IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 77002

JAMES MONTELL CHAPPELL

Appellant,

v.

WILLIAM GITTERE, Warden, and AARON FORD,
Nevada Attorney General,

Respondents.

Appeal from Order Dismissing Petition for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County
The Honorable Carolyn Ellsworth, District Judge

APPELLANT'S REPLY BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Howard Brooks, Willard Ewing, David Schieck, and Clark Patrick represented Chappell during the pretrial, trial, and sentencing proceedings in 1996 and 2007.
2. Howard Brooks, Michael Miller, and JoNell Thomas represented Chappell on direct appeal.
3. David Schieck and Christopher Oram represented Chappell during post-conviction proceedings and before this Court.

4. The Federal Public Defender, District of Nevada, represented Chappell during all subsequent proceedings.

DATED this 27th day of December, 2019.

/s/ *Brad D. Levenson*
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

State Statutes

Other

I. INTRODUCTION

In his opening brief, Chappell raised several meritorious arguments concerning constitutional violations during both the guilt phase and the penalty rehearing phase of his trial. And, recognizing that procedural rules disfavor successive petitions, Chappell also pleaded and established good cause and prejudice for the presentation of his claims in the instant petition. The State largely ignores Chappell's merits arguments which establish prejudice to overcome the procedural bars. Instead, the State focuses almost exclusively on other procedural arguments. But the State miscomprehends this Court's law on overcoming procedural bars, misstates the factual background of this case, and waives several arguments by not addressing them in the answering brief.

II. ARGUMENT

A. Chappell Has Established Cause and Prejudice to Excuse Procedural Bars

The State spends the majority of its answering brief challenging Chappell's arguments for cause and prejudice. But the State focuses primarily on Chappell's arguments under *Crump v. Warden*, ignoring

Chappell's argument that the trial court's actions during his initial post-conviction proceedings also provide cause to overcome procedural bars. Moreover, for the *Crump* arguments that the State does address, the State miscomprehends the law and misconstrues Chappell's opening brief. To be clear, ineffectiveness of initial post-conviction counsel—following both the guilt phase and the penalty rehearing—provides cause to overcome any procedural default of each claim that counsel, because of their ineffectiveness, failed to raise.

1. Ineffective assistance from initial guilt-phase post-conviction counsel establishes cause and prejudice

In his opening brief, Chappell argued that ineffectiveness from initial state post-conviction counsel, David Schieck,[1] established cause and prejudice to overcome any procedural default of his guilt-phase claims. Opening Brief (OB) 10–16 (citing *Crump v. Warden*, 113 Nev. 293, 304–05, 934 P.2d 247, 254 (1997)). But the State in its answering brief refuses to address this argument, insisting that it came nine years

[1] Schieck continued to represent Chappell during his penalty rehearing in 2005. For clarity, throughout this subsection, Chappell is referring to Schieck's effectiveness only during his role as Chappell's initial state post-conviction counsel.

too late. Answering Brief (AB) 9–16, 23, 32. The State is incorrect; Chappell argued Schieck's ineffectiveness at the first available opportunity.

There are three conceivable points at which Chappell could have argued Schieck was ineffective:

May 2, 2007	June 8, 2011	November 16, 2016
Within one year of remittitur following Chappell's first state post-conviction proceedings	Within one year of remittitur following direct appeal of Chappell's penalty rehearing	Within one year of remittitur following Chappell's second state post-conviction proceedings

Chappell, the State, this Court, and the district court all have agreed June 8, 2011, the second potential option, was not the appropriate time. Specifically, during Chappell's previous appeal, this Court explained that guilt-phase claims were not properly before it "because the proceeding at issue [was Chappell's] second penalty hearing." 3AA724. The district court similarly explained that "all claims regarding ineffective assistance of trial counsel, first penalty counsel, and first appellate counsel are procedurally barred or moot due to the

granting of a new penalty hearing." 3AA712. Finally, the State in its answering brief during this appeal conceded that counsel during the previous proceedings could not properly have raised guilt-phase claims. AB 14–15, 99–101.[2] And the State further acknowledged what this Court held in *Rippo v. State*—that petitions raising *Crump* arguments must be filed within one year of remittitur following a previous post-conviction petition, *not* direct appeal. *Id.* at 11–13 (citing *Rippo v. State*, 134 Nev. 411, 420–21, 423 P.3d 1084, 1096 (2019)).

The State disputes Chappell's argument, though, that the third option was the correct time to raise claims concerning Schieck's effectiveness. Instead, the State argues that Chappell should have pled Schieck's ineffectiveness by May 2, 2007—within one year of remittitur following Chappell's *first* state post-conviction proceedings. *Id.* at 9–15. But the State ignores one major problem with that argument—Schieck

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[2] Confusingly, in two other sections of the answering brief, the State asserts that counsel during the second state post-conviction proceedings *should have* raised guilt-phase claims. *Id.* at 18, 31–32. This conflicts with an entire section of the answering brief, *id.* at 9–15, and it is likely a mistake. In the event it is not a mistake, the State is still incorrect for the reasons below.

was still representing Chappell for his penalty rehearing, and would continue doing so, along with attorney JoNell Thomas, until September 2010. 1 Appellant's Reply Appendix (ARA) 7.[3] On May 2, 2007, Chappell had not even been formally sentenced. 1ARA1.

Courts universally agree that counsel cannot be expected to argue their own ineffectiveness. As this Court held in *Nika v. State*, requiring counsel in an ongoing representation to simultaneously "defend [his] own conduct" in earlier proceedings places both counsel and client "in an untenable position." 120 Nev. 600, 606–07, 97 P.3d 1140, 1145 (2004); *see also Christeson v. Roper*, 135 S. Ct. 891, 894 (2015) (explaining that counsel cannot reasonably be expected to "denigrate their own performance," as that action "threatens their professional reputation and livelihood"); *United States v. Del Muro*, 87 F.3d 1078, 1080–81 (9th Cir. 1996) (describing conflict as "actual" and "irreconcilable" when counsel had to present evidence of his own

[3] The State asserts that Schieck's representation of Chappell ended in 2007. But Schieck represented Chappell in his capacity as the Special Public Defender. A different member of the same office worked on Chappell's appeal, and Schieck did not ask to be relieved as counsel until 2010. *Id.* In any event, it is indisputable that Schieck was still making appearances for Chappell after May 2, 2007.

ineffectiveness). Schieck could not, then, have raised his own ineffectiveness while continuing to represent Chappell in his penalty rehearing. If, under the State's reading of *Rippo*, Schieck's performance as post-conviction counsel had to be challenged by May 2007, separate counsel should have been appointed to litigate a *Crump* petition raising guilt-phase claims—and alleging Schieck's ineffectiveness as good cause and prejudice to overcome the procedural bars—while Schieck was defending Chappell's penalty rehearing. Because separate counsel was not appointed, Schieck's conflict provides good cause to overcome procedural bars. *See Manning v. Foster*, 224 F.3d 1129, 1134–35 (9th Cir. 2000) (holding that attorney's conflict can provide good cause to overcome procedural default).

Chappell recognizes that in this scenario, he would still be required to raise his *Crump* arguments against Schieck at the first available opportunity. And he did so, with his 2016 state post-conviction petition. The district court and this Court did not allow Chappell to raise guilt-phase claims earlier, since "the proceeding at issue" during Chappell's second post-conviction proceeding was Chappell's "second

penalty hearing." 3AA724; *see* 3AA712. And Chappell's counsel at that time, Christopher Oram, was clearly ignorant of any responsibility on his part to raise guilt-phase claims, failing to do any investigation or consult any experts about guilt-phase claims.

In addition, for several reasons, it is problematic to require petitioners in Chappell's position to raise guilt-phase *Crump* arguments while also litigating their penalty rehearing. First, until the jury returned the verdict from the penalty rehearing, there was no final verdict to challenge in a state post-conviction petition. *See Johnson v. State*, 133 Nev. 571, 574, 402 P.3d 1266, 1272 (2017). Second, relatedly, because Chappell was not under a sentence of death at that time, it is unclear if the rules governing capital cases or non-capital cases—including the rules concerning appointment of counsel—would apply to him. *See id.* at 574–75, 402 P.3d at 1272–73 (explaining that bifurcated post-conviction proceedings would be "unworkable in practice, particularly in capital cases"). Third, simultaneous trial and post-conviction proceedings would be complicated in practice, with two sets of attorneys, experts, and investigators examining many of the same

issues. *See id.* Fourth, under this requirement, Oram would have been required to act as initial post-conviction counsel with respect to penalty-phase claims and *Crump* counsel with respect to guilt-phase claims. Requiring an attorney to raise claims in a petition that are in two different procedural phases does not comport with this Court's goal of preventing "piecemeal litigation that would further clog the criminal justice system." *Rippo*, 134 Nev. at 420–21, 423 P.3d at 1096; *see Johnson*, 133 Nev. at 574–75, 402 P.3d at 1272–73. The Court would have to apply different standards depending on whether the attorney was acting as a post-conviction attorney or *Crump* attorney for each claim raised in a petition. And fifth, the second option is essentially a random date under this Court's current caselaw, and this Court would have to overturn its precedent in *Rippo* to conclude that Oram should have raised *Crump* arguments related to Schieck.

Were this Court to choose that option, it would be unfair to apply the new rule retroactively to Chappell. Alternatively, the failure to provide Chappell with notice that he had to present his guilt-based claims would constitute "[a]n impediment external to the defense,"

which provides good cause for overcoming the procedural default. *Clem v. State*, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003).

Thus, the more reasonable reading of *Rippo* required Chappell to raise all of his *Crump* arguments in the same petition, within one year of remittitur following the second penalty-phase post-conviction proceedings. That date marks the end of the initial state post-conviction proceedings. And this option aligns most closely with this Court's goal in *Rippo* and *Johnson*—to bring clarity and simplicity to Nevada's system for challenging death sentences in post-conviction proceedings. *Rippo*, 134 Nev. at 420–21, 423 P.3d at 1096; *Johnson*, 133 Nev. at 574–75, 402 P.3d at 1272–73. And it prevents "piecemeal litigation that would further clog the criminal justice system," which this Court in *Rippo* and *Johnson* also sought to avoid. *Rippo*, 134 Nev. at 420–21, 423 P.3d at 1096; *Johnson*, 133 Nev. at 574–75, 402 P.3d at 1272–73. In sum:

May 2, 2007	June 8, 2011	November 16, 2016
Within one year of remittitur following Chappell's first post-conviction proceedings	Within one year of remittitur following direct appeal of Chappell's penalty rehearing	Within one year of remittitur following Chappell's second post-conviction proceedings
		
Inconsistent with *Nika* and *Rippo*; unnecessarily complex for reviewing court	Inconsistent with *Rippo*; piecemeal litigation	Consistent with *Rippo* and *Johnson*; simple rule for litigants and reviewing courts

As for Chappell's arguments specifically concerning Schieck's ineffectiveness, the State's only response is to admit that Schieck had much of the information he needed to investigate and raise the guilt-phase claims that Chappell now raises. AB 24, 50–51, 70, 101. Chappell agrees. By ignoring these red flags, Schieck provided ineffective assistance. *See Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 52–24 (2003); *Douglas v. Woodford*, 316 F.3d 1079,

1085 (9th Cir. 2003). The State has waived any additional argument challenging Schieck's effectiveness by not including it in the answering brief. *See Polk v. State,* 126 Nev. 180, 185–86, 233 P.3d 357, 360–61 (2010); *Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 671 n.7, 262 P.3d 705, 715 n.7 (2011); *Weaver v. State, Dep't of Motor Vehicles*, 121 Nev. 494, 502, 117 P.3d 193, 198–99 (2005).

Similarly, the State has waived any challenge to these underlying guilt-phase claims by relying solely on procedural default in its answering brief: Claim One (ineffective assistance of counsel during the guilt phase); Claim Two (unconstitutional guilt-phase jury instructions); Claim Six (unconstitutional guilt-phase jury selection under *Batson*); Claim Seven (unconstitutionally biased jury during the guilt phase); Claim Ten and Claim Twenty-Three (unconstitutional errors by the trial court during the guilt phase); Claim Eleven (innocence of burglary, robbery, and first-degree murder); Claim Fifteen (prosecutorial misconduct during the guilt phase); Claim Eighteen (potential jurors during the guilt phase not drawn from a fair cross-section of the community); Claim Twenty-One (convictions invalid because of

Nevada's system of electing judges); Claim Twenty-Four (convictions invalid because of unrecorded bench conferences); and Claim Twenty-Six (cumulative error during the guilt phase). In particular, the State fails to address anything other than procedural default on the portion of Claim One included as Section H in Chappell's opening brief. *See* AB 48–50. Because the State has waived merits-based challenges to these claims, Chappell relies on the arguments in his opening brief and will not further discuss these claims.

