ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

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JAMES MONTELL CHAPPELL Appellant/Cross-Respondent, vs. THE STATE OF NEVADA, Respondent/Cross-Appellant.	CASE NO. 43493

FILED

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APPELLANT'S OPENING BRIEF

STATE'S APPEAL FROM GRANTING OF PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION) AS TO A NEW PENALTY HEARING AND CHAPPELL'S CROSS-APPEAL AS TO FAILURE TO GRANT A NEW TRIAL AND FOR NOT GRANTING RELIEF ON THE OTHER GROUNDS RAISED CHALLENGING THE PENALTY HEARING IN THE EIGHTH JUDICIAL DISTRICT COURT

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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STATEMENT OF ISSUES

1. WHETHER CHAPPELL WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE TRIAL PHASE AND THE DISTRICT COURT SHOULD HAVE ORDERED A NEW TRIAL

2. WHETHER THE DISTRICT COURT ERRED IN NOT REVERSING CHAPPELL'S CONVICTION AND SENTENCE UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, IMPARTIAL JURY FROM CROSS-SECTION OF THE COMMUNITY, AND RELIABLE DETERMINATION DUE TO THE TRIAL, CONVICTION AND SENTENCE BEING IMPOSED BY A JURY FROM WHICH AFRICAN AMERICANS AND OTHER MINORITIES WERE SYSTEMATICALLY EXCLUDED AND UNDER REPRESENTED

3. WHETHER CHAPPELL'S CONVICTION AND SENTENCE ARE INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEE OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS, EFFECTIVE ASSISTANCE OF COUNSEL AND RELIABLE SENTENCE BECAUSE CHAPPELL WAS NOT AFFORDED EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL

4. WHETHER CHAPPELL'S CONVICTION AND SENTENCE ARE INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEE OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS, EFFECTIVE ASSISTANCE OF COUNSEL AND RELIABLE SENTENCE BECAUSE THE A NUMBER OF JURY INSTRUCTIONS GIVEN AT TRIAL WERE FAULTY AND WERE NOT THE SUBJECT OF CONTEMPORANEOUS OBJECTION BY TRIAL COUNSEL, AND NOT RAISED ON DIRECT APPEAL BY APPELLATE COUNSEL

5. WHETHER THE INSTRUCTIONS GIVEN AT THE PENALTY HEARING FAILED TO APPRAISE JURY OF THE PROPER USE OF CHARACTER EVIDENCE AND AS SUCH THE IMPOSITION OF THE DEATH PENALTY

WAS ARBITRARY AND NOT BASED ON VALID WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES IN VIOLATION OF THE EIGHTH AMENDMENT TO THE CONSTITUTION

6. WHETHER CHAPPELL'S DEATH SENTENCE IS INVALID UNDER THE FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, AND A RELIABLE SENTENCE BECAUSE THE NEVADA CAPITAL PUNISHMENT SYSTEM OPERATES IN AN ARBITRARY AND CAPRICIOUS MANNER AND DOES NOT NARROW THE CLASS ELIGIBLE TO RECEIVE THE DEATH PENALTY

STATEMENT OF THE CASE

JAMES CHAPPELL (hereinafter referred to as CHAPPELL) was charged by way of an Information filed on October 11, 1995 with Burglary, Robbery with use of a Deadly Weapon, and Murder with use of a Deadly Weapon. (1 APP 38-43) The State filed a Notice of Intent to seek the death penalty alleging four aggravating circumstances: the murder was committed while the person was engaged in the commission of or an attempt to commit a robbery; the murder was committed while the person was engaged in the commission of or an attempt to commit any burglary or home invasion; the murder was committed while the person was engaged in the commission of or an attempt to commit any sexual assault; and the murder involved torture or depravity of mind. (1 APP 44-46)

The jury trial commenced on October 7, 1996 and the jury convicted CHAPPELL of all charges and after the penalty hearing imposed a sentence of death. The District Court imposed consecutive sentences on the burglary and robbery charges. (9 APP 2189-2191)

CHAPPELL pursued a direct appeal to the Nevada Supreme Court with the conviction and sentence being affirmed on December 30, 1998. Chappell v. State, 114 Nev. 1404, 972 P.2d 838 (1998). CHAPPELL filed for Rehearing and on March 17, 1999 an Order was entered Denying Rehearing. A Petition for Writ of Certiorari was filed with the United States Supreme Court and Certiorari was denied on October 4, 1999. The Nevada Supreme

Court issued it's Remittitur on October 26, 1999. (10 APP 2335-2350)

A Petition for Writ of Habeas Corpus (Post Conviction) was timely filed by CHAPPELL on October 19, 1999. (9 APP 2255-2314) After appointment of counsel a Supplemental Petition for Writ of Habeas Corpus was filed on April 30, 2002. (10 APP 2427-2490) Argument by counsel was heard on July 25, 2002 and the Court ordered that an evidentiary hearing be held to allow trial counsel to testify concerning that failure to utilize the witnesses named in the Supplemental Petition. (10 APP 2539-2544) The evidentiary hearing was held on September 13, 2002 and Deputy Public Defenders Howard Brooks and Willard Ewing testified. (11 APP 2548-2615)

At the conclusion of the evidentiary hearing CHAPPELL requested to be allowed to call other witnesses for live testimony and the Court denied the request, but allowed CHAPPELL to obtain and file affidavits from the witnesses, and then allowed Post Hearing Briefing for the purposes of showing the relationship between the attorney's testimony and the witnesses that should have been used at the trial and penalty hearing. (11 APP 2685-2696)

The District Court granted the Petition for Writ of Habeas Corpus as to sentencing only and ordered a new penalty hearing. (11 APP 2716-2719) The State of Nevada filed a Notice of Appeal on or about the 17th day of June, 2004 (11 APP 2721-22) and CHAPPELL filed a Notice of Cross-Appeal on June 24, 2004

(11 APP 2726-2727).

This case presents an extremely unique procedural history and procedural posture for this Court. The District Court granted a new penalty hearing, but not on all of the grounds raised by CHAPPELL. The State appealed the new penalty hearing and CHAPPELL cross-appealed for the failure to grant a new trial and for not granting relief on the other grounds raised challenging the penalty hearing. It is therefore necessary for CHAPPELL to raise all grounds both for trial and penalty hearing to preserve his record.

STATEMENT OF THE FACTS

For purposes of this Brief CHAPPELL will incorporate the Facts from the decision of the Nevada Supreme Court on direct appeal, with the caveat that CHAPPELL maintains that no proper investigation was conducted before either the trial or penalty hearing and therefore the testimony presented was virtually unopposed at trial and penalty hearing and does not accurately portray the facts of the case. (See e.g. Buffalo v. State, 111 Nev. 1145, 901 P.2d 647 (1995) wherein the Court found that the overwhelming evidence that appeared after trial was entirely different from the evidence that came to light after post-conviction pleadings). CHAPPELL also provides a summary of the evidence conducted at the post conviction evidentiary hearing.

TRIAL TESTIMONY

> "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 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 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. 1404, 972 P.2d 838 (1998).

