JAMES MONTELL CHAPPELL,
Appellant/Cross-Respondent,
Appellant,
v.
THE STATE OF NEVADA,
Respondent/Cross-Appellant.
Respondent.

ORIGINAL

Case No. 43493

RESPONDENT'S ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

Cross-Appeal From A Post-Conviction Order Granting A New Penalty Hearing

Eighth Judicial District Court, Clark County

DAVID M. SCHIECK
Clark County Special Public Defender
Nevada Bar No. 000824
333 South Third Street, 2nd Floor
Las Vegas, Nevada 89155 - 2316
(702) 455-6265

Counsel for Appellant

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
Clark County Courthouse
200 South Third Street, Suite 701
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 455-4711
State of Nevada

BRIAN SANDOVAL
Nevada Attorney General
Nevada Bar No. 003805
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

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(775) 684-1265

Counsel for Respondent

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Cross-Appeal From A Post-Conviction Order Granting A New Penalty Hearing Eighth Judicial District Court, Clark County

STATEMENT OF THE ISSUES

1. Whether the district court erred in holding that it could not reach the merits of Defendant's petition based on procedural bars because no good cause had been established.
2. Whether the district court erred in determining that Defendant's claims of ineffective assistance of trial counsel warranted no relief as any alleged error was harmless due to the overwhelming evidence of guilt, and
3. Whether the district court abused its discretion in granting Defendant a new penalty hearing.

STATEMENT OF THE CASE

On October 11, 1995, James Montell Chappell, hereinafter Defendant, was charged by Information with Count I- Burglary, Count II- Robbery with Use of a Deadly Weapon, and Count III- Murder (open) with Use of a Deadly Weapon. On

November 8, 1995, the State filed a Notice of Intent of Seek the Death Penalty. On July 30, 1996, Defendant filed a Motion to Strike Allegations of Aggravating Factors. The District Court denied this motion. Thereafter, a jury trial commenced. On October 16, 1996, the jury returned guilty verdicts against Defendant in all three counts. The penalty phase of the trial was held in which the jury sentenced Defendant to death for Count III.

Defendant was sentenced on December 30, 1996 to the following: Count I- a maximum of one hundred twenty (120) months and a minimum of forty-eight (48) months in the Nevada Department of Prisons, Count II- a maximum of one hundred eighty (180) months and a minimum of seventy-two (72) months in the Nevada Department of Prisons with an equal and consecutive sentence for the deadly weapon enhancement to run consecutive to Count I, and Count III- death to run consecutive to Counts I and II. Defendant was given one hundred ninety two (192) days credit for time served. The Judgment of Conviction was filed on December 31, 1996.

On January 17, 1997, Defendant filed a Notice of Appeal with the Nevada Supreme Court. In his appeal, Defendant raised thirteen issues: (1) that the trial court abused its discretion by allowing the State to introduce prior domestic batteries committed by Defendant, (2) that the trial court abused its discretion by allowing the State's witnesses to testify regarding the state of mind of the victim, (3) that the trial court abused its discretion by allowing the State to introduce evidence that Defendant committed shoplifting the day after murdering Panos, (4) that the trial court abused its discretion by allowing the State to characterize Defendant as an unemployed thief, (5) cumulative error, (6) that the State discriminated against Defendant in using pre-emptory challenges to exclude two African American jurors, (7) that there was insufficient evidence to support Defendant's convictions for burglary and robbery, (8) that the trial court erred in refusing to grant Defendant's motion to strike the Notice of Intent to seek the Death Penalty, (9) that the State committed prosecutorial misconduct during closing argument, (10) that the State committed prosecutorial

misconduct during the penalty phase, (11) that Defendant was denied a fair penalty hearing by a State's witness testifying that Defendant deserved the death penalty, (12) that there was insufficient evidence to support the aggravating circumstances of burglary, robbery, and sexual assault, and (13) that the death sentence is disproportionate to the crime committed by Defendant. Defendant's appeal was denied the by the Nevada Supreme Court on December 30, 1998. The Remittitur was filed on October 26, 1999.

On October 19, 1999, Defendant filed a Petition for Writ of Habeas Corpus (Post-conviction). After post-conviction counsel was appointed, Defendant filed a Supplemental Petition for Writ of Habeas Corpus (Post-conviction). Defendant raised over twenty-two issues in his Petition: (1) ineffective assistance of counsel for the failure to call certain witnesses, (2) ineffective assistance of counsel for failure to object to "systematic exclusion of African Americans" from jury service, (3) ineffective assistance of counsel for failure to object to improper jury instructions, (4) ineffective assistance of counsel for failing to move to strike overlapping aggravating circumstances of burglary and robbery, (5) ineffective assistance of counsel for failure to object to prosecutorial misconduct, (6) ineffective assistance of counsel for failure to object to victim impact testimony, (7) ineffective assistance of counsel for failure to object to questioning of Defendant during cross-examination, (8) ineffective assistance of counsel for failure to move to strike the death penalty as unconstitutional and racially biased, (9) ineffective assistance of counsel for failure to object to the prosecutor arguing the absence of mitigating factors, (10) Clark County systematically excludes African Americans form jury service, (11) ineffective assistance of appellate counsel for failing to raise issue of unconstitutional jury instructions, (12) ineffective assistance of appellate counsel for failing to raise issue of overlapping aggravating circumstances, (13) ineffective assistance of appellate counsel for failure to raise issue of victim impact testimony, (14) ineffective assistance of appellate counsel for failing to raise issue of improper cross examination of Defendant, (15) insufficient appellate

review by this Court, (16) improper jury instruction defining premeditation and deliberation, (17) improper jury instruction that jury could not consider sympathy in mitigation, (18) that the trial court erred in failing to instruct the jury regarding non-statutory mitigating circumstances, (19) that the trial court erred in allowing the State to use overlapping aggravating circumstances of burglary and robbery, (20) that the jury instructions failed to apprise the jury of the proper use of character evidence in determining penalty, (21) that the death penalty was imposed against Defendant in a racially biased manner, (22) that the Nevada death penalty statutes are unconstitutional.

The district court heard arguments on Defendant's Petition on July 25, 2002, and determined that many of Defendant's claims in his Petition were waived as they should have been addressed on direct appeal. RT 7-25-02, p. 4-5. The district court, however, granted an evidentiary hearing as to Defendant's claims of ineffective assistance of counsel. Evidentiary hearing was held on September 13, 2002.

The district court did not address every issue individually, but concluded that due to the overwhelming evidence of guilt presented during the trial, none of Defendant's claims of ineffective assistance of counsel during the guilt phase of the trial warranted relief, as any error was harmless. The district court granted Defendant a new penalty hearing based on his counsel's failure to locate and call to testify certain witnesses during the penalty phase. The district court did not reach the merits of Defendant's other claims of ineffective assistance of counsel during the penalty phase, and did not determine the merits of Defendant's remaining claims. Findings of Fact, Conclusions of Law, and Order was filed on June 3, 2004.

