ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL RIPPO,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 44094

FILED

JAN 17 2006

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RESPONDENT'S ANSWERING BRIEF

Appeal From Denial of Petition for Writ of Habeas Corpus (Post Conviction)
Eighth Judicial District Court, Clark County

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF

Appeal from Denial of Petition for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial Court, Clark County

STATEMENT OF THE ISSUES

1. Whether the Court Should Consider the McConnell Retroactivity Issue in the Context of the Instant Appeal
2. Whether McConnell Applies Retroactively
   A. Retroactivity Analysis
   B. Retroactivity as Applied to McConnell
   C. Whether Retroactivity Exceptions Are Applicable to McConnell

STATEMENT OF THE CASE

On May 19, 2005 Defendant filed his opening brief with the Nevada Supreme Court. On June 17, 2005, the State submitted its answering brief. On September 30, 2005, the State requested leave to file a supplemental briefing. The Court granted the State's motion and its request that supplemental briefing be ordered on the question of whether McConnell v. State, 102 P.3d 606 (Nev. 2004) should be applied retroactively to Defendant's case.

STATEMENT OF THE FACTS

On February 18, 1992, Michael Rippo and his girlfriend, Diana Hunt, went to the Katie Arms Apartment Complex to meet victim Lauri Jacobson, who was home alone. Rippo and Jacobson injected themselves with morphine for recreational

purposes. Shortly thereafter victim Denise Lizzi arrived, and she and Jacobson went outside for approximately twenty minutes. While Jacobson and Lizzi were outside, Rippo closed the apartment curtains and the window and asked Hunt to give him a stun gun she had in her purse. Rippo then made a phone call.

When Jacobson and Lizzi returned to the apartment, they went into the bathroom. Rippo brought Hunt a bottle of beer and told her that when Jacobson answered the phone, Hunt should hit Jacobson with the bottle so that Rippo could rob Lizzi. A few minutes later the phone rang, and Jacobson came out of the bathroom to answer it. Hunt hit Jacobson on the back of her head with the bottle causing Jacobson to fall to the floor. Rippo and Lizzi were yelling in the bathroom, and Hunt could hear the stun gun being fired. Hunt witnessed Rippo wrestle Lizzi across the hall into a big closet. Hunt ran to the closet and observed Rippo sitting on top of Lizzi and stunning her with the stun gun. Hunt then went to the living room and helped Jacobson sit up. Rippo came out of the closet holding a knife which he had used to cut the cords from several appliances, told Jacobson to lie down, tied her hands and feet, and put a bandanna in her mouth.

Hunt next saw Rippo in the closet with Lizzi. Rippo had tied Lizzi's hands and feet. At this point, a friend of Jacobson's approached the apartment, knocked on the door, and called out for Jacobson. Rippo put a gag in Lizzi's mouth. Jacobson was still gagged and apparently unable to answer. After the friend left, Rippo began stunning Jacobson with the stun gun. He placed a cord or belt-type object through the ties on Jacobson's feet and wrists, and dragged her across the floor to the closet. As Rippo dragged her, Jacobson appeared to be choking. Hunt began to vomit and next remembered hearing an odd noise coming from the closet. She observed Rippo with his knee in the small of Lizzi's back, pulling on an object he had placed around her neck.

When Hunt accused Rippo of choking the women, Rippo told her that he had only temporarily cut off their air supply, and that Hunt and Rippo had to leave before

the two women woke up. Rippo wiped down the apartment with a rag before leaving. While cleaning up, Rippo went into the closet and removed Lizzi's boots and pants. He explained to Hunt that he needed to remove Lizzi's pants because he had bled on them.

Later that evening, Rippo called Hunt and told her to meet him at a friend's shop. When Hunt arrived, Rippo was there with Thomas Simms, the owner of the shop, and another unidentified man. Rippo told Hunt that he had stolen a car for her and that she needed to obtain some paperwork on it. Hunt believed the car, a maroon Nissan, had belonged to Lizzi.

The next day, on February 19, 1992, Hunt and Rippo purchased a pair of sunglasses using a gold Visa card. Rippo told Hunt that he had purchased an air compressor and tools on a Sears credit card that morning. Later that day, Hunt, who was scared of Rippo and wanted to "get away from him[,]" went through Rippo's wallet in search of money. Hunt was unable to find any money, but she took a gold Visa card belonging to Denny Mason, Lizzi's boyfriend, from Rippo's wallet. Hunt did not know who Mason was. Around February 29, 1992, Rippo confronted Hunt. Hunt suggested to Rippo that they turn themselves in to the LVMPD, but Rippo refused, telling Hunt that he had returned to Jacobson's apartment, cut the women's throats, and jumped up and down on them.