EVIDENCE AT EVIDENTIARY HEARING

Howard Brooks had been licensed as an attorney for 14 years and worked for the Clark County Public Defender's office for 12 years (11 APP 2551). He was assigned to represent CHAPPELL as soon as the case came into the system. He was part of the murder team starting in January, 1995 and his supervisor was Phil Kohn (11 APP 2552). During that period of time his caseload was typically between nine and eleven cases (11 APP 2552-3). When the CHAPPELL case went to trial he had tried one other death penalty case and three other murder trial (11 APP 2553). Will Ewing assisted Brooks during trial and it was Ewing's first capital murder case. Ewing's primary role was to prepare penalty phase evidence and witnesses (11 APP 2554).

Brooks made the strategic decision to stipulate to certain facts after talking to CHAPPELL about the matter (11 APP 2555). It had become clear to Brooks that the State was trying to bring in all sorts of extraneous evidence regarding the prior relationship between CHAPPELL and Panos. Brooks wanted to limit the evidence to the facts of the killing because he felt he had a very strong argument for either second degree murder or voluntary manslaughter. The only way that Brooks felt he could make the other bad acts irrelevant was to stipulate that CHAPPELL had committed the killing and it was not an accident (11 APP 2555). Brooks discussed this strategy with CHAPPELL and he agreed to the stipulation. The State argued that the evidence was admissible despite the stipulation and the Court

allowed the admission of the evidence (11 APP 2556).

Brooks did not withdraw the offer to stipulate because he was convinced that CHAPPELL could not get a fair trial if all of the extraneous issues concerning domestic violence from years earlier were admitted during the trial (11 APP 2557). At the Petrocelli hearing the Court ruled that an offer of proof was sufficient and that witnesses were not needed and based on the offer of proof ruled that the prior incidents were proven by clear and convincing evidence. The offer of proof was a bare bones summary and had nothing to do with what was presented at trial where there was vast testimony about every single incident of domestic violence (11 APP 2558).

The focus of the trial became the long history of the relationship between CHAPPELL and Panos. Brooks did not anticipate that the trial was going to be about their relationship and thus his investigation focused on the specifics of the killing and mitigation evidence (11 APP 2560). CHAPPELL had given Brooks a list of witnesses that he wanted interviewed and called at trial, but even as to those witnesses that Brooks located, his focus was still on the killing and not the long relationship between CHAPPELL and Panos. Brooks was stunned that the evidentiary rulings were going against him and had no idea before trial that all the bad character evidence would be admitted (11 APP 2560). Brooks did not seek a continuance when he learned that the focus of the trial had changed and admitted that he probably should have done so (11

APP 2561).

Although Brooks went to Michigan to prepare for trial he did not interview any persons from high school concerning the relationship between CHAPPELL and Panos (11 APP 2561). An investigator went with him to Michigan but they were looking for information on CHAPPELL'S past and were not focusing on the relationship at all (11 APP 2562). When they went to Michigan they only were there for one full day and should have stayed a few days and tried to find the witnesses. If they did go to house of a witness and they weren't home they did not go back later (11 APP 2568). He did not go to Arizona to interview anyone concerning CHAPPELL and Panos' relationship while the lived Arizona (11 APP 2562).

Brooks' opinion was that the case was compelling one for voluntary manslaughter since the provocation of learning of the betrayal by Panos was self-evident. Second degree murder was a fall-back option (11 APP 2563). Brooks admitted that it would have been important to present witnesses to testify that even though CHAPPELL and Panos would argue and fight it was not uncommon that Panos would quickly forgive him and they would get back together. Brooks did not present any witnesses to corroborate how the relationship was working between them (11 APP 2564).

The defense team was trying to find witnesses the week before trial due to the rulings of the Court on the character evidence and in retrospect Brooks believe he should have sought

a continuance to give him time to find the witnesses, but at the time he just couldn't believe the great detail of other alleged bad acts that the Court was allowing to be presented to the jury (11 APP 2565).

Brooks did not contact Shirley Sorrell, nor did he not spend a lot of time trying to located James Ford (11 APP 2567). Ford was the best friend of CHAPPELL in Michigan and could been presented at trial to rebut the State's case and in mitigation at the penalty hearing (11 APP 2567-68). Brooks and his investigator looked for Ivri Marrell but when they went to his house he wasn't there (11 APP 2569). Brooks testified that they should have stayed a few extra days in Michigan and found the other witnesses (11 APP 2570).

Neither Chris Bardow or David Green from Arizona were called as witnesses and Brooks never spoke with them (11 APP 2570). CHAPPELL had told Brooks about Green and Bardow and had given him a list of the other witnesses that he wanted located and interviewed as witnesses but no effort was made to locate witnesses in Arizona (11 APP 2571).

With respect to the claims concerning the failure to object Brooks did not have a strategic reason for not objecting to any of the asserted improper arguments (11 APP 2573-76). To his recollection none of his objections were successful in the case and the attorneys were so exhausted by the rulings that by halfway through the trial everything seemed futile (11 APP 2576).

One Motion that Brooks had filed before trial was to dismiss the charges on equal protection grounds as he had other similar cases where the case had not sought the death penalty and he believed that only reason the State sought the death penalty against CHAPPELL because he was a black man that had killed a white women (11 APP 2582-83). In hindsight he believed the proper motion would have been to strike the death penalty instead of to dismiss the entire case (11 APP 2583).

Based on the Briefs filed with the Nevada Supreme Court and the issues raised which were not addressed by the Opinion of the Court, Brooks was of the opinion that the case was not fully and properly reviewed by the Nevada Supreme Court, and that the Court did not address the most important issues raised (11 APP 2588).

With respect to not offering jury instructions that set forth specific mitigating circumstances and the proper limited use of character evidence, Brooks did not have a strategic reason for not having done so. (11 APP 2589-90)

Prior to trial, Brooks did not go out and interview any of the State's witnesses and historically it had been the practice of the office not to do so, and if you asked for it the investigators would pretty much laugh at you (11 APP 2590). After the Court ruled that the prior domestic battery incidents were admissible, Brooks did no investigation into the facts and circumstances of any of the other acts. If he had known that all of the details of the domestic batteries were going to be

admitted he certainly would have done a tremendous number of things to investigate the incidents (11 APP 2591).

Will Ewing was primarily assigned to handle the penalty hearing and was the attorney responsible for making objections at the penalty hearing. He was not yet qualified under Supreme Court Rule 250 at the time of the CHAPPELL trial (11 APP 2604). He had no strategic reasons for not objecting to any of the arguments that were challenged in CHAPPELL'S Habeas Corpus Petition (11 APP 2605-2607). With respect to the testimony from the family of Panos asking the jury to give CHAPPELL death, the failure to object was a misunderstanding of the law that such testimony was permissible (11 APP 2607). Further there was no strategic reason not to offer jury instructions that contained specific mitigating circumstances or which properly defined the use of character evidence at the penalty hearing (11 APP 2608-2609).

