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**IN THE SUPREME COURT OF THE UNITED STATES**

September 20, 2022

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JAMES MONTELL CHAPPELL, *Petitioner*,

v.

THE STATE OF NEVADA, *Respondent*

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*ON PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF NEVADA*

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**RESPONDENT'S BRIEF IN OPPOSITION**

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## **QUESTION PRESENTED**

### CAPITAL CASE

Whether Chappell's challenge to the Nevada Supreme Court's determination that Chappell failed to overcome the statutory procedural bars to his habeas petition presents an important federal question or a conflict between the courts that must be addressed by this Court.

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iii
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS.....	4
ARGUMENT .....	5
I.    CHAPPELL’S PETITION SHOULD NOT BE GRANTED BECAUSE IT DOES NOT RAISE A FEDERAL QUESTION .....	5
II.   THE NEVADA SUPREME COURT CORRECTLY FOUND CHAPPELL FAILED TO DEMONSTRATE INEFFECTIVENESS OF HIS SECOND POST-CONVICTION COUNSEL .....	13
CONCLUSION .....	15

## **TABLE OF AUTHORITIES**

Page Number:

### **Cases**

<u>Byram v. Ozmint,</u> 339 F.3d 203, 211 (4th Cir. 2003).....	10
<u>Chappell v. State,</u> 114 Nev. 1403, 972 P.2d 838 (1998) .....	1, 2, 3, 4
<u>Chappell v. State, Docket No.43493</u> (Order of Affirmance, April 7, 2006).....	2
<u>Chappell v. State, Docket No. 49478</u> (Order of Affirmance, October 20, 2009) .....	3
<u>Chappell v. State, Docket No. 61967</u> (Order of Affirmance, June 18, 2015).....	3
<u>Chappell v. State, Docket No. 77002</u> (Order Denying Rehearing, Mar. 24, 2022).....	4
<u>Chappell v. State, Docket No. 77002</u> (Order of Affirmance, Dec. 30, 2021).....	4
<u>Coleman v. Thompson,</u> 501 U.S. 722, 729, 111 S. Ct. 2546, 2553-54 (1991).....	8
<u>Glenn v. Tate,</u> 71 F.3d 1204, 1207 (6th Cir. 1995).....	10
<u>Hooks v. Workman,</u> 689 F.3d 1148, 1203 (10th Cir. 2012).....	10
<u>Jefferson v. GDCP Warden,</u> 941 F.3d 452, 478 (11th Cir. 2019).....	10
<u>Lee v. Kemna,</u> 534 U.S. 362, 375, 122 S. Ct. 877, 885 (2002).....	8
<u>Rice v. Sioux City Memorial Park Cemetery, Inc.,</u> 349 U.S. 70, 79, 75 S. Ct. 614, 620 (1955) .....	6

<u>Rippo v. State,</u> 134 Nev. 411, 420, 423 P.3d 1084, 1096 (2018).....	7
<u>Ross v. Moffit,</u> 417 U.S. 600, 616-17, 94 S. Ct. 2437, 2447 (1974).....	5
<u>Smith v. Phillips,</u> 455 U.S. 209, 221, 102 S. Ct. 940, 948 (1982).....	6
<u>Strickland v. Washington,</u> 466 U.S. 668, 690, 104 S. Ct. 2052, 2066, (1984).....	9
<u>Williams v. Stirling,</u> 914 F.3d 302, 314 (4th Cir. 2019).....	10

### **Statutes**

NRS 34.726 .....	7
NRS 34.726(1) .....	7, 8
NRS 34.810 .....	7
NRS 34.810(1)(b).....	7
NRS 34.810(1)(b)(2).....	7
NRS 34.810(2) .....	7
NRS 34.810(3) .....	8

### **Other Authorities**

36 C.J.S. Federal Courts §295 (2012).....	5
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No. 22-5416

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**RESPONDENT’S BRIEF IN OPPOSITION**

**STATEMENT OF THE CASE**

On December 31, 1996, Petitioner James Chappell (“Chappell”) was convicted, pursuant to a jury verdict, of burglary, robbery with use of a deadly weapon, and first-degree murder with the use of a deadly weapon. Chappell was subsequently sentenced to serve a term of four to ten years in prison for burglary and two consecutive terms of six to fifteen years for robbery with the use of a deadly weapon. Chappell was sentenced to death for first-degree murder with the use of a deadly weapon. On appeal, the Nevada Supreme Court affirmed Chappell’s convictions and sentence of death. Chappell v. State, 114 Nev. 1403, 972 P.2d 838 (1998).