The medical examiner, Dr. Giles Sheldon Green, who performed autopsies on Lizzi and Jacobson, also testified at Rippo's trial. Dr. Green testified that Lizzi had been found with a sock in her mouth, secured by a gag that encircled her head. The sock had been pushed back so far that part of it was underneath Lizzi's tongue, blocking her airway. Pieces of cloth were found tied around each of her wrists. Dr. Green testified that Lizzi's numerous injuries were consistent with manual and ligature strangulation.

Dr. Green testified that Jacobson died from asphyxiation due to manual strangulation. Dr. Green found no traces of drugs in Jacobson's system. Neither of

the womens' bodies revealed stun gun marks.

Thomas Simms also testified at trial that Rippo arrived at his shop on February 18, 1992, with a burgundy Nissan. When Simms asked about the ownership of the car, Rippo responded that someone had died for it. Rippo gave Simms several music cassette tapes, many bearing the initials D.L., and an empty suitcase with Lauri Jacobson's name tag. On February 21, 1992, Simms heard a news report that two women had been killed and that one of them was named Denise Lizzi. On February 26, 1992, Simms met Rippo in a parking lot to return a bottle of morphine that Rippo had left in Simms' refrigerator. When Simms inquired about the murders, Rippo admitted that he had "choked those two bitches to death" and that he had killed the first woman accidentally so he had to kill the other one.

The jury found Rippo guilty of two counts of first-degree murder, and one count each of robbery and unauthorized use of a credit card. After the penalty hearing, the jury sentenced Rippo to death, finding six aggravating factors: (1) the murders were committed by a person under sentence of imprisonment; (2) the murders were committed by a person who was previously convicted of a felony involving the use or threat of violence to another person; (3) the murders were committed while the person was engaged in the commission of or an attempt to commit robbery; (4) the murders involved torture; (5) the murders were committed while the person was engaged in the commission of or an attempt to commit burglary; and (6) the murders were committed while the person was engaged in the commission of or an attempt to commit kidnapping.

ARGUMENT

I

THIS COURT MAY PROPERLY CONSIDER THE RETROACTIVITY OF THE MCCONNELL DECISION IN THE CONTEXT OF THIS APPEAL.

Although neither the retroactivity issue nor the specific concerns addressed in McConnell were expressly raised or litigated in the proceedings below, it is primarily

a question of law that does not involve factual determinations outside the record. The Court, per its discretion, "may consider an issue first raised on appeal when the issue presented is purely one of law and the opposing party will suffer no prejudice as result of the failure to raise the issue below." United States v. Hernandez-Valdovinos, 352 F.3d 1243, 1248 n.4 (2003) (citing United States v. Echavarria-Escobar, 270 F.3d 1265, 1268 (9th Cir. 2001)).

The State is aware of the Court's concern with maintaining the integrity of procedural bars, which in turn maintain the integrity of the finality of cases. The Nevada Supreme Court has been under regular attack by various petitioners who claim Nevada does not consistently apply its procedural bars. See, e.g., State v. Riker, 121 Nev. Adv. Op. 25 (2005); Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001). However, as long as the State rules are consistently applied, the federal courts must show deference to the State court's application of procedural bars. Loveland v. Hatcher, 231 F.3d 640 (9th Cir.2000) (denying claim made that Nevada does not consistently apply NRS 34.726(1), the one year limit for filing habeas petition); Petrocelli v. Angelone, 248 F.3d 877 (9th Cir. 2001) (holding that the Nevada Supreme Court had consistently applied the procedural bar in NRS 34.800).

In this case no purpose would be served by requiring Rippo to submit his claim of retroactivity in a successive petition where the question of the validity of an aggravating circumstance amounts to a "fundamental miscarriage of justice" and "actual innocence" of the death penalty are called into question. Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993). The Court has previously recognized this standard can be met when the Defendant may be ineligible for the death penalty. See Jones v. State, 101 Nev. 573, 580, 707 P.2d 1128, 1133 (1985) (change in law raised constitutional issues that might invalidate a defendant's sentence of death); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996); Hill v. State, 114 Nev. 169, 953 P.2d 1077 (1998). This is the situation facing Defendant and an estimated forty (40) other death row inmates from Clark County alone, all of whom

had at least one felony-aggravator found against them. All these death row inmates have "good cause" to file a new, successive petition based on McConnell because it constitutes a fundamental change in law not previously available to them and are "prejudiced" if McConnell is held to be retroactive because it would invalidate the felony-aggravators upon which their death sentence was based.