AFFIDAVIT EVIDENCE

IVRI MARRELL was friends with CHAPPELL while in high school and after high school and was one his best friends. He could have testified to CHAPPELL'S employment history and also concerning his relationship with Panos. Marrell also knew about CHAPPELL'S relationship with his children. Marrell further could have testified that CHAPPELL did not follow Panos to Arizona but rather it was she that was always calling him and asking him to come back to Tucson and she sent him the ticket to go back to Tucson. (11 APP 2676-78)

BENJAMIN DEAN another good friend of CHAPPELL in Lansing and had learned from CHAPPELL when he came back from Tucson about all the problems that he had to endure. He felt that it was his obligation to take care of Deborah and the kids and that another guy would not want to take care of her. He would do all the chores around their apartment such as cooking and cleaning and would take care of the children while Deborah worked. Despite this, Deborah was very controlling and demanding of him, often making racial comments to him. Further CHAPPELL was not violent, and was like a big clown and was always real playful. He was the life of a party and would always make people laugh. (11 APP 2679-81)

JAMES FORD, another friend knew Deborah Panos through her relationship with JAMES. There was a great deal of animosity from Deborah's family toward JAMES because he was black. Deborah was very controlling and jealous of JAMES and wouldn't let him go out with the guys and would often verbally abuse him. In many respects the testimony from Marrell, Ford and Dean is similar because of their close friendship with CHAPPELL and knowledge of his relationship with Panos. (11 APP 2682-84)

CLARA AXAM is the grandmother of CHAPPELL raised him and his two sisters after their mother was killed in an automobile accident. Although she did testify at the penalty hearing she was not called during the trial. Her knowledge of the relationship with Panos should have been used to bolster the argument for less that a first degree murder conviction. The

claim as to Axam is not for not locating her to testify, but not using her to her full potential. She would have been able to provide information to locate James Ford, Ivri Marrell, and Ben Dean if she had been asked to do so. (11 APP 2665-66)

SHIRLEY SORRELL knew CHAPPELL at Otto Junior High School and at Sexton High School and also knew Panos in High School. She was aware that they had become a couple and her opinion she was very controlling of him. Panos was really jealous of JAMES and would continually accuse him of having had an affair with her and used their friendship to control JAMES. (11 APP 2667-68)

BARBARA DEAN first met CHAPPELL when he was five years old and she was working as a teacher's aid. He was a special education student and was always hungry and would eat extra lunches and breakfasts at the school. When he came back from Tucson she believed that at that time he had started using drugs and that he needed treatment. He should have received treatment instead of being let out of jail. At the time of the trial her health condition would not have allowed here to travel to Las Vegas to testify at the trial but she could have assisted in finding all of the other witnesses. For instance her daughter Meka also knew JAMES and Debbie and was nearer to their same age and would have offered testimony about the relationship. She was not interviewed by the attorney and investigator but would have been readily available. (11 APP 2669-71)

DAVID GREEN was a witness residing in Tucson that knew of the relationship in Arizona. He was located and interviewed by both CHAPPELL'S investigator and attorney, but lost his job and disappeared before his affidavit could be signed. CHAPPELL is aware that the affidavit of investigator Reefer is hearsay and not admissible for it's content regarding Green's testimony. The affidavit is offered to substantiate that witnesses were available that could have assisted CHAPPELL'S defense if an effort had been made to locate them at trial. (11 APP 2672-74)

ARGUMENT

I.

CHAPPELL WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE TRIAL PHASE AND THE DISTRICT COURT SHOULD HAVE ORDERED A NEW TRIAL

The Sixth Amendment guarantees that a person accused of a crime receive effective assistance of counsel for his defense. The right extends from the time the accused is charged up to and through his direct appeal and includes effective assistance for any arguable legal points. Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The United State Supreme Court has consistently recognized that the right to counsel is necessary to protect the fundamental right to a fair trial, guaranteed under the Fourteenth Amendment's Due Process Clause. Powell v. Alabama, 287 U.S. 45, 53 S.Ct.55, 77 L.Ed. 158 (1932); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Mere presence of counsel does not fulfill the constitutional requirement: The right to counsel is the right to effective counsel, that is, "an attorney who plays the role necessary to ensure that the trial is fair." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 657 (1984); McMann v. Richardson, 439 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d. 763 (1970).

Pre-trial investigation is a critical area in any criminal case and failure to accomplish same has been held to constitute ineffective assistance of counsel. The Nevada Supreme Court in Jackson v. Warden, 91 Nev. 430, 537 P.2d 473 (1975) stated:

> "It is still recognized that a primary requirement is that counsel . . . conduct careful factual and legal investigations and inquiries with a view toward developing matters of defense in order that he make informed decisions on his client's behalf both at the pleading stage . . . and at trial."

Jackson 91 Nev. at 433, 537 P.2d at 474. The Federal Courts are in accord that pre-trial investigation and preparation for trial are a key to effective representation of counsel. U.S. v. Tucker, 716 F.2d 576 (1983).

In U.S. v. Baynes, 687 F.2d 659 (1982) the Court, in language applicable to this case, stated:

> "Defense counsel, whether appointed or retained is obligated to inquire thoroughly into all potential exculpatory defenses and evidence, mere possibility that investigation might have produced nothing of consequences for the defense could not serve as justification for trial defense counsel's failure to perform such investigations in the first place. Fact that defense counsel may have performed impressively at trial would not have excused failure to investigate defense that might have led to complete exoneration of the Defendant."

In Warner v. State, 102 Nev. 635, 729 P.2d 1359 (1986) the Nevada Supreme Court found that trial counsel was ineffective where counsel failed to conduct adequate pre-trial investigation, failed to properly utilize the Public Defender's full time investigator, neglected to consult with other attorneys although urged to do so, and failed to prepare for the testimony of defense witnesses. See also, Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1991).

In his Petition and Supplemental Petition, CHAPPELL asserted that his attorneys were deficient in a number of

respects. The allegations of CHAPPELL included the following:

A. Trial counsel was ineffective in failing to call witnesses to testify on behalf of CHAPPELL.

Evidence from the evidentiary hearing shows that Attorney Howard Brooks knew that the State was trying to introduce substantial evidence concerning the prior relationship between CHAPPELL and Panos. Given this knowledge he should have been prepared to present testimony from those persons that were most familiar with the relationship. The affidavits submitted by CHAPPELL clearly established that there was a vast body of information that was kept from the jury that would have made a great difference, both during the trial phase and at the penalty hearing.

The affidavits that were filed came from witnesses that were available and ready to testify from CHAPPELL'S hometown of Lansing, Michigan. The contents of the Affidavits are summarized in full in the State of Facts above. This evidence was admissible at the trial phase and would have provided a basis for relief for CHAPPELL for ineffective assistance of counsel at trial.

The only witnesses called at the trial portion of the case were a next door neighbor that said the house was messy, Dr. Etcoff and CHAPPELL. The State's entire case was built around portraying CHAPPELL as a chronic abuser, thief and individual of poor character. A number of witnesses were called by the State to describe the relationship between CHAPPELL and Panos

and did so in a fashion that was totally derogatory to CHAPPELL. Numerous witnesses could have been called from Nevada, Michigan and Arizona that had knowledge of the relationship and would have described it as loving and not abusive. Further, contrary to the testimony at trial, witnesses could have shown that CHAPPELL did not follow Panos to Arizona, but rather she begged him to come out and be with her. All of this testimony would have had an impact on the State's case and corroborated the defense theory that the killing was not first degree murder. The witnesses were described in CHAPPELL'S affidavit in support of his Supplemental Petition and included the following; some of which provided separate affidavits in support of CHAPPELL'S Petition:

1. Ernestine (Sue) Harvey. Sue was a friend of CHAPPELL and Ms. Panos and could have testified as the relationship. Her testimony would have greatly rebutted the testimony from the State's witnesses that portrayed CHAPPELL as being abusive, but instead had a loving relationship.

2. Shirley Sorrell. Shirley knew Debra and CHAPPELL for many years and talked with them on the phone even after they moved to Arizona and then Nevada.

