Case No. 77002

Supreme Court of Nevada

James Montell Chappell,

Appellant,

vs.

The State of Nevada,

Appellee.

District Court Case No. C131341

Petition for Rehearing

DEATH PENALTY CASE

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Appellant James Chappell petitions this Court for rehearing from its decision affirming the denial of his petition for writ of habeas corpus (postconviction).[1] Rehearing is required because this Court overlooked and failed to consider controlling statutory authority, NRS 34.724(1), 34.735, 34.820(4), and case law in *Nika v. State*, 120 Nev. 600, 606-07, 97 P.3d 1140, 1144-45 (2004), which is directly controlling of the dispositive procedural issue decided in the case. NRAP 40(c)(2)(B). Rehearing is necessary to secure and maintain the uniformity of this Court's decisions. NRAP 40A(c).

The issue of first impression that this Court decided in Chappell's case will have far reaching consequences for habeas petitioners in capital cases whose death sentences are vacated during post-conviction proceedings and for the current practice of the district court of appointing habeas counsel in connection with resentencing proceedings. This Court did not grant oral argument in Chappell's case so he was not able to address those issues. This issue is of great importance as it implicates the meaningfulness of the statutory right to the effective

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[1] *Chappell v. State*, 137 Nev. Adv. Op. 83, 501 P.3d 935 (2021).

assistance of habeas counsel in death penalty cases. *See Crump v. Warden*, 113 Nev. 293, 304-05, 934 P.2d 247, 253-54 (1997). Reconsideration is requested as Chappell's case represents the first published decision on this issue with precedential effect.

Rehearing is also required because this Court overlooked and misapprehended material facts in the record and material questions of law in this case. NRAP 40(c)(2)(A).

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I. Introduction

On December 30, 2021, this Court issued its decision in Chappell's case affirming the denial of his petition for writ of habeas corpus (postconviction).[2] The Court declined to consider Chappell's arguments of good cause based on post-conviction counsel's ineffective assistance as it applied to the guilt phase of the case, holding that his procedural arguments were untimely raised.[3] *See* NRS 34.726. Chappell's procedural arguments were found untimely because "he did not [raise them] until after the penalty phase retrial, the direct appeal from the judgment entered after the penalty phase retrial, and the remittitur issued on appeal from the district court order denying his second postconviction habeas petition."[4]

However, this Court did not calculate the timeliness of Chappell's habeas petition against any of these events.

Instead, this Court held that Chappell, a capital habeas petitioner with Fetal Alcohol Spectrum Disorder ("FASD"), should have filed a

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[2] *Chappell*, 137 Nev. Adv. Op. 83, 501 P.3d 935 (2021) ("Opn.").
[3] Opn. at 2.
[4] Opn. at 2.

petition for writ of habeas corpus *pro se* attacking the performance of prior post-conviction counsel when there was no final judgment fixing a sentence for his first-degree murder conviction.[5] This Court held that Chappell was obligated to attack the performance of the very counsel who was representing him at the resentencing.[6] And this Court retroactively imposed this new rule on Chappell for an alleged omission that occurred over fifteen years ago.

This Court acknowledged the novel default ruling it created based on the splitting of separate guilt and penalty judgments "may be complicated."[7] This Court summarily dismissed any such complications, however, holding "any adverse impact a second postconviction petition might have had on [trial counsel's] performance during the penalty phase retrial could have been addressed in the retrial proceedings or in a subsequent postconviction petition challenging the sentence imposed on retrial."[8]

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[5] Opn. at 7-11.
[6] Opn. at 9-10.
[7] Opn. at 10.
[8] Opn. at 9-10.

II. Argument

A. This Court's decision is inconsistent with Chapter 34 of the Nevada Revised Statutes and with controlling case law interpreting those statutory provisions

This Court must reconsider its procedural ruling because Chapter 34 of the NRS expressly requires the existence of a conviction and sentence before a petitioner may file a postconviction petition. Moreover, this Court has previously acknowledged that it cannot interpret the procedural default rule of NRS 34.810 in a manner that would require a petitioner to attack the performance of the attorney who is currently representing him. *See, e.g.*, *Nika v. State*, 120 Nev. at 606-07, 97 P.3d at 1144-45. This Court must follow the same rationale in interpreting and applying NRS 34.726 in Chappell's case.