Moreover, as the issue is before the Court presently, it is reasonable that the Court address McConnell now within Defendant's case rather than have it remanded for consideration of retroactivity, only for the appellate process to return all parties to the present point. This Court has recognized that within federal limitations it is "free to choose the degree of retroactivity or prospectivity which we believe appropriate to the particular rule under consideration . . . ." Colwell v. State, 188 Nev. 807, 818, 59 P.3d 463, 471 (2003). Accordingly, it is an exercise in futility for the lower court judges to speculate and attempt to divine this Court's intent for the retroactivity of the McConnell decision. No evidentiary hearing is required below where the factual prerequisites to determining application of McConnell are already part of the record: namely, whether the same felony was used to support a theory of felony-murder as well as to aggravate it to death eligibility. This Court could have decided retroactivity in the McConnell opinion at the time it announced the new rule but simply chose not to. Doing so now is not only permissible, but is advisable in order to avoid a waste of judicial resources and time on a discretionary decision of this Court which has potentially undermined the finality of most of Nevada's death row population.

II.

MCCONNELL SHOULD NOT APPLY RETROACTIVELY

Defendant is seeking to vacate his sentence of death. In support of his argument Defendant is relying on the Nevada Supreme Court's rule espoused in McConnell v. State, 102 P.3d 606 (Nev. 2004), *rehearing denied* McConnell v. State, 107 P.3d 1287 (Nev. 2005), and asks this court to apply this rule retroactively to his case. It is the State's position, however, that the Nevada Supreme Court enunciated a

new rule of criminal procedure that should not be applied retroactively to a finalized case on collateral review. Further, the rule does not fit within any exception prescribed in Colwell; therefore, Defendant's sentence of death should stand.

A. Retroactivity Analysis

In Colwell v. State, 118 Nev. 807, 59 P.3d 463 (2002) the Nevada Supreme Court adopted, with modification, the United States Supreme Court's three-step retroactivity analysis under Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060 (1989) (plurality opinion).

The first step is to determine whether the subsequent interpretation by the court established a "new rule." Unlike Teague, Colwell's definition of what constitutes a new rule is more strictly construed. See, Clem v. State, 81 P.3d 521 (2004). As per examples in Colwell, a rule is new "if the decision announcing it overrules precedent; or disapproves a practice the Court has arguably sanctioned in prior cases; or overturns a longstanding practice that lower courts had uniformerly approved." Colwell, 118 Nev. at 472; Hubbard v. State, 112 Nev. 946, 948 n.1, 920 P.2d 991, 993 n.1 (1996).

Once it is determined that a rule is new, the next step is to determine whether the conviction of the person[s] seeking application of the new rule has become final. Id. A conviction is final when judgment has been entered, the availability of appeal has been exhausted, and a petition for certiorari to the Supreme Court has been denied or the time for the petition has expired. Id. (quoting Griffith v. Kentucky, 479 U.S. 314, 321 n. 6, 107 S. Ct. 708 (1987)). If a conviction is not final, then the Court must apply new rules of federal constitutional law or be in violation of the basic norms of constitutional adjudication. Id. If a conviction, however, is final, then the general rule is not to apply the rule retroactively. Id.

The final step, once it is determined that a subsequent interpretation has announced a new rule and that the conviction of the person[s] seeking adjudication has become final, it is to determine if one of the two exceptions to the retroactivity bar

apply to the specific case at hand. The two exceptions enunciated in Colwell are more liberally defined than in Teague. See, Clem v. State, 119 Nev. 615, 81 P.3d 521 (2004). A new constitutional rule will apply retroactively under Colwell if: "(1) the rule establishes that it is unconstitutional to proscribe certain conduct as criminal or to impose a type of punishment on certain defendants because of their status or offense; or (2) it establishes a procedure without which the likelihood of an accurate conviction is seriously diminished." Id. at 531 (quoting Colwell, at 820, 59 P.3d at 472).