3. James C. Ford. CHAPPELL'S best friend in Michigan. CHAPPELL grew up with Mr. Ford and he was around Debra and CHAPPELL during the first five years of our relationship. He also knew about CHAPPELL'S employment history and could have testified at both the trial and the penalty hearing.

4. Mr. Ivri Marrell was also a friend of CHAPPELL and Debra in Michigan and stayed in contact with them in Arizona. He could have testified to Debra's behavior and the relationship with CHAPPELL.

5. CHAPPELL'S sisters, Mrya Chappell and Carla Chappell had been around Debra a lot and knew about the type of relationship that they had together. CHAPPELL and Panos lived with Carla for a period of time after the first baby was born and she would babysit for them on occasions.

6. Chris Bardow and David Green. Both were friends of CHAPPELL in Arizona and could have rebutted most of the testimony that was introduced concerning the events that allegedly took place in Arizona.

The District Court denied CHAPPELL an opportunity to call these witnesses at an evidentiary hearing and therefore did not give full consideration to CHAPPELL'S request for a new trial. The District Court erred in not finding that CHAPPELL was denied effective assistance of counsel.

Other errors by trial counsel that mandated reversal of the conviction included the following, which were also raised by CHAPPELL as substantive violation of his constitutional rights, and should have been a basis for relief.

B. There was an absence of contemporaneous objection by CHAPPELL'S counsel to the following:

1. The systematic exclusion and under-representation of African Americans on jury panels in Clark County, Nevada;

2. Unconstitutional jury instructions defining premeditation and deliberation;

3. Unconstitutional jury instructions defining express and implied malice;

4. Unconstitutional jury instructions on the use of "character evidence" in weighing aggravation and mitigation;

5. Unconstitutional jury instructions preventing sympathy as a factor in mitigation of sentence;

6. Unconstitutional jury instructions on the existence of non-statutorily listed mitigating circumstances; and

7. The use of overlapping aggravating circumstances to impose death. It should be noted that this Court has recently decided the case of McConnell v. State, 120 Nev.Ad.Op. 105 (2004) (rehrg pending) which appears to invalidate three of the four aggravating circumstances alleged by the State. This decision may make moot the claim of overlapping aggravating circumstances and may also form the basis of a finding that CHAPPELL cannot be eligible for the death penalty. The only remaining aggravating circumstance of torture or depravity of mind was stricken by this Court on direct appeal.

The District Court denied relief based on any of the above stated grounds and CHAPPELL hereby preserves each ground as a separate and distinct basis for relief.

C. Numerous instances of improper closing argument at the trial and penalty hearing were not the subject of objection at trial and not raised on direct appeal in violation of the Sixth

Amendment right to effective counsel and under the Fifth and Fourteenth Amendments rights to due process and a fundamentally fair trial. These included the following which denied CHAPPELL effective assistance of counsel and it was error for the District Court not to rule in CHAPPELL'S favor on these issues:

1. During her closing argument at the penalty hearing the prosecutrix improperly argued that it was not appropriate for the jury to consider rehabilitation stating:

> "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." (8 APP 2018-19)

It is improper for the prosecution to make arguments that minimize the existence and utilization of mitigating circumstances in the weighing process. Recently in Hollaway v. State, 116 Nev. 732, 6 P.3d 987 (2000) the Nevada Supreme Court reversed a death penalty based in part on the argument of the prosecution against the existence of mitigation. In Hollaway the Court stated:

> "The United States Supreme Court has held that to ensure that jurors have reliably determined death to be the appropriate punishment for a defendant, 'the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime.' *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989). In *Penry*, the absence of instructions informing the jury that it could consider and give effect to certain mitigating evidence caused the Court to conclude that
>
> > 'the jury was not provided with a vehicle for expressing its reasoned moral response to that evidence in rendering its

> sentencing decision. Our reasoning in [Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982),] thus compels a remand for resentencing so that we do not risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'"

Hollaway, 116 Nev. at 744. The Court then went on to command that a jury instruction be given in all capital cases directing the jury to make an independent and objective analysis of all relevant evidence and that arguments of counsel do not relieve the jurors of this responsibility.

A prosecutor may not comment that the defendant is unlikely to be rehabilitated, or that the defendant's potential for rehabilitation cannot be considered as a mitigating factor. Bowen v. Kemp, 769 F.2d 672, 678 (11th Cir. 1985) (improper for prosecutor to express opinion about prospects for rehabilitation in support of death penalty), cert. denied, 478 U.S. 1021 (1986). Flanagan v. State, 104 Nev. 105, 108, 754 P.2d 836, 838 (1988) (concluding that prosecutor's reference to defendant's improbable rehabilitation was "particularly objectionable" and ordering new penalty hearing), vacated on other grounds, 504 U.S. 930 (1992). It was an abuse of discretion for the District Court not to grant relief on this ground.

2. Without objection from trial counsel the prosecutor improperly referred to facts not in evidence at the penalty hearing:

"The death penalty deters. We know that all we need

> to do is look in the newspapers or turn on the television set and we all recognize that a very large percentage of the murders that are committed out there today are murders by individuals who have abused their victims in the past just like in this case." (8 APP 2019)
>
> "We know the death penalty deters. It sends out a message and what message has the defendant sent out in this case besides domestic violence ends in murder?" (8 APP 2021)

No evidence was presented at the penalty hearing concerning deterrence or the percentage of murders that came from abusive relationships.

In Donnelly v. DeChrisoforo, 416 U.S. 637, 645, the Supreme Court explained "[i]t is totally improper for a prosecutor to argue facts not in evidence..." Such arguments also violate the right to confrontation and cross-examination, in the same way that a prosecutor's expression of personal opinion puts unsworn "testimony" before the jury. In Agard v. Portuondo, 117 F.3d 696, 711 (2d Cir. 1997) the Court held that alluding to facts that are not in evidence is "prejudicial and not at all probative.", cert. granted on other grounds, 119 S.Ct. 1248 (1999). See also People v. Adcox, 47 Cal.3d 207, 236, 763 P.2d 906, 919 (Cal. 1988) wherein the California Supreme Court reaffirmed that "'statements of fact not in evidence by the prosecuting attorney in his argument to the jury constitute misconduct.'") (quoting People v. Kirkes, 39 Cal.2d 719, 724, 249 P.2d 1 (Cal. 1952)), cert. denied, 494 U.S. 1038 (1990).

The Nevada Court has also condemned arguments that refer

to facts not in evidence. In Leonard v. State, 108 Nev. 79, 82, 824 P.2d 287, 290 (1992) the Court held that it is improper for a prosecutor to state that defendant committed crime because he "liked it" with no supporting evidence, cert. denied, 505 U.S. 1224 (1992). Similarly in Williams v. State, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987) the Court found that was improper to argue that defendant purchased alibi testimony based on facts outside record.