This Court has never previously suggested that a death sentence that is vacated during postconviction proceedings can be the grounds for a successive petition challenging the performance of postconviction counsel with respect to the guilt phase of the trial while the new penalty is being determined on retrial. And any suggestion that a petitioner is obligated to attack the guilt portion of a vacated judgment is plainly contrary to Chapter 34 of the Nevada Revised Statutes.

NRS 34.724(1) limits postconviction relief to petitioners who have a judgment of conviction for a crime and a corresponding sentence:

> Any person convicted of a crime *and* under a sentence of death or imprisonment who claims that the conviction was obtained, or the sentence was imposed, in violation of the Constitution of the United States or the Constitution or laws of this State, or who claims that the time the person has served pursuant to the judgment of conviction has been improperly computed, may without paying a filing fee, file a postconviction petition for writ of habeas corpus to obtain relief from the conviction or sentence or to challenge the computation of time that the person has served.

(Emphasis added). Therefore, a precondition to filing a petition challenging a judgment of conviction requires a crime *and* a sentence, not a vacated judgment where only the guilty verdict is left undisturbed. NRS 34.724(1) prohibits Chappell from filing a petition as this Court now requires during the time when the judgment was vacated and where he was awaiting resentencing.

Other provisions in Chapter 34 also make clear that there must be a crime and a sentence to file a petition for writ of habeas corpus. NRS 34.820(4) requires that the "court shall inform the petitioner and petitioner's counsel that all claims which challenge the conviction or imposition of sentence *must be joined in a single petition* and that any

matter not included in the petition will not be considered in a subsequent proceeding." (Emphasis added). The statutes also refer to a judgment of conviction singular. And the instructions contained in NRS 34.735 require the petitioner to designate his sentence in the questions provided in the standard form. These statutory provisions are irreconcilable with this Court's holding that Chappell could file a postconviction petition while he was awaiting resentencing.

This Court's interpretation of NRS 34.726 here is also inconsistent with this Court's decision in *Nika v. State*. In *Nika*, this Court interpreted the procedural default rule of NRS 34.810(1)(b) as applied to a petitioner who received a remand during direct appeal under former SCR 250(VI)(H) to conduct an evidentiary hearing on potential claims of ineffective assistance of trial counsel. *Nika*, 120 Nev. at 606-07, 97 P.3d at 1144-45. While the Court acknowledged the State's argument that the petitioner's ineffective assistance claims were barred as successive was "reasonable," this Court declined to adopt that interpretation of NRS 34.810. *See id*.

This Court's conclusion in *Nika* that a hearing under SCR 250(VI)(H) was not an adequate opportunity to present his claims is equally applicable in Chappell's case:

> [W]ith simultaneous litigation of both the direct appeal and the SCR 250 proceeding, Nika and his trial counsel were placed in an untenable position. In regard to the direct appeal, trial counsel should have been unconstrained advocates of Nika's position, willing and able to provide advice and support to Nika's direct appeal counsel. However, in the SCR 250 proceeding they found themselves defending their own conduct of the trial against challenges by Nika. In fact, Nika was required to waive his privilege of attorney-client confidentiality in that proceeding even though his direct appeal was not yet decided. We therefore conclude that the SCR 250 proceeding in this case was not, under NRS 34.810(1)(b), a proceeding in which Nika could have fully and adequately raised grounds of ineffective assistance of trial counsel. For the same reasons, we also decline to rely on our 1997 order dismissing Nika's appeal following the SCR 250 proceeding as the law of the case.

Id. at 606-07, 97 P.3d at 1145 (footnotes omitted).

The circumstances in Chappell's case are even more problematic than those before the Court in *Nika*. In *Nika*, trial counsel were not simultaneously representing the petitioner as counsel was in Chappell's case. *See* RPC 1.7(a)(2). Moreover, trial counsel faced the prospect of receiving requests for confidential information from the prosecutor if

Chappell had filed a postconviction petition and counsel would have been hampered in zealously representing his client in connection with the resentencing while also defending himself from allegations of ineffectiveness.[9] This Court's statement "that it would [not] be unworkable in practice to require a person in Chappell's position to file a postconviction petition before a penalty phase retrial,"[10] is irreconcilable with *Nika's* acknowledgment that these circumstances "did not provide [the petitioner] with a full and fair opportunity to raise claims of ineffective trial counsel." *Nika*, 120 Nev. at 606, 97 P.3d at 1145. Reconsideration is required to harmonize this Court's decision in Chappell's case with its decision in *Nika*.[11]

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[9] It is also likely in such circumstances that counsel's investigation in connection with the resentencing could overlap with facts pertaining to the guilt phase of trial. There is no indication from this Court's decision that it has considered how counsel would ethically or practically navigate such a situation from the perspective of document discovery and other requests for information from the prosecutor in connection with the habeas proceeding.

