug and alcohol addicted mother and "suffered a learning disability." The State did not argue against this mitigating evidence.

Judicial scrutiny of counsel's performance must be highly deferential. Strickland v. Washington, 466 U.S. 668, 688-90, 104 S.Ct. 2052 (1984). It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Id. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Id. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." Id.

There are "countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Harrington v. Richter, 131 U.S. 770, 131 S.Ct. 770, 788-89 (2011). "[R]elying on 'the harsh light of hindsight' to cast doubt on a trial" that took place many years ago "is precisely what Strickland . . . seek[s] to prevent." Id., 131 S.Ct. at 779. Moreover, "an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for remote possibilities." Id. Rare are the situations in which the "wide latitude

counsel must have in making tactical decisions" will be limited to any one technique or approach. Id. In a capital case, there are any number of hypothetical experts—specialists in psychiatry, psychology, ballistics, fingerprints, tire treads, physiology, or numerous other disciplines and sub disciplines—whose insight might possibly have been useful. Id. But counsel is entitled to formulate a strategy that is reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies. Id. Even if an expert theoretically could support a client's defense theory, a competent attorney may strategically exclude it, consistent with effective assistance, if such expert may be fruitless or harmful to the defense. Id. at 789-90.

To fairly assess counsel's performance, "[t]he reviewing court must try to avoid the distorting effects of hindsight and evaluate the conduct under the circumstances and from counsel's perspective at the time." Foster v. State, 121 Nev. 165, 170, 111 P.3d 1083, 1086-87 (2005). There is no requirement that trial counsel be clairvoyant. St. Pierre v. State, 96 Nev. 887, 892, 620 P.2d 1240, 1243 (1980). What appears by hindsight to be a wrong or poorly advised decision of tactics or strategy is not sufficient to meet the defendant's heavy burden of proving ineffective counsel. "Judicial review of a lawyer's representation is highly deferential, and a defendant must overcome the presumption that a challenged action might be considered sound strategy." State v. LaPena, 114 Nev. 1159, 1166, 968 P.2d 750, 754 (1998), quoting from Strickland, 466 U.S. at 689, 104 S.Ct at 2052 (1984). The role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978), *citing* Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977).

Certainly, in denying the motions for fetal alcohol experts in prior post-conviction proceedings, this Court faulted Oram's motions as "non-specific," "bare and conclusory," and found that the motions "failed to make any specific allegation as to what these experts and investigators would uncover that could possibly change the outcome of [the] case." FCL,

November 16, 2012, p. 5. But despite any shortcomings in the motions, this Court accepted as true the allegation that Chappell did in fact suffer from Fetal Alcohol Syndrome and still found that the failure to raise the argument did not amount to ineffective assistance of counsel. The denial of this claim was unanimously affirmed on appeal. Additionally, Chappell's claim that Oram ignored this Court's invitation to more fully support his motion for a FASD expert is not persuasive. Oram testified at the Evidentiary Hearing on April 6, 2018 that he chose to focus on another topic because while other issues were important too, he knew as a capital litigator "that if there are no aggravators you cannot sentence my client to death." HT at 28, 12-15.

Furthermore, this Court finds no reasonable probability that, but for counsel's alleged errors, the outcome of the proceedings would have been different. That a jury unanimously returned a death verdict for the second time in this case when only one aggravating circumstance remained demonstrates the aggravated nature and death quality of this particular murder. When the death sentence was previously overturned, additional mitigation evidence did not make a difference in the outcome of the case. While the testimony regarding Fetal Alcohol Syndrome which was presented at the evidentiary hearing was fascinating, the testimony was more explanatory of the etiology of the defendant's deficits, rather than being substantially different than that heard by the jury in the defendant's second penalty hearing. That Fetal Alcohol Syndrome may have been the cause of the defendant's psychological, emotional and learning deficits, the jury nonetheless did hear testimony concerning these deficits as reasons to mitigate against a penalty of death, recognized and found that the defendant was born to a drug and alcohol addicted mother, and "suffered a learning disability" as mitigating factors, but nonetheless found that they did not outweigh the aggravating factor.