2. Ineffective assistance from initial penalty-phase post-conviction counsel and the district court's denial of resources establishes cause and prejudice

Chappell made two related arguments for cause to overcome procedural bars for his penalty-phase claims. The State ignores one of these arguments—that the district court's denial of resources provides cause to overcome procedural bars. OB 20–21. The State has consequently waived any challenge to this argument. *See Francis*, 127 Nev. at 671 n.7, 262 P.3d at 715 n.7; *Weaver*, 121 Nev. at 502, 117 P.3d at 198–99.

Chappell's second argument is that post-conviction counsel's ineffectiveness provides cause to overcome procedural bars. OB 16–20. The State concedes, as it must, that the current proceeding is the proper place to raise this argument. AB 8, 86 n.31, 98–99, 103. But the State responds only to two portions of Chappell's argument: that counsel was ineffective for "not properly requesting resources" and "not doing a variety of other extra-record investigation related to Appellant's neurological state." AB 101–02.

Turning first to counsel's request for resources, the State's derides Chappell's argument as "conclusory." AB 101. But Chappell explained in detail how counsel failed to support his request with any facts specific to this case, like evidence that Chappell's mother was addicted to drugs and alcohol, and that Chappell had been diagnosed with learning disabilities. As a result, the State was able to successfully argue that Chappell was simply on a "fishing expedition." 27–28AA6750–51. The State also contends that counsel was not ineffective because the district court's denial of counsel's motion made any additional efforts futile. This is circular. The district court denied

counsel's motions *because* they were deficient. Had counsel corrected those deficiencies, there is a reasonable probability a district court would have treated the motions differently, just as the same court did in these proceedings. *See* 27AA6706.

As for counsel's investigation into Chappell's "neurological state," the State contends this argument is barred by law of the case. AB 102. This Court previously determined there was no prejudice from trial counsel's failure to obtain a brain scan, since counsel had presented at the second penalty hearing evidence that Chappell "had a low IQ as well as cognitive deficits." 3AA00727. This is a different argument than the one Chappell makes now: that post-conviction counsel was ineffective for not investigating and consulting an expert on Fetal Alcohol Spectrum Disorder (FASD). *See Pellegrini v. State*, 117 Nev. 860, 888, 34 P.3d 519, 538 (2001) (explaining that law of the case applies to "issues previously determined").

More importantly, the doctrine of law of the case only bars relitigation of claims if the facts are "substantially the same." *Bejarano v. State*, 122 Nev. 1066, 1074, 146 P.3d 265, 271 (2006). The argument

this Court previously rejected had almost no factual support. In the district court, counsel's one paragraph request for an FASD expert said only that "Chappell's mother may have been addicted to drugs and alcohol," and that FASD could cause "physical problems and problems with behavior and learning." 16AA3883. His request for a brain scan, neurological testing, and investigator were no better. 16AA3880–85; 5AA1050. And, after the district court denied the deficient motions, counsel failed to investigate the claims on his own, either to correct the deficiencies or to create a better record for this Court's review. *See Ward v. Hall*, 592 F.3d 1144, 1159–61 (11th Cir. 2010) (affirming district court's conclusion that lack of funding did not excuse failure to obtain and present affidavits and testimony); *Dowthitt v. Johnson*, 230 F.3d 733, 758 (5th Cir. 2000) ("Dowthitt's arguments that lack of funding prevented the development of his claim are . . . without merit. Obtaining affidavits from family members is not cost prohibitive.").

Chappell's current claim, on the other hand, is based on expert reports, witness declarations, and a full day of testimony at an evidentiary hearing. That evidence shows that Chappell was exposed to

alcohol and drugs in utero (not just born to a mother addicted to drugs and alcohol). *See* 29–30AA7204–7369; 6–7AA1428–1549. And that exposure irreversibly damaged Chappell's developing brain, resulting in severe cognitive delays and adaptive deficits that are directly tied to his offenses. *See* 29–30AA7204–7369; 6–7AA1428–1549.

Critically, this information directly rebuts what this Court, without the benefit of expert testimony, assumed in its previous decision: that evidence of FASD added nothing to what the jury heard about Chappell's "low IQ" and "cognitive deficits." 3AA00727. As neuropsychologist Dr. Paul Connor explained, there is a difference between symptoms of brain damage and the cause of that brain damage, particularly when the symptoms are incorrectly linked to a personality disorder and drug addiction. *See Williams v. Stirling*, 914 F.3d 302, 317–19 (4th Cir. 2019) (concluding that counsel's failure to investigate and present evidence of FASD was prejudicial despite jury hearing evidence that petitioner had some symptoms of the disorder (mental illnesses and learning disabilities)); *Harris v. Pulley*, 885 F.2d 1354, 1381–83 (9th Cir. 1988) (nothing that the "ordinary citizen" would

not consider evidence of personality disorder as mitigation like other mental disorders). 30AA7760-61; 19AA4735-37, 4756-49, 20AA4751-54, 4762-64, 4767, 4772, 4815, 4828-29. And, as psychologist Dr. Natalie Brown explained—and other courts have recognized, *see Williams*, 914 F.3d at 317–19; *Bemore v. Chappell*, 788 F.3d 1151, 1172 (9th Cir. 2015); *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1999)—an expert would have been needed in 2007 to explain the devastating, lifelong effects of FASD, even had some of the jurors heard the label. 20AA7364-65; *see also* 20AA7324 (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"). Thus, this claim does not represent simply "a more detailed and precisely focused argument." *Hall v. State*, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). It instead includes necessary facts that were utterly lacking from Oram's motions, substantially changing the argument. *Compare Rippo*, 134 Nev. at 428, 423 P.3d at 1101 (concluding that law of the case did not bar claim when petitioner

pointed to new evidence not presented in previous proceeding), *and Hsu v. Clark County*, 123 Nev. 625, 630, 173 P.3 724, 729 (2007) (explaining that law of the case does not apply when "subsequent proceedings produce substantially new or different evidence"), *with Hall*, 91 Nev. at 315–16, 535 P.2d at 315–16 (barring claim under law of the case when petitioner simply sought to revive same claim with "a more detailed and precisely focused argument").

The State ignores the rest of Chappell's argument, which goes further than counsel's deficient performance concerning Chappell's "neurological state." Counsel did no extra-record investigation and consulted no experts, instead raising only record-based claims in a conclusory, deficient manner. This approach is antithetical to counsel's duties in a capital post-conviction proceeding, which require counsel to investigate constitutional violations that the cold record does not reveal. *See Martinez*, 566 U.S. at 13; *United States v. Benford*, 574 F.3d 1228, 1231 (9th Cir. 2009); *see also Hargrove v. State*, 100 Nev. 498, 502–03, 686 P.2d 222, 225 (1984) (explaining that "'bare' or 'naked' claims for relief, unsupported by any specific factual allegations" do not entitle

movant to relief). Indeed, "winning collateral relief in capital cases will require changing the picture that has previously been presented. The old facts and legal arguments are unlikely to motivate a collateral court." *Nash v. Ryan*, 581 F.3d 1048, 1054 n.9 (9th Cir. 2009) (quoting ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.1.1, cmt (2003)), *abrogated on other grounds by Ryan v. Gonzales*, 568 U.S. 57 (2013). As a result, counsel was unable to raise the meritorious claims that undersigned counsel developed. And counsel's failure was particularly obvious, as he at the same time was criticizing prior counsel for identical failures, 4–5AA965–1046. *See Johnson v. Mitchell*, 585 F.3d 923, 942 (6th Cir. 2009) (explaining that counsel's performance was "egregiously deficient" when he failed to investigate despite securing a second trial because of previous counsel's failures).

B. The Laches Doctrine Does Not Bar Review of Any of Chappell's Claims

Citing NRS 34.800, the State argues that the laches doctrine applies and bars Chappell's third habeas petition because it was filed, as the State claims, sixteen years after Chappell's conviction became

final and ten years after Chappell's death sentence became final. AB 95. Because the delay is not attributable to Chappell and he can rebut the presumption of prejudice, laches does not bar this Court's consideration of Chappell's claims.

1. Any delay in bringing these claims is not attributable to Chappell

As a threshold matter, the State's calculation of the time that has lapsed—sixteen years and ten years—is grossly exaggerated, overlooking the fundamental principle that a final sentence is a necessary component of a final valid judgment of conviction. *See Burton v. Stewart*, 549 U.S. 147, 156–57 (2007) (explaining that final judgment in a criminal case occurs when sentence is pronounced; where a defendant has been resentenced, the judgment becomes final after direct review of the resentencing); *Berman v. United States*, 302 U.S. 211, 212 (1937) ("Final judgment in a criminal case means sentence. The sentence is the judgment."). Thus, until Chappell's second death sentence was affirmed on direct appeal, a final judgment from which Chappell could have sought post-conviction relief was unavailable. Since remittitur from the direct appeal of Chappell's second death

sentence issued in 2010, only six years elapsed before Chappell filed his instant habeas petition.

The State attempts to distinguish *State v. Powell*, 122 Nev. 751, 758–59, 138 P.3d 453, 458 (2006), which held that the State was not entitled to dismissal because of laches because the delay in the filing of a habeas petition was not the petitioner's fault. Using the correct year when Chappell's conviction and sentence truly became final, *Powell* is virtually indistinguishable from the facts here. Just as in *Powell*, several years elapsed between Chappell's judgment of conviction and this Court's affirmance of his second death sentence. *See Powell*, 122 Nev. at 758, 138 P.3d at 458; *Burton*, 549 U.S. at 156–57. And, just as in *Powell*, this delay is not attributable to Chappell and should not serve as a basis for applying the laches doctrine to bar consideration of Chappell's claims. *See Powell*, 122 Nev. at 758, 138 P.3d at 458.

Moreover, this Court should not fault Chappell for any delays caused by initial state post-conviction counsel's ineffectiveness. The State wisely concedes that, pursuant to *Crump v. Warden*, laches does not bar claims arising from ineffective assistance of post-conviction

counsel following the penalty rehearing, Christopher Oram. AB 98. Although the State does not concede this point concerning the guilt-phase claims, the same rationale applies: under *Crump*, ineffective assistance of initial post-conviction counsel following Chappell's 1996 trial also constitutes good cause sufficient to overcome the laches bar for Chappell's guilt-phase claims. As explained above and the opening brief, OB 14–15, Chappell could not have raised his guilt-phase *Crump* arguments until his third post-conviction petition. Since Chappell filed that petition within one year of remittitur from denial of the prior post-conviction petition, the laches doctrine does not bar these claims. *See Rippo*, 134 Nev. at 420–21, 423 P.3d at 1095–1097.

Finally, several of Chappell's claims are based on "grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred." NRS 34.800; *see also Crump*, 113 Nev. at 305, 934 P.2d at 354; *State v. Riker*, 121 Nev. 225, 239, 112 P.3d 1070, 1079 (2005) (stating it was likely that the State would have been unsuccessful in pleading laches and prejudice "given [this Court's] determination that [the petitioner]

had established cause and prejudice under NRS 34.726 for the untimely filing of his petition").

2. Chappell can rebut the presumption of prejudice to the State

The State also contends that it would be prejudiced in retrying Chappell, AB at 97–98, but this contention is purely speculative. The State has successfully retried capital defendants decades after the crimes in those cases occurred. *See, e.g., Browning v. State*, 124 Nev. 517, 522, 188 P.3d 60, 64 (2008) (State retried a defendant in 2008 for a 1985 murder); *State v. Haberstroh*, 119 Nev. 173, 177, 69 P.3d 676, 679 (2003), *as modified* (June 9, 2003) (State retried a defendant in 2001 for a 1986 murder). The State does not contend that any witnesses are now unavailable. Even if they were, the State has retried capital defendants using transcripts where witnesses were unavailable because they had died. *See*, *e.g.*, *Browning*, 124 Nev. at 522, 188 P.3d at 64. Further, the State can use transcripts (and indeed anything) to refresh the recollections of any witnesses whose memories have faded. *See* NRS 50.125. As for lost evidence, the State produces not a single example of evidence that has been lost due to the passage of time. The State's

arguments as to why Chappell may not rebut the presumption of prejudice ring hollow.