On October 19, 1999, Chappell filed his first proper person post-conviction

petition for writ of habeas corpus. David Schieck was appointed as post-conviction counsel, and Chappell, through counsel, filed a supplement to his petition on April 30, 2002. After an evidentiary hearing held on September 13, 2002, the district court partially granted and partially denied the petition, vacated Chappell's sentence of death, and ordered a new penalty hearing. The district court found that counsel's failure to call mitigating witnesses likely impacted the jury's decision. The district court otherwise upheld Chappell's conviction and denied his claims relating to the guilt phase of his trial. On appeal, the Nevada Supreme Court affirmed the district court's decision. Chappell v. State, Docket No. 43493 (Order of Affirmance, April 7, 2006).

The second penalty hearing began on March 12, 2007. As an aggravating factor, the State alleged that the murder was committed during a sexual assault, and the jury agreed. The jury found seven mitigating factors:

- 1) Chappell suffered from substance abuse;
- 2) Chappell had no father figure in his life;
- 3) Chappell was raised in an abusive household;
- 4) Chappell was physically abused as a child;
- 5) Chappell's mother was addicted to drugs and alcohol;
- 6) Chappell had a learning disability; and
- 7) Chappell was raised in a depressed housing area.

The jury determined that these seven mitigators did not outweigh the aggravating circumstance, and sentenced Chappell to death. The district court entered the Judgment of Conviction on May 10, 2007. On appeal, the Nevada

Supreme Court once again affirmed the sentence of death. Chappell v. State, Docket No. 49478 (Order of Affirmance, October 20, 2009). After Chappell unsuccessfully sought both rehearing and certiorari, remittitur issued on June 8, 2010.

On June 22, 2010, Chappell filed his second proper person post-conviction petition for writ of habeas corpus. The district court appointed Christopher R. Oram, Esquire, as post-conviction counsel, and Chappell, through counsel, filed a supplemental brief in support of his second petition on February 15, 2012. The district court denied the petition in a Findings of Fact, Conclusions of Law and Order filed on November 16, 2012. The Nevada Supreme Court affirmed the district court's decision. Chappell v. State, Docket No. 61967 (Order of Affirmance, June 18, 2015).

Chappell next proceeded to federal court where he filed a federal habeas petition on March 23, 2016, and the U.S. District Court appointed the Federal Public Defender. On November 1, 2016, Chappell sought and obtained a federal order staying the federal proceedings to allow exhaustion of claims in state court. Chappell then filed a third habeas petition in state court on November 16, 2016; the State responded on April 5, 2017. Chappell filed a reply to the State's response on July 5, 2017.

On April 6, 2018, the district court held an evidentiary hearing. Following the evidentiary hearing, Chappell filed a post-hearing brief on April 27, 2018. The State,



in turn, filed a post-hearing brief on May 4, 2018. Chappell replied on May 11, 2018. On May 21, 2018, the district court denied the petition. The district court entered its Findings of Fact, Conclusions of Law and Order on August 8, 2018.

Chappell filed his Notice of Appeal on September 14, 2018. The Nevada Supreme Court affirmed the district court's denial of the petition. Petitioner's Appendix A; Chappell v. State, Docket No. 77002 (Order of Affirmance, Dec. 30, 2021). The Nevada Supreme Court also denied Chappell's Petition for Rehearing. Petitioner's Appendix B; Chappell v. State, Docket No. 77002 (Order Denying Rehearing, Mar. 24, 2022). On August 18, 2022, Chappell filed a petition for writ of certiorari with this Court.

### **STATEMENT OF THE FACTS**

The Nevada Supreme Court's opinion issued on direct appeal sets forth the facts of this matter:

On the morning of August 31, 1995, James Montell Chappell was mistakenly released from prison in Las Vegas where he had been serving time since June 1995 for domestic battery. Upon his release, Chappell went to the Ballerina Mobile Home Park in Las Vegas where his ex-girlfriend, Deborah Panos, lived with their three children. Chappell entered Panos' trailer by climbing through the window. Panos was home alone, and she and Chappell engaged in sexual intercourse. Sometime later that morning, Chappell repeatedly stabbed Panos with a kitchen knife, killing her. Chappell then left the trailer park in Panos' car and drove to a nearby housing complex.

Chappell v. State, 114 Nev. 1403, 1405, 972 P.2d 838, 839 (1998).

