JAMES CHAPPELL,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 49478

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

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STATEMENT OF THE CASE

This is a direct appeal from a sentence of death entered by jury verdict following a re-trial of the penalty hearing. Previously on post-conviction, the district court had granted habeas relief as to the original death sentence but had denied relief as to all guilt phase issues, which decision this Court affirmed on appeal.

STATEMENT OF THE FACTS

In 1996, Chappell was originally convicted of burglary, robbery, and murder and was sentenced to death for sexually assaulting and then stabbing to death his ex-girlfriend, Deborah Panos, in her own home. 9 ROA 2190-5. The conviction and sentence were both affirmed on direct appeal. 9 ROA 2273-89. Although this Court struck the torture and depravity of mind aggravator on appeal, sufficient evidence was found in support of all the remaining aggravators specifically including sexual assault. 9 ROA 2279-80.

In the subsequent post-conviction proceedings, Chappell raised several claims of ineffective assistance of counsel including the failure to object to the State's allegedly improper cross-examination of Chappell. 10 ROA 2447-8. Following an evidentiary hearing, the trial court held that all claims of attorney error at trial were harmless due to the overwhelming evidence and none of the claims prejudiced the outcome of the trial. 11 ROA 2745-9. However, a new penalty hearing was ordered due to attorney error for not calling certain mitigation witnesses. Id.

On appeal from denial of post-conviction, this Court affirmed the district court's decision. 11 ROA 2783-2797. In so doing, this Court struck two of the felony-aggravators pursuant to McConnell, but specifically held that the sexual assault aggravator was unaffected and remained viable if the State elected to seek the death penalty again at the new penalty hearing. Id.

On remand, Chappell filed a motion to have the district court judge order the Clark County District Attorney's Death Review Committee to reconsider the decision to seek the death penalty. 12 ROA 2817-25. The State opposed the motion on grounds that the decision to seek the death penalty is a discretionary function of the prosecution protected by the doctrine of separation of powers. 12 ROA 2885. The district court agreed and denied the motion because "it's a discretionary function at the DA's office whether they have the Committee, and what the Committee reviews, and what the Committee allows you to do." 12 ROA 3015-6. Chappell also filed a pre-trial motion to strike the sexual assault aggravating circumstance which the district court denied based on the law of the case. 12 ROA 2801; 3016-19

During voir dire for the new penalty hearing, the defense made a few challenges for cause which were denied. Although Juror "Bundren" initially said she would automatically pick the death penalty and would not change her mind, she clarified several times that this opinion was based solely on the information provided to her in the questionnaire and she would consider all the evidence presented. 19 ROA 3908. While Juror Hibbard could not conceive of any mitigating circumstances other than insanity that would mitigate against the death penalty, he said he could consider all forms of punishment, follow the court instructions, and consider all the evidence. 19 ROA 3966. Although Juror Ramirez was from Texas, favored the death penalty and was ex-military, he said he could set aside any preconceived notions and consider all the evidence fairly in reaching a verdict. 19 ROA 3976-77.

Testimony at the new penalty hearing began on March 15, 2007, and included prior bad act testimony describing a history of domestic violence between Chappell

and the victim, Deborah Panos. Charmaine Smith and Clare McGuire both testified that Panos had told them of an incident where Chappell had straddled her, sat on her chest, and held a knife to her throat. 13 ROA 3236-7, 3247-8. In fact, a police officer also testified to these facts and arrested Chappell for battery domestic violence. 15 ROA 3640-1. The incident occurred in June of 1995 three months before the sexual assault in this case and served as the basis for a probation violation report as well as an order for in-patient drug treatment. Id.; 13 ROA 3237. Chappell's attorney had previously told the jury they would not contest such prior incidences of domestic violence, 13 ROA 3077-8, and Chappell himself fully admitted what he had done. 15 ROA 3658-9.

Likewise, Det. Weidner testified he arrested Chappell for felonious assault in 1988, eight years before the alleged sexual assault in this case. 13 ROA 3251-2. Although Weidner described details of the offense as related by the victim, Chappell's counsel also elicited hearsay from Weidner as to Chappell's version of what happened. 13 ROA 3252-4.