Moreover, a retrial at this stage would be more reliable than Chappell's prior trial because Chappell has developed compelling evidence, including evidence that he did not possess the requisite intent for a first-degree murder conviction and significant evidence in mitigation. Chappell did not previously present this evidence because defense counsel were ineffective, rendering his convictions and death sentence unreliable. Since the State has no legitimate interest in upholding an unreliable conviction or death sentence merely because of the passage of time, the State is not prejudiced by the delay, if any, between his conviction and sentence becoming final and his current post-conviction petition. *See Berger v. United States*, 295 U.S. 78, 88 (1935) (the State's interest "in a criminal case is not that it shall win the case, but that justice shall be done").

C. Procedurally Barring Chappell's Claims Would Result in a Fundamental Miscarriage of Justice

In his opening brief, Chappell argued: (1) the only remaining aggravating factor is unsupported, OB 48–60; and (2) he was "actually

innocent" of robbery, burglary, and first-degree murder, OB 60–66. Chappell presented these arguments both as independent constitutional violations and as a reason to excuse procedural bars, since failure to consider his claims would amount "to a fundamental miscarriage of justice." *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001) (citations and internal quotation marks omitted). The State's responses to Chappell's innocence arguments are all unavailing.

1. Chappell is ineligible for the death penalty because there is no valid aggravating factor

Chappell's death sentence rests on a single aggravating factor: that the murder was committed in furtherance of a sexual assault. In his petition and opening brief, Chappell argued that this aggravating factor is constitutionally invalid for several reasons, including lack of evidence, ineffective assistance of counsel, and violations of the Confrontation Clause. *See* OB 46–60. These reasons are independent constitutional violations, and Chappell can overcome procedural default because he is on death row despite being ineligible for the death penalty. *See id.*

In its answering brief, the State first responds to this argument by insisting that this Court has already rejected it, and, thus, according to the State, it is barred by law of the case. AB 26–29. The State is wrong. On direct appeal from the penalty rehearing, Chappell argued that insufficient evidence supported the aggravating factor, since the evidence presented—lack of vaginal trauma, Panos being fully clothed during the stabbing, and a ten-year relationship—was consistent with a consensual sexual encounter. 17AA4098-99. Chappell's current argument is substantially different. *See Bejarano*, 122 Nev. at 1074, 146 P.3d at 271 (explaining that law of the case only applies if the facts are "substantially the same"). In addition to the problems pointed out by appellate counsel, Chappell has presented new arguments concerning misleading testimony from a medical examiner and a criminalist at the penalty rehearing, OB 51–55; the temporal proximity between Panos's killing and the alleged sexual assault, OB 55–56; Confrontation Clause violations that occurred during the penalty

rehearing, OB 57–58; and counsel's ineffectiveness in not requesting a jury instruction on mistaken consent, OB 59–60.[4]

The State next responds to Chappell's argument that the sole aggravating factor is invalid under *McConnell v. State*, 120 Nev. 1043, 1069–70, 102 P.2d 606, 624–25 (2004). OB 56–57. The State argues that the argument is waived, AB 30, insisting that it should have been raised on direct appeal. It *was* raised—and decided—on direct appeal. 3AA676-77. To the extent the State contends that Chappell waived this argument by not raising it on his first direct appeal, this Court previously rejected an identical argument, since "*McConnell* was not decided at the time Chappell filed his petition below," the "State has had an opportunity to address this issue on appeal during briefing and oral arguments," and the "interests of justice and judicial economy warrant resolving the issue." 3AA665.

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[4] Even if the doctrine of law of the case did apply, this Court has recognized that it can depart from the doctrine where a prior holding was "clearly erroneous," or the failure to do so would result in a fundamental miscarriage of justice. *Hsu*, 123 Nev. at 629–30, 173 P.3d at 728. Chappell's claims have merit, this Court's prior holdings were clearly erroneous, and this Court should grant relief to prevent a fundamental miscarriage of justice.

The State also contends that the argument is barred by law of the case. AB 30. The State is correct that this Court rejected a *McConnell* argument on direct appeal from Chappell's penalty rehearing. 3AA676-77. It did so because the State, changing course from its pre-*McConnell* arguments, insisted that sexual assault in this case was separate from the homicide. 24AA5981. If that is true, then the sexual assault did not occur "immediately before, during or immediately after" the killing, NRS 200.033(13), and it still is not a valid aggravating factor. This Court has not addressed the incompatibility between *McConnell* and NRS 200.030(13) in Chappell's case, and law of the case consequently does not bar this Court's consideration.

Next, the State addresses Chappell's argument that trial counsel, specifically David Schieck and Clark Patrick, were ineffective for failing to request a jury instruction on mistaken consent, a defense to the crime of sexual assault. AB 31–32. The State says only that this argument is procedurally barred. For the reasons provided above, this claim is not procedurally barred.

Finally, the State addresses Chappell's Confrontation Clause argument. AB 32–33. First, for the reasons provided above, this claim is not procedurally barred. Second, the State contends that it is foreclosed by caselaw from the United States Supreme Court: *Williams v. Illinois*, 567 U.S. 50 (2012). The State is wrong. "The Supreme Court's fractured decision in *Williams* provides little guidance and is of uncertain precedential value because no rationale for the decision—not one of the three proffered tests for determining whether an extrajudicial statement is testimonial—garnered the support of a majority of the Court." *State v. Dotson*, 450 S.W.3d 1, 68 (Tenn. 2014); *see State v. Michaels*, 95 A.3d 648, 666 (N.J. 2014); *see also Stuart v. Alabama*, 139 S. Ct. 36, 36–37 (2018) (Gorsuch, J., joined by Sotomayor, J., dissenting from the denial of cert.) (citing with approval cases explaining *Williams's* uncertain precedential value). And, even had the opinion garnered a majority of the United States Supreme Court, the facts of Chappell's case are distinguishable: unlike in *Williams*, Chappell had already been arrested and charged when Cellmark tested the DNA evidence. *See Williams*, 567 U.S. at 84. As Justice Gorsuch later

explained, eight of the nine justices on the Supreme Court when *Williams* was decided would have agreed that "a forensic report qualifies as testimonial . . . when it is 'prepared for the primary purpose of accusing a targeted individual' who is 'in custody [or] under suspicion.'" *Stuart*, 139 S. Ct. at 37 (Gorsuch, J., joined by Sotomayor, J., dissenting from the denial of cert.) (quoting *Williams*, 567 U.S. at 84) (alteration in original); *see State v. Hutchison*, 482 S.W.3d 893, 911 (Tenn. 2016); *Dotson*, 450 S.W.3d at 69; *Young v. United States*, 63 A.3d 1033, 1043–44 (D.C. 2013).

The State also argues that any Confrontation Clause violation is harmless because the testimony admitted in violation of the Confrontation Clause was cumulative to Chappell's testimony. AB 33. The State is wrong. Chappell stipulated to engaging in *consensual* intercourse with Panos. 4AA820–21. The DNA evidence was used to support the State's argument that Chappell engaged in *nonconsensual* intercourse with Panos. "[B]ut for [this] constitutional error, no reasonable juror would have found [Chappell] death eligible." *Pellegrini*

v. State, 117 Nev. at 887, 34 P.3d at 537. The Confrontation Clause violation justifies a new penalty hearing.

2. Chappell's innocence of burglary and robbery justify this Court's consideration of the merits of his claims

In his opening brief, OB 60–63, Chappell argued that, because he lived in the trailer with Panos, he was innocent of burglary, *see State v. White*, 130 Nev. 533, 538–40, 330 P.3d 482, 485–86 (2014), and, because he took Panos's property as an afterthought to the killing, he was innocent of robbery, *see Nay v. State*, 123 Nev. 326, 333, 167 P.3d 430, 435 (2005). Chappell was nevertheless convicted of both crimes because of constitutional violations occurring during the guilt phase. This Court's refusal to consider these claims, consequently, would result in a fundamental miscarriage of justice. *See Pellegrini v. State*, 117 Nev. at 887, 34 P.3d at 537.

The State contends that this Court has previously rejected these arguments, and, thus, according to the State, the claims are barred by law of the case. AB 34. However, the opinion concerning the burglary conviction is from 1998, 3AA644, and this Court's opinion in *White* was issued in 2014. Because *White* is in "intervening change in controlling

law," the doctrine of law of the case does not apply. *Hsu*, 123 Nev. at 630, 173 P.3d at 729. *White*, however, *does* apply—it is a substantive decision that applies retroactively. *See Clem v. State*, 119 Nev. 615, 628, 81 P.3d 521, 530–31 (2003); *Colwell v. State*, 118 Nev. 807, 820, 59 P.3d 463, 472 (2002). And further, Chappell's claim is supported by new and different evidence, *see* 7AA1733–34 (Decl. of Clare McGuire); 7AA1588–89 (Decl. of Wilfred Gloster); 16AA3877–78 (City of Las Vegas Municipal Court mailer); 17AA4219 (Decl. of Rosemary Pacheco); 17AA4223 (Decl. of Dina Richardson), which substantially changes its nature. *See Bejarano*, 122 Nev. at 1074, 146 P.3d at 271. Similarly, this Court decided *Nay* in 2005—a decision that also applies retroactively. Therefore, Chappell's innocence of burglary and robbery justifies this Court's renewed consideration of these claims and reversal of the convictions and death sentence.

The State also challenges Chappell's argument that he is innocent of burglary and robbery under the Double Jeopardy Clause. AB 36–37. The State first argues that this claim is waived because appellate counsel failed to raise it on direct appeal. Appellate counsel was

ineffective for failing to challenge these convictions. As for the merits, the State argues that this Court correctly interpreted Nevada statutes in deciding that the legislature intended cumulative punishments for felony murder and underlying felonies. *See Talancon v. State*, 102 Nev. 294, 300, 721 P.2d 764, 768 (1986). But the United States Constitution requires "a clear indication of . . . legislative intent," *Whalen v. United States*, 445 U.S. 684, 692 (1980), and neither this Court nor the State has pointed to that clear indication in the Nevada statutes. Finally, the State attempts to dismiss the entire argument because success on this claim would not vacate Chappell's murder conviction or death sentence. Post-conviction proceedings represent Chappell's opportunity to challenge each of his convictions, not just first-degree murder.

3. Chappell's innocence of first-degree murder, and thus the death penalty, meets the miscarriage-of-justice standard

For the same reasons that Chappell is innocent of burglary and robbery, he is innocent of felony murder. And Chappell is additionally innocent of premeditated and deliberate murder. *See* below. But the State avoids addressing Chappell's innocence of first-degree murder by

misconstruing Nevada's miscarriage-of-justice standard. According to the State, Chappell's cannot be "actually innocent" if he is guilty of second-degree murder or manslaughter. AB 35–36. This is wrong on multiple levels.

First, most obviously, if Chappell is guilty of second-degree murder but is factually innocent of first-degree murder (because he lacked the necessary *mens rea* to commit first-degree murder), then he is ineligible for the death penalty. *Compare* NRS 200.030(4) *and* NRS 200.030(5). This fact alone justifies excusing any procedural bars to Chappell's claims. *See Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001) (holding the miscarriage-of-justice standard can be "met where the petitioner makes a colorable showing he is . . . ineligible for the death penalty").

Second, the State equates first-degree murder, second-degree murder, and voluntary manslaughter, by suggesting that innocence of the *mens rea* element does not equate to innocence of the crime itself. AB 35. This could not be further from the truth. By statute, the legislature defines what facts are necessary to render one "guilty" of a

crime. Perhaps the most critical element of a crime—the element distinguishing first-degree murder from other killings—is the *mens rea* requirement. *See Finger v. State*, 117 Nev. 548, 555, 27 P.3d 66, 71 (2001) (explaining that "a 'crime' involves something more than just the commission of a particular act, it also involves a certain mental component"); *see also* Elizabeth Bennett, *Neuroscience And Criminal Law: Have We Been Getting It Wrong For Centuries And Where Do We Go From Here?*, 85 Fordham L. Rev. 437, 437–38 (2016). Simply put, physical actions alone do not make one guilty of the crime if the accused did not also harbor the necessary mental state. *See Morissette v. United States*, 342 U.S. 246, 250 (1952). In other words, a person who did not harbor the mental-state element necessary for a crime is factually innocent of that crime—the facts simply do not meet the statute's definition, no matter if that person is nonetheless guilty of a different, or lesser, crime. Accepting the State's argument that Chappell is guilty no matter what his mental state was would undermine the fundamental tenets of the criminal justice system.