3. Trial counsel failed to object to improper, inflammatory and prejudicial closing argument at the penalty hearing. The specific argument by the prosecutrix was as follows:

> "The defendant has stated many times, during the trial in the guilt phase, that he feels lower than dirt, yet, ironically, ladies and gentlemen, the only thing lower than dirt is Deborah Panos' decomposed and lifeless body." (8 app 2022)
>
> "A lot of people have paid for the chances that this system has given this defendant and we can thank our system who gave these chances to this defendant for the last memories to little Chantell and little JP and Anthony of their mom and dad, that perhaps of daddy being taken away from jail crying, as they cry, and mommy getting taken away in an ambulance. Or perhaps we can thank this defendant for his last memory of the day of being with their mother, of being placed into Child Haven into protective custody yet another time. And we can thank the defendant for the fact that this four year old child sits there and wants to die. A four year old wants to die so she can be in heaven with her mommy. How pathetic and a little eight year old child, who's afraid to talk about the violence he's witnessed, and wants sleeping pills at the age of eight years old. Eight year olds shouldn't want sleeping pills, ladies and gentlemen. That is a depressed little eight year old. That is a guilty little child because he could not protect his mommy from this man. He could not protect his

brothers and sisters from that man right there." (8 APP 2049-50)

"...I'm asking you not to forget about Deborah Panos. It may be that it's been a year since her death and that, perhaps, weeds have grown around her tombstone and that only piece of Deborah Panos' body left is this -- her blood and her vaginally swabs and her pieces of skin that we casually pass around this courtroom..." (11 APP 2051).

At a sentencing hearing, it is most important that the jury not be influenced by passion, prejudice, or any other arbitrary factor. Hance v. Zant, 696 F.2d 940, 951 (11th Cir. 1983). This argument clearly went beyond the appropriate limits and should have formed a basis for relief in District Court.

4. Trial counsel also failed to object to arguments by the prosecution that the jury by its verdict should send a message to the community.

A prosecutor may not pressure jurors by telling them to do their "job," to fulfill their civic duty, to act as the conscience of the community, to cure society's ills, or to send out a message by finding the defendant guilty. Such comments may also constitute an impermissible assertion of a personal opinion and a reference to facts outside the record. In U.S. v. Young, 470 U.S. 1, 5-7 (1985) the court reminded prosecutors to "refrain from improper methods calculated to produce a wrongful conviction" in holding that it was improper for a prosecutor to tell jurors that "[i]f you feel you should acquit him for that it's your pleasure. I don't think you're doing

your job as jurors in finding facts as opposed to the law..." Similarly the Court in Viereck v. U.S., 318 U.S. 236, 247 (1943) (held that the prosecutor's statement, including telling jurors that "[t]he American people are relying upon you ladies and gentlemen for their protection against this sort of a crime" compromised the defendant's right to a fair trial. See also U.S. v. Leon-Reyes, 1999 WL 314682, at *5 (9th Cir. 1999) ("A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear.").

Most recently the Nevada Supreme Court in Evans v. State, 117 Nev. 609, 28 P.3d 498 (2001) again condemned arguments by prosecutors that urged the jury to impose the death penalty in order to solve a social problem finding that such argument diverted jurors' attention from their correct task, "which is the determination of he proper sentence for the defendant before them based upon his own past conduct". See also Collier v. State, 101 Nev. 473, 478, 705 P.2d 1126, 1129 (1985). The argument of the prosecutrix violated these holdings by arguing

that CHAPPELL should get the death penalty because domestic violence is a problem in society:

> "You can certainly deter him and you have it within your power to send a message today out into this community, which is that 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 Chappells what the consequence is when you engage in that type of action." (8 APP 2021).

Trial counsel was ineffective in failing to object to this argument which was highly prejudicial and improper and the District Court should have granted relief on this ground.

5. During closing argument at the guilt phase of the trial the prosecutor improperly argued victim impact without drawing an objection from the defense.

It is well established that victim impact testimony is highly prejudicial and not relevant during the trial portion of a criminal proceedings. Nonetheless trial counsel completely failed to object and prevent argument from the State that was blatantly victim impact and highly prejudicial. An emotional appeal to consider the victim's family is patently improper and prejudicial. Mears v. State, 83 Nev. 3, 422 P.2d 230 (1967). The argument in the instant case was as follows:

> "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 is the promise of her years once written on her brow? Where sleeps that promise now?" (7 APP 1608)

Trial counsel was ineffective in failing to object to the victim impact argument during the trial portion of the case.

Such argument was prejudicial and a different result would have been likely had the jury not been subjected to the inflammatory argument, and the District Court should have so ruled.

6. The was no objection from trial counsel to the argument by the prosecutor which improperly quantified reasonable doubt and the guilt phase of the trial.

The improper argument was the following:

> "A reasonable doubt is one based on reason. It's a reasonable doubt. It's not mere possible doubt. So it's not possibilities, it's not speculation because it says, 'Doubt to be reasonable must be actual, not mere possibility or speculation,' okay. It's got to be based on reason, okay. It's not an impossible burden, ladies and gentlemen. Prosecutors across the country everyday meet this burden. It's not an impossible burden. It's a doubt based on reason.
>
> It's a type of doubt that would control a person in the weighty affairs of life. What is a weighty affair of life? Well, for some people it could be the decision to get married. For some people it could be the decision to have a child or switch occupations or perhaps -- let me put it to you this way. You have all made reasonable doubt or, excuse me, you have all made weighty affair of life decisions. You have all made them. You have all probably, at some time, bought a home. So, what are some of the things you look for in buying a home?....." (7 APP 1691-92)

There was no objection to this improper argument wherein the prosecutor equates decisions in "every day life" that are unanswered to the constitutional standard applicable to criminal cases. In Quillen v. State, 112 Nev. 1369, 1382, 929 P.2d 893, 902 (1996) the Court found persuasive the reasoning of the Ninth Circuit model instruction, "because decisions like 'choosing a spouse, buying a house, borrowing money, and the

like...may involve a heavy element of uncertainty and risk-taking and are wholly unlike the decision jurors ought to make in criminal cases'". See, 9th Cir. Crim. Jury Inst. 3.03 CMT (1995).

Reasonable doubt is a subjective state of near certitude. McCullough v. State, 99 Nev. 62, 75, 657 P.2d 1157, 1158 (1983). However, when prosecutors attempt to rephrase the reasonable doubt standard, they venture into troubled waters. Howard v. State, 106 Nev. 713, 721, 800 P.2d 175, 180 (1990). See also, Wesley v. State, 112 Nev. 503, 916 P.2d 793 (1996).

The above argument is strikingly similar to the argument in Wesley, supra, that was found to be improper, however, was concluded to be harmless. In Wesley, the prosecutor stated, "[I]f you feel it in your stomach and if you feel it in your heart...then you don't have reasonable doubt." Id., 112 Nev. at 514. See also, Evans v. State, 117 Nev. 609, 28 P.3d 498 (2001) wherein the Court recently condemned similar arguments.

In McCullough v. State, 99 Nev. 72, 657 P.2d 1157 (1983) the Court discussed at some length the attempts to clarify or quantify reasonable doubt stating in summary that:

> "The concept of reasonable doubt is inherently qualitative. Any attempt to quantify it may impermissibly lower the prosecutor's burden of proof, and is likely to confuse rather than clarify."

McCullough, 99 Nev. at 75. The Court reversed a murder conviction based, in part, on the argument of the prosecutor that quantified reasonable doubt with the Court stating:

"Additionally, we caution the prosecutors of this State that they venture into calamitous waters when they attempt to quantify, supplement, or clarify the statutorily prescribed reasonable doubt standard."

Holmes v. State, 114 Nev. 1357, 972 P.2d 337, 343 (1998). The improper argument of the prosecutor in Holmes, was similar to that in the case at bar as it also used the concept of buying a house to quantify the weighty affairs of life.