The State filed a notice of appeal on the trial court's granting of a new penalty hearing on June 18, 2004. Defendant filed a notice of cross appeal on the trial court's denial of a new trial on June 24, 2003. This Court designated Defendant as Appellant/Cross Respondent and the State as Respondent/Cross Appellant. Defendant filed his opening brief on January 11, 2005.

STATEMENT OF THE FACTS

This Court outlined the facts of the case as follows:

> 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.
>
> The State filed an information on October 11, 1995, charging Chappell with one count of burglary, one count of robbery with the use of a deadly weapon, and one count of murder with the use of a deadly weapon. On November 8, 1995, the State filed a notice of intent to seek the death penalty. The notice listed four aggravating circumstances: (1) the murder was committed during the commission of or an attempt to commit any robbery; (2) the murder was committed during the commission of or an attempt to commit any burglary and/or home invasion; (3) the murder was committed during the commission of or an attempt to commit any sexual assault; and (4) the murder involved torture or depravity of mind.
>
> Prior to trial, Chappell offered to stipulate that he (1) entered Panos' trailer home through a window, (2) engaged in sexual intercourse with Panos, (3) caused Panos' death by stabbing her with a kitchen knife, and (4) was jealous of Panos giving and receiving attention from other men. The State accepted the stipulations, and the case proceeded to trial on October 7, 1996.
>
> Chappell took the witness stand on his own behalf and testified that he considered the trailer to be his home and that he had entered through the trailer's window because he had lost his key and did not know that Panos was at home. He testified that Panos greeted him as he entered the trailer and that they had consensual sexual intercourse. Chappell testified that he left with Panos to pick up their children from day care and discovered in the car a love letter addressed to Panos. Chappell, enraged, dragged Panos back into the trailer where he stabbed her to death. Chappell argued that his actions were the result of a jealous rage.
>
> The jury convicted Chappell of all charges. Following a penalty hearing, the jury returned a sentence of death on the murder charge, finding two mitigating circumstances--murder committed while Chappell was under the influence of extreme mental or emotional disturbance and "any other

> mitigating circumstances."--and all four alleged aggravating circumstances. The district court sentenced Chappell to a minimum of forty-eight months and a maximum of 120 months for the burglary; a minimum of seventy-two months and a maximum of 180 months for robbery, plus an equal and consecutive sentence for the use of a deadly weapon; and death for the count of murder in the first degree with the use of a deadly weapon. The district court ordered all counts to run consecutively. Chappell timely appealed his conviction and sentence of death.

Chappell v. State, 114 Nev. 1403, 1405-1406, 972 P.2d 838, 839-840 (1999).

ARGUMENT

I

THE ISSUES RAISED BY DEFENDANT THROUGHOUT THIS OPENING BRIEF ARE NOT COGNIZABLE IN THIS APPEAL

It is clear, based on the cover page of Appellant's Opening Brief, that he is appealing the Order issued by the District Court denying him a new trial in his Petition for Writ of Habeas Corpus. Yet, there is no mention throughout the rest of the Opening Brief that references the pleadings filed in the district court, the hearing held before the district court or the fact that most of the claims raised Defendant's petition were denied on the basis of procedural bars and the merits of the issues were never reached. Defendant uses the whole of the brief to address how each issue should be reviewed by this Court, even though the district court never reviewed them. In addition, Defendant is asking this Court to hear the merits of his claims regarding alleged errors in the penalty phase even though Defendant has already been granted a new penalty hearing. Nowhere in Defendant's brief is there any argument as to why the district court erred in upholding the procedural rules as to his claims that were procedurally barred. The State maintains that it would be improper for this Court to review the merits of each of Defendant's issues that were presented in his Petition as they were never considered by the district court.

The only cognizable issues before this Court at this juncture are (1)whether the district court erred in holding that it could not reach the merits of Defendant's petition based on procedural bars because no good cause had been established and (2) whether

the district court erred in determining that Defendant's claims of ineffective assistance of trial counsel warranted no relief as any alleged error was harmless due to the overwhelming evidence of guilt, and (3) whether the district court abused its discretion in granting Defendant a new penalty hearing.

II

THE DISTRICT COURT DID NOT ERR IN DENYING DEFENDANT A NEW TRIAL

A. Trial Counsel Was Not Ineffective

Defendant raises several instances of ineffective assistance of trial counsel in his brief. The Supreme Court has clearly established the appropriate test for determining whether a defendant received constitutionally defective assistance of counsel. To demonstrate ineffective assistance of counsel, a convicted defendant must show both that his counsel's performance was deficient, and that the deficient performance prejudiced his defense. Strickland v. Washington, 566 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). The Nevada Supreme Court has adopted this test articulated by the Supreme Court. Bennett v. State, 111 Nev. 1099, 1108, 901 P.2d 676, 682 (1995).

Counsel's performance is deficient where counsel made errors so serious that the adversarial process cannot be relied on as having produced a just result. Strickland, at 686. The proper standard for evaluating an attorney's performance is that of "reasonable effective assistance." Strickland, at 687. This evaluation is to be done in light of all the circumstances surrounding the trial. Id. The Supreme Court has created a strong presumption that defense counsel's actions are reasonably effective:

> Every effort [must be made] to eliminate the distorting effects of hindsight to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . .A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Id at 689-690. "[S]trategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992). The Nevada Supreme Court has held that it is presumed counsel fully discharged his duties, and said presumption can only be overcome by strong and convincing proof to the contrary. Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978)

It is not enough for a defendant to show deficient performance on the part of counsel, a defendant must also demonstrate that the deficient performance prejudiced the outcome of his case. Strickland v. Washington, 566 U.S. 668, 686, 104 S.Ct. 2052, 2065 (1984). In meeting the prejudice requirement of an ineffective assistance of counsel claim, a defendant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 401, 990 P.2d 1263, 1268 (1999) citing Strickland, 566 U.S. 668, 687, 104 S.Ct. 2052, 2066 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. citing Strickland, 466 U.S. at 687-89, 694.

Defendant claims that he received ineffective assistance of counsel during the guilt phase when his attorney: 1) failed to call witnesses during trial, 2) failed to object to the exclusion of African Americans from the jury system, 3) failed to object to improper jury instructions, 4) failed to object to prosecutorial misconduct during closing argument, and 6) failed to object thereby precluding important issues on appeal. Applying this standard of review, the State will address each of the Defendant's claims of ineffective assistance of counsel individually.

1) Failure to Call Witnesses

Defendant asserts that his counsel was ineffective for failing to call witnesses at trial. Specifically, Defendant claims that the witnesses listed in his petition would have demonstrated that Defendant and the victim had a loving, rather than abusive, relationship. Pursuant to Bejarano v. State, 106 Nev. 840, 842, 801 P.2d 1388, 1390 (1990), the Court need not determine whether counsel's actions were ineffective prior

to evaluating whether Defendant has been prejudiced. In this case, Defendant has failed to demonstrate how his counsel's failure to call the enumerated witnesses prejudiced him. In demonstrating that prejudice exists, the defendant must show that the decision in the case would have been different absent the errors. McNelton v. State, 115 Nev. 396, 401, 990 P.2d 1263, 1268 (1999). Here, the defendant cannot demonstrate this.