Essentially, "...on collateral review under Colwell, if a rule is not new, it applies retroactively; if it is new, but not a constitutional rule, it does not apply retroactively; and if it is new and constitutional, then it applies retroactively only if it falls within one of Colwell's delineated exceptions." Id.

B. Retroactivity Analysis as Applied to McConnell

McConnell stands for the proposition that the enumerated felonies in Nevada's Felony Murder statute as per NRS 200.030(1)(b) cannot be used both to establish first-degree murder and to aggravate the murder to capital status. McConnell, supra, at 623. This rule is in contradiction to the prior cases that specifically upheld the use of felonies to establish felony-murder and to aggravate the murder to capital status.[1] In Atkins v. State, 112 Nev. 1122, 923 P.2d 1119 (1996), the most recent case in this line of decisions, the Nevada Supreme Court specifically rejected the argument that the felony aggravator statute did not sufficiently narrow the class of eligible persons

[1] Petrocelli v. State, 101 Nev 46, 692 P. 2d 503 (1985)(NRS 200.033 was constitutional and that the statutory aggravators it lists, even "in combination," properly narrow the class of persons eligible for the death penalty); Gallego v. State, 117 Nev. 348, 370, 23 P.3d 227, 242 (2001); see also, Bennet v. State, 106 Nev. 135, 787 P.2d 797 (1990), overruled on other grounds by Leslie v. Warden, 118 Nev. 773, 59 P.3d 440 (2002)) (NRS 200.033 subdivision 4 is not constitutionally overbroad or arbitrary); Smith v. State, 114 Nev. 33, 953 P.2d 264 (1998) (subdivision 8 is not constitutionally vague and ambiguous); Cambro v. State, 114 Nev. 106, 952 P.2d 946 (1998) and Geary v. State, 112 Nev. 1434 (1996) (subdivision 9 is not constitutionally vague); Leslie v. Warden, 118 Nev. 773, 59 P.3d 440 (2002) (Defense counsel was not deficient in failing to argue that "at random and without apparent motive" aggravator was not supported by evidence in penalty phase of defendant's murder trial, where Supreme Court had consistently upheld that aggravator when, as in defendant's case, killing was unnecessary to complete robbery, and defense counsel, knowing that Supreme Court was required to independently review all aggravating circumstances, may have chosen to focus on issues more likely to yield results); Miranda v. State, 101 Nev. 562, 707 P.2d 1121 (1985).

for the death penalty. Thus, because McConnell expressly overruled precedent, the rule is "new" as defined in Colwell, supra.[2]

Defendant argues that because the Court in McConnell based its ruling on Lowenfeld v. Phelps, 484 U.S. 231, 108 S.Ct. 546 (1988), which involved narrowing the class of murders eligible for the death penalty, then the rule cannot be new because Lowenfeld was decided in 1988 (prior to Defendant's case becoming final), "and it is simply not a new rule that aggravating circumstances must genuinely narrow the class of persons eligible for the death penalty." Appellant's Supplemental Brief ("Brief"), 12/14/05, 11, 11 n.4. Defendant also notes that the U.S. Supreme Court did not consider the Lowenfeld decision to be new rule under its "stringent" retroactivity analysis. Brief, 11 n.4. Defendant misstates, however, the Court's reliance on Lowenfeld.

Lowenfeld held that the same felony can be used to establish first-degree murder and to aggravate it to capital status so long as the definition of capital murder was sufficiently narrow even before aggravators were considered. McConnell v. State, 107 P.3d 1287, 1291 (Nev. 2005). The Court, based on the analytical framework of Lowenfeld, as opposed to the decision, asked, "Is Nevada's definition of capital felony murder narrow enough that no further narrowing of death eligibility is needed *once the defendant is convicted?"* Id. (Emphasis added and internal quotations omitted). This Court in McConnell reached a contrary ruling as to Nevada's death eligibility narrowness based on the same analysis that was used in Lowenfeld, but it in no way based its ruling on the decision in Lowenfeld. Thus, McConnell is a new rule.

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[2] The Court in Colwell, supra, at 820 stated:

> We consider too sweeping the proposition [as espoused in Teague] that a rule is new whenever any other reasonable interpretation of prior law was possible. However, a rule is new, for example, when the decision it overrules precedent, or disapprove[s] a practice this Court had arguably sanctioned in prior cases, or overturn[s] a longstanding practice that lower courts had uniformly approved."