D. The Merits of Chappell's Claims Support His Arguments for Cause and Prejudice

In his opening brief, Chappell argued that each claim in his petition is meritorious, as the merits of claims are intertwined with the analysis for cause and prejudice. *See Rippo*, 134 Nev. at 423–24, 423 P.3d at 1098; *accord Clabourne v. Ryan*, 745 F.3d 362, 377 (9th Cir. 2014). The State responds to most of these arguments in a conclusory manner, insisting without support that each is procedurally barred. The few arguments the State makes on the merits are also unavailing.

1. Defense counsel were ineffective for failing to investigate and present evidence of Chappell's brain damage caused by prenatal exposure to alcohol

In Claims One and Three of his petition, Chappell argued that trial counsel were ineffective for failing to present evidence of Chappell's FASD. *See* OB 22–47. The State responds that this claim is procedurally barred, as "information about [Chappell's] mother abusing drugs and alcohol while pregnant" was available "throughout the twenty-plus year history of this case." AB 23–24. That is exactly the point. State post-conviction counsel was ineffective for failing to investigate red flags in the record showing that Chappell likely has

FASD. *See Rompilla*, 545 U.S. at 387; *Wiggins*, 539 U.S. at 524–25; *Douglas*, 316 F.3d at 1085. This ineffective assistance provides good cause to overcome procedural default. *See Rippo*, 134 Nev. at 422–24, 423 P.3d at 1097–98; *Crump*, 113 Nev. at 304–05, 934 P.2d at 254. And because the underlying claim of ineffective assistance of trial counsel is meritorious, Chappell can also establish prejudice. *See Rippo*, 134 Nev. at 422–24, 423 P.3d at 1097–98; *Crump*, 113 Nev. at 304–05, 934 P.2d at 254.

The State further argues that this claim is foreclosed by law of the case. AB 24. For the reasons given above, the doctrine of law of the case does not bar this claim.

2. The State exercised peremptory challenges in a racially biased manner

In his opening brief, OB 66–89, Chappell argued that the State violated the Equal Protection Clause by striking potential jurors because of their race during both the guilt phase and penalty rehearing. *See Flowers v. Mississippi*, 139 S. Ct. 2228, 2239 (2019); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Williams v. State*, 134 Nev. 687, 689–96, 429 P.3d 301, 305–10 (2018). The State separately replies to Chappell's

arguments concerning the guilt phase and the penalty phase. Neither of the State's arguments are persuasive.

a. Guilt phase

First, for the guilt phase, the State argues that Chappell's claim is barred by law of the case. AB 38. The State is incorrect; this Court can depart from a prior holding "when subsequent proceedings produce substantially new or different evidence." *Hsu*, 123 Nev. at 630, 173 P.3d at 729–30. That is precisely what happened here.

At trial, the State urged three reasons for exercising peremptory challenges to strike two Black jurors: both challenged jurors were equivocal regarding capital punishment, one juror's religious views potentially conflicted with her duty as a juror, and the other juror hesitated before answering the State's questions on voir dire. OB 68–76. On direct appeal, however, appellate counsel only challenged the first reason. 8AA1886–87. All three reasons the State gave were pretextual. In addition, appellate counsel failed to argue that the State's questioning of the two Black jurors lasted considerably longer than those of similarly situated White jurors. Chappell's argument now is

thus substantially different. *See Hsu*, 123 Nev. at 630, 173 P.3d at 729–30.

Moreover, even if law of the case did apply, this Court has recognized that it can depart from the doctrine when a prior holding was "clearly erroneous," or when the failure to do so would result in a fundamental miscarriage of justice. *Hsu*, 123 Nev. at 629–30, 173 P.3d at 728; *accord Arizona v. California*, 460 U.S. 605, 618 n.8 (1983). Here, as discussed in detail in the opening brief, from a comparative juror analysis, it is clear the State exercised its peremptory challenges to exclude both potential Black jurors based upon their race. Bourne and Marshall were no more equivocal about capital punishment than White potential jurors. OB 68–73. Prospective juror Marshall's religious views did not prevent her from considering the death penalty in Chappell's case any more than similarly situated White jurors. OB 73–75. And the prosecutor's explanation that prospective juror Bourne "hesitated" before answering questions did not distinguish her from other White jurors. OB 75–76. Thus, the State's "race-neutral" justification for excusing the two prospective jurors was purely pretextual. As a result,

this Court should revisit its prior holding and grant Chappell a new trial. *See Batson*, 476 U.S. at 86, 91; *Williams*, 134 Nev. at 689–96, 429 P.3d at 305–10.

b. Penalty rehearing

As for the racially based peremptory strikes during the penalty rehearing, the State argues that a *Batson* challenge at trial would have been unsuccessful, given the potential jurors' answers on the jury questionnaires. AB 39–41. But the State ignores the most crucial aspects of Chappell's argument—both potential jurors were rehabilitated during voir dire—to the same extent as White jurors whom the State did not strike—and both expressed favorable views to the State. *See Flowers*, 139 S. Ct. at 2243.[5]

The State first points to two statements made by Potential Juror Mills on the questionnaire: that her son's experience in the criminal justice system "could affect her ability to be fair," and that she was

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[5] The State labels Chappell's comparative juror analysis as "flimsy," AB 40, but argues only that Chappell's situation is not exactly the same factually as other cases. No two cases are exactly the same, but the law is nevertheless clearly established—prosecutors cannot use pretext to unconstitutionally dismiss prospective jurors based on race. *See Flowers*, 139 S. Ct. at 2234; *Batson*, 476 U.S. 79.

"angry at first with the lawyers and the judge" from her son's trial. AB 40. However, when the prosecutor asked Mills to expand on her statement, Mills replied that she would "want[] to see the facts and see how strong [the case] is and how it happened. 16AA3960 at 117. She also confirmed that she was able to set aside her feelings and consider Chappell's case fairly and impartially. In fact, Mills pointed out that her poor opinion of lawyers and judges only existed "at the time" of her son's case. 16AA3959–60. And crucially, as Chappell pointed out in his opening brief, Mills was not alone in these views. OB 80. She was, however, the only prospective juror struck because of them; the other cynical jurors were White. *See* OB 80; 21AA5107 at 54–55 (Juror Forbes); 22AA5284 (Juror Bundren); 21AA5229; 16AA3390 at 238 (Juror Morin); 21AA5239 (Juror Kaleikini-Johnson).

The State also points out that Mills wrote she would "probably" be affected if "the evidence shows that the victims in this case are of a different racial background than the accused." 21AA5186; AB 40. On voir dire, however, Mills did not remember writing that answer and told defense counsel she would not have a problem if Chappell was a

different race than the victim. 16AA3960 at 120. Again, other jurors, who were White, made similar comments but were not stricken by the prosecutor. 22AA5306–07 (Juror Forbes); 22AA5340 (Juror Feuerhammer).

With regard to Prospective Juror Theus, the State relies on Theus's expression in the questionnaire of religious and moral opposition to the death penalty. AB 40; 22AA5351–52. But, in that same questionnaire, she denied holding "any strong moral or religious views about the death penalty." 22AA5352. Theus also stated that although she was personally opposed to the death penalty, she would be able to impose it. 16AA3976 at 182, 184; 16AA3977 at 186, 3979. And, just as with Prospective Juror Mills, White jurors who expressed similar views were not removed by the prosecution. 21AA5106 at 52; 22AA5340–41 (Juror Feuerhammer); 22AA5361, 5363; 21AA5110–11 (Juror Scott); 21AA5124 at 123–24; 22AA5373–74 (Juror Stalye); 22AA5428–29 (Juror Noahr); *see* OB 85–86.

In sum, counsel's failure to raise a *Batson* objection at trial, on appeal, or during initial post-conviction proceedings amounted to

prejudicial, deficient performance, *see Eagle v. Linahan*, 279 F.3d 926, 938–43 (11th Cir. 2001); *Hollis v. Davis*, 941 F.2d 1471, 1476-79 (11th Cir. 1991); *Mitchum v. Davis*, 103 F. Supp. 3d 1091, 1104–20 (N.D. Cal. 2015), and Chappell is entitled to a new penalty hearing.

3. Trial counsel were ineffective for failing to present abundant evidence of Chappell's childhood trauma and losses

In Claim Three of his petition, Chappell argued that trial counsel were ineffective in investigating and presenting evidence of Chappell's traumatic upbringing during the penalty phase. The State responds by pointing out that the jury found seven mitigating factors, which correspond in part to the mitigating evidence developed by undersigned counsel. AB 42–43. True enough, at least one juror was sufficiently persuaded by counsel's scant mitigation presentation to write out seven mitigating factors on the verdict form. 4AA00916–17. But it's the weight of mitigating factors that matters, not the number. *See McConnell v. State*, 120 Nev. 1043, 1070, 102 P.3d 606, 625 (2004); *State v. Haberstroh*, 119 Nev. 173, 184, 69 P.3d 676, 683 (2003), *as modified* (June 9, 2003); *see also Wiggins*, 539 U.S. at 534–37

(explaining that post-conviction prejudice analysis involves "reweigh[ing] the evidence in aggravation against the totality of available mitigating evidence"). Had counsel performed effectively, they would have presented enough evidence that the numerous mitigating factors would not have been outweighed by the sole aggravating factor. *See, e.g.*, *Rompilla*, 545 U.S. at 378, 381–93 (concluding counsel's performance during penalty phase was deficient despite counsel's nonminimal efforts and the jury's finding of two mitigating factors); *Doe v. Ayers*, 782 F.3d 425, 448–49 (9th Cir. 2015) (same despite evidence during penalty phase of physical abuse during childhood).

The State first compares evidence of Chappell's family history of substance abuse and mental illness to the jury's finding that Chappell's "mother was addicted to drugs and alcohol." AB 43. The jury's finding, however, says nothing about intergenerational substance abuse prevalent among Chappell's other family members, let alone mental illness. *See White v. Ryan*, 895 F.3d 641, 659–60, 666–70 (9th Cir. 2018) (concluding counsel's performance was deficient for, among other problems, not investigating family history of addiction and abuse);

Saranchak v. Sec'y, Pa. Dep't of Corr., 802 F.3d 579, 587, 595–96 (3d Cir. 2015) (similar). Instead, the jury based this finding on only a handful of isolated references to drug use by Chappell's mother. 18AA4295 at 255–56, 4316 at 340. When compared to what effective counsel would have uncovered—addiction, cognitive delays, and mental illness throughout Chappell's family—counsel's presentation did not come close. *See Lambright v. Schriro*, 490 F.3d 1103, 1121 (9th Cir. 2007) (explaining that courts considering prejudice under *Strickland* must "evaluate whether the difference between what was presented and what could have been presented is sufficient to 'undermine confidence in the outcome' of the proceeding" (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

The State next contends that evidence of Chappell's abuse, neglect, and loss is the same as the jury's finding that Chappell "was physically abused as a child." AB 43. There is a substantial difference, however, between testimony about "spankings" and "whoopings," 19AA4576; 20AA4784–85; 18AA4292–94 at 243, 248–49, 4300 at 273, 4312 at 324, 4317 at 344, and evidence of a childhood of severe beatings,

emotional and physical neglect, and traumatic, violent deaths of caregivers. *See Porter*, 558 U.S. at 41–44 (concluding petitioner was prejudiced by counsel's failure to present evidence of physical abuse); *Rompilla*, 545 U.S. at 390–93 (same when counsel failed to present evidence of neglect, intellectual disability, and maternal alcoholism); *Wiggins*, 539 U.S. at 534–38 (same when counsel failed to present evidence of "excruciating life history"). This difference is in fact emphasized by the State's argument at trial, suggesting to the jury that the behavior of Chappell and his siblings required a stern response from their grandmother. 20AA4787–88 (characterizing testimony about grandmother's discipline as "describ[ing] about every parent out there" and caused by having "[g]ood days and bad days"); 18AA4304–06 at 291–97, 4317–18 at 342–45 (skeptically questioning mitigation witnesses about grandmother's methods of discipline); 20AA4938–39 at 60–61 (ridiculing mitigation argument about abuse and neglect).

The State then argues that evidence of Chappell's childhood in poverty is equivalent to the jury's finding that Chappell "was raised in a depressed housing area." AB 43. The jury heard that Chappell was

raised in a "low income" neighborhood, with some well-kept houses, some vacant or rundown houses, lots of families, and drug availability. 18AA4293 at 248, 4294 at 250-51, 4303-04 at 288-91, 4307 at 304, 4312 at 322-53, 4319-20 at 352-53. But the income level of the neighborhood did not tell the full story; the jury did not hear about the violence or environmental contamination that pervaded the neighborhood Chappell grew up in. *See Debruce v. Comm'r, Alabama Dep't of Corr.*, 758 F.3d 1263, 1269–78 (11th Cir. 2014); *Robinson v. State*, 95 So. 3d 171, 180 (Fla. 2012).