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999), *citing*

Strickland, 466 U.S. at 687. In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. *See* Wong v. Belmontes, 558 U.S. 15, 27, 130 S. Ct. 383 (2009) (per curiam); Strickland, 466 U.S., at 693, 104 S. Ct. 2052. Instead, Strickland asks whether it is "reasonably likely" the result would have been different. Id., at 696, 104 S. Ct. 2052. The likelihood of a different result must be substantial, not just conceivable. Id., at 693, 104 S. Ct. 2052.

Under the Strickland standard, where the new evidence "would barely have altered the sentencing profile presented," there is no reasonable probability that the omitted evidence would have changed the sentence imposed and relief is unwarranted. Strickland v. Washington, 466 U.S. 668, 699-700, 104 S.Ct. 2052, 2071 (1984). There is no prejudice under Strickland where the new evidence is "merely cumulative" of the evidence actually presented. Wong v. Belmontes, 558 U.S. 15, 22-23, 130 S.Ct. 383, 387 (2009). In Wong v. Belmontes, the jury was "well-acquainted with Belmontes' background and potential humanizing features" such that "[a]dditional evidence on these points would have offered an insignificant benefit, if any at all." Id. The Court firmly rejected the simplistic "more-evidence-is-better" approach to assessing prejudice under Strickland. Id., 558 U.S. at 25, 130 S.Ct. at 389.

As discussed above, this Court is not persuaded that the new testimony regarding Fetal Alcohol Syndrome would have persuaded the jury in this case to vote for a non-death sentence. At best, additional evidence on Fetal Alcohol Syndrome would have served only to add a little more weight to a mitigating factor two prior juries had already found to be insufficient to overcome the death penalty. As was demonstrated by the prior reversal and renewed death sentence by another jury, simply adding more mitigation to the equation would have been inadequate to dissuade the jury from re-imposing the death penalty based on the record and egregious facts of this murder.

//

ORDER

Based on the foregoing, the instant petition is untimely, presumptively prejudicial, waived and abusive without good cause and prejudice to overcome the procedural defaults. The motion to dismiss the petition is granted.

DATED this 8th day of August, 2018.

CAROLYN ELLSWORTH
DISTRICT JUDGE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 8th of August, 2018 she served the foregoing Decision and Order by faxing, mailing, or electronically serving a copy to counsel as listed below:

Brad D. Levenson, Esq.
Federal Public Defender

Steven S. Owens
Chief Deputy District Attorney
Attorney for Plaintiff

Shelby Lopaze

SHELBY LOPAZE
JUDICIAL EXECUTIVE ASSISTANT, DEPARTMENT V

NEO

DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES M. CHAPPELL,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: 95C131341

Dept No: V

Death Penalty

NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PLEASE TAKE NOTICE that on August 8, 2018, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on August 17, 2018.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 17 day of August 2018, I served a copy of this Notice of Entry on the following:

☑ By e-mail:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:

James Chappell # 52338
P.O. Box 1989
Ely, NV 89301

Rene L. Valladares
Federal Public Defender
411 E. Bonneville, Ste 250
Las Vegas, NV 89101

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

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Attorneys for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES MONTELL CHAPPELL,

Petitioner,

v.

WILLIAM GITTERE, Warden, and ADAM PAUL LAXALT, Nevada Attorney General,

Respondents. [1]

Case No. 95C-131341
Dept. No. V

NOTICE OF APPEAL

(Death Penalty Habeas Corpus Case)

[1] Warden William Gittere is automatically substituted for former warden Timothy Filson pursuant to Nev. R. Civ. Pro. 25(d)(1).

NOTICE IS HEREBY GIVEN that the Defendant, James Montell Chappell, appeals to the Nevada Supreme Court from the Notice of Entry of Findings of Fact, Conclusions of Law and Order filed in this action on August 17, 2018.

DATED this 14th day of September, 2018.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ Brad D. Levenson
BRAD D. LEVENSON
Assistant Federal Public Defender
411 E. Bonneville Ave., Suite 250
Las Vegas, Nevada 89101
Phone: (702) 388-6577
Facsimile: (702) 388-5819

CERTIFICATE OF SERVICE

In accordance with EDCR 7.26(a)(4) and 7.26(b)(5), the undersigned hereby certifies that on the September 14, 2018, a true and accurate copy of the foregoing NOTICE OF APPEAL was filed electronically with the Eighth Judicial District Court and served by Odyssey EFileNV, addressed as follows:

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

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