## ARGUMENT

### **I. CHAPPELL'S PETITION SHOULD NOT BE GRANTED BECAUSE IT DOES NOT RAISE A FEDERAL QUESTION**

Chappell's request for extraordinary relief does not present an actual conflict among inferior courts or an important federal question. This Court's purpose is not to seek out opportunities to consider constitutional issues, but to address those problems that truly require resolution.

Rule 10 of the Rules of the Supreme Court of the United States precludes discretionary intervention in this matter. Certiorari is only warranted where there is a substantial conflict between decisions of lower state or federal courts, or where an important question of federal law needs to be settled. It is generally accepted that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." 36 C.J.S. Federal Courts §295 (2012). "This Court's review ... is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review." Ross v. Moffit, 417 U.S. 600, 616-17, 94 S. Ct. 2437, 2447 (1974).

A conflict between lower courts must be substantial to warrant intervention by this Court. Indeed, "[i]t is very important that [this Court] be consistent in not granting the writ of certiorari except . . . in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 79, 75 S. Ct. 614, 620 (1955).

An important question of federal law is one that goes beyond whether the alleged error complained of “is undesirable, erroneous or even ‘universally condemned.’” Smith v. Phillips, 455 U.S. 209, 221, 102 S. Ct. 940, 948 (1982). In order to amount to an important federal question, the issue must be one of broad scope that actually needs to be settled:

A federal question raised by a petitioner may be ‘of substance’ in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. ... ‘Special and important reasons’ imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court’s duty to avoid decisions of constitutional issues unless avoidance becomes evasion.

Rice, 349 U.S. at 74, 75 S. Ct. at 616-17 (citations omitted).

**a. The State procedural bars constitute an adequate and independent state law ground precluding relief**

Chappell ignores the fact that in affirming the lower court’s denial of his request for post-conviction relief, the Nevada Supreme Court applied mandatory Nevada statutes concerning procedural bars to such decisions. Chappell inaccurately characterizes the Nevada Supreme Court’s decision as simply a decision as to whether counsel was ineffective for not presenting evidence concerning Chappell’s Fetal Alcohol Spectrum Disorder (“FASD”) as mitigation at the penalty hearing. But

Chappell ignores the fact that this claim itself is procedurally defaulted under Nevada statutes NRS 34.726 and NRS 34.810, and the Nevada Supreme Court concluded that Chappell failed to demonstrate the statutorily required good cause and prejudice necessary to overcome these procedural bars. Chappell, 137 Nev. at \_\_\_, 501 P.3d at 945.

Chappell's petition for postconviction relief was untimely pursuant to NRS 34.726, as well as successive and an abuse of the writ pursuant to NRS 34.810(2). Several of his claims were waived because they could have been raised in the direct appeal of his conviction, or in prior post-conviction proceedings. NRS 34.810(1)(b)(2). Nevada statutes require petitioners to demonstrate good cause and prejudice. NRS 34.726(1); NRS 34.810(1)(b). In an attempt to overcome these procedural bars, Chappell alleged ineffective assistance of both first and second post-conviction counsel.

The Nevada Supreme Court, considering the aforementioned statutes and relevant case law, that Chappell failed to raise his ineffectiveness claims concerning first post-conviction counsel in a timely manner, and therefore such claims could not constitute good cause. 137 Nev. at \_\_\_, 501 P.3d at 947-48. See also Rippo v. State, 134 Nev. 411, 420, 423 P.3d 1084, 1096 (2018) (finding that a good cause claim based upon ineffective assistance of post-conviction counsel must be raised within

one year of “the conclusion of the postconviction proceedings in which the ineffective assistance allegedly occurred.”).

The Nevada Supreme Court found that Chappell did timely raise his ineffectiveness claims concerning second post-conviction counsel, but ultimately concluded these claims lacked merit and thus did not constitute good cause to overcome the procedural bars to his petition. 137 Nev. at \_\_\_, 501 P.3d at 949-51. Furthermore, the Nevada Supreme Court found that Chappell failed to plead this good cause claim with the specificity required under NRS Chapter 34 and accompanying case law. Id. at \_\_\_, 501 P.3d at 949. See also NRS 34.735; NRS 34.726(1); NRS 34.810(3).

Given that the Nevada Supreme Court’s decision rested on Chappell’s failure to overcome the procedural bars set forth in Nevada’s statutes, certiorari should be denied in this case. “This Court will not review a question of federal law decided by a state court if the decision is sustainable on a state law ground that is independent of the federal question and adequate to support the judgment.” Lee v. Kemna, 534 U.S. 362, 375, 122 S. Ct. 877, 885 (2002); Coleman v. Thompson, 501 U.S. 722, 729, 111 S. Ct. 2546, 2553-54 (1991). This rule applies whether the state law ground is substantive or procedural. Id.