Next, the State compares the evidence counsel should have presented about brain damage to the jury's finding that Chappell "had a learning disability." AB 43–44. But brain damage and learning disabilities are not the same, particularly when those learning disabilities are characterized as Chappell being "psychologically disturbed," "slow," "not overly bright," and lazy. 18AA4373–74; 19AA4731, 4735, 4749; 20AA4929 at 23–24; *see* OB 104. In addition, the testimony about Chappell's learning struggles told the jury nothing about either the cause of those struggles or the effect on Chappell's

adult behavior. Evidence about FASD, on the other hand, "could have established *cause and effect* for the jury." *Williams*, 914 F.3d at 318. Specifically, the jury would have heard that Chappell's brain was damaged in utero, not through adolescent and adult drug use. And the jury would further have heard about the lifelong consequences of that brain damage—consequences directly relevant to both the killing of Deborah Panos and Chappell's other bad acts. *See Rompilla*, 545 U.S. at 391; *Williams*, 914 F.3d at 317–19.

Finally, the State argues that evidence Chappell used drugs as an escape was adequately presented, since the jury found that he "suffered from substance abuse." AB 44. But merely telling the jury that Chappell was an addict is fundamentally different than explaining to the jury *why* Chappell was an addict—the poverty, abuse, and predisposition to addiction that caused Chappell to turn to drugs at an early age. *See Canaan v. McBride*, 395 F.3d 376, 386 (7th Cir. 2005); *Doss v. State*, 19 So. 3d 690, 707–08 (Miss. 2009); *Orme v. State*, 896 So. 2d 725, 733–35 (Fla. 2005).

When viewed together, the mitigating evidence counsel should have presented during the penalty rehearing paints Chappell in a different light. *See Williams v. Taylor*, 529 U.S. 362, 397–98 (2000) (instructing courts to "evaluate the totality of the available mitigation evidence" in determining prejudice); *White*, 895 F.3d at 670–71 (concluding state court's decision was "contrary to *Strickland* because the court analyzed prejudice separately for each of 12 different types of mitigating evidence"). Chappell was not simply a misbehaving youth experimenting with drugs and deserving of corporal punishment; he was an abused, neglected, brain-damaged child who turned to drugs as an escape from the poverty he grew up in. Had the jury heard this evidence, there is a reasonable probability of a different outcome. *See Wiggins*, 539 U.S. at 534; *White*, 895 F.3d at 670–71.

4. Defense counsel were ineffective for failing to present critical expert testimony

In his opening brief, OB 106–12, Chappell argued that counsel during both the guilt phase and penalty rehearing were ineffective for failing to investigate and present expert testimony on neuropharmacology and trauma. *See Hinton v. Alabama*, 571 U.S. 263,

273 (2014); *Duncan v. Ornoski*, 528 F.3d 1222, 1235 (9th Cir. 2008). Ineffective assistance of state post-conviction counsel and the district court's denial or resources provides good cause for excusing procedural default of this claim. *See Rippo*, 134 Nev. at 420–21, 423 P.3d at 1093, *Crump*, 113 Nev. at 304–05, 934 P.2d at 254. But the State nevertheless argues that this claim is procedurally barred. The State is wrong.

First, the State contends that "overwhelming evidence" during the guilt phase necessarily defeats any claim of ineffectiveness. AB 45. True enough, there was "overwhelming evidence" that Chappell killed Panos—he admitted as much on the stand. 14AA3278–3381. But the evidence that Chappell was guilty of first-degree murder was far from overwhelming. Chappell, a brain-damaged man addicted to crack cocaine, killed Panos in a fit of jealous rage—supporting a conviction for second-degree murder or voluntary manslaughter, but not first-degree murder. *See* NRS 200.030, 200.050; *Ewish v. State*, 111 Nev. 1365, 1367, 904 P.2d 1038, 1039 (1995). The reason Chappell was convicted of first-degree murder and not a lesser offense was due to counsel's ineffectiveness in not presenting expert testimony, showing that

Chappell was predisposed to abuse drugs and alcohol from birth, and once addicted he had little ability to control his impulses. *See* 7AA1554–55, 1568 (Report of Jonathan Lipman, Ph.D.); *see also* 9AA2114 ¶¶ 5, 8. Had the jurors heard this evidence, there is a reasonable probability that the jury would have voted for a lesser conviction.

As for the penalty rehearing, the State asserts in a conclusory manner that counsel were "extremely effective" because at least one juror found seven mitigating factors, and, thus, Chappell cannot show prejudice. AB 45. Had counsel been "extremely effective," the jury would not have returned a death sentence, as expert testimony, especially when combined with the mitigating evidence uncovered by undersigned counsel, would have explained and given context to Chappell's bad acts. For example, the jury heard that Chappell stole from his children, but did not hear that Chappell's genetic, in utero, and environmental predisposition to drug addiction caused him to steal out of desperation to avoid withdrawal. 15AA3672–73; *see also* 5AA1247 ¶2; 13AA3246; 19AA4673–74 at 84–85; 18AA4496 at 147–48. And the jury heard some

isolated episodes of Chappell's traumatic upbringing, but heard nothing about the effects trauma has throughout an individual's life. 10AA2293.

Similarly, the State contends that expert testimony would have been cumulative to "the large amount of experts [Chappell] did proffer." AB 46. Inquiries about counsel's effectiveness do not depend on whether counsel hired any expert. *See, e.g., Williams*, 914 F.3d at 314–17 (concluding trial counsel's failure to recognize, investigate, and present FASD evidence in mitigation constituted deficient performance despite the hiring of four other experts); *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). Moreover, counsel did not even properly prepare the experts he did hire. 19AA4568, 4578-84; 19-20AA4724-25, 4781-83, 4786-87, 4799-05; 6AA at ¶¶9, 10, 12. And, again, none of

those experts was qualified to explain to the jury the impact of addiction, intoxication, and trauma.

In sum, counsel during both the guilt and penalty rehearing presented only snippets of Chappell's history, which the State was able to effectively undermine. Presenting testimony from experts who were knowledgeable about Chappell's struggles and genetic predisposition to drug and alcohol abuse would have combatted the State's arguments. There is a reasonable probability that at least one juror, after hearing this expert testimony, would have struck a different balance. *See Wiggins*, 539 U.S. at 537.

5. Trial counsel were ineffective for failing to adequately prepare witnesses

In Claims One and Three of the petition, Chappell argued that counsel during both the guilt trial and the penalty rehearing were ineffective for not preparing several lay and expert witnesses to testify. The State ignores the guilt-phase portion of this claim. As for the penalty phase, the State has three responses, all factually incorrect.

The State first asserts that Chappell did not allege ineffectiveness from state post-conviction counsel as cause to excuse procedural default

of this claim. AB 47. But Chappell clearly argued in his opening brief that post-conviction counsel was ineffective following the penalty rehearing for not presenting the "meritorious penalty-phase claims raised in these state post-conviction proceedings." OB 20.

The State next contends that including this claim in the previous petition would have been futile because, according to the State, this Court had already rejected it. AB 47. But this Court in the previous proceedings did not address Chappell's current argument concerning counsel's deficient preparation of lay witnesses. *See Bejarano*, 122 Nev. at 1074, 146 P.3d at 271.

As for that portion of the claim relating to lay witnesses, the State argues that it is inadequately briefed. AB 47–48. But the State cites only Chappell's conclusion, not his analysis. Preceding that conclusion, Chappell cites to the declarations of Benjamin Dean, Charles Dean, Fred Dean, Myra Chappell-King, and Willie Richard Chappell, Jr., which all note that counsel did not adequately prepare them before their testimony. OB 116. And Chappell additionally argues that counsel were deficient in preparing him to testify during the guilt phase

(testimony that was read to the jury during the second penalty hearing). OB 116.

6. Jury issues during the guilt phase and penalty rehearing violated Chappell's constitutional rights

The juries that convicted Chappell and sentenced him to death included biased jurors who were not selected from a fair cross-section of the community. OB 125–37. The State argues that this claim is procedurally barred, AB 50, but Chappell has established good cause and prejudice to overcome procedural default.

The State focuses the majority of its argument on prejudice. AB 52–57. Turning first to Juror Fittro during the guilt phase, the State insists that statements during voir dire cured the prejudice he demonstrated in his juror questionnaire. AB 52–53. Just the opposite—Juror Fittro *repeated* during voir dire the same biased views he included in his questionnaire. 11AA2549–50. Thus, Juror Fittro was actually biased against Chappell due to Chappell's race. Moreover, Juror Fittro's viewed rendered him impliedly biased—the nature of his biases rendered him unqualified to serve on the jury, as a matter of law, regardless of any assurances he could be fair. *See Dyer v. Calderon*, 151

F.3d 970 (9th Cir. 1998) (en banc); *see also United States v. Henley*, 238 F.3d 1111, 1121 (9th Cir. 2001) ("The government does not dispute that a juror who answered in the affirmative questions about whether race would influence his decision would be subject to a challenge for cause."); *Fields v. Saunders*, 278 P.3d 577, 580–81 (Okla. 2012) (reversing judgment when juror "entertained bias against the plaintiff's race"); *cf. Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 867–69 (2017) (constitutional violation due to racist commentary during deliberations). Fittro's prejudice against interracial relationships falls into the rare, extraordinary category of implied bias presumed by law.

The State responds similarly to Chappell's argument concerning racially biased jurors during the penalty phase. Turning first to Juror Forbes, the State insists that this Court should look only to her ambivalent statement that race made "no difference," and that she just did not "care." AB 53–54; *see* 21AA5108 at 59. But, just like Juror Fittro during the guilt phase, Juror Forbes expressed racist views and admitted the views could affect her ability to be fair and impartial.

22AA5306–07. Juror Forbes's self-serving, contradictory statement does not cure her actual and implied bias against Chappell.

The State next addresses Chappell's argument concerning jurors' biased feelings about domestic violence, substance abuse, and law enforcement, contending that, even if these jurors were biased, the bias did not affect the verdict. *See* AB 54–55. Yet, the mere presence of a biased juror during deliberations is a structural error—"the presence of a biased juror cannot be harmless." *Dyer*, 151 F.3d at 973 & n.2. The State also points out that these jurors assured the court they could be "fair and impartial." AB 55. Again, these assurances are inadequate, given the jurors' personal experiences, to cure their biases. *See United States v. Allsup*, 566 F.2d 68, 71 (9th Cir. 1977) ("That men will be prone to favor that side of a cause with which they identify themselves either economically, socially, or emotionally is a fundamental fact of human character.").

Lastly, in the same section, the State additionally disputes Chappell's characterization of Juror Feuerhammer's testimony, contending that the juror "only complained about credit for time

served—not a term of years sentence." AB 55. It is the State's characterization, not Chappell's, that is incorrect—Juror Feuerhammer complained about a term sentence of forty years minus the ten years Chappell had already served. 21AA5106 at 49. Feuerhammer's assurances he could be fair, after his concerning commentary, were not credible.

The State next argues Chappell's challenges to jurors Hibbard, Ramirez, and Button are barred by the law-of-the-case doctrine. AB 55–57. Law of the case does not bar this Court's consideration because of a different overall factual picture of prejudice. And, in any event, this Court should reconsider this argument because the Court's prior determination was clearly erroneous and the failure to do so would result in a fundamental miscarriage of justice. *See Hsu*, 123 Nev. at 629–30, 173 P.3d at 728. Chappell's claims have merit and this Court should grant relief.

Finally, the State's challenges Chappell's argument that his jury venire was unconstitutional, as it was not drawn from a fair cross-section of the community. AB 57–59. The State argues this claim is both

procedurally barred and barred by the law-of-the-case doctrine. AB 57–58. This claim is not procedurally barred, for the reasons discussed above. Further, Chappell respectfully requests this Court consider this claim despite law of the case, as the Court's prior determination was clearly erroneous, and the failure to do so would result in a fundamental miscarriage of justice. *See Hsu*, 123 Nev. at 629–30, 173 P.3d at 728. And the State's assertion, AB 58, that the opening brief speaks only in "generalities" is untrue—the opening brief provided a thorough description of the claim, the reason Clark County systematically excludes jurors from minority groups, and the likelihood that the venires in this case were unrepresentative of minorities in violation of Chappell's constitutional rights. OB 135–37. This claim warrants relief.