7. During the penalty hearing, the aunt of Panos, Carol Monson testified and told and urged the jury to give CHAPPELL the death penalty, stating: "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". (8 APP 1961) The was no objection by trial counsel and no request that the jury be admonished to disregard the improper comment.

The next witness, Norma Penfield, the mother of Panos, made a similar improper request during her testimony: "My only wish now is that justice will punish to the fullest the person who took her life." (8 app 1965) She finished up her testimony telling the jury: "I feel the system has let her down once. I hope to heaven they don't do it again." (8 APP 1975)

While a victim may address the impact the crime has had on the victim and victim's family, a victim can only express and opinion regarding the defendant's sentence in a non capital case. Witter v. State, 112 Nev.908, 921 P.2d 886 (1996); Randell v. State, 109 Nev. 5, 846 P.2d 278 (1993).

8. Trial counsel failed to object to the prosecutor

asking a series of questions during cross-examination at the trial phase of CHAPPELL concerning the punishment he would like to receive and whether the wanted the death sentence. (6 APP 1472-75) Clearly at the trial phase the subject of punishment is not relevant and the jury is explicitly so instructed. The failure to object to the irrelevant and prejudicial questioning constituted ineffective assistance of counsel.

9. Trial counsel failed to object to cross-examination of CHAPPELL that implied that he made up his testimony after hearing all the evidence in violation of his Fifth Amendment right to remain silent. During CHAPPELL'S testimony the following exchange took place, without any objection from trial counsel:

> "Q You've had a substantial period of time to think about today, haven't you?
>
> A Yes, sir.
>
> Q You've known for quite awhile, haven't you, that at some point you would take the witness stand and give the jury your version of what occurred?
>
> A Yes, sir.
>
> Q And once you had made that decision, whenever it was, you've given a lot of attention to what you would tell the jury?
>
> A I didn't make up anything, sir.
>
> Q I didn't say you made up anything, Mr. Chappell. Have you thought a lot about what you would tell the jury?
>
> A No.
>
> Q Have you thought a lot about how you would act

on the witness stand?

A No, sir." (6 APP 1471-72)

During closing argument the prosecutor argued that CHAPPELL had made up his story after finding out the DNA results, which was the subject of an objection and raised on direct appeal. Counsel, however, failed to include the improper cross-examination as exacerbating the prejudicial impact of the implication being given to the jury. A prosecuting attorney may not suggest that the accused's presence at trial helped him frame his testimony or fabricate a defense. Such comments infringe the defendant's constitutional right to be present at trial and to confront and cross-examine the witnesses against him. In Shannon v. State, 105 Nev. 782, 788-89, 783 P.2d 942, 946 (1989) the Court condemned as "improper," under the constitutional right to appear and defend, the prosecutor's comment that the defendant was putting on a "show" for jurors.

10. CHAPPELL was denied effective assistance of counsel when his trial attorneys failed to move to strike the death penalty being sought in violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution to Due Process and Equal Protection, in that the decision to seek the death penalty was made in racial biased manner, when compared to other murder cases involving non-African American defendants.

11. CHAPPELL was denied effective assistance of counsel

when trial counsel failed to object to the prosecutor arguing the absence of statutory mitigating circumstances that were not asserted by CHAPPELL. As discussed below the State argued the absence of statutory mitigators during closing argument at the penalty hearing. No objection was made this improper argument by trial counsel.

It is impermissible for a prosecutor to comment on mitigating factors which the defendant does not raise for a number of reasons. First, it suggests that jurors are restricted in the sentencing process to only the mitigating factors the prosecution discusses. Second, it suggests that the defendant is more worthy of receiving the death penalty because his case does not present mitigating factors found in other cases, which is fundamentally inconsistent with the principle of individualized sentencing.

In Penry v. Lynaugh, 492 U.S. 302, 326-28 (1989) the United State Supreme Court held that prosecutorial misconduct in argument violates right to individualized sentencing under Eighth and Fourteenth Amendments. Restricting consideration of sentencers to a handful of specified mitigating factors violates the Eighth and Fourteenth Amendments. Lockett v. Ohio, 438 U.S. 586, 604 (1978). See also State v. DePew, 528 N.E.2d 542, 557 (Ohio 1988) (explaining that "[i]f the defendant chooses to refrain from raising some of or all of the factors available to him, those factors not raised may not be referred to or commented upon by the trial court or the

prosecution"), and State v. Bey, 709 N.E.2d 484, 497 (Ohio 1999) ("As in State v. Mills, ..., here 'the prosecutor did err by referring to statutory mitigating factors not raised by the defense, when he explained why those statutory mitigating factors were not present.'").

II.

THE DISTRICT COURT ERRED IN NOT REVERSING CHAPPELL'S CONVICTION AND SENTENCE UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, IMPARTIAL JURY FROM CROSS-SECTION OF THE COMMUNITY, AND RELIABLE DETERMINATION DUE TO THE TRIAL, CONVICTION AND SENTENCE BEING IMPOSED BY A JURY FROM WHICH AFRICAN AMERICANS AND OTHER MINORITIES WERE SYSTEMATICALLY EXCLUDED AND UNDER REPRESENTED

CHAPPELL is an African American and was tried by a jury that was under represented of African Americans. There were no African Americans on the trial jury. Clark County has systematically excluded from and under represented African Americans on criminal jury pools. According to the 1990 census, African Americans -- a distinctive group for purposes of constitutional analysis -- made up approximately 8.3 percent of the population of Clark County, Nevada. A representative jury would be expected to contain a similar proportion of African Americans. A prima facie case of systematic under-representation is established as an all-white jury was seated in a community with an 8.3 percent African American population.

CHAPPELL was denied his Sixth Amendment right to a jury drawn from a fair cross-section of the community, his right to an impartial jury as guaranteed by the Sixth Amendment, and his right to equal protection under the 14th Amendment. The arbitrary exclusion of groups of citizens from jury service, moreover, violates equal protection under the state and federal constitution. The reliability of the jurors' fact finding

process was compromised. Finally, the process used to select CHAPPELL'S jury violated Nevada's mandatory statutory and decisional laws concerning jury selection and CHAPPELL'S right to a jury drawn from a fair cross-section of the community, and thereby deprived CHAPPELL of a state created liberty interest and due process of law under the 14th Amendment.

III.

CHAPPELL'S CONVICTION AND SENTENCE ARE INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEE OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS, EFFECTIVE ASSISTANCE OF COUNSEL AND RELIABLE SENTENCE BECAUSE CHAPPELL WAS NOT AFFORDED EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL

Appellate counsel failed to provide reasonably effective assistance to CHAPPELL by failing to raise on appeal, or completely assert all the available arguments supporting constitutional issues raised herein. In addition, specific errors that occurred during the case and which were not raised on appeal due to the ineffectiveness of appellate counsel include the following:

A. Appellate counsel failed to raise on direct appeal that a number of jury instructions given to the jury during the trial and penalty hearing were unconstitutional in improper. The specific instructions are addressed below in CLAIM V, and are incorporated herein by this reference.

B. Appellate counsel failed to raise the use of overlapping aggravating circumstances on direct appeal, just as trial counsel failed to object to same at trial. The specific basis for the issue as being meritorious is discussed above in CLAIM ONE (D) and incorporated herein by this reference.

C. Appellate counsel failed to raise the issue the improper closing argument on direct appeal and argue that the prosecutorial misconduct was plain error.