Defendant claims that if the witnesses listed in his petition had testified, they would have demonstrated that defendant did not commit first-degree murder because their testimony would have demonstrated that he had permission to be in the house and use the victim's belongings. The evidence indicating to the contrary is overwhelming. Further, Defendant himself testified that he committed pre-meditated murder after flying into a jealous rage having seen a letter from another man to the victim. As such, character witnesses would not have changed the outcome of the case. Thus, Defendant's attorney was not ineffective for not calling the witnesses.

2) Failure to Object to Jury Selection

Defendant claims that he received ineffective assistance of counsel because his attorney failed to object to the Clark County jury selection system which systematically excludes African Americans. Defendant's claim is without merit.

Both the Sixth and the Fourteenth Amendments to the United States Constitution guarantee a defendant the right to a jury selected from a representative cross-section of the community. This right requires that the pools from which juries are drawn do not systematically exclude distinctive groups in the community. Taylor v. Louisiana, 419 U.S. 522, 538, 95 S.Ct. 692, 702 (1975). However, there is no requirement that the jury that is selected actually mirror the population at large. Holland v. Illinois, 493 U.S. 474, 110 S.Ct. 803 (1990).

The defendant bears the burden of establishing a prima facie violation of the fair cross-section requirement. In order to demonstrate a prima facie violation, the defendant must show 1) that the group alleged to be excluded is a distinctive group in

the community, 2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community and 3) that this under representation is due to systematic exclusion of the group in the jury selection process. Duren v. Missouri, 439 U.S. 357, 364, 99 S.Ct. 664, 668 (1979). This test has been adopted by this Court. See Evans v. State, 112 Nev. 1172, 1186, 926 P.2d 265, 274 (1996).

Defendant has failed to meet this test. Defendant claims that African Americans have been excluded from jury selection in Clark County Nevada. Although African Americans are a distinctive group, Defendant has failed to prove the other two prongs required for a prima facie showing that African Americans have been systematically excluded. Defendant's claim that the number of African Americans on the jury was not reasonable and that they were systematically excluded from the jury is belied by the record. Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984). The record indicates that initially there were a substantial number of African Americans on the entire panel from which the jury in Defendant's case was selected. (Docket No. 29884, ROA 4: 832). Further, several of the African American prospective jurors indicated an unwillingness to serve on the jury due to their beliefs regarding the death penalty. (Id.). Additionally, this Court found that the two African Americans that were excused from the jury based on the State's preemptory challenges were not removed based on race. See Chappell v. State, 114 Nev. at 1411, 972 P.2d 843 (1998) . Thus, the record indicates that the representation of African Americans in the jury pool was fair and that African Americans have not been excluded unfairly.

As Defendant has failed to show that the jury selection process was unconstitutional, he cannot demonstrate that his counsel was ineffective in not objecting to it.

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3) Failure to Object to Jury Instructions

Defendant alleges that he received ineffective assistance of counsel when his attorney failed to object to improper jury instructions. These claims are without merit as the jury instructions were proper.

a) Instructions Regarding Premeditation and Deliberation

Defendant claims that the jury instruction on premeditation denied his due process rights because it does not distinguish between first and second degree murder. Defendant also claims that he received ineffective assistance of trial counsel and appellate counsel when his attorneys did raise this issue before the District Court and Nevada Supreme Court. Defendant asserts that the instructions are improper because they do not clarify the terms deliberation and willful only premeditation. Instructions twenty- one and twenty-two were given to the jury.

Instruction No. 21

> Murder of the First Degree is murder which is (a) perpetrated by any kind of willful, deliberate and premeditated killing and/or (b) committed in the perpetration of burglary or attempted burglary and/or (c) committed in the perpetration of robbery or attempted robbery.

(AA 7:1720)

Instruction No. 22

> Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or after the time of the killing.
> Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believed from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

(AA 7:1721). This Court has indicated that the instruction above, the Kazalyn instruction, does not fully define "willful, deliberate, and premeditated", elements of first degree murder. Byford v. State, 116 Nev.___, 994 P.2d 700, 716 (2000). However, this case was tried in October of 1996, prior to the ruling in Byford, and this

Court has indicated that the ruling in Byford is not retroactive. Garner v. State, 116 Nev. 770, 6 P.3d 1013, 1025 (2000).

Further, in Garner, this Court clarified that its holding in Byford did not indicate that giving the Kazalyn instruction constituted error. This Court stated that it did not articulate any constitutional grounds for its decision in Byford. Id. There is sufficient evidence that Defendant committed first degree murder. As such, Defendant's constitutional rights were not violated when the Kazalyn instruction was given. Further Defendant's attorneys were not ineffective in not objecting or raising the issue on appeal.

b) Instruction on Malice

Defendant claims that jury instruction number twenty was improper and that his counsel was ineffective in failing to object to it. Specifically, Defendant contends that the jury instruction gives the improper presumption of implied malice. Jury instruction twenty reads:

> Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.
> Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

(AA 7:1719). As Defendant admits, this Court has held that this exact instruction accurately informs the jury of the distinction between express and implied malice. Guy v. State, 108 Nev. 770, 777, 839 P.2d 578, 583 (1992). As such, Defendant has not demonstrated that his rights have been violated. Further, Defendant's counsel was not ineffective in not objecting to this instruction.

4. Failure to Object to Alleged Prosecutorial Misconduct

Defendant argues that he received ineffective assistance of counsel when his trial counsel failed to object to numerous episodes of prosecutorial misconduct during the guilt phase of the trial. Defendant has failed to demonstrate that his counsel was ineffective.

In addressing the issue of prosecutorial misconduct, the United States Supreme Court has stated,

> [A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial.

United States v. Young, 470 U.S. 1, 11, 105 S.Ct. 1038, 1044 (1985). Inappropriate prosecutorial comments, standing alone do not warrant reversal of a criminal conviction if the proceedings were otherwise fair. Id. In order to reverse a conviction, the errors must be "of constitutional dimension and so egregious that they denied [the defendant] his fundamental right to a fair jury trial." Williams v. State, 113 Nev. 1008, 1018, 945 P.2d 438, 444 (1997), overruled on other grounds in Byford v. State, 116 Nev. Adv. Op. 23, 994 P.2d 700 (2000).

In order for a defendant to prove prosecutorial misconduct, he must show "that the remarks made by the prosecutor were 'patently prejudicial'." This standard of review is based on a defendant's right to have a fair trial, not necessarily a perfect one. Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990). The relevant inquiry is whether the prosecutor's statements so contaminated the proceedings with unfairness as to make the result a denial of due process. Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986). The defendant must show that the statements violated a clear and unequivocal rule of law, he was denied a substantial right, and as a result, he was materially prejudiced. Libby v. State, 109 Nev. 911, 859 P.2d (1993).