7. The prosecutors committed misconduct throughout the guilt phase and penalty rehearing

Prosecutorial misconduct pervaded both the guilt phase and penalty phase of Chappell's trial. The State argues, however, that Chappell's claims of prosecutorial misconduct are procedurally barred.

AB 59–62. Chappell properly raised these claims in the current proceedings.

The State first argues that law of the case bars consideration of the guilt-phase portion of this claim because this Court previously held that overwhelming evidence of guilt precluded relief. AB 61 n.15. This is incorrect—these claims raise different issues than those raised in Chappell's previous proceedings, so the question of prejudice involves a different standard and facts. *See Hsu*, 123 Nev. at 629–30, 173 P.3d at 728; *Bejarano*, 122 Nev. at 1074, 146 P.3d at 271.

Next, the State argues that this Court's previous denial of some claims of prosecutorial misconduct bars this Court's consideration of Chappell's current claim. AB 61. It does not. This Court has not previously considered each instance of prosecutorial misconduct, nor has it considered the total cumulative impact of the misconduct. *See United States v. Nobari*, 574 F.3d 1065, 1082 (9th Cir. 2009).

The State also argues that portions of this claim were waived. But Chappell preserved for appeal a claim that prosecutors committed misconduct throughout his trial by, among other things, improperly

disparaging Chappell, misstating the law, and appealing to the passions of the jurors. *See generally* 2AA484, 492; *see also* 2AA356–61 (raising argument concerning improper impeachment of Fred Dean in context of a claim of ineffective assistance of counsel). In addition, Chappell claimed in his petition that cumulative prejudice caused by prosecutorial misconduct justified a new trial and sentencing. 2AA473-92. To the extent that any of the arguments are appeal are similar but not identical to those below, they are nonetheless related and constitute a necessary component of the cumulative prejudice inquiry. *See Nobari*, 574 F.3d at 1082.

Finally, the State argues that Chappell cannot prove prejudice because prior counsel did make at least *some* arguments on his behalf, albeit not all the ones currently raised. AB 62. It follows, the State suggests, that this Court should presume this choice demonstrates "strategic thinking." AB 62. Without an evidentiary hearing where counsel can testify about their strategic decisions (or lack thereof), this Court cannot presume counsel's omission of certain arguments was purposeful—particularly when there is no obvious strategic advantage

to not raising all instances of prosecutorial misconduct. *See Jones v. Shinn*, 943 F.3d 1211, 1228 (9th Cir. 2019) ("Although the court defers to a lawyer's strategic trial choices, 'counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" (quoting *Strickland*, 466 U.S. at 691)).

8. Improper jury instructions

Chappell argued the jury received nine improper jury instructions that prejudiced the outcome of both his guilt and penalty hearings. OB 161.[6] The State argues that each part of this claim is procedurally barred. The State is incorrect.

The State first argues that the doctrine of law of the case bars this Court's consideration of Chappell's argument concerning (1) premeditation and deliberation and (2) malice. AB 64. The State admits, however, that this Court addressed these arguments in the

[6] The section heading in the State's answering brief erroneously characterizes this claim as a challenge to only the guilt-phase instructions. AB 62. To be clear, Chappell raised a claim concerning the jury instructions at both the guilt phase and the penalty rehearing. OB 161–73.

context of a claim of ineffective assistance of counsel, not substantive claims. AB 63–64. This difference is critical as the two types of claims have different prejudice standards. *Compare Estelle v. MgGuire*, 502 U.S. 62, 72 (1991), *with Strickland*, 466 U.S. at 694. In addition, the factual picture of prejudice is different now, because this appeal identifies additional errors and evidence not presented before. Thus, even though this Court previously concluded the evidence against Chappell was so "overwhelming" that any ineffectiveness of counsel was harmless, the prejudicial impact of these jury instructions is different in light of the totality of errors identified in this appeal. For both these reasons, the law-of-the-case doctrine does not apply. *See Hsu*, 123 Nev. at 629–30, 173 P.3d at 728; *Bejarano*, 122 Nev. at 1074, 146 P.3d at 271.

The State next argues that Chappell was not entitled to the correct jury instructions on burglary and afterthought robbery, since this Court's precedent concerning those two offenses came after Chappell's guilt phase had completed. AB 65–66 & n.20. Not so—the trial court should have instructed the jury that afterthought robbery is

not a basis for felony murder and that a person cannot burglarize his own residence, just as this Court determined in later decisions.

The State also improperly conflates the insufficiency-of-the-evidence standard with the prejudice standard for instructional error, arguing that Chappell cannot establish prejudice for his burglary claim because this Court previously found sufficient evidence to sustain the burglary conviction. AB 65. As the jury was not properly instructed on the law, it simply never considered whether the robbery was an afterthought or whether Chappell occupied or lived in the premises he entered. A finding that sufficient evidence supported the verdict is not the same inquiry as whether these instructional errors were prejudicial.

The State then relies on *Jeremias v. State*, 134 Nev. 46, 412 P.3d 43 (2018), to challenge Chappell's argument concerning the proper standard for Nevada's outweighing determination. AB 68. Chappell respectfully requests this Court reconsider its decision in *Jeremias*, along with *Castillo v. State*, 135 Nev. ___, 442 P.3d 558 (2019), since both decisions conflict with the plain language of Nevada statutes and three decades of this Court's caselaw. Further, because this Court's

previous rejection of this case occurred before the United States Supreme Court's decision in *Hurst v. Florida*, law of the case does not apply. *See Hsu*, 123 Nev. at 630, 173 P.3d at 729.

Next, the State points out that this Court has previously upheld two jury instructions that Chappell now challenges, the instruction on reasonable doubt and the instruction on "equal and exact justice." These instructions were provided at both the guilt phase *and* the penalty rehearing. *See* 1AA150; 1AA142. Regarding the reasonable-doubt instruction, it appears that no court has explicitly held the "govern or control" language, specifically, complies with the federal constitution.[7] Similarly, although the State argues that this Court has repeatedly

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[7] This Court had occasion to address these specific words in *Elvik v. State*, 114 Nev. 883, 897-98, 965 P.2d 281, 290-91 (1998), but instead of providing a specific analysis of the challenge, the Court simply pointed to *Lord v. State*, 107 Nev. 28, 38, 806 P.2d 548, 554 (1991)—which was not a challenge to the "govern" and "control" language in the instruction—and pointed to the language's existence in a Nevada statute, Nev. Rev. Stat. § 175.211, as justifications for affirming. More importantly, the limited analysis this Court did provide referred to different language entirely, not the "govern" or "control" language. *See Elvik*, 114 Nev. at 290, 965 P.2d at 898 (discussing the words "actual and substantial"). Thus, *Elvik* did not explicitly endorse the "govern" or "control" language. To the extent that it may have done so implicitly, Chappell respectfully requests reconsideration of that decision, because *Elvik*'s limited analysis was based on a case that did not address this argument. *See Lord*, 107 Nev. at 38, 806 P.2d at 554.

upheld the equal-and-exact-justice instruction "against claims that it violates the presumption of innocence or is vague and archaic," AB 65 n.19, the case the State relies on did not actually address a vagueness challenge—instead, it simply cites to *Leonard v. State*, 114 Nev. 1196, 969 P.2d 288 (1998). *See Thomas v. State*, 120 Nev. 37, 46, 83 P.3d 818, 824 (2004). And *Leonard* addressed only the argument that this instruction undermines the presumption of innocence, not that it is vague, as Chappell argues here.

The vagueness challenge is meritorious because the ambiguity in this statute creates a reasonable likelihood that the jury applied it in a way that violates the federal constitution, not holding the State to its burden of proof at the guilt or penalty phases. *See Estelle v. MgGuire*, 502 U.S. 62, 72 (1991). To be clear, this means that even if the instruction did not technically misstate the law—that is, maybe a lawyer or judge would understand it does not modify the burden of proof—it's nonetheless unconstitutional because its ambiguity creates a reasonable likelihood a layperson juror would have misconstrued it or applied it in a way that violated the constitution. *See id.* With regard to

the other problematic language in the reasonable-doubt and equal-justice instructions, Chappell respectfully requests this Court reconsider its prior rulings.

Finally, the State does not respond to the merits of Chappell's challenges to the unanimity and anti-sympathy instructions, instead arguing only that they are procedurally barred. As Chappell argues elsewhere in this brief, he can establish good cause to overcome procedural default of these claims. And, because these instructional errors rendered his trial fundamentally unfair, he can establish prejudice: but for these instructional errors, the results of the proceedings would have been different.

9. Defense counsel were ineffective in various additional ways throughout the guilt phase and penalty rehearing

In his petition and opening brief, Chappell argued several instances of ineffectiveness from his defense counsel. The State contends incorrectly that these arguments are all procedurally barred. AB 69–76.

First, the State argues that Chappell was not prejudiced by counsel's failure to impeach Deborah Turner's testimony at trial, since, according to the State, revealing her felony convictions to the jury would have made no difference. AB 69–70. As Chappell explained in his opening brief, Turner testified at trial about Chappell's purported nonchalant demeanor and behavior after the offense. *See* OB 173–74. The relevance of post-offense behavior in a capital murder trial is obvious: the State could argue it gives insight into the defendant's state of mind at the time of the offense. And, here, Turner's testimony allowed the State to imply Chappell was a cold-blooded, remorseless, calculated killer. Therefore, any evidence that would have impeached Turner's testimony would have been critical to the defense's effort to rebut this narrative—and argue Chappell was not guilty of first-degree murder. *Cf. Hinton v. Alabama*, 571 U.S. 263 (2014) (trial counsel ineffective for failing to hire expert witness to impeach State's expert witness).

Second, the State argues that Chappell inadequately briefed his claim concerning counsel's failure to move to excuse biased jurors. AB

70. The authority governing an ineffective-assistance-of-counsel claim is simply *Strickland v Washington*. Chappell explicitly cited *Strickland* as the authority governing such claims repeatedly throughout his opening brief. OB 12, 24, 37, 50, 52, 77, 107. And in any event, the State actually knew this was a "*Strickland* claim . . . ." AB 71. Further, Chappell devoted an earlier section of the opening brief to juror bias, resulting in a fundamentally unfair trial. OB 126–29.

The prejudice Chappell suffered by his counsel's failure to object to jury bias is that he was deprived of his right to a trial by an impartial jury. Courts recognize the bias of even a single juror as a structural error. *See, e.g.*, *Dyer*, 151 F.3d at 973 n.2. For the same reason, the failure of counsel to object to a biased juror created a structural error. And in any event, for the same reasons that courts recognize juror bias as a structural error, it can also be said that there is at least a reasonable probability that, but for counsel's failure to object to this biased juror's service on this jury, the trial would have resulted in a more favorable outcome for Chappell.

Regarding Juror Hill, she shared a career with the victim. Indeed, it is well known that people "will be prone to favor that side of a cause with which they identify themselves either economically, socially, or emotionally"—this is "a fundamental fact of human character." *United States v. Allsup*, 566 F.2d 68 (9th Cir. 1977); *see Smith v. Phillips*, 455 U.S. 209, 222 (O'Connor, J., concurring) (discussing implied bias); *Dyer*, 151 F.3d at 981 (same); *Jackson v. United States*, 395 F.2d 615, 617–18 (D.C. Cir. 1968) (juror presumed biased when he was previously involved in "love triangle" similar to that involved in the trial); *United States ex rel De vita v. McCorkle*, 248 F.2d 1, 8 (3rd Cir. 1957) (juror presumed biased in robbery trial because he was a robbery victim). This juror's actual and implied bias—based on her shared experience with the victim—was a structural error.

Finally, regarding Juror Ewell, Chappell provided this Court the essential information supporting this claim: Juror Ewell openly admitted he believed Black people cause more crime than White people, OB 174–75, establishing that Chappell's trial was rendered fundamentally unfair because of racial bias. *See Dyer*, 151 F.3d at 981;

cf. Pena-Rodriguez, 137 S. Ct. 855 (holding racist commentary in deliberations unconstitutional).

Third, the State contends that certain death-scrupled jurors during the penalty rehearing were incapable of rehabilitation, and, thus, that defense counsel were not ineffective for failing to challenge them. AB 71–72. However, had trial counsel rehabilitated these jurors, these jurors would have been permitted to participate in deliberations and the final jury would have represented a broader diversity of viewpoints and ultimately a fairer jury of Chappell's peers. There is a reasonable probability that such a jury would have returned a more favorable verdict. Therefore, this claims is meritorious, and Chappell demonstrates prejudice.