[10] Opn. at 9.

[11] This Court has previously suggested overcoming NRS 34.726(1)(a) is easier than showing an impediment external to the defense in order to overcome the default rule of NRS 34.810. *See, e.g., Bennett v. State*, 111 Nev. 1099, 1103, 901 P.2d 676, 679 (1995).

Finally, this Court's decision in Chappell's case is inconsistent with *Johnson v. State*, 133 Nev. 571, 402 P.3d 1266 (2017), where this Court rejected a similar argument in the context of a vacated death sentence on direct appeal because "the statutory scheme envisions the filing of a single petition challenging the validity of a petitioner's convictions *and* sentences." *Id.* at 573, 402 P.3d at 1272 (emphasis in original). These are the same statutory provisions that this Court overlooked in Chappell's case. The proper application of those statutes must result in the conclusion that "since the judgment of conviction was not final until the sentences for the murder convictions were settled on remand" "the one-year period [of NRS 34.726] did not begin until remittitur issued" from the direct appeal affirming the new penalty judgment. *Id.*

This Court's attempt to distinguish *Johnson* from Chappell's case fails to address the controlling statutory provisions in Chapter 34 that apply in both circumstances. This Court merely acknowledged that

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Overcoming section 34.726(1)(a) cannot be more difficult than overcoming section 34.810 as the first provision refers to the "fault of the petitioner" rather than to an impediment external to the defense.

Johnson left open the very question this Court decided in Chappell's case; but then the Court relied on out of jurisdiction cases cited in the same footnote that address an entirely different procedural posture. *See Johnson*, 133 Nev. at 575 n.1, 402 P.3d at 1273 n.1. In the cited cases, the issue was the scope of a new direct appeal after a death sentence is vacated in postconviction proceedings.[12] However, those cases do not interpret the provisions of Chapter 34 that this Court addressed in *Johnson* or the acknowledgment in that case that a vacated penalty renders the judgment non-final. Chappell's case is indistinguishable from *Johnson* and the cases it cites and their proper application here requires reconsideration.[13]

This Court must grant rehearing and reconsider its present decision to ensure the uniformity of the Court's decisions.

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[12] *E.g.*, *People v. Kemp*, 517 P.2d 826, 828 (Cal. 1974); *People v. Jackson*, 429 P.2d 600, 602 (Cal. 1967).

[13] This Court's failure to reconsider its decision in Chappell's case would result in an oddity under state law where an uncertain amount of restitution is more problematic than not having a sentence. *See, e.g.*, *Whitehead v. State*, 128 Nev. 259, 262, 285 P.3d 1053, 1055 (2012). This is inconsistent with NRS 176.105(1) which places the sentence on equal footing with the restitution provision.

B. This Court's decision creates serious constitutional, ethical, and practical concerns not addressed by the Court

The implementation of the new procedural default ruling announced here will have major implications concerning the appointment of defense counsel in capital cases and the ethical obligations of counsel. These concerns exist regardless of whether appointed counsel was also prior postconviction counsel who obtained a vacated death sentence during postconviction proceedings.

This Court's only acknowledgment of the difficulties facing a capital petitioner in Chappell's position is its statement that "any adverse impact a second postconviction petition might have had on [counsel's] performance during the penalty phase retrial could have been addressed in the retrial proceedings or in a subsequent postconviction petition challenging the sentence imposed on retrial."[14] To the extent this Court intends this statement to mean that trial courts in Nevada must immediately stop their current practice of appointing postconviction counsel to capital resentencing proceedings

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[14] Opn. at 9-10.

this Court should grant rehearing, clarify its decision, and say so directly. To the extent this Court believes that capital defense counsel could still represent a client in such circumstances it must at least grapple with the constitutional, ethical, and practical difficulties such a situation would create.