(Internal quotations marks and citations omitted).

Additionally, Defendant's contention here is analogous to the defendant's arguments in Colwell. There, defendant argued that Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002), should be applied retroactively because the U.S. Supreme Court used prior case law in deciding Ring, and hence, Ring could not be considered new for purposes of retroactivity analysis. Colwell, supra, at 821. This Court, however, stated that while Ring had applied prior case law, it also had to address prior opinion which contradicted the principles set out in Ring. Id. The Court decided, "[b]ecause Ring dealt with conflicting prior authority and expressly overruled precedent in announcing its rule [...] the rule is new." Id.

The same situation is evident here with McConnell. While the Court used Lowenfeld in framing its reasoning, it expressly overruled prior Nevada case law, and this overruling makes McConnell a new rule.[3] Moreover, the Court stated in its opinion denying a rehearing on McConnell that the "analysis and result reached in [McConnell] [was] dependent on the pertinent *Nevada* statutes." McConnell v. State, 107 P.3d 1287, 1293 (Nev. 2005). (Emphasis added).

Next, the inquiry is whether Defendant's conviction was final when McConnell was decided, and the answer is yes. The Court affirmed Defendant's conviction on direct appeal October 1, 1997; Defendant's petition for rehearing was denied on February 9, 1998; and Defendant's petition for writ of certiorari filed with the United States Supreme Court was denied on October 5, 1998. Accordingly, because Defendant's conviction is final and the rule is new, it does not apply retroactively unless it can fit within either exception to nonretroactivity. Neither exception is applicable here.[4]

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[3] This Court is also not bound by decisions that consider federal law within the federal court system, so long as it gives the minimum constitutional protections. See California v. Ramos, 463 U.S 992, 1013-14, 103 S.Ct. 3446 (1983); see also Sessions v. State, 106 Nev. 186, 191, 789 P.2d 1242, 1245 (1990) ("This court is not bound to follow a decision of the federal district court regarding Nevada law.").

[4] In argument C of his brief, beginning on page eleven, Defendant relies on the U.S. Supreme Court case of Bousley v. United States, 523 U.S 614, 118 S.Ct. 1604 (1998), inter alia, to argue that McConnell is a substantive rule of law, which is outside retroactivity analysis per Teague and Colwell, and that prior case law dictates that new substantive rules

C. The Retroactivity Exceptions Are Not Applicable to McConnell

Defendant is not part of a class of individuals who cannot be punished because of their status or offense. See Brief, p. 14. An example of status would be the case of Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1917 (1967) where the U.S. Supreme Court ruled that a couple cannot be punished because they married persons of different races. See Mackey v. United States, 401 U.S. 667, 692 n.7, 91 S. Ct. 1171 (1971) (Harlan, J., concurring) ("[...][P]rimary, private individual conduct beyond the power of the the criminal-lawmaking authority to proscribe."). Another example of the "status" to which the Court referred involved prohibition against executing mentally retarded criminals. Colwell, 118 Nev. at 817. Defendant does not fit within the type of status as contemplated by the U.S. Supreme Court or this Court.

Moreover, McConnell did not forbid the criminalization of a defendant who kills another person in the course of a felony. In using Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242 (2002), Defendant claims that his "status as a [defendant] convicted of first-degree murder using a felony-murder theory prevents the State from using the robbery aggravating circumstance to render [defendant] eligible for death." Brief, p. 14. But the Atkins Court was using status in terms of culpability. See Atkins, supra, at 312. A sentence of death is cruel, unusual, and excessive for one who "neither took life, attempted to take a life, nor intended to take a life." Id. Defendant does not fit within this parameter. Defendant is not arguing that he could not comprehend both the legal and moral culpability involved in his crime. Defendant does not argue that he has "diminished capacity[y] to understand and process information, to communicate, to abstract from mistakes and learn from experience, to

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should always be applied retroactively. The Court, however, in Clem v. State, 119 Nev. 615, 81 P.3d 521, 532 (2003), stated:

> ...Bousley addresses only the retroactivity of United States Supreme Court decisions interpreting the meaning of federal criminal statutes. It does not bind this court. Nor does it undermine our choice to apply the same retroactivity approach to both decisions announcing new procedural rules and decisions newly interpreting the substantive provisions of state criminal statutes.