Defendant points to several alleged instances of prosecutorial misconduct which his attorney failed to object to. Each of these statements will be reviewed individually below.

a) Improper Quantification of Reasonable Doubt

Defendant asserts that his attorney was ineffective when he failed to object to a statement regarding reasonable doubt. Defendant has failed to show this statement prejudiced him. It is improper for the State to compare reasonable doubt with

decisions to buy a house, choose a spouse, etc. Evans v. State, 28 P.498 (2001). However, this Court has found that this comparison is not prejudicial where a proper written instruction is given. Id. In Lord v. State, 107 Nev. 28, 35, 806 P.2d 548, 552 (1991), the prosecutor for the State suggested that reasonable doubt was fulfilled where 90-95% of the pieces of the puzzle were there. This Court found that the improper quantification of reasonable doubt was not prejudicial to the defendant because the jury received the correct written instruction and because after making improper comments the prosecutor stated the correct statutory definition. Id. See also Randolph v. State, 36 P.3d 424 (2001) (This Court found that the statement "if you have a gut feeling he's guilty, he's guilty" was not prejudicial).

Defendant has failed to show that the statement regarding reasonable doubt was so egregious that Defendant was denied his fundamental rights. In this case, the jury was given instruction number thirty-six (36) which read:

> The Defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the Defendant is the person who committed the offense.
>
> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.
>
> If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty.

(AA 7:1734). Instruction thirty-five did not contain any improper quantification of reasonable doubt; thus, Defendant was not prejudiced by the prosecutor's statement. As such, it was not improper for his attorney to fail to object.

b) Failure to Preserve Valid Issues for Appeal

Defendant also argues that he received ineffective assistance of counsel because his trial counsel failed to make contemporaneous objections during trial, thereby

precluding appellate review of important issues. Defendant cites to five instances where his attorney did not object. Defendant fails to demonstrate that his attorney was ineffective.

1. Questions Regarding Defendant's Sentence

Next, Defendant suggests that his counsel was ineffective for failing to object when the State questioned him about punishment. The following exchange took place between Defendant and the State during cross-examination at the guilt phase of the trial.

> MR. HARMON: As you sit here this afternoon are you concerned about punishment?
> DEFENDANT: No, sir. Whatever I get I'll accept it.
> MR. HARMON: It doesn't matter to you whether you're convicted of voluntary manslaughter or murder of the second degree or murder of the first degree?
> DEFENDANT: Does it matter? Is that what you said?
>
> MR. HARMON: I'm asking you if it matters which you were convicted of?
> DEFENDANT: No, it doesn't matter, sir. Whatever I'm convicted of I'll accept it.
> MR. HARMON: And you're not concerned if it's murder of the first degree that the punishments be minimized to some extent?
> DEFENDANT: Could you please repeat that, sir.
> MR. HARMON: You said it really doesn't matter to you what you're convicted of, if it's first degree murder you will accept that. Is that what you said basically?
> DEFENDANT: Yes, whatever I'm convicted of I will accept it, sir.
> MR. HARMON: My question therefore was so there isn't some effort here on the witness stand to present yourself in such a way that you will minimize your punishments?
> DEFENDANT: No, sir.
> MR. HARMON: You don't care if you get a death sentence?
> DEFENDANT: Yes, I do care if I get the death sentence.
> MR. HARMON: So you don't want to get a death sentence?
> DEFENDANT: I have three children, sir, and I want to see them and be able to do something with them sometime in my life.
> MR. HARMON: So we have established that is a punishment that you want to avoid; is that true?
> DEFENDANT: Yes, sir, I am pretty sure any man or woman would want to avoid the death penalty?
> MR. HARMON: Are you telling us it doesn't matter beyond that if it's life with the possibility of parole or life without parole? You don't care?

DEFENDANT: I do care, but --
MR. HARMON: What do you mean you do care?
DEFENDANT: Of course I'm going to care, you know.
MR. HARMON: The bottom line is you don't want to get life without parole either, do you, Mr. Chappell?
DEFENDANT: If I get it, I will accept it sir.
MR. HARMON: Is that what you want?
DEFENDANT: No. I have three children and I want to see my three children and be able to do something with em in their life. I never had no father, sir.
MR. HARMON: So you'd certainly prefer a life with parole sentence.
DEFENDANT: I would be honored to have life with.
MR. HARMON: Honored, is that your answer?

DEFENDANT: I would be honored to be able to get out sometime in my life and be able to reconcile with my children.
MR. HARMON: So you do have an interest in how this case turns out?
DEFENDANT: Of course. Yes.

(AA 6:1472-75). The record indicates that the prosecutor was attempting to discredit Defendant's testimony by demonstrating that he had a strong personal interest in the ultimate verdict reached by the jury. The prosecutor was not addressing sentencing in order to dissuade or persuade the jury to come to a verdict, rather he was demonstrating the Defendant's own bias. As such, this line of questioning was not improper. Defendant's attorney was not ineffective in failing to object.

2. Implication Defendant Made Up His Testimony

Defendant claims that his attorney was ineffective for not objecting to the State's cross-examination that allegedly implied Defendant made up his testimony in violation of Defendant's Fifth Amendment rights. Specifically, Defendant claims that the State's cross-examination suggested that he fabricated his testimony after hearing the DNA evidence. Defendant cites to the following testimony:

MR. HARMON: You've had a substantial period of time to think about today, haven't you?
DEFENDANT: Yes, sir.
MR. HARMON: You've known for quite a while, haven't you, that at some point you would take the witness stand and give the jury your version of what occurred?
DEFENDANT: Yes, sir.
MR. HARMON: And once you had made that decision, whenever it was, you've given a lot of attention to what you would tell the jury?

DEFENDANT: I didn't make up anything, sir.

MR. HARMON: I didn't say you made up anything, Mr. Chappell. Have you thought a lot about what you would tell the jury?
DEFENDANT: No.
MR. HARMON: Have you thought a lot about how you would act on the witness stand?
DEFENDANT: No, sir.

(AA 6:1471-72). The statements by the prosecutor were not a comment on Defendant's Fifth Amendment right to be present at trial. The prosecutor only asked Defendant if he had thought a great deal about his testimony. Defendant was the one who brought up the fact that his testimony was not fabricated. The exchange indicates that the prosecutor was only trying to demonstrate Defendant's bias and was not making a statement on Defendant's right to testify. As such, Defendant's attorney was not ineffective in not objecting to this line of questioning.

3. Failure to Strike Motion for Death Penalty Based on Race

Defendant claims that his attorney was ineffective for failing to strike the notice of intent to seek the death penalty based on the racially biased manner in which the death penalty is applied to African Americans. Defendant's claim is a naked allegation. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Defendant has failed to provide any evidence that the death penalty notice was filed against him based on his race alone. Although Defendant provided with his Petition Exhibit One indicating several other cases in which the death penalty was not sought, there has been no evidence that the death penalty was sought in Defendant's case based on his race. As such, Defendant's attorney was not ineffective in not moving to strike the death penalty based on race.