The district court has an independent obligation to inquire into potential conflicts of interest by defense counsel as they can impair the fairness of a trial and the finality of the judgment. *See, e.g.*, *Wheat v. United States*, 486 U.S. 153, 159-61 (1988). This Court's decision does not state whether trial courts should continue to follow the practice of appointing habeas counsel as trial counsel for resentencing proceedings. This Court should clarify its decision on this point because any time this is allowed to occur in the future will necessarily involve complicated waiver canvasses by the trial court and unforeseen pitfalls during the course of the proceedings that cannot be anticipated. *See, e.g.*, *Ryan v. Eighth Judicial District Court*, 123 Nev. 419, 426-29, 168 P.3d 702, 708-10 (2007).

Moreover, capital defense counsel has an ethical responsibility not to accept representation in cases involving a concurrent conflict of

interest between a client and the lawyer. *See* NRPC 1.7(a)(2); *Matter of Discipline of Arabia*, 137 Nev. __, 495 P.3d 1103, 1112 (2021).[15] This Court has recognized that trial counsel has an actual conflict when he/she has a personal interest that is directly contrary to the client. *E.g.*, *Clark v. State*, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992). A pending habeas petition against defense counsel alleging IAC is precisely the type of conflict that could impair an attorney's representation of a client. *See* NRPC 1.1, 1.3, 1.7(a)(2). And such a situation risks infringing on a capital defendant's constitutional rights to representation by unconflicted defense counsel. *E.g.*, *Holloway v. Arkansas*, 435 U.S. 475, 484 (1978).

The Court's suggestion that planting reversible error into a capital case that can be potentially remedied in future appeals and/or postconviction proceedings is concerning Any procedural default ruling from this Court that requires a capital petitioner to file a *pro se* petition attacking the performance of an attorney representing him in a capital resentencing promises to cause irreparable prejudice to the

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[15]Quoting *Model Rules of Prof'l Conduct* r.1.7 cmt. 1 (Am. Bar Ass'n 2016). *See Matter of Arabia*, 137 Nev. at __, 495 P.3d at 1112.

proper consideration of the issues in the petition and to the attorney-client relationship in connection with the resentencing proceeding. This Court stated that such as postconviction proceeding "would have been a wholly separate proceeding from the penalty phase retrial,"[16] but this statement fails to acknowledge the reality of parallel litigation. Even in the Eighth Judicial District Court where habeas proceedings are opened as new civil cases, such cases are routed to the same judicial department handling the criminal case. Litigation of both cases at the same time promises to foment confusion as it implicates local rules of the court prohibiting a client represented by counsel from filing *pro se* pleadings. EDCR 3.70 ("all motions, petitions, pleadings or other papers delivered to the clerk of the court by a defendant who has counsel of record will not be filed but must be marked with the date received and a copy forwarded to that attorney for such consideration as counsel deems appropriate."). Even the most diligent and well-meaning *pro se* capital defendant risks being treated as a vexatious litigant whose obstreperous filings should be summarily rejected.

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[16] Opn. at 9.

These concerns are not hypothetical.

For example, in the capital case of *Joseph Smith v. State*, this Court remanded Smith's case for a new penalty phase trial. *Smith v. State*, 110 Nev. 1094, 1107, 881 P.2d 649, 657 (1994). Prior to the retrial, Smith requested that his trial counsel whose office had previously represented Smith at the first trial and on direct appeal, be relieved, and that Smith be permitted to represent himself. Ex. 1 to Request to Take Judicial Notice.[17] The court granted Smith's motion and made trial counsel stand-by counsel. Smith also filed a *pro se* petition alleging that counsel was ineffective at the prior guilt phase trial. Ex. 2.[18]

At a status conference, the trial court addressed Smith's *pro se* petition, alleging Smith filed the petition solely for purposes of delay and as a part of a larger pattern of disruptive behavior. Ex. 3. The court also opined the writ was premature before the penalty retrial. *Id.* at 9.

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[17] Chappell has filed a request seeking judicial notice of the public records in the *Smith* case.

[18] Smith's petition was filed over twenty years before this Court first decided the issue regarding the timeliness of such a petition in *Johnson*.

On the first day of the penalty retrial, the trial court denied Smith's *pro se* petition summarily and without a written order. Ex. 4.