engage in logical reasoning, to control impulses, and to understand the reactions of others." Id. at 318. Moreover, the type of status as discussed by the Atkins Court focuses on the "who", while the decision of McConnell is more concerned with the "how": How is the severity of punishment determined under capital murder for the taking of a life?[5]

The purpose behind the Court's new stance in McConnell is to sufficiently narrow death eligibility of defendants who commit felony murder in full satisfaction of the constitutional requirements as set forth in the Constitutions of the United States and of the State of Nevada.[6] McConnell stands for those "applications of the Constitution that forbid the Government to utilize certain techniques or processes in enforcing concededly valid societal proscriptions on the individual." Mackey v. United States, 401 U.S. 667, 91 S.Ct. 1171 (1971) (Harlan, J. concurring). Thus, McConnell is not retroactive under the first exception in Colwell. The only other possibility is the second exception, and as argued infra, the Defendant will likewise find no relief within its parameters.

McConnell's prohibition of the underlying felony for use as an aggravator for death penalty purposes is not a procedure "in which accuracy of a conviction [or sentence] is *seriously* diminished." Colwell, supra, at 820. (Emphasis added). First, where the conviction is sufficiently supported by evidence of premeditation and deliberation as opposed to felony murder, use of the felony-aggravator is permissible. See McConnell, supra. The Court can be assured that such narrowing has occurred where a defendant pleads guilty or is tried solely under a theory of premeditation and deliberation, or if a special verdict form is used when alternative theories are alleged. Id. Where no such special verdict form was previously required under pre-McConnell

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[5] Justice Harlan in his concurrence in Mackey v. United States gave examples of "who" as being a couple who chooses to use birth control and individuals who view pornography in the privacy of their home. See, Mackey, supra, at 693 n7.

[6] Specifically, Nev. Const. art. 1 §§ 6, 8 (5) (prohibition against cruel and unusual punishment and deprivation of life without due process of law, respectively).

law, this Court can nonetheless determine under a sufficiency of evidence analysis that the conviction is supported by sufficient evidence of premeditation and deliberation as this Court did on direct appeal. Such evidence of Rippo's murder of Lauri Jacobson and Denise Lizzi is detailed in the State's Answering brief on file herein (See Answering Brief, pp. 7-8) and was part of the record on appeal. In fact, Rippo's admission to Thomas Simms and Donald Hill that he planned and intended in advance to kill these two girls is no different than Robert McConnell's plea of guilty under a theory of premeditation in terms of the requiste narrowing being met.

Second, in addition to evidence of premeditation and deliberation, this Court can look to any valid aggravating circumstances found by the jury which are not called into question by McConnell to determine whether the accuracy of the death verdict is seriously diminished. The three aggravating circumstances that would remain against Rippo involve torture for the use of the stun gun and manual strangulation of the victims as well as being on parole and having committed a prior crime of violence, namely sexual assault in 1982. Details of these aggravators are further discussed in the State's Answering brief already on file herein. See Answering brief, pp. 9-10.

The situation of concern to the Nevada Supreme Court is one in which the "sole" aggravating circumstance is the same as the underlying felony upon which the conviction is based because there is no constitutionally mandated narrowing. Lowenfield v. Phelps, 484 U.S. 231, (1988), which served as the framework for the Court's decision in McConnell, dealt with a challenge to a death sentence on the basis that the "sole aggravating circumstance was identical to an element of the capital murder." Furthermore, in McConnell the Court stated, "But in cases where the State bases a first-degree murder conviction in whole or part on felony murder, to seek a death sentence the State will have to prove an aggravator other than one based on the felony murder's predicate felony." McConnell, supra. [emphasis added]. Where a death sentence is based upon multiple aggravators (other than the felony aggravator)

the narrowing function required by the constitution has been met and the retroactivity of McConnell would serve no purpose.