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**b. Chappell fails to establish a conflict among the lower courts**

In a failed attempt to support his claim that the Nevada Supreme Court's decision conflicted with circuit court decisions, Chappell cites four irrelevant decisions. None are directly on point here, as all of these cases involve determinations that *trial counsel* was ineffective for not presenting sufficient evidence in mitigation. Here, the Nevada Supreme Court considered a different question: whether or not second post-conviction counsel was ineffective for not sufficiently arguing that prior counsel was ineffective for not presenting sufficient FASD evidence in mitigation. Chappell, 137 Nev. at \_\_\_, 501 P.3d at 951 ("Chappell has not demonstrated that he would have been granted relief had second postconviction counsel handled the FASD claim differently.").

Furthermore, there is no conflict because the Nevada Supreme Court did not conclude that not presenting mitigating information regarding FASD during the penalty phase could never be ineffective. The Nevada Supreme Court's conclusion was based on an analysis of the facts as they exist in his unique case. This is precisely the sort of inquiry this Court requires. Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 2066, (1984) ("a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct *on the facts of the particular case*, viewed as of the time of counsel's conduct.") (emphasis added).

Given that an ineffectiveness inquiry depends greatly on the particular circumstances of an individual case, it is hardly surprising that in some cases ineffectiveness will be found due to failure to present FASD evidence in mitigation, and in other cases it will not. In fact, in one of the cases Chappell cites, the Court acknowledges a previous case in which the Court found failure to present FASD evidence in mitigation was not constitutionally deficient. Williams v. Stirling, 914 F.3d 302, 314 (4th Cir. 2019) (*citing* Byram v. Ozmint, 339 F.3d 203, 211 (4th Cir. 2003)).

In none of the circuit cases cited by Chappell, did the Court find the failure to present FASD evidence in mitigation automatically amounts to deficient performance. See Jefferson v. GDCP Warden, 941 F.3d 452, 478 (11th Cir. 2019) (finding deficient performance due to counsel ignoring a psychologist's recommendation to obtain further neuropsychological evaluation of the defendant and presenting a "half-hearted mitigation case"); Hooks v. Workman, 689 F.3d 1148, 1203 (10th Cir. 2012) (finding deficient performance based upon counsel offering little evidence in mitigation and failing to rebut the prosecution's evidence of aggravation, though such evidence was available); Stirling, 914 F.3d at 315 (finding deficient performance based upon failure to conduct further investigation based on FASD indicators counsel discovered in the case); Glenn v. Tate, 71 F.3d 1204, 1207 (6th Cir. 1995) (finding deficient performance based on counsel

presenting virtually no evidence in mitigation at sentencing, despite such evidence being available). Of these cases, Stirling is the only case that even addresses FASD evidence.

The Nevada Supreme Court's decision does not conflict with any of the above cases, as the Court did not conclude that a failure to present FASD evidence in mitigation could never constitute deficient performance. Rather, the Court found, based on this case's specific facts, that Chappell did not demonstrate second postconviction counsel was ineffective for not adequately supporting his argument that penalty counsel should have presented FASD evidence in mitigation. 137 Nev. at \_\_\_, 501 P.3d at 950-51. The Court noted that second postconviction counsel did in fact request postconviction relief based on penalty counsel's failure to present such evidence, and requested funding for a FASD expert and a PET scan. Id.; 501 P.3d at 951. The Court noted second postconviction counsel made a strategic decision to focus more on his claim challenging the death aggravator, as success on this claim would render Chappell ineligible for the death penalty. Id.

The Court also considered Chappell's claim that the presentation of FASD evidence would have resulted in a more favorable result at the penalty hearing. Id. The Court examined the evidence presented at the penalty hearing, and concluded such information was unlikely to alter the jury's penalty decision, considering the



substantial mitigation evidence the jury received, and still concluded it was outweighed by the aggravating circumstance:

the omitted information merely supplements what the jury heard during the penalty phase retrial: that Chappell suffered from substance abuse, was born to a mother addicted to drugs and alcohol, and suffered a learning disability. One expert explained during the penalty phase retrial that Chappell had less free will than the average person. That same expert noted Chappell's placement in special-education classes as early as second grade, his lack of early success in school, his behaviors that were atypical of a second grader, and his classification "as severely learning disabled" in fourth grade. Additionally, the expert explained that those with a low verbal IQ, such as Chappell, were overrepresented in the prison population because they have trouble problem solving and making good decisions. Lastly, the expert testified that Chappell's low verbal IQ, difficult childhood, constant drug use, and diagnosed personality disorder(s) negatively affected his free will. Thus, the jury heard evidence that Chappell had cognitive deficits and that those deficits, along with Chappell's upbringing, resulted in diminished free will and difficulty with decision-making. Information regarding FASD may have explained the *cause* of Chappell's cognitive deficits, but we are not convinced that the cause of those deficits would have been more compelling than the deficits themselves.