Fourth, the State argues that Chappell has inadequately briefed his claim concerning trial counsel's failure to object. In this section of the opening brief, Chappell lists eight errors, which he elaborates on in greater detail elsewhere in the opening brief. OB 176–77; *see* OB 66 (Claim D), 137 (Claim J), 161 (Claim K), 125 (Claim I), 174 (Claim L(2)).

The State also complains of Chappell's citation to trial counsel's testimony at a post-conviction evidentiary hearing. AB 72–73. Chappell cited this testimony to support his argument that counsel's failures to object were not strategic, not in support of any claim concerning constitutional violations during that hearing.

Next, the State claims this court "*cannot* consider matters not properly appearing in the record on appeal." OB 73. Yet the entirety of the state-court proceedings are before this Court, in the record on appeal. Doc. Nos. 19-19241–92 (the appendices in this appeal). There is no deficiency in the record in this case. *See Carson Ready Mix, Inc. v. First Nat'l Bank of Nev.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) (holding that the court cannot consider matters that do not properly appear in the record on appeal); NRAP 10(b) (defining the "record on appeal" as including, in part, the appendices).

The State further cites *Edwards v. Emperor's Garden Restaurant*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006), which stated that this Court need not consider claims that are not cogently argued or supported by relevant authority. Yet *Edwards* is not a jurisdictional

limit on this Court's power. Rather, it simply provides this Court the discretion to decline consideration of an issue it deems inadequately briefed.

In any event, *Edwards* does not apply here because this claim *is* adequately briefed, at least for the simple purpose it serves—at least with respect to certain issues, this claim serves as the *Strickland* companion claim to the underlying substantive claims it refers to by name (*i.e.* to the extent that relief on those underlying merits claims is not warranted due to a failure by trial counsel to object, then trial counsel provided ineffective assistance that prejudiced the outcome of proceedings). The detailed authority and argument in support of those claims is found within the underlying merits claims themselves.

Otherwise, the claim provides the essential information necessary to adjudicate it on the merits. Trial counsel's failure to object to these various errors in the guilt and penalty phases of trial prejudiced the outcome of the trial—but for trial counsel's failure to object, there is a reasonable probability of a more favorable outcome.

Finally, the State argues that Chappell made only a "bare and naked assertion that counsel fell below the standard of reasonableness." AB 74. Not so—as Chappell explained in his opening brief, this claim is unique regarding the evidence in support of deficient performance in that trial counsel openly admitted they were emotionally exhausted and believed everything seemed futile. OB 177 (citing 8AA1787). Specifically, counsel testified they stopped objecting because they were tired and felt defeated; this is not a valid strategic justification, but instead is ineffective. *See Murray v. Carrier*, 477 U.S. 478, 496 (1986).

Fifth, the State argues trial counsel were not ineffective for failing to challenge burglary and robbery because this Court had not yet decided *White* and *Nay*. AB 75–76. Although *White* and *Nay* were issues of first impression before this Court, both decisions represent the correct interpretation of statutes that pre-dated the crimes here, based on statutory-interpretation principles that should have been familiar to trial counsel. *See White*, 130 Nev. at 536–37, 330 P.3d at 484–85 (relying on common law); *Nay*, 123 Nev. at 331, 167 P.3d at 433–34 (adopting the majority view). Thus, Chappell is not arguing his counsel

should have "anticipated future changes in the law," AB 75—rather, Chappell's point is that effective counsel would have argued this was *existing* law, even at the time of trial. That this Court later explicitly adopted these arguments in *White* and *Nay* supports Chappell's claim—assuming the trial court would have applied the same legal analysis this Court did later in *White* and *Nay,* then the trial court would have drawn the same legal conclusions this Court drew, for the same reasons. At a minimum, there is a reasonable probability that, had trial counsel raised this argument, the results of Chappell's trial would have been different.

Sixth, the State says in a conclusory manner that "these alleged errors" did not "cumulate[]." AB 76. The State is incorrect: separately or taken together, the prejudicial impact of these errors undermines the reliability of Chappell's proceedings, and there is a reasonable probability that, absent counsel's deficient performance, the results would have been different.

10. Severe mental illness renders Chappell ineligible for execution

The United States Supreme Court has forbidden the death penalty for people who, as a class, are less culpable and, consequently, less deserving of execution—a punishment that would do little to serve the purposes behind the death penalty. *See Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002). The same principles support the conclusion that individuals suffering from severe mental illnesses are ineligible for the death penalty. OB 179–80.

The State miscomprehends Chappell's claim, by arguing it fails because Chappell cannot demonstrate "significant subaverage general intelligence." AB 80. Chappell is not arguing he is intellectually disabled; he is arguing that the High Court's reasoning in *Roper* and *Atkins* support the legal conclusion that people in Chappell's position—people with severe mental illness—are ineligible for the death penalty.

The *Atkins* Court discussed the principles driving its conclusion that the execution of the intellectually disabled is unconstitutional. Primarily, the Court (1) evaluated whether the practice comports with society's evolving standards of decency, and (2) considered how

intellectual disability creates serious impediments to the reliability of capital proceedings. *See Atkins*, 536 U.S. 304. On the first prong of the analysis, the Court noted that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . . The Amendment must draw its meaning form the evolving standards of decency that mark the progress of a maturing society." *Id.* at 311–12 (quoting *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958)).

The Court then explored the proportionality principle at length. *See id.* at 311–12. Because "it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense," even ninety days' imprisonment would be unconstitutional if, for example, a state imposed it as the penalty solely for a defendant's "status" of narcotic addiction. *Id.* at 311 (citing *Robinson v. California*, 370 U.S. 660, 666–67 (1962)). And "[e]ven one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold." *Id.*

The Court then considered the two justifications for imposing the death penalty: retribution and deterrence. *Id.* at 319. "Unless the imposition of the death penalty on a mentally retarded person

measurably contributes to one or both of these goals, it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment." *Id.* (citations and internal quotation marks omitted).

By this logic, the United States Supreme Court's death-penalty jurisprudence "has consistently confided the imposition of the death penalty to a narrow category of the most serious crimes." *Id.* And the Court's discussion makes clear that the seriousness of the crime depends in large part on the relative moral culpability of the offender—even a murder does not always justify the imposition of the death penalty. Indeed, the Court has "set aside a death sentence because the petitioner's crimes did not reflect a consciousness materially more depraved than that of any person guilty of murder." *Id.* Applying that logic to the issue in *Atkins*, the Court reasoned: "If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." *Id.*

This logic also applies to the case of a severely mentally ill defendant. Even if the defendant is not intellectually disabled, he may nonetheless suffer from such a severe mental illness that it lowers his relative moral culpability below that of the "average murderer." This is so because one suffering from severe mental illness likely can demonstrate that it was a serious contributing factor leading to his commission of the offense, but the "average murderer" without such illness cannot. Relatively, therefore, the severely mentally ill defendant typically carries less moral culpability for his actions than the average murderer. Therefore, like the Supreme Court concluded regarding intellectual disability in *Atkins*, he is ineligible for the death penalty.

Further, the United States Supreme Court in *Atkins* discussed an entirely separate concern with imposing the death penalty on people who are intellectually disabled: the defendant's intellectual disability creates an impermissible risk of error. *See id.* at 320. Among other things, defendants with intellectual disability "may be less able to give meaningful assistance to their counsel," are "typically poor witnesses," and have a "demeanor" that "may create an unwarranted impression of

a lack of remorse for their crimes." *Id.* at 320–21. And these problems are not cured by introducing evidence of intellectual disability in mitigation, since relying on intellectual disability as a mitigating factor "can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." *Id.* All told, intellectually disabled "defendants in the aggregate face a special risk of wrongful execution." *Id.*

In many cases, these factors can apply with even more force when the defendant suffers from severe mental illness. *See* Scott E. Sundby, *The True Legacy of Atkins and Roper: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling*, 23 Wm. & Mary Bill Rts. J. 487, 512–24 (2014) ("[A] mentally ill defendant is arguably even more debilitated as a client and witness than an intellectually disabled or juvenile client."). Just like with intellectual disabilities, a defendant's severe mental illness can utterly derail the attorney-client relationship and preclude effective representation.

Further, a client's severe mental illness can substantially interfere with decision making, render the defendant a poor witness,

and give jurors "an unwarranted impression of a lack of remorse for their crimes." *Cf. Atkins*, 536 U.S. at 320–21. Further, many severe mental illnesses carry a serious stigma and "can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." *Cf. id.* Thus, severely mentally ill defendants "in the aggregate face a special risk of wrongful execution." *Cf. id.*

The legal and mental health communities similarly recognize that imposing the death penalty on an individual who suffers from severe mental illness violates the evolving standards of decency that underpin our maturing society. *See* Sundby, at 512–24; American Bar Association, *Report on the Task force on Mental Disability and the Death Penalty*, 2–7 (2007); American Psychiatric Association, *Position Statements on Diminished Responsibility in Capital Sentencing*, http://www.psychiatry.org/File%20Library/Learn/Archives/Position-2014-Capital-Sentencing-Diminished-Responsiblity.pdf.[8] Mental health

[8] *See also* ABA Comm. on Mental and Physical Disability Law, Res. 122A (2006) (recommending barring the death penalty from being

experts have also argued that adaptive deficits inherent in FASD make that condition equivalent to intellectual disability. *See* Stephen Greenspan, Natalie Novick Brown, & William Edwards, *FASD and the Concept of "Intellectual Disability Equivalence,"* Fetal Alcohol Spectrum Disorders in Adults: Ethical and Legal Perspectives, pp. 241–66, *available at* https://www.nofas.org/wp-content/uploads/2017/02/FASD-and-the-Concept-of-Intellectual-Disability-Equivalence.pdf.

As the United States Supreme Court has held for the intellectually disabled, the execution of the severely mentally ill will not measurably advance the deterrent or the retributive purposes of the death penalty. *Cf. Atkins*, 536 U.S. at 321. Applying the United States Supreme Court's Eighth and Fourteenth Amendment jurisprudence and principles discussed in cases such as *Atkins* and *Roper*, our "evolving

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imposed on those who "had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law"); Conn. Gen. Stat. § 53a-46a(h)(2) (2015) (barring the death penalty when "the defendant's mental capacity was significantly impaired or the defendant's ability to conform the defendant's conduct to the requirements of the law was significantly impaired but no so impaired in either case as to constitute a defense to prosecution").

standards of decency" dictate that the execution of the severely mentally ill is excessive and unconstitutional.

Finally, even if this conclusion were not mandated by the United States Supreme Court's Eighth Amendment jurisprudence, this Court is not limited to that which it believes the federal judiciary has decided or would decide on this question. Rather, it is this Court's prerogative to find this practice unconstitutional under the Nevada Constitution, Nev. Const. art. 1 § 6, irrespective of federal law. Regardless of what would be "excessive" or cruel under federal law, execution of the severely mentally ill certainly does not comport with the evolving standards of decency of the State of Nevada.

11. Nevada's death-penalty scheme is unconstitutional

Chappell acknowledges that the United States Supreme Court and this Court have upheld the general constitutionality of the death penalty. Chappell nonetheless asserts and preserves the argument that the death penalty is unconstitutional.

12. Nevada's system of electing judges renders Chappell's convictions and death sentence invalid

In his opening brief, Chappell argued that his convictions and death sentence were invalid because popularly elected judges, subject to removal due to an unpopular decision, presided over Chappell's guilt phase, penalty rehearing, post-conviction proceedings, and appeals. OB 185. Chappell recognized this Court's holding in *McConnell v. State*, 125 Nev. 243, 256, 212 P.3d 307, 316 (2009), rejected a similar claim, but he argued his case was distinguishable, since Judge Maupin, who presided over Chappell's guilt trial, was running for a seat on the Nevada Supreme Court at the time of the trial. OB 185. The State does not address this argument, instead dismissing it as "a bare allegation." AB 88. The State is incorrect.

In *McConnell*, this Court rejected the petitioner's claim in part because he had not provided any specific allegations of judicial bias by McConnell's trial judge. 125 Nev. at 256, 212 P.3d at 316. Here, in contrast, Chappell pointed specifically to Judge Maupin's desire to obtain a seat on this Court through a popular election—at the time of Chappell's trial. *See Ward v. Village of Monroeville*, 409 U.S. 57, 62

(1972) (holding that defendants have the constitutional right to a "neutral and detached" judge). The risk of bias in this situation "was too high to be constitutionally tolerable," *Rippo v. Baker*, 137 S. Ct. 905, 907 (2017) (per curiam); *see Rippo v. State*, 134 Nev. 411, 430, 423 P.3d 1084, 1102 (2018), and Chappell is entitled to a new trial.