B. African Americans Were Not Systematically Excluded from the Jury

Defendant asserts that his constitutional rights were violated because the Clark County jury selection system systematically excludes African Americans. It should first be noted that this claim is not cognizable in this appeal. The district court denied this claim as it should have been addressed in Defendant's direct appeal and

Defendant provided no good cause to overcome the procedural bar. See NRS 34.810 (1)(b)(2). NRS 34.810(1)(b)(2) states that the Court shall dismiss a petition for habeas corpus if the defendant's conviction was based on a trial and the grounds could have been raised in a direct appeal or a prior petition for writ of habeas corpus unless the court finds both good cause for failure to bring such issues previously and actual prejudice to the defendant. See NRS 34.810(1)(b). Good cause is "an impediment external to the defense which prevented [the petitioner] from complying with the state procedural rules." Crump v. Warden, 113 Nev. 293, 298, 934 P.2d 247, 252 (1997).

Defendant's claim however is without merit. As discussed above, Defendant failed to establish a prima facie showing that the jury selection violates the fair cross-section requirement. The record indicates that a number of African Americans were originally in the jury pool and were dismissed based on their beliefs regarding the death penalty. As such, Defendant's rights have not been violated.

C. The Jury Instructions Were Not Improper

As argued above, this argument is not cognizable as the district court did not determine this issue on the merits as it was barred by NRS 34.810 (1)(b)(2). However, as the State argued above in II(A), these instructions were not improper.

D. The Application of Death Penalty was not Racially Motivated

Defendant asserts that the death penalty was inappropriately applied to him based on his race in violation of his constitutional rights. As argued above, this argument is not cognizable in this appeal as the district court did not address the merits of this claim, but rather found this claim to be barred pursuant to NRS 34.810 (1)(b)(2). This argument however is without merit. A defendant who seeks to assert an Equal Protection clause violation must prove that prosecuting authorities acted with discriminatory purpose in his particular case. McClesky v. Kemp, 481 U.S. 279, 292, 107 S.Ct. 1756, 1767 (1986). Defendant has provided no evidence that would support his inference that Defendant's race played a part in the prosecution's decision to seek the death penalty in his case. Instead, Defendant presents three completely

unrelated cases in which the death penalty was not sought. As Defendant has provided no evidence that the State acted with discriminatory purpose in prosecuting his case, he has failed to demonstrate a violation of the equal protection clause has occurred.

E. The Administration of Capital Punishment in Nevada is Not Arbitrary

Defendant argues that the imposition of the death penalty in Nevada is arbitrary and therefore, unconstitutional. This argument is also not cognizable as the district court did not address the merits of this claim. Both the United States Supreme Court and this Court have repeatedly upheld the constitutionality of the death penalty. Colwell v. State, 112 Nev. 807, 814, 919 P.2d 403, 408 (1996). Defendant's claim that the State of Nevada arbitrarily applies the death penalty is a naked allegation unsubstantiated by fact. See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

Defendant further adds that Court's holding in McConnell v. State, 102 P.3d 606 (2004) provides support for his argument that the death penalty is unconstitutional. This argument is not cognizable as McConnell was not raised in district court. Moreover, McConnell does not apply to the instant case. First and foremost, this Court has not yet determined that its holding in McConnell is to be applied retroactively. Furthermore, Defendant himself testified as to his pre-meditation and deliberation in committing this murder.

F. Appellate Counsel was not Ineffective

Defendant next argues that his appellate counsel was ineffective for failing to raise various issues in his direct appeal. The United States Supreme Court has held that there is a constitutional right to effective assistance of counsel in a direct appeal from a judgment of conviction. Evitts v. Lucey, 469 U.S. 395, 397, 105 S.Ct. 830, 836, 837 (1985); see also, Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). The federal courts have held that in order to claim ineffective assistance of appellate counsel the defendant must satisfy the two-prong test of Strickland v. Washington by demonstrating that: (1) counsel's representation fell below an

objective standard of reasonableness; and (2) but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. See Strickland, 466 U.S. at 687, 688 & 694, 104 S.Ct. at 2065 & 2068; Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991).

Further, there is a strong presumption that counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See, United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. This Court, although not yet affirming the decision of the federal courts, has held that all appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence." Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). Finally, in order to prove that appellate counsel's alleged error was prejudicial, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. See Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132.

Counsel is not required to assert frivolous claims on appeal. The Defendant has the ultimate authority to make fundamental decisions regarding his case. Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983). However, the Defendant does not have the constitutional right to "compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." Id. In reaching this conclusion, the United States Supreme Court has recognized the "importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most, on a few key issues." Jones, 463 U.S. at 751-752, 103 S.Ct. at 3313. In particular, a "brief that raises every colorable issue runs the risk of burying the good arguments ... in a verbal mound made up of strong and weak contentions." Id. at 753, 3313. The Court has, therefore, held that for "judges to second guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim

suggested by a client would deserve the very goal of vigorous and effective advocacy." Id. at 754, 3314.

Similar to the standards of ineffective assistance regarding trial counsel, appellate counsel has the right and discretion to employ his professional knowledge and tactics in construing a defendant's appeal. Unless the Defendant can demonstrate that counsel did not provide "reasonably effective assistance," appellate counsel's professional conduct will be upheld as effective. See Strickland, 466 U.S. at 687, 104 S.Ct. at 2064; Love v. State, 109 Nev. 1138, 865 P.2d 323 (1993). The Defendant has not shown that appellate counsel acted unreasonably. Furthermore, appellate counsel did raise key issues on direct appeal. Obviously, appellate counsel focused on those issues that had the greatest chance of success on appeal and thus any argument of ineffectiveness is without merit.

1. Instructions were Proper

Defendant claims that his appellate counsel was ineffective for not raising claims on direct appeal regarding improper jury instructions. As argued above and will be argued in III below, the jury instructions were not improper. As the jury instructions were proper, Defendant cannot show his appellate counsel was ineffective.

2. Overlapping Aggravators

Defendant asserts that his appellate counsel was ineffective for failing to raise the issue of overlapping aggravating circumstances. As will be argued in Argument III below, such an argument would not have been successful as this Court has already determined that Burglary and Robbery aggravating circumstances can properly be proven and found. As such, Defendant's appellate counsel was not ineffective.

3. Prosecutorial Misconduct

Defendant claims that his appellate counsel was ineffective for failing to raise issues regarding instances of prosecutorial misconduct. As discussed above and will

be addressed below in Argument III, the prosecutor did not commit misconduct. Thus, Defendant's claim is without merit.

4. Application of Death Penalty Based on Race

This issue was addressed above. As it is without merit, Defendant cannot demonstrate that his appellate counsel was ineffective.

5. Victim Impact Testimony

Defendant claims that his appellate counsel was ineffective in not raising issues on appeal with regard to the testimony of the victim's mother and aunt. As will be argued further in Argument III, this claim is belied by the record as Defendant's counsel did indeed raise this issue on direct appeal. See Chappell, 114 Nev. at 1411, 972 P.2d at 843; Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Moreover, this testimony was not improper. Thus, Defendant's appellate attorney was not ineffective for not raising this issue on appeal.