Most of this testimony involving prior bad acts and hearsay had been admitted at the original 1996 trial pursuant to the State's motion to admit prior bad acts. 1 ROA 217-26. In particular, testimony was adduced in the 1996 trial that Chappell had made threats against Deborah Panos, that she did not want to continue the relationship with Chappell and was planning on moving before he got out of jail. 4 ROA 911-12, 915, 938-9. Additionally, it was testified to at trial that Deborah Panos had called Latrona Smith and asked her to call back with some kind of excuse so that she could leave the house. 5 ROA 1307-8. Any objections to this testimony at trial were overruled and on appeal the Nevada Supreme Court found no merit in Chappell's claim of error in admitting these hearsay statements or Chappell's prior acts of domestic violence. 9 ROA 2282-3, 2289.

In regards to threats, Lisa Larsen testified she received a message directly from Chappell to tell Debbie "that when he got out, that she wasn't going to have any kind

of life or anything . . . she wouldn't have any friends." 13 ROA 3171. Dina Freeman-Richardson twice overheard Chappell threaten Deborah Panos that he would "do an OJ Simpson on your ass." 14 ROA 3302-3. Chappell himself admitted writing a letter to Deborah Panos threatening that "One day soon I'll be at that front door, and what in God's name will you do then." 15 ROA 3668.

Although the victim came from a large, close-knit family, 15 ROA 3685, only two family members were actually called to give testimony, the victim's aunt, Carol Monson, and the victim's mother, Norma Penfield. 15 ROA 3681-90. During her testimony, Carol Monson read short letters from the victim's cousin Christina Reese, and another aunt, Doris Waskowski. 15 ROA 3684-5. None of the victim's three children were called as witnesses, although they were discussed during Norma Penfield's testimony. 15 ROA 3681-90.

Chappell's prior testimony from the guilt phase of the 1996 trial was read in to the record over Chappell's objection. 15 ROA 3641-68. In objecting, Chappell's trial attorney acknowledged that prior sworn testimony is generally admissible, but wanted to preserve an issue regarding ineffective assistance of counsel in the 1996 trial for allowing Chappell to testify as he did. 15 ROA 3632. In allowing the prior testimony, the district court reasoned that ineffectiveness in allowing Chappell to testify had not been raised in the post-conviction proceedings and was procedurally barred. 15 ROA 3632-3. Also, the guilt phase had been affirmed twice on appeal. Id.

In mitigiation, Chappell affirmatively presented evidence of his character and childhood as diminishing his culpability or ability to exercise free will in mitigation of the murder. 14 ROA 3514-17. Dr. Etcoff testified that Chappell's conditions in life had impaired his ability to make free will choices thereby making him less culpable and compared Chappell's relative free will with that of others in the courtroom. 14 ROA 3514-17. In allocution to the jury, Chappell claimed he spoke honestly, insisted that his childhood experiences contributed to his wrong choices, and promised to work better and improve himself so he could help others. 16 ROA 3769. Only two

out of the original nine witnesses for which the new penalty hearing was ordered were actually called as witnesses by the defense. 16 ROA 3803-4.

In its rebuttal case, the State sought and obtained a ruling from the Court to introduce redacted copies of the two pre-sentence reports. 16 ROA 3770. The defense had no objection to the admission of the presentence report from Chappell's prior gross misdemeanor case, and objected to the 1996 presentence report prepared for the instant case only as to Chappell's handwritten statement. Id. The district court found that Miranda did not apply to such a statement and further found it to be freely and voluntarily made. Id.

The jury was instructed on the proper role of mitigating circumstances and that mercy could be properly considered. 15 ROA 3747, 3753-5, 3758. In closing argument, the prosecutor drew a distinction between the character of Chappell and that of the victim and her mother in how each dealt with negative circumstances in their lives. 16 ROA 3778-87. The prosecutor urged the jury not to select a verdict just because it was "easier," but to "do the right thing" even though it may be "harder." 16 ROA 3787. The prosecutor also acknowledged the role of mercy in the sentencing determination, but argued that the demands of justice also be balanced. 16 ROA 3786-7. The defense summation repeatedly disparaged opposing counsel with accusations of hiding the ball and intentionally confusing or misleading the jury. 16 ROA 3787-91.

Although the defense had proposed thirteen mitigating circumstances, 15 ROA 3755, in a special verdict form the jury only found seven mitigating circumstances. 15 ROA 3739-40. After deliberation, the jury once again returned a verdict for the death penalty having found the existence of the sexual assault aggravator beyond a reasonable doubt and that the mitigating circumstances did not outweigh the aggravating circumstance. 15 ROA 3738-41.