Ultimately, the parallel litigation prejudiced Smith both as to the claims in his petition and as to his resentencing proceedings. On the direct appeal from the new penalty judgment, this Court affirmed the trial court's denial of Smith's *Faretta* claim as well as the lower court's factual finding that Smith had "dilatory purposes when he moved to waive counsel," *Smith v. State*, 114 Nev. 33, 40, 953 P.2d 264, 268 (1998), when the trial court's decision was based in part on Smith's filing of a postconviction petition.

The *Smith* case repels this Court's assurance that "any adverse impact a second postconviction petition might have had on [counsel's] performance during the penalty phase retrial could have been addressed in the retrial proceedings or in a subsequent postconviction petition challenging the sentence imposed on retrial."[19] Reconsideration is therefore required based on the disastrous practical consequences that this Court's decision will have for trial courts and capital defense

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[19] Opn. at 9-10.

counsel in implementing this Court's newly announced procedural default ruling.

C. Applying this Court's newly announced default ruling retroactively to Chappell violates his constitutional rights to due process and equal protection

Whatever default rule this Court announces for future cases, this Court cannot constitutionally apply that ruling retroactively to Chappell to penalize him for an alleged omission that occurred over fifteen years ago when he had no notice from the statutes or this Court's case law that such a rule existed. *Cf. Pellegrini v. State*, 117 Nev. 860, 874, 34 P.3d 519, 529 (2001) (noting due process requirement that habeas petitioners be allowed one-year grace period after the effective date of NRS 34.726 to comply with that provision). Any suggestion that a brain damaged individual like Chappell should have had the foresight that the experienced capital defense attorney that represented him did not have violates his constitutional rights to fair notice as well as equal protection. This Court emphasizes its own rejection of Chappell's guilt phase claims raised on direct appeal after the new penalty judgment[20]

[20] Opn. at 8.

without acknowledging the inconsistency with its present holding that Chappell was obligated to file a petition arguing that postconviction/trial counsel was ineffective in failing to effectively litigate guilt phase issues from the prior postconviction proceeding. Rehearing and reconsideration is independently required on this basis to alleviate the harsh result that would otherwise occur with retroactive application of this Court's new rule to Chappell.

Due process principles prevent this Court from announcing a new procedural rule and retroactively applying it to Chappell to encompass events that occurred over fifteen years ago. *Cf. Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964). As this Court has acknowledged, "[n]ew rules apply prospectively unless they are rules of constitutional law, and then they apply retroactively only under certain circumstances." *Gier v. Ninth Judicial Dist. Ct.*, 106 Nev. 208, 212, 789 P.2d 1245, 1248 (1990). The procedural default ruling just announced and applied to Chappell is not constitutional in nature so it can only be applied prospectively.

The procedural default rule this Court announced in Chappell's case was not foreseeable. *See* Section II(A), above. Alternatively, even

procedural rules that "appeared 'in retrospect to form a part of a consistent pattern of procedures,' [are not sufficient to show the petitioner is] deemed to have been apprised of its existence." *Ford v. Georgia*, 498 U.S. 411, 424 (1991). Such rules cannot bar review of meritorious constitutional claims because they were not "firmly established" at the time of the events giving rise to the default. *Id*. at 424.

D. This Court overlooked and misapprehended material questions of law and fact regarding the prejudice Chappell suffered from trial counsel's failure to investigate and present evidence of FASD

This Court overlooked and misapprehended material questions of law and fact regarding post-conviction counsel's failure to investigate and raise a claim of IAC for failing to investigate and present evidence of FASD and the impact that properly presented evidence of FASD would have had on the sentencing jury.[21]

[21] Opn. at 15-18.

1. This Court improperly relied on unscientific assumptions about FASD to deny Chappell relief.

FASD is not a mere learning disability, nor does the impact of FASD only extend to areas of learning and cognitive deficiency.[22] By blurring the clear factual line between a mere learning disability and FASD, this Court misapprehended facts which lead to the incorrect conclusion that presentation of FASD mitigating evidence would not have made a difference to the jury at sentencing.[23]

There is a substantial difference between a learning disability and/or a low IQ [24], and evidence of FASD and how it impacts and connects to events in an individual's life. Had this evidence been properly presented, there is a reasonable probability of a different sentence. *See Williams v. Stirling*, 914 F.3d 302 (4th Cir. 2019).