D. Appellate counsel failed to raise on direct appeal

that the death penalty was sought in violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution to Due Process and Equal Protection in that the decision to seek the death penalty was not made in a race neutral fashion.

E. Appellate counsel failed to challenge the improper victim impact testimony wherein the witnesses urged the jury to impose the death penalty.

F. Appellate counsel failed to challenge the improper cross-examination of CHAPPELL at the guilt phase concerning the subject of punishment and the possibility of parole.

IV.

CHAPPELL'S CONVICTION AND SENTENCE ARE INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEE OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS, EFFECTIVE ASSISTANCE OF COUNSEL AND RELIABLE SENTENCE BECAUSE THE A NUMBER OF JURY INSTRUCTIONS GIVEN AT TRIAL WERE FAULTY AND WERE NOT THE SUBJECT OF CONTEMPORANEOUS OBJECTION BY TRIAL COUNSEL, AND NOT RAISED ON DIRECT APPEAL BY APPELLATE COUNSEL

A. The jury instruction given defining premeditation and deliberation was constitutionally infirm and denied CHAPPELL due process and equal protection under the United States and Nevada Constitutions. The instructions failed to provide the jury with any rational or meaningful guidance as to the concept of premeditation and deliberation and thereby eliminated any rational distinction between first and second degree murder. The instruction given does not require any premeditation at all and thus violates the constitutional guarantee of due process of law because it is so bereft of meaning as to the definition of two elements of the statutory offense of first degree murder as to allow virtually unlimited prosecutorial discretion in charging decisions.

By eliminating any conceivable, rational distinction between first and second degree murder, the instruction given during CHAPPELL'S trial also failed to narrow the class of defendants eligible for the death penalty, and thereby corrupted a crucial element of the capital punishment scheme.

Instruction number 22 as given to the jury was not subject

of an objection by CHAPPELL. The instruction informed the jury that:

> "Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at 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 believes from the evidence that the act constituting the killing was preceded by and is 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." (7 APP 1721)

The above instruction must be read in conjunction with Number 21 which stated, in relevant part that:

> "Murder of the First Degree is murder which is (a) perpetrated by any kind of willful, deliberate and premeditated killing....." (7 APP 1720)

The instructions do not define, explain or clarify for the jury the phrases "premeditated", "willful" and "deliberate". The instructions correctly inform the jury that there are three (3) necessary and distinct elements to the crime of First Degree Murder. NRS 200.030(1)(a). The use of the conjunctive "and" crystallizes that the elements are separate and each one is required to support a verdict of murder in the first degree. The jury, however, was only given an instruction relating to premeditation for further guidance with no guidance whatsoever at the meaning of deliberate.

The challenged instruction was modified by the Court in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). In Byford, the Court rejected the argument as a basis for relief for

Byford, but recognized that the erroneous instruction raised "a legitimate concern" that the Court should address. The Court went on to find that the evidence in the case was clearly sufficient to establish premeditation and deliberation.

B. The malice instruction were vague and ambiguous and gave the state an improper presumption of implied malice.

At the settling of jury instructions trial counsel failed to object to Instruction Number 20 which defined express and implied malice as follows:

> "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." (7 APP 1719)

The instruction in no uncertain terms defines what express malice is without issuing a directive as to when express malice may be found. The distinction is obvious, express malice is merely defined whereas the jury is virtually directed to find implied malice "when no considerable provocation appears". This interpretation of Instruction No. 20 is consistent with the finding of the Court in Thomas v. State, 88 Nev. 382, 498 P.2d 1314 (1972) that "[g]enerally, the word 'may' is construed as permissive and the word 'shall' is construed as mandatory".

The State of California having recognized the problem has altered its instruction to read "Malice is express when...; and malice is implied when...." California Jury Instructions,

Criminal, Section 8.11.

Although the Nevada Supreme Court has upheld the validity of the instruction as correctly informing the jury of the distinction between express and implied malice under NRS 200.020, Guy v. State, 108 Nev. 770, 839 P.2d 578 (1992). CHAPPELL still urges that the presumption language is improper. It is therefore urged that the Court reconsider the finding in Guy, supra and reverse the conviction of CHAPPELL.

C. It was a violation of the Eighth and Fourteenth Amendments to fail to properly instruct the jury on the existence and use of mitigating circumstances presented by CHAPPELL as opposed to simply listing the statutory mitigators.

Instruction number 22 at the penalty hearing set forth the seven (7) statutory mitigating circumstances, but did not include any mitigating factors which were unique to CHAPPELL'S case. (9 APP 2154) The prosecutor in her closing argument went down the list of statutory mitigating circumstances and was able to ridicule most of them as they did not apply to the facts of this case. Counsel clearly should have tailored the jury instructions to remove mitigators that did not apply and insert the unique mitigators that were being proferred by the defense. In addition to the limited statutory mitigating circumstances, CHAPPELL contends that the evidence also supported the giving of individual theories of mitigation.

In every criminal case a defendant is entitled to have the jury instructed on any theory of defense that the evidence

discloses, however improbable the evidence supporting it may be. Allen v. State, 97 Nev. 394, 632 P.2d 1153 (1981); Williams v. State, 99 Nev. 530, 665 P.2d 260 (1983).

In Lockett v. Ohio, 438 US 586, 98 S.Ct 2954, 57 L.Ed. 2d 973 (1978) the Court held that in order to meet constitutional muster a penalty hearing scheme must allow consideration as a mitigating circumstance any aspect of the defendant's character or record or any of the circumstances of the offense that the defendant proffers as a basis for a sentence of less than death. See also Hitchcock v. Dugger, 481 US 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) and Parker v. Dugger, 498 US 308, 111 S.Ct 731, 112 L.Ed.2d 812 (1991).

NRS 175.554(1) provides that in a capital penalty hearing before a jury, the court shall instruct the jury on the relevant aggravating circumstances, and shall also instruct the jury as to the mitigating circumstances alleged by the defense upon which evidence has been presented during the trial or during the hearing. The statute thus requires instructions on alleged mitigators and does not restrict such instructions to the enumerated statutory mitigators. Byford v. State, 116 Nev. 215, 994 P.2d 7000 (2000).

It was error for the Court to fail to specifically instruct the jury on the mitigating circumstances that CHAPPELL submitted as his theory of the case at the penalty hearing.

V.

THE INSTRUCTIONS GIVEN AT THE PENALTY HEARING FAILED TO APPRAISE JURY OF THE PROPER USE OF CHARACTER EVIDENCE AND AS SUCH THE IMPOSITION OF THE DEATH PENALTY WAS ARBITRARY AND NOT BASED ON VALID WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES IN VIOLATION OF THE EIGHTH AMENDMENT TO THE CONSTITUTION

NRS 200.030 provides the basic scheme for the determination of whether an individual convicted of first degree murder can be sentenced to death and provides in relevant portion:

> "4. A person convicted of murder of the first degree is guilty of a category A felony and shall be punished:
>
> (a) By death, only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances; or
>
> (b) By imprisonment in the state prison: ..."

In the case at bar, in addition to the alleged aggravating circumstances there was a great deal of "character evidence" offered by the State that was used to urge the jury to return a verdict of death. The jury, however, was never instructed that the "character evidence" or evidence of other bad acts that were not statutory aggravating circumstances could not be used in the weighing process.

Instruction No. 7 spelled out the process as follows:

> "The State has alleged that aggravating circumstances are present in this case.
>
> The defendants have alleged that certain

mitigating circumstances are present in this case.