Id.

The Nevada Supreme Court denied Chappell's claim because it concluded that FASD evidence was unlikely to change the result, given the information already presented during the penalty phase. This decision does not reflect a conflict among lower courts; it simply a factual analysis with which Chappell disagrees. He is attempting to manufacture a conflict because he wishes for this Court to correct what he perceives as an error. Accordingly,

this Court should deny Chappell's invitation to resolve a conflict that does not exist.

## **II. THE NEVADA SUPREME COURT CORRECTLY FOUND CHAPPELL FAILED TO DEMONSTRATE INEFFECTIVENESS OF HIS SECOND POST-CONVICTION COUNSEL**

Even if this Court were willing to ignore its own rules and precedents in order to consider Chappell's challenge to the Nevada Supreme Court's upholding standing precedent, there still is no reason for this Court to intervene as Chappell's claims are meritless.

The Nevada Supreme Court properly recognized that the presentation of information regarding FASD at the penalty hearing would have provided the jury with additional information as to the cause of Chappell's deficits, but Chappell had failed to establish that presentation of such information would have likely changed the jury's decision at the second penalty hearing. The jury found seven mitigating factors, including that Chappell's mother was addicted to drugs and alcohol and that he had a learning disability. Chappell provides no compelling basis for his contention that presenting FASD as the cause of Chappell's substance abuse and cognitive deficits would have caused the jury to determine that these seven mitigating factors outweighed the aggravating circumstance.

Importantly, Chappell fails to address that the Nevada Supreme Court denied this claim due to Chappell's failure to demonstrate both that penalty phase counsel was ineffective for failing to present FASD-related information and that second

postconviction counsel was ineffective for failing to present the claim that first postconviction counsel was ineffective on this basis. 137 Nev. at \_\_\_, 501 P.3d at 950-51. See also Rippo, 134 Nev. at 424, 423 P.3d at 1098. In other words, the Nevada Supreme Court did not directly consider whether or not Petitioner's penalty counsel was ineffective for not investigating and presenting FASD-related evidence. This claim was procedurally barred, and consequently could not be considered in the absence of good cause and prejudice.

As good cause for raising this procedurally barred claim, Chappell alleged second postconviction counsel was ineffective for failing to sufficiently support this claim. Considering that second postconviction counsel did in fact argue that first postconviction counsel was ineffective for failing to investigate FASD-related evidence, the Nevada Supreme Court reasonably found that second postconviction counsel was not ineffective.

In his Petition, Chappell ignores the fact that second postconviction counsel did in fact raise the very claim he presents to this Court—that penalty phase counsel was ineffective for not presenting mitigating evidence related to Second postconviction counsel requested additional funding for a PET scan and an investigator for the purpose of investigating FASD evidence, and these requests were denied by the court. The Nevada Supreme Court noted that during the penalty phase, the jury received detailed information regarding Chappell's life history—that his

mother was addicted to drugs and alcohol throughout her pregnancy with Chappell and after his birth, and that Chappell suffered from a severe learning disability. 130 Nev. at \_\_\_, 501 P.3d at 951. The Court reasonably concluded that “[i]nformation regarding FASD may have explained the *cause* of Chappell's cognitive deficits, but we are not convinced that the cause of those deficits would have been more compelling than the deficits themselves.” Id. In light of this failure to establish FASD evidence would have had a favorable impact at sentencing, the Court properly concluded that Chappell failed to demonstrate that he would have obtained postconviction relief “had second postconviction counsel handled the FASD claim differently.” Id.

The Nevada Supreme Court properly found that Chappell failed to present a valid claim of ineffectiveness of second post-conviction counsel to excuse the procedural bars to his post-conviction claims. As Chappell has provided this Court with only meritless arguments, his Petition must be denied.

### **CONCLUSION**

Chappell has failed to establish that this Court’s exercise of discretionary jurisdiction is warranted. No important federal issue or conflict in authority exists in this matter. Therefore, this Court should deny certiorari.

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Dated this 20th day of September, 2022,

Respectfully submitted.



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