FASD evidence can provide a "jury evidence of overarching neurological defect that caused [Chappell's] criminal behavior." *Williams,* 914 F.3d at 315. And on the other side, the lack of

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[22] Opn. at 17.
[23] Opn. at 17-18.
[24] Opn. at 17.

information regarding FASD could lead a jury to assume that Chappell, despite his abusive childhood, disabilities, mental health issues, and learning disabilities[25] "was generally responsible for his actions, and therefore would have assigned greater moral culpability to him for his criminal behavior." *Williams*, 914 F.3d at 315.

During the penalty re-trial, the jurors heard *nothing* about FASD but rather, heard about symptoms that Chappell experienced which experts tied to personality disorder[26] and drug addiction, not brain damage. 19-20AA4735-4737, 4746-4749, 4751-4754, 4762-4764, 4767, 4772, 4815, 4828-4829; *see* 30AA7260-7261. But there is a fundamental difference between knowing that Chappell's mother drank and knowing that because of the drinking, she *permanently damaged the brain of her unborn child*, impacting his entire life.

At the penalty retrial, while the jury heard evidence that Chappell's verbal IQ was 77 and his Performance IQ was 91, 19AA4738, 19AA4738, the jury did not hear evidence that the difference in IQ

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[25] Opn. at 17.

[26] Evidence of personality disorder is usually considered aggravating. *See Bejarano v. State*, 106 Nev. 840, 842–43, 801 P.2d 1388, 1390 (1990).

scores is noteworthy as being typical in FASD: "This patchiness, this unevenness is what distinguishes an FASD brain from brains of individuals who might have other conditions" and that "[w]hat it means is uneven brain functioning. Some areas—when alcohol exposure occurs, whatever is developing in the brain at that point in time is damaged . . . ." *See* 30AA7335.

And while it is true that the jury heard that Chappell had less free will than the average person[27], this is not the same as hearing evidence the FASD caused brain damage, affecting Chappell's ability to control his actions on the day of the crime:

> [B]ecause Chappell's executive control over his behavior is significantly impaired due to his FASD and because he was under stress and in an unstructured environment at the time of the offense which diminishes anyone's executive control, it is likely that his ARND [alcohol related neurodevelopmental disorder] influenced his offense conduct at the time of the offense.

30AA7355. Because of his FASD (and childhood trauma), Chappell's coping skills were equivalent to those of a twelve-year old child. 30AA7344-47; 6AA1489-98.

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[27] Opn. at 17.

The jury never heard this evidence, and therefore never heard anything related to how Chappell's FASD impacted his behavior on the day of the offense. It was not just a matter of "less free will," but that due to his brain damage he could not process the situation as a typical individual would.

And while the jury heard about Chappell's substance abuse[28] without the FASD evidence the jury did not hear how Chappell's FASD and brain damage made him *predisposed* to addiction. *See* 30AA7356-7.

The jury in Chappell's case had no actual context regarding the meaning behind his deficits. FASD is not a mere "cause" of Chappell's learning disability, it is a lifelong brain-based condition which impacts an individual in all areas of their life. Causing learning deficits or disabilities is only one part of the determinantal impact it has. The evidence the jury heard and the evidence the jury could have heard is fundamentally different.

Without the full context of his condition being presented, Chappell was prejudiced by his counsel's performance as it did not give the jury a

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[28] Opn. at 17.

full understanding of his substance abuse, the lifetime impact his mother's addiction had on him, nor the extent of cognitive and adaptive deficits Chappell has and had at the time of the offense. This Court's holding that that proper presentation of a FASD claim by postconviction counsel would not have made a difference overlooks the scientific and psychological facts of FASD and the impact it had on Chappell. Chappell therefore requests that this Court grant rehearing and vacate his death sentence.

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III. Conclusion

For the foregoing reasons, Chappell requests that this Court grant his petition for rehearing, vacate his death sentence, and remand for consideration of his arguments of ineffective assistance of postconviction counsel as applied to the guilt phase of the case.

Dated this 17th day of February, 2022.

Respectfully submitted,

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/s/ David Anthony
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/s/ Brad D. Levenson
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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition for rehearing complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

It has been prepared in a proportionally spaced typeface using Microsoft Word processing program in 14-point font size and Century font;

2. I further certify that this petition for rehearing complies with the page or type-volume limitations of NRAP 40 because it is proportionately spaced, has a typeface of 14 points or more, and contains 4,520 words.

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

CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2022, I electronically filed the foregoing document with the Nevada Supreme Court by using the appellate electronic filing system. The following participants in the case will be served by the electronic filing system:

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