It shall be your duty to determine:

(a) Whether an aggravating circumstance or circumstances are found to exist; and

(b) Whether a mitigating circumstance or circumstances are found to exist; and

(c) Based upon these findings, whether a defendant should be sentenced to a definite term of 50 years imprisonment, life imprisonment or death.

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 circumstance or circumstances found.

A mitigating circumstance itself need not be agreed to unanimously; that is, any one juror can find a mitigating circumstance without the agreement of any other juror or jurors. The entire jury must agree unanimously, however, as to whether the aggravating circumstances outweigh the mitigating circumstances or whether the mitigating circumstances outweigh the aggravating circumstances.

Otherwise, the punishment shall be imprisonment in the State Prison for a definite term of 50 years imprisonment, with eligibility for parole beginning when a minimum of 20 years has ben served or life with or without the possibility of parole." (9 APP 2139)

The jury was not instructed the proper use of character evidence in the sentencing process. The jury was never instructed that such evidence was not to be part of the weighing process to determine death eligibility.

In Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985) the Court described the procedure that must be followed by a sentencing jury under a statutory scheme similar to Nevada:

"After a conviction of murder, a capital sentencing hearing may be held. The jury hears evidence and argument and is then instructed about statutory aggravating circumstances. The Court explained this instruction as follows:

> The purpose of the statutory aggravating circumstance is to limit to a large degree, but not completely, the fact finder's discretion. Unless at least one of the ten statutory aggravating circumstances exist, the death penalty may not be imposed in any event. If there exists at least one statutory aggravating circumstance, the death penalty may be imposed but the fact finder has a discretion to decline to do so without giving any reason ...[citation omitted]. In making the decision as to the penalty, the fact finder takes into consideration all circumstances before it from both the guilt-innocence and the sentence phase of the trial. The circumstances relate to both the offense and the defendant.

[citation omitted]. The United States Supreme Court upheld the constitutionality of structuring the sentencing jury's discretion in such a manner. Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)."

Brooks, 762 F.2d at 1405.

In Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996) the Court stated:

> "Under NRS 175.552, the trial court is given broad discretion on questions concerning the admissibility of evidence at a penalty hearing. *Guy*, 108 Nev. 770, 839 P.2d 578. In Robins v. State, 106 Nev. 611, 798 P.2d 558 (1990), *cert. denied*, 499 U.S. 970 (1991), this court held that evidence of uncharged crimes is admissible at a penalty hearing once any aggravating circumstance has been proven beyond a reasonable doubt."

Witter, 112 Nev. at 916.

Additionally in Gallego v. State, 101 Nev. 782, 711 P.2d

856 (1995) the court in discussing the procedure in death penalty cases stated:

> "If the death penalty option survives the balancing of aggravating and mitigating circumstances, Nevada law permits consideration by the sentencing panel of other evidence relevant to sentence NRS 175.552. Whether such additional evidence will be admitted is a determination reposited in the sound discretion of the trial judge."

Gallego, at 791. More recently the Court made crystal clear the manner to properly instruct the jury on use of character evidence:

> "To determine that a death sentence is warranted, a jury considers three types of evidence: 'evidence relating to aggravating circumstances, mitigating circumstances and 'any other matter which the court deems relevant to sentence'. The evidence at issue here was the third type, 'other matter' evidence. In deciding whether to return a death sentence, the jury can consider such evidence only after finding the defendant death-eligible, i.e., after is has found unanimously at least one enumerated aggravator and each juror has found that any mitigators do not outweigh the aggravators. Of course, if the jury decides that death is not appropriate, it can still consider 'other matter' evidence in deciding on another sentence."

Evans v. State, 117 Nev. 609, 28 P.3d 498 (2001).

As the court failed to properly instruct the jury at the penalty hearing the sentence imposed must be set aside.

VI.

CHAPPELL'S DEATH SENTENCE IS INVALID UNDER THE FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, AND A RELIABLE SENTENCE BECAUSE THE NEVADA CAPITAL PUNISHMENT SYSTEM OPERATES IN AN ARBITRARY AND CAPRICIOUS MANNER AND DOES NOT NARROW THE CLASS ELIGIBLE TO RECEIVE THE DEATH PENALTY

The Nevada capital sentencing process permits the imposition of the death penalty for any first degree murder that is accompanied by an aggravating circumstance. NRS 200.030(4)(a). The statutory aggravating circumstances are so numerous and so vague that they arguably exist in every first degree murder case. See NRS 200.033. Nevada permits the imposition of the death penalty for all first degree murders that are "at random and without apparent motive." NRS 200.033(9). Nevada statutes also appear to permit the death penalty for murders involving virtually every conceivable kind of motive: robbery, sexual assault, arson, burglary, kidnaping, torture, escape, to receive money, and to prevent lawful arrest, and escape. See NRS 200.033. The scope of the Nevada death penalty statute makes the death penalty an option for all first degree murders that involve a motive, and death is also an option if the first degree murder involves no motive at all.

The death penalty is accordingly permitted in Nevada for all first degree murders, and first degree murders, in turn, are not restricted in Nevada within traditional bounds. As the result of unconstitutional definitions of reasonable doubt, express malice and premeditation and deliberation, first degree

murder convictions occur in the absence of proof beyond a reasonable doubt, in the absence of any rational showing of premeditation and deliberation, and as a result of the presumption of malice aforethought. Consequently, a death sentence is permissible under Nevada law in every case where the prosecution can present evidence, not even beyond a reasonable doubt, that an accused committed an intentional killing, or a death occurred during the commission of a felony. See McConnell v. State, 120 Nev.Ad.Op. 105 (2004).

Nevada law fails to provide sentencing bodies with any rational method for separating those few cases that warrant the imposition of the ultimate punishment from the many that do not. The narrowing function required by the Eighth Amendment is accordingly non-existent under Nevada's sentencing scheme, and the process is contaminated even further by Nevada Supreme Court decisions permitting the prosecution to present unreliable and prejudicial evidence during sentencing, regarding uncharged criminal activities of the accused. Consideration of such evidence necessarily diverts the sentencer's attention from the statutory aggravating circumstances, whose appropriate application is already virtually impossible to discern.

CONCLUSION

Based on the arguments and authorities contained herein it is respectfully urged that the Court not only affirm the granting of a new penalty hearing but also remand the case for a new trial.

Dated this 11 day of January, 2005.

RESPECTFULLY SUBMITTED:

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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: Jan. 11, 2005

BY_____

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DECLARATION OF MAILING

DONNA POLLOCK, an employee with the Clark County Special Public Defender's Office, hereby declares that she is, and was when the herein described mailing took place, a citizen of the United States, over 21 years of age, and not a party to, nor interested in, the within action; that on the 11th day of January, 2005, declarant deposited in the United States mail at Las Vegas, Nevada, a copy of the Appellant's Opening Brief in the case of James Montell Chappell v. State, Case No. 43493, enclosed in a sealed envelope upon which first class postage was fully prepaid, addressed to James Montell Chappell, #52338, Ely State Prison, P.O. Box 1989, Ely, Nevada 89301, that there is a regular communication by mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on the 11th day of January, 2005.

DONNA POLLOCK

RECEIPT OF A COPY of the foregoing **Appellant's Opening Brief** is hereby acknowledged this 11th day of January, 2005.

DAVID ROGER
CLARK COUNTY DISTRICT ATTORNEY

By