The State also insists that Chappell's claim would undermine the entire system of criminal prosecution in Nevada. AB 88. This is not a reason to deny Chappell relief, as this Court need only address the narrow issue before it. *See Am.'s Future v. State ex rel. Miller*, 128 Nev. 878, 381 P.3d 588 (2012) (recognizing "the fundamental principle that courts should only decide actual issues of actual consequence to the parties, not provide advisory opinions on abstract questions of law or policy."). Moreover, Chappell's situation is relatively unique; not often does a judge preside over a capital trial while simultaneously courting votes for a Supreme Court seat.

13. Direct appeal counsel was ineffective

In his opening brief, Chappell argued that appellate counsel was ineffective for not raising certain meritorious claims, which Chappell

explains more fully elsewhere in his opening brief. OB 185–86. In contrast to the State's response, specifically incorporating these arguments without needlessly repeating them is sufficient for this Court's review.

14. The trial court erred in not striking the State's notice of intent

In the opening brief, Chappell argued that his death sentence was unconstitutional because the State filed its notice of intent to seek capital punishment without a hearing on probable cause. OB 187–88. The State argues that the claim is barred under law of the case as it was raised in Chappell's first direct appeal. AB 90. This Court should depart from the doctrine because its previous decision was erroneous, and the failure to do so would result in a fundamental miscarriage of justice. *See Hsu*, 123 Nev. at 629-30, 173 P.3d at 728.

15. Cumulative error

a. This Court must consider Chappell's claims cumulatively

In his opening brief, Chappell argued that the cumulative effect of multiple errors during the guilt and penalty phases of his trial violated his right to due process. OB 188–89.

The State first contends that this claim is barred by law of the case, since the Nevada Supreme Court rejected similar claims in previous proceedings. AB 90. This argument overlooks that Chappell's current post-conviction petition alleges errors that were not raised earlier or were not raised in their current form because of the ineffectiveness of trial, appellate, and post-conviction counsel. Thus, any prior assessments of cumulative error did not and could not have taken these additional errors into account. As such, the law of the case doctrine cannot bar this Court from considering the cumulative impact of the errors alleged in Chappell's third habeas petition. This same rationale also means that this Court's previous determinations do not preclude a finding of prejudice to excuse procedural default of Chappell's current claim. For the errors that this Court previously acknowledged but found harmless, *see* 3AA00735, this Court must consider anew cumulatively with the other errors alleged in Chappell's instant habeas petition. If this Court finds prejudice, that prejudice is sufficient to overcome procedural bars.

The State's reliance on *Rippo v. State* is misplaced. *See* AB 91. In *Rippo*, this Court determined that prosecutorial misconduct had not occurred and therefore, there was nothing to cumulate. *Rippo*, 134 Nev. at 436, 423 P.3d at 1107. Here, by contrast, this Court has already recognized that there were errors. If this Court finds that those errors resulted in prejudice, either individually or when aggregated with the errors alleged in Chappell's third habeas petition, that prejudice is sufficient to overcome procedural bars.

Further, the State asserts that this Court has "yet to endorse application of its direct appeal cumulative error standard to the post-conviction *Strickland* context," and if it applied, such a claim would be "extraordinarily rare and require[] an extensive aggregation of errors." AB 92. While this Court may not yet have held that multiple deficiencies in counsel's performance may be considered cumulatively for the purposes of *Strickland*'s prejudice prong, the Ninth Circuit has long recognized that "prejudice may result from the cumulative impact of multiple deficiencies." *Harris By and Through Ramseyer v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995) (citing *Cooper v. Fitzharris*, 586 F.2d

1325, 1333 (9th Cir. 1978)). Further, while in *Harris*, there were several deficiencies, in *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992), there were only a few errors, which included counsel ineffectiveness for failing to present mitigation evidence during the penalty phase. *See Harris*, 64 F.3d at 1438 ("The number of errors that tainted Harris's defense far exceeds the number that infected the defense in *Mak*."). Nonetheless, the Ninth Circuit held in *Mak* that the errors, when considered cumulatively, prejudiced the defendant. 970 F.2d at 622. Thus, there is no requirement that the errors be "extensive" before they will be considered cumulatively. Accordingly, this Court must consider the errors alleged in Chappell's third habeas petition cumulatively.

b. On the merits, cumulative error deprived Chappell of a fair trial

It is well-established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair. *See Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974) (explaining that cumulative error warrants habeas relief where the errors have "so infected the trial with unfairness as to make the resulting conviction a denial of due process"); *Chambers v.*

Mississippi, 410 U.S. 284, 298, 302–03 (1973) (holding that combined effect of individual errors "denied [Chambers] a trial in accord with traditional and fundamental standards of due process" and "deprived Chambers of a fair trial"); *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (same). For example, where the combined effect of errors renders a criminal defense "far less persuasive than it might [otherwise] have been," the resulting conviction violates due process. *See Chambers,* 410 U.S. at 294, 302–03. Moreover, the cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or independently warrants reversal. *See Chambers,* 410 U.S. at 290 n.3; *Parle*, 505 F.3d at 927*; Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 480–81 (2008).

In reviewing a due process challenge based on cumulative error, the reviewing court must determine the relative harm caused by the errors. To do this, the court considers (1) whether the issue of guilt is close, (2) the quantity and character of the errors, and (3) the gravity of the crime charged. *Valdez*, 124 Nev. at 1195, 196 P.3d at 481. Even where there is substantial evidence of guilt, the Nevada Supreme Court

has cautioned that courts "must ensure that harmless-error analysis does not allow prosecutors to engage in misconduct by overlooking cumulative error in cases with substantial evidence of guilt." *Id.* at 1196, 196 P.3d at 481. Considering all three factors here, the cumulative effect of these manifold errors denied Chappell a fair trial and due process of law, which requires a reversal of his conviction and death sentence.

(1) The evidence of Chappell's guilt for burglary, robbery, and first-degree murder was far from overwhelming

Here, and as discussed in detail above, the evidence the State presented during the guilt phase was far from overwhelming, notwithstanding the State's claim to the contrary. AB at 92–93. The State altogether fails to address that Chappell could not have been convicted of burglary when it failed to prove either that Chappell intended to commit a felony when he entered his home or that he did not live in the home with Panos. *See White*, 130 Nev. at 538–39, 330 P.3d at 485–86 (holding that a person cannot burglarize their own home); *State v. Adams*, 94 Nev. 503, 505, 581 P.2d 868, 869 (1978) ("A

criminal intent formulated after a lawful entry will not satisfy [the burglary] statute."). It similarly fails to address that Chappell could not have been convicted of robbery because Chappell's intent to take Panos's car did not arise until well after force had been used. *See*, *e.g.*, *Nay*, 123 Nev. at 333, 167 P.3d at 435 ("Robbery does not support felony murder where the evidence shows that the accused kills a person and only later forms the intent to rob that person."); *accord Phillips v. Woodford*, 267 F.3d 966, 982 (9th Cir. 2001). And, most significantly, the State fails to address that Chappell could not have been convicted of first-degree murder via a theory of either felony murder or premeditated, deliberate murder, when it could not have proved either of the underlying felonies or that Chappell premeditated and deliberated over Panos's death. Instead, the evidence established that Chappell, whose brain damage limited his ability to plan out actions and consider consequences, killed Panos in a fit of jealous rage, which "support[s] an inference of a sudden attack in anger rather than premeditation and meditation." *Valdez*, 124 Nev. at 1196, 196 P.3d at 481 (holding that there was cumulative error warranting reversal when

petitioner had been drinking and arguing prior to the crime and had a cognitive impairment which limited his ability to exercise good judgment and control his impulses).

The State cites to this Court's December 30, 1998, opinion to support its contention that the evidence was "overwhelming." AB 93. The State's reliance on this opinion is misplaced—after Chappell's guilt phase, this Court disapproved the jury instruction for premeditated and deliberate murder. *See Byford v. State*, 116 Nev. 215, 234–35, 994 P.2d 700, 714 (2000) ("By defining only premeditation and failing to provide deliberation with any independent definition, the *Kazalyn* instruction blurs the distinction between first- and second-degree murder."). In addition, this Court did not have the benefit of the arguments raised in the current petition, which further undermine the evidence of Chappell's guilt. And the State otherwise makes no argument that Chappell's guilt for the crimes of first-degree murder, burglary, or robbery was overwhelming.

(2) The errors committed were several in number and substantial in character

The errors, as laid out in Chappell's third habeas petition, were extraordinarily high in number and substantial in character, infringing many of Chappell's constitutional rights. Pursuant to the Sixth Amendment, Chappell was guaranteed to be tried by a fair and impartial jury. *See Godoy v. Spearman*, 861 F.3d 956, 958 (9th Cir. 2017). Yet, Chappell was denied that right when the trial court permitted (and trial counsel did not seek to remove) *admittedly* biased jurors such as Juror Fittro and Juror Forbes to serve on the jury. OB 126–30. And the State infringed Chappell's right to equal protection of the law when it used peremptory strikes in a racially discriminatory manner during both the guilt phase and the penalty rehearing. *See Batson*, 476 U.S. 79; *Williams*, 134 Nev. at 696, 429 P.3d at 310.

Under the Sixth Amendment, Chappell was also entitled to effective assistance of counsel during the guilt and penalty phases of trial. *See Strickland*, 466 U.S. at 684–85. Yet Chappell was represented during the guilt phase by lawyers who failed to interview any of the State's witnesses or subject the State's case to meaningful adversarial

testing. And he was represented during the penalty phase by lawyers who failed to adequately investigate Chappell's background or ensure that essential witnesses were able to testify. As discussed above, had counsel performed effectively, there is a reasonable probability that at least one juror would not have voted to impose the death sentence on Chappell.

Still other errors occurred, such as the failure to correctly instruct the jury, allowing the jury to convict Chappell without holding the State to its burden of proving the elements of each crime beyond a reasonable doubt and infringing Chappell's right to due process guaranteed by the Fourteenth Amendment. *See In re Winship*, 397 U.S. 358, 364 (1970) ("the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); *Valdez*, 124 Nev. at 1197, 196 P.3d at 482 (recognizing failure to properly instruct the jury leading to juror misconduct was a substantial error warranting relief for cumulative error). This error led to another insofar as Chappell's erroneous conviction for first-degree murder permitted him to be

sentenced to death arbitrarily in violation of his Eighth Amendment rights. *See Valdez*, 124 Nev. at 1197, 196 P.3d at 482 (concluding that failure to properly instruct jury contributed to juror misconduct and resulted in arbitrary imposition of death sentence).

For its part, the State denies that the errors "even when aggregated, deprived [Chappell] of a reasonable likelihood of a better outcome at trial." AB at 93. Not only is this not true, it is not the correct standard. The proper standard is whether the errors, when aggregated, deprived Chappell of a fair trial. *See Valdez*, 124 Nev. at 1198, 196 P.3d at 482; *Harris*, 64 F.3d at 1438–39 (explaining that "ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged"). Notwithstanding the State's claims to the contrary, the errors during the guilt and penalty phases of Chappell's trial deprived him of fundamental constitutional rights and denied him a fair trial.

(3) The seriousness of Chappell's charges should not control when the evidence of guilt was far from overwhelming

Finally, while the crimes with which Chappell was charged are grave, the evidence of his guilt for those crimes was far from overwhelming. When that is the case, this Court "cannot say without reservation that the verdict would have been the same in the absence of error." *Valdez*, 124 Nev. at 1198, 196 P.3d at 482. For example, in *Valdez*, this Court explained that first-degree murder with a deadly weapon and attempted murder with a deadly weapon were grave crimes, but because the evidence was not overwhelming, it could not say that the verdict would have been the same absent any errors. *Id.* The same is true here.

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III. CONCLUSION

For the foregoing reasons, this Court should grant Chappell relief and reverse his convictions and death sentence. In the alternative, this Court should remand the case for a full and fair hearing on Chappell's procedural and substantive allegations.

DATED this 27th day of December, 2019.

Respectfully submitted,

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Respectfully submitted,

/s/ *Brad D. Levenson*
BRAD D. LEVENSON

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I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 27th day of December, 2019, electronic service of the foregoing APPELLANT'S REPLY BRIEF shall be made in accordance with the Master Service List as follows:

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