ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Case No. 43493

CROSS-APPELLANT'S REPLY BRIEF

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

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STATEMENT OF THE ISSUE

Whether the district court's finding that the failure to locate and call certain witnesses at the penalty hearing was ineffective assistance of counsel requiring a new penalty hearing was supported by strong and convincing proof.

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

THE DISTRICT COURT IMPROPERLY GRANTED A NEW PENALTY HEARING WHEN IT FOUND THAT THE FAILURE TO CALL WITNESSES WHO WERE UNAVAILABLE AND WOULD PROVIDE LITTLE OR NO BENEFIT TO DEFENDANT'S CASE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL

The district court incorrectly granted Defendant a new penalty hearing on the sole issue that Defendant's counsel was ineffective for failing to locate and call certain witnesses to testify during the penalty phase of Defendant's case. Specifically, the court found that Defendant's Counsel should have located and called the following witnesses to testify at the penalty hearing: Shirley Sorrell, James Ford, Ivri Marrell, Chris Bardow, David Green, Benjamin Dean, Clara Axam, Barbara Dean, and Earnestine Harvey.

To demonstrate ineffective assistance of counsel, a 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). The district court's conclusion that Defendant's counsel was "deficient in failing to locate, interview, and call as witnesses at the penalty hearing numerous witnesses that would have established mitigating factors for [Defendant]" is not supported by strong or convincing proof.

First, Defendant's trial counsel undertook efforts to locate these witnesses. Defendant gave his trial counsel a list of witnesses that could allegedly testify that Defendant and the victim had a loving relationship. In preparation for trial, Defendant's counsel went to Michigan to interview potential witnesses, but he had a difficult time finding the ones on the Defendant's list. (AA 11:2560-61) When the penalty hearing approached, there was no indication that the witnesses would be anymore available at that time than they were prior to trial. As a result, Defendant's counsel at the penalty hearing expended little effort to locate these witnesses. This was a reasonable decision at the time and the district court's finding that this decision was ineffective assistance fails 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." Strickland, at 689-690. Moreover, given the unsuccessful attempts at locating Defendant's witnesses, it can hardly be said that a strategic decision to focus on other areas of Defendant's case at the penalty constitutes ineffective assistance of counsel.

Second, despite Defendant's assertions, there is no concrete evidence that all of these witnesses would have been located and available to testify at the penalty hearing. For example, Defendant points out that David Green was in fact located, but

he pays little attention to the fact that afterwards he disappeared and was unavailable. If David Green's availability is any indicator, Defendant's assertions that the witnesses could have and should have been located are unfounded.

Assuming arguendo that Defendant's counsel was deficient, 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, 566 U.S. at 686. 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). Here, the district court fails to specifically demonstrate how Defendant was prejudiced by the failure to call these witnesses.

First, overwhelming evidence was presented in support of the four aggravating circumstances found by the jury. Second, the testimony of these witnesses would not have changed the outcome of Defendant's penalty hearing and even contradicted Defendant's testimony at certain points.

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 also 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 and tends to contradict his testimony that they had a loving relationship.

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 affidavit does not indicate that Defendant and victim had an overwhelmingly loving relationship.

3. Ivri Marrell stated in his affidavit that he knew 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 affidavit provides no meaningful or specific evidence in favor of Defendant and 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, each of them stated that Defendant and victim's relationship was burden with difficult problems and that they didn't get along much of the time. Moreover,

none of them had any direct knowledge of Defendant's relationship with the victim after they moved to Las Vegas. In fact, it is clear that all of these individuals had lost all contact with Defendant. It is also clear that these witnesses would have added little, if anything, to the penalty hearing and in some cases would have contradicted Defendant's testimony that he and the victim had a loving relationship. Consequently, the district court committed error when it granted Defendant new hearing simply because these witnesses were not located and called to testify by his counsel.

In support of the district court's decision, Defendant argues in his answer to the cross appeal that Howard Brooks testified that the focus of the trial was the relationship between Defendant and victim and that the above witnesses would have corroborated Defendant's testimony concerning their loving relationship. However, as demonstrated above, these witnesses had no direct knowledge of the relationship between Defendant and victim after they moved to Las Vegas and, prior to the move, they had only general knowledge that the relationship was burdened with numerous problems. Thus, they did not have any significant testimony to give at trial or at the penalty hearing.

Defendant also argues that this Court should be deferential to the district court's decision to grant the new penalty hearing. Hill v. State, 114 Nev. 169, 175, 953 P.2d 1077, 1082 (1998). Although deference should be given to factual findings regarding ineffective assistance of counsel, "[t]he question of whether a defendant has received ineffective assistance of counsel at trial in violation of the Sixth Amendment is a mixed question of law and fact and ... thus subject to independent review." Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994)(citing State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993)).

In this case, the district court made a specific finding that the above witnesses could both be located and would give meaningful testimony concerning the relationship between Defendant and victim. No deference should be given to this finding because, as demonstrated above, there is not strong or convincing proof that

the witnesses could have been found or that they would have given testimony beneficial to Defendant's case. In fact, in reviewing the available affidavits, it is clear that the witnesses would have only contradicted Defendant's testimony that the relationship was a loving one.

Thus, because there is insufficient evidence to demonstrate that Defendant's counsel could have found these witnesses or that they would have given testimony beneficial to Defendant's case, this Court should overturn the district court's finding of ineffective assistance of counsel and the granting of a new penalty hearing.

CONCLUSION

For the aforementioned reasons, the State respectfully requests that the District Court's decision to grant a new penalty hearing be reversed.

Dated August 8, 2005.

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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 August 8, 2005.

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CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Cross-Appellant's Reply Brief to the attorney of record listed below on August 8, 2005.

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