As the Court has reasoned in the past, the reweighing of the evidence is permissible under the Nevada Constitution and does not entail impermissible fact-finding. Leslie v. Warden, 118 Nev. 773, 782, 59 P.3d 440, 447 (2002) (citing Canape v. State, 109 Nev. 864, 859 P.2d 1023 (1993)). This is especially true when the Court has invalidated a heretofore valid aggravating circumstance. Id; accord Browning v. State, 120 Nev. 347, 91 P.3d 39, 51 (2004) ("Once an aggravator is stricken, the court either reweighs the aggravating and mitigating circumstances or applies a harmless error analysis."). In State v. Haberstroh, 119 Nev. 173, 69 P.3d 676 (2003) the Court stated:

> The Supreme Court has held that "the Federal Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by reweighing of the aggravating and mitigating evidence or by harmless-error review. It appears that either analysis is essentially the same and that either should achieve the same result. Harmless-error review requires this court to actually perform a new sentencing calculus to determine whether the error involving the invalid aggravator was harmless beyond a reasonable doubt. Reweighing involves disregarding the invalid aggravating circumstances and reweighing the remaining permissible aggravating and mitigating circumstances. In any case, we must provide close appellate scrutiny of the import and effect of invalid aggravating factors to implement the well-established Eighth Amendment requirement of individualized sentencing determinations in death penalty cases. Haberstroh, supra, at 682. (Internal quotation marks and citations omitted).

The State submits that the reweighing process is an inherent factor of retroactivity analysis itself. In considering whether McConnell would apply retroactively, the Court must consider that McConnell did not even receive the benefit of the rule because he admitted to premeditation. McConnell, supra, at 615. And

while felony aggravators were considered, it is evident that McConnell was guilty under premeditation and deliberation. See id. at 624. But the reweighing of evidence in considering retroactivity is practically mandated when it is not clear under which theory a defendant was adjudged guilty—felony-murder or premeditation and deliberation. See NRS 177.055(2) (Requiring the court to review whether the jury imposed a death sentence under the influence of "passion, prejudice, or and arbitrary factor"). The Court has stated:

> We recognize that many of our duties require us to make factual determination. For example, this court is often called upon to determine whether the jury's verdict is supported by sufficient evidence. With respect to capital cases, we are required to consider whether the sentence was imposed under the influence of passion, prejudice, or any arbitrary factor and whether the sentence is excessive, considering the crime and the defendant. We concluded that reweighing after invalidating an aggravating circumstance is similar to these permissible duties. Therefore, we hold that reweighing is proper under the Nevada Constitution and statutes. *We are of the same opinion today.* Leslie, supra, at 782-83. (Emphasis added).

In the instant case, to determine the applicability of the second exception under a retroactivity analysis, the Court must employ a process akin to reweighing, particularly where a jury has not specified whether a Defendant was convicted using felony-murder or premeditation and deliberation. An otherwise blanket retroactive effect of McConnell would do a disservice to both the State and the juries' deliberation in past cases, considering that a less prejudicial option remains, even if it is used on a case-by-case basis.

Further, the "exception" to the new rule espoused by the Court in McConnell is a specific direction by the Court for the use of the special verdict form and urges the argument that McConnell was intended to apply prospectively. It must be used when the jury makes a specific determination during the guilt phase of the trial that its verdict is based on a theory of premeditation and deliberation rather than felony

murder. McConnell, supra, at 624. Under this circumstance the Court in McConnell deemed it permissible for the State to use the underlying felonies which could have been the basis for the conviction for first-degree murder in the guilt phase as aggravators warranting a sentence of death during the penalty phase. Id. In McConnell, the Court specifically advised the State that "if it charges alternative theories of first-degree murder intending to seek a death sentence, jurors in the guilt phase should receive a special verdict form that allows them to indicate whether they find first-degree murder based on deliberation and premeditation, felony murder, or both." Id.

Essentially, McConnell "does not 'alter[] our understanding of what constitutes basic due process,'" but merely removes a specific type of aggravator (one identical to the underlying charge) from consideration in imposing the death penalty. See, Bockting v. Bayer, 399 F.3d 1010, 1020 (9th Cir. 2005) (quoting Brown v. Uphoff, 381 F.3d 1219, 1226-27 (10th Cir. 2004)). McConnell does not disturb the conviction of a defendant, but only addresses the severity of the punishment imposed. If it is to be death, then McConnell narrows those eligible, but it in no way affects a defendant's culpability. The importance of this distinction cannot be overstated.

Moreover, as a policy concern, the State has no way of reviewing prior cases similar to Defendant's and deciding how a jury reached its decisions. No form existed in which the jury specified its verdict based on deliberation and premeditation, felony murder, or both.[7] The State cannot poll former juries to discover their thought processes in making their decisions. Again, the only way for the Court to determine

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[7] The State notes that this problem was also acknowledged by Defendant:

> The jury was not given a special verdict form, however, and it is therefore impossible to know whether all of the jurors found [Defendant] guilty under a theory of premeditation and deliberation. Both [felony murder and premeditation and deliberation] were presented and argued to the jury, the jury was instructed on both theories, and it is certainly possible the jury could have based its decision upon [premeditation and deliberation]

Brief, p. 16.

this is to review the sufficiency of the evidence in order to ascertain whether a defendant's sentence was supported by a theory of premeditation.