6. Improper Cross-examination of Defendant

Defendant claims that his appellate counsel was ineffective in not raising an issue with regard to the cross-examination of Defendant. As argued above, this issue is without merit. As such, Defendant cannot demonstrate his appellate attorney was ineffective.

III

THE DISTRICT COURT ERRED IN FINDING THE SOLE ISSUE OF FAILURE TO CALL PENALTY PHASE WITNESSES SUFFICIENT TO GRANT A NEW PENALTY HEARING

The district court granted Defendant a new penalty hearing on the sole assignment of error that Defendant's counsel was ineffective for failing to locate and call certain witnesses to testify during the penalty phase of Defendant's case. The district court did not address the merits of Defendant's other claims. As such, as argued in I above, Defendant's arguments in his opening brief regarding other assignments of error during the penalty phase are not cognizable in this appeal. The State however will address the merits of each issue below.

A. Trial Counsel's Inability to Locate Certain Mitigating Witnesses Did Not Warrant Reversal of Defendant's Sentence

The district court concluded that Defendant's Counsel was ineffective for failing to locate and call the following witnesses to testify: Shirley Sorrell, James Ford, Ivri Marrell, Chris Bardow, David Green, Benjamin Dean, Clara Axam, Barbara Dean, and Earnestine Harvey.

Defendant's trial attorney Howard Brooks testified at the evidentiary hearing that he traveled to Michigan in an attempt to locate these witnesses, and could not find them. (AA 11: 2561-2595). According to Defendant, these witnesses could have testified that Defendant and the victim had a loving relationship. A close examination of the affidavits however reveals that the testimony of these witnesses would not have changed the outcome of defendant's penalty hearing.[1]

1. Shirley Sorrell stated in her affidavit that she knew Defendant and the victim during junior high and high school in Michigan. (AA 11: 2667-2668). She stated that the victim's family was prejudiced toward Defendant and that Defendant and the victim argued a lot. The victim was controlling and had accused defendant of infidelity. Id. Such testimony is not particularly relevant or mitigating in nature such that the penalty might have been different if Shirley Sorrell had testified.

2. James Ford stated in his affidavit that he based the contents of his affidavit on the "collective recollection" between himself, Ivri Marrell, and Benjamin Dean. (AA 11: 2682-2684). Ford stated that the victim and Defendant had a very strained relationship due to the victim's family being prejudiced toward Defendant and the victim being very jealous. Ford stated that though Defendant was not a violent person to his knowledge, if Defendant became addicted to crack while living in Las Vegas, "that may have changed him." James Ford's testimony regarding the true character of

[1] It should be noted that Defendant's present counsel could not locate either David Green or Earnestine Harvey. AA 11: 2672-2674 (affidavit of Reefer). Additionally, Chris Birdow did not remember much about Chappell and only knew him socially through David Green. AA 11: 2673.

the relationship between the defendant and the victim may have been relevant at trial, but offers little in the way of mitigating evidence.

3. Ivri Marrell stated in his affidavit that he knew the Defendant during high school and for a short time after high school. (AA 11: 2676-2678). Marrell stated that he has no knowledge of anything that happened after Defendant moved to Tucson. Marrell also stated that if Defendant became addicted to crack cocaine, "that may have changed him." Id. Marrell believes he could have rebutted many inaccurate things at trial about defendant and the victims' relationship. However, his testimony would have been only marginally relevant at the penalty phase.

4. Benjamin Dean stated that Defendant confided in him that he felt that the victim was very controlling of him. (AA 11: 2679-2681). Dean believes he could have countered "some of the negative testimony from the trial about James," even though trial counsel had actually contacted and spoken with him. Id.

5. Clara Axam actually testified at the penalty hearing, but was not asked to testify during the trial portion of the case. (AA 11: 2665-2666). The district court judge ruled that "none of the claimed trial errors would have affected the outcome of the trial." (AA 11: 2717). Accordingly, this witness' affidavit does not support the granting of a new penalty hearing.

6. Barbara Dean stated that she knew Defendant while he was in elementary school. (AA 11: 2669-2671). Dean was contacted by the trial counsel and investigator, but her health would have prohibited her from traveling to Las Vegas to testify even if she were called. Id.

While the above witnesses may have had good things to say about Defendant's character, none of them had any knowledge of Defendant's character or his relationship with the victim after Defendant and the victim had moved to Las Vegas. In fact, it is quite clear that all of these individuals had lost all contact with Defendant. Moreover, much of what these witnesses stated in their affidavits focused on how Defendant was treated by the victim and her family.

At the penalty hearing, trial counsel offered the testimony of three witnesses. William Moore, Chappell's juvenile probation officer from Michigan, testified to Chappell's troubled home life, difficulty in school, and activities as a youth. (AA 8: 1983-2002). Clara Axam, the grandmother who raised defendant upon the death of his mother, testified that Chappell was mentally slow and non-violent. (AA 8: 2004-2008). Finally, Sharon Axam, defendant's aunt, testified to the impact of his mother's death when he was two-years old, but that he was non-violent as a child. (AA 8: 2009-2012). In allocution, defendant expressed his love for the victim and his desire to maintain contact with his children. (AA 8: 2012-2013).

Overwhelming evidence was presented in support of the four aggravating circumstances found by the jury. Trial counsel and an investigator traveled to Michigan to locate witnesses, but were only marginally successful. Just because certain childhood acquaintances of defendant are located now, does not mean it was error for trial counsel to not locate them at the time. The proffered affidavits from the new witnesses pertain primarily to the nature of the relationship between the defendant and the victim and none had personal knowledge of the acts of domestic violence introduced by the State. The defendant had already testified at trial to the same facts and details that these witnesses would have testified to at the penalty hearing. (AA 6: 1424-1527). At trial, the defendant testified to the hostility he received from the victim's family (AA 6: 1426-1435), his drug usage (AA 6: 1428, 1438-1439, 1443), and his past domestic violence and threats against the victim (AA 6: 1439-1447). Having additional witnesses testify at the penalty hearing would have been cumulative to the defendant's trial testimony, and in some cases would have directly contradicted the defendant's sworn testimony. It is highly unlikely that had the jury heard their testimony, they would have reached a verdict different than death.

B. Defendant's Remaining Claims Regarding the Penalty Phase of his Trial Warranted no Relief Use of Character Evidence

Defendant argues that the failure to properly apprise the jury of the use of character evidence in a penalty hearing violated his constitutional rights. As argued above, this issue is not properly before the court as the district court determined that it was barred by NRS 34.810 (1)(b)(2). However, even based on its merits this claim deserves no relief. The jury was given instructions seven and eight. They read as follows:

> The jury may impose a sentence of death only if (1) the jurors unanimously find at least one aggravating circumstance has been established beyond a reasonable doubt and (2) the jurors unanimously find that there are no mitigating circumstances sufficient to outweigh the aggravating circumstances or circumstances found.
>
> The law never requires that a sentence of death be imposed; the jury however, may only consider the option of sentencing the Defendant to death where the State has established beyond a reasonable doubt that an aggravating circumstance or circumstances exist and the mitigating evidence is not sufficient to outweigh the aggravating circumstance.