To make McConnell apply retroactively would be a severe blow to the public's confidence in the rule of law and in the finality of so many serious cases that go back twenty to thirty years. On this point, the Court in Colwell reasoned:

> [...][E]ven the effect on finality is not extreme when a state appellate court, as opposed to a federal court, decides to apply a rule retroactively: first, the decision affects only cases within that state, and second, most collateral review occurs much sooner than federal collateral review. *In addition, we are concerned with encouraging the district courts of this State to strive for perspicacious, reasonable application of constitutional principles in cases where no precedent appears to be squarely on point.* Colwell, supra, at 818. (Emphasis added).

However, in light of the many inmates on death row and the fact that the State and lower courts were inarguably acting within "precedent squarely on point," the effect on finality is that no finality seems to exist at all. It is unduly prejudicial to ask the State to restructure its capital sentencing hearings and simultaneously address the appeals that a retroactive McConnell would bring forth.

This Court has assured the State for no less than twenty years that it was operating well within Constitutional bounds in the manner in which it alleged felony-aggravators and multiple theories of liability without need for a special verdict. See, note 1, supra. This is even truer when the Court reaffirmed the use of the underlying felony as a felony aggravator in Atkins v. State, supra, decided almost a decade after Lowenfeld. The State contends that it is bad public policy to afford retroactive relief under these circumstances: "...It does not follow that, when a criminal defendant has had a full trial and one round of appeals in which the state faithfully applied the Constitution as we understood it at the time, he may nevertheless continue to litigate his claims indefinitely in hopes that we will one day have a change of heart." Shriro v. Summerlin, 542 U.S. 348, 354, 124 S.Ct. 2519,2526 (2004).

As a last policy consideration, should the Court apply McConnell retroactively its application would be analogous to applying an ex post facto law against the State. The decision in McConnell was completely unexpected and unforeseeable. See, Stevens v. Warden, 114 Nev. 1217, 969 P.2d 945 (1998) (quoting Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697 (1964)) *overruled on other grounds by* Nevada Dep't of Prisons v. Bowen, 103 Nev. 477, 745 P.2d 697 (1987); Houlgin v. Raines,695 F.2d 372, 374 (9th Cir. 1982). At the time Defendant's punishment was imposed in 1998, the State was operating under good law and made decisions about the theory of murder on which to proceed and which aggravating circumstances to pursue, for which the State is now being prejudiced and punished. See Stevens, supra, at 1222. When the Court changes its mind as it so often has done in the area of capital litigation, the result is a hodge podge of conflicting rulings with which the State can not keep up.

In considering retroactivity and the potential harm to the public's sense of fairness and finality, this Court would be wise to consider the U.S. Supreme Court's description of the theory underlying the function of habeas corpus as described in Teague, supra:

> The interest in leaving concluded litigation in a state of repose, that is, reducing the controversy to a final judgment not subject to further judicial revision, may quite legitimately be found by those responsible for defining the scope of the writ to outweigh in some, many or most instances the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed.... Given the broad scope of constitutional issues cognizable on habeas ... it is sounder in adjudicating habeas petitions generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of [habeas] cases on the basis of intervening changes in constitutional interpretation.

Teague v. Lane, 489 U.S. 288, 306, 109 S.Ct. 1060, 1073 (1989) (citing Mackey v. United States, 401 U.S. 667, 91 S.Ct. 1160 (1971)) (Emphasis added); accord

Colwell, supra, at 820 ("...[T]his adaption approach taken in Teague and its progeny provides us with a fair and straightforward framework for determining retroactivity."). In Defendant's case, the law at the time of his penalty hearing should prevail and his sentence of death should stand.

CONCLUSION

Based on the foregoing, the State again respectfully requests that the Order Denying Defendant's Petition for Writ of Habeas Corpus be AFFIRMED.

Dated this 11th day of January, 2006.

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 this 11th day of January, 2006.

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CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Respondent's Answering Brief to the attorney of record listed below on this 11th day of January, 2006.

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