(AA 9:2139-2140). These two jury instructions made it clear that the jury could not sentence Defendant to death based on character evidence presented during the penalty hearing. Further, the jury found four aggravating factors and found that these factors outweighed the mitigating circumstances. (AA 9:2167-2169). Thus, it is clear that the jury followed the instructions above. As such, the failure to instruct the jury that they could not consider character evidence prior to finding aggravating circumstances could be nothing more than harmless error. Chapman v. California, 386 U.S. 18, 22, 87 S.Ct. 824, 826 (1967).

Instruction regarding sympathy

Defendant claims that the jury was improperly instructed that it could not consider sympathy in mitigation of the death penalty. Specifically, Defendant claims that this instruction undermined the jury's ability to consider mitigating evidence. Further

Defendant claims that both his trial and appellate counsel were ineffective in not raising this issue.

In this case, the jury was given instruction number twenty-eight which reads:

> Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the evidence which you feel are justified in the light of common experience, keeping in mind that such inferences should not be based on speculation or guess.
> A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

(AA 9:2160). Defendant's claim that this instruction restricted the jury's consideration of mitigating factors has previously been rejected by this Court. Lay v. State, 110 Nev. 1189, 1194, 886 P.2d 448, 451 (1994). This Court has approved the instruction above so long as the jury is instructed to consider the mitigating circumstances placed before it. Id. In the instant case, jury instruction twenty-two listed the mitigating factors for first degree murder. (ROA Vol. 11 p.2153). In addition, instruction number thirty advised the jury:

> The Court has submitted two sets of verdicts to you. One set of verdicts reflects the four possible punishments which may be imposed. The other verdicts are special verdicts. They are to reflect your findings with respect to the presence or absence and weight to be given any aggravating circumstance and any mitigating circumstance.

(AA 9:2162). It is evident from the record that the jury was instructed to consider mitigating circumstances. As such, the antisympathy jury instruction was not improper. See Lay v. State, 110 Nev. 1189, 1194, 886 P.2d 448, 451 (1994).

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Instruction regarding non-statutory mitigation

Defendant claims that his eighth and fourteenth amendment rights were violated when the District Court did not give a jury instruction delineating the mitigating factors he claimed were present in addition to the statutory mitigating factors. This claim is without merit. In Byford v. State, 994 P.2d 700, 715 (2000), the defendant claimed that the district court had erred in refusing to give the jury an instruction regarding specific mitigating factors. This Court found that the defendant had not properly preserved the issue for appeal. Id. Further, this Court explained that even if the District Court erred in not giving the instruction, it did not violate the eighth and fourteenth amendments pursuant to a Supreme Court decision in Buchanan v. Angelone, 522 U.S. 269, 275, 118 S.Ct. 757, 761 (1998). This Court further explained that the defendant had been given the opportunity to argue the additional mitigating factors during the penalty hearing. Id. As in Byford, Defendant's constitutional rights were not violated when the special jury instruction was not given. Further, instruction number twenty-two indicated that the jury could consider any other mitigating factor. (AA 9:2154).

Overlapping Aggravating Circumstances

Defendant asserts that the State's use of overlapping aggravating circumstances to impose the death penalty was unconstitutional. Furthermore, Defendant claims that his trial counsel was ineffective for failing to move to strike the aggravating circumstances of burglary and robbery and his appellate counsel was ineffective for failing to raise this issue on appeal. It is well settled that the use of burglary and robbery as aggravating factors is not improper. In Bennett v. State, 106 Nev. 135, 142, 787 P.2d 797, 801 (1990), the defendant argued that the State had improperly used burglary and robbery as two separate aggravating factors even though the charges arose out of the same indistinguishable course of conduct. Id. In disagreeing with the defendant, this Court reasoned that because defendant could be prosecuted for both crimes separately and because convictions of both burglary and robbery do

not violate the double jeopardy clause as they are separate and distinct offenses they could be used separately as aggravating factors. Id. See also Wilson v. State, 99 Nev. 362, 376, 664 P.2d 328, 336 (1983) (where the court found that any enumerated felonies that are committed during the course of a murder can be aggravating factors). Thus, it was not improper for the State to use robbery, burglary and sexual assault as aggravating factors, and therefore, neither trial counsel nor appellate counsel was ineffective for not raising this issue.

Defendant further argues in his instant brief that this Court's holding in McConnell v. State, 120 Nev. ___, 102 P.3d 606 (2004) precludes the State's use of the burglary, robbery, and sexual assault aggravating circumstances. It is important to first note that this argument is not cognizable as it was not raised in the district court. However, this claim has no merit. First, this Court has yet to determine whether its holding in McConnell applies retroactively. As this Court stated in it's opinion denying rehearing, the McConnell decision constitutes a new rule that does not apply to convictions which are final. Defendant's conviction has been final since 1999. Even if this Court were to apply McConnell retroactively to the instant appeal, that does not mean that the aggravating circumstances must be stricken. To the contrary, there was overwhelming evidence of premeditation and deliberation in this case. Defendant himself testified that after breaking into the victim's home and having sex with her, he discovered a letter written to the victim by another man. Defendant testified that after discovering this letter in the car, he dragged the victim back into the trailer and stabbed her numerous times.

Claims of Prosecutorial Misconduct

Defendant claims that there were several instances of prosecutorial misconduct during the penalty phase that his counsel was ineffective for not objecting to during the trial and his appellate counsel was ineffective for not raising on direct appeal.

a. This is Not a Rehabilitation Hearing

Defendant first claims that the following statement was inappropriate.

> And this is a penalty hearing. It's a penalty hearing because a violent murder occurred on August 31st of 1995. So it's not appropriate for you to be considering rehabilitation. This isn't a rehabilitation hearing.

(ROA Vol. 11 p.2017). The State submits that this comment was not improper. In Evans v. State, 117 Nev. 1606, 15, 28 P.3d 498, 514 (2001), the defendant argued misconduct occurred when the prosecutor offered his view that the penalty hearing was not a rehabilitation hearing but was for the purpose of retribution and deterrence. Specifically, the prosecutor said, "in my view, based upon this evidence, such a person has forfeited the right to continue to live." Id. This Court determined that there was no error in the prosecutor's remarks and explained:

> A prosecutor in a penalty phase hearing may discuss general theories of penology, such as the merits of punishment, deterrence, and the death penalty. And statements indicative of opinion, belief, or knowledge are unobjectionable when made as a conclusion from the evidence introduced at trial.

Id. Thus, Defendant is incorrect in asserting that the prosecutor committed misconduct when he made the statement above. During closing argument in the penalty phase of the trial, the prosecutor expressed her view that the hearing was not a rehabilitation hearing. The prosecutor was merely commenting on theories of penology with regard to rehabilitation. As such, Defendant's counsel was not ineffective in failing to object, and his appellate counsel was not ineffective for not raising this issue on appeal.

b. Reference to Facts Not in Evidence

Next Defendant claims that the prosecutor improperly introduced facts that were not in evidence at the penalty hearing. The guilt phase and the penalty phase in a capital case are separate proceedings and what is inadmissible in one may be admissible in the other. Evans v. State, 112 Nev. 1172, 926 P.2d 265 (1996). The evidentiary rules are less stringent in a penalty phase of the trial. Id. Evidence which may not ordinarily be admissible at trial may be admitted in the penalty phase as long as the evidence does not draw its support from impalpable or highly suspect evidence. Id. In this case, the prosecutor's statements were made as a commentary on the merits

of the death penalty. As such, they were proper. See Evans v. State, 117 Nev. 1609, 28 P.3d 498, 514 (2001). Defendant has failed to demonstrate that his counsel was ineffective in not objecting.

c. Inflammatory Statement During Closing at Penalty Hearing

Defendant claims that his attorney was ineffective for failing to object to the prosecutor's inflammatory statement during closing argument. See Appellant's Opening Brief p. 26. This Court has expressly held that a prosecutor may comment on the loss experienced by the family of a murder victim. Lay v. State, 110 Nev. 1189, 1194, 886 P.2d 448, 451 (1994). In the instant case, the prosecutor's statement was a comment on the effect Deborah Panos' murder had on her family and was, therefore, proper. Additionally, in Evans v. State, 117 Nev. 1609, 28 P.2d 498, 514 (2001), this Court found that the statement by the prosecutor that Defendant was "an evil magnet" was not improperly inflammatory. Likewise, the statements made by the prosecutor during closing argument at the penalty hearing were not improperly inflammatory. Reference to the fact that the victim died, that her death impacted her children did not unduly prejudice Defendant. Thus, Defendant's attorney was not ineffective in not objecting to the statements.

d. Statement Regarding Sending a Message to the Community

Defendant also claims that his attorney was ineffective for not objecting when the prosecutor encouraged the jury to send a message to the community. In his rebuttal closing argument during the penalty phase, the prosecutor made the following statement:

> My partner also mentioned deterrence. There's nothing illegitimate about deterrence as a factor to be considered. You have it in this case, as the ladies and gentlemen of this jury, within your power to guarantee by the punishment you impose that Mr. Chappell never makes another woman a corpse. You can certainly deter him and you have it within your power to send a message today out into this community, which is we do not tolerate those who have a history of domestic violence, who will let it accelerate and become a murderer and you can tell the other would be James Chappell's what the consequence is when you engage in that type of action.

(AA, 8:2021). A prosecutor may ask a jury to make a statement to the community. Williams v. State, 113 Nev. 1008, 1019, 945 P.2d 438, 444 (1997). In Williams, the prosecutor remarked, "Do not let the system fail them again. When we failed them in the first instance it cost their lives. Should we fail in this instance it will take away the meaning and dignity of their lives." This Court found that this statement was not misconduct and explained that the prosecutor, "may ask the jury, through its verdict, to set a standard or make a statement to the community." Id. at 1020. Similar to the prosecutor in Williams, the prosecutor in this case was asking the jury to make a statement to the community and specifically to the defendant. This comment does not amount to prosecutorial misconduct and Defendant's attorney was not ineffective in not objecting.

e. Argument regarding Victim Impact

Defendant claims that his attorney was ineffective for failing to object to misconduct when the State introduced victim impact testimony during the trial phase. Defendant's claim is without merit. Defendant argues that the prosecutor improperly admitted victim impact testimony during the penalty phase when he referenced the loss of Deborah Ann Panos and her children during his closing argument.

> All evil required was a kitchen knife, Exhibit 68-A-1. Not a large knife, but deadly in its consequences for Deborah Panos. All evil required was a cowering victim. Deborah Ann Panos, 26 years of age, the mother of three little children aged seven, five, and three. Where the promise of her years once written on her brow? Where sleeps that promise now?

(AA 7:1608). This Court has expressly held that a prosecutor may comment on the loss experienced by the family of a murder victim. Lay v. State, 110 Nev. 1189, 1194, 886 P.2d 448, 451 (1994). In Lay, this Court found that the following statement during the prosecutor's closing argument was not reversible error:

> On the night of June 4th, 1990, society received a great loss and a life was taken from us. Richard Carter's family and friends can no longer have the opportunity to see him.

The statement made by the prosecutor in the instant case is similar to that above. A passing reference to the fact that the victim had three children hardly constitutes victim impact testimony. The State did not commit prosecutorial misconduct in making the statement above. As such, Defendant's attorney was not ineffective in not objecting.

Testimony of Victim's Aunt and Mother

Defendant claims that he received ineffective assistance of counsel when his attorney failed to object to the testimony of the victim's mother, Norma Penfield, and aunt, Carol Monson, during the penalty hearing. Defendant claims that the witnesses improperly requested the jury to give Defendant the death penalty.

The victim's mother made the following statements at the penalty phase of the hearing.

> My only wish now is that justice will punish to the fullest the person who took her life.
> I feel the system has let her down once. I hope to heaven they don't do it again.

(AA 8:1965, 1975). The statements of the victim's mother were not inappropriate. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597 (1991). The statements in the instant case are similar to those made by the victims in the case of Witter v. State, 112 Nev. 908, 922, 921 P.2d 886, 896 (1996). The family in Witter asked the jury to show no mercy to the defendant. Id. The family also said that they wanted to do everything in their power to make sure the defendant would not receive mercy. Id. In Witter, this Court ruled that the statements of the victim's family were intended to ask the jury to return the most severe verdict it deemed appropriate not to request a specific sentence. Similarly, the statements made by the victim's mother in this case were asking the jury to return the harshest punishment they could. They were not improper. Id.

During the penalty phase, the aunt of the victim made the following statement. "We only pray now that justice will do what it needs to do and not fail her children again. By that, I mean to give James what he gave Debbie, death." (AA 8:1961). This statement was addressed in Defendant's direct appeal. This Court already concluded that this issue lacked merit. Chappell, 114 Nev. 1411, 972 P.2d 843. In this case, the jury found four aggravating factors. Where aggravating factors have been proven, this error could amount to nothing more than harmless error. See Chapman v. California, 386 U.S. 18, 22, 87 S.Ct. 824, 827 (1967). Defendant's attorney was not ineffective in not objecting to these statements.

CONCLUSION

For the aforementioned reasons the State respectfully requests theat Cappell's appeal be denied and that the State's appeal be granted.

Dated this 31st day of May, 2005.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar # 002781

BY 
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #000439

Office of the Clark County District Attorney
Clark County Courthouse
200 South Third Street, Suite 701
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 455-4711

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 31st day of May, 2005.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar # 002781

BY 

STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #000439
Office of the Clark County District Attorney
Clark County Courthouse
200 South Third Street, Suite 701
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 455-4711

CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Respondent's Answering Brief On Appeal And Opening Brief On Cross-Appeal to the attorney of record listed below on this 31st day of May, 2005.

David M. Schieck
Clark County Special Public Defender
333 South Third Street, 2nd Floor
Las Vegas, Nevada 89155 - 2316

Employee, Clark County
District Attorney's Office

OWENS/Noreen Nyikos/english