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ARGUMENT

A. The Alleged Failure to Properly Instruct on Deliberation is a Guilt Phase Issue Not Properly Before the Court

Chappell alleges that the premeditation and deliberation instruction used to obtain his murder conviction in 1996, 7 ROA 1722, misstated the law and relieved the State of its burden of proof on each of the material elements of first degree murder pursuant to the new case authority of Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007). However, because the instant case was previously affirmed as to guilt and was reversed only for a new penalty hearing, this current appeal pertains to the new death sentence only and the validity of Chappell's convictions is not properly before this Court.

As to the validity of his convictions, Chappell has already had a direct appeal to this Court, a petition for writ of certiorari to the U.S. Supreme Court, a post-conviction challenge in district court, and another appeal to this Court from the denial of his post-conviction petition. A conviction qualifies as 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. Colwell v. State, 118 Nev. 807, 59 P.3d 463 (2002). The 9th Circuit Court of Appeals has recognized that a conviction remains final even though a case may be sent back for re-sentencing. Phillips v. Vasquez, 56 F.3d 1030 (9th Cir. 1995). A conviction for murder is a final judgment even when the death penalty sentence has been reversed and is not yet final. People v. Jackson, 60 Cal.Rptr. 248, 250, 429 P.2d 600, 602 (1967). When a judgment is vacated only insofar as it relates to the death penalty, "the original judgment on the issue of guilt remains final during retrial of the penalty issue and during all appellate proceedings . . ." People v. Kemp, 111 Cal.Rptr. 562, 564, 517 P.2d 826, 828 (1974). Chappell's 1996 judgment of conviction was vacated only insofar as the sentence was concerned and the conviction has remained valid and final.

Accordingly, any new challenges to Chappell's guilt must be raised by collateral attack through a post-conviction writ of habeas corpus. NRS 34.724(2)(b); NRS 34.738(1); Edwards v. State, 112 Nev. 704, 918 P.2d 321 (1996). In such a proceeding, Chappell must demonstrate good cause and prejudice to overcome the one-year time bar of NRS 34.726, the successive petition bar of NRS 34.810, and equitable laches or the five-year bar of NRS 34.800. By entertaining such issues in the context of this appeal, this Court would run afoul of its own rules and gives ammunition to critics who seek to undermine this Court's consistent application of the procedural bars. See State v. District Court (Riker), 121 Nev. 225, 112 P.3d 1070 (2005); Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001).

Should this Court hold otherwise and unwisely reach the merits of the issue, the State offers the following argument out of an abundance of caution and to avoid waiving any further argument on the matter. Notably, Chappell did not object to the premeditation instruction at trial, 7 ROA 1605-7, nor raise the issue on direct appeal. 9 ROA 2273-89. Eventually in 2002, Chappell raised the issue for the first time on post-conviction in light of the new Byford and Garner opinions, 10 ROA 2456-59, but the denial of this issue was affirmed by this Court on appeal from post-conviction. 11 ROA 2789. Accordingly, the law of the case controls.

In the present argument, Chappell relies upon the new authority of Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), for raising the issue again. Although Polk v. Sandoval was published on September 11, 2007, the basis for the 9th Circuit's ruling was not new law but was federal precedent decided decades earlier. See Sandstrom v. Montana, 442 U.S. 510 (1979); Francis v. Franklin, 471 U.S. 307 (1985); In re Winship, 397 U.S. 358 (1970). In other words, the underlying argument and authority relied upon in Polk v. Sandoval has always been available to the defense and the Polk opinion in 2007 does not provide Chappell with any new claim.

Furthermore, the holding in Polk v. Sandoval has no application to Chappell's murder conviction which was final on October 26, 1999, upon issuance of remittitur

following direct appeal. At the time of Chappell's trial in 1996, Nevada defined murder in accord with the so-called *Kazalyn* instruction and viewed the term "deliberate" as simply redundant to "premeditated." Powell v. State, 108 Nev. 700, 708-10, 838 P.2d 921, 926-27 (1992). In fact, the terms premeditated, deliberate and willful were viewed as a single phrase as opposed to separate elements. Greene v. State, 113 Nev. 157, 168, 931 P.2d 54, 61 (1997). Under such a definition of murder, the *Kazalyn* instruction used in Chappell's trial is a correct statement of law. There is no unconstitutional mandatory presumption or failure to instruct on a material element where premeditation and deliberation are synonymous. It was not until the year 2000 that Nevada departed from the *Kazalyn* instruction and changed the definition of murder to include willful, deliberate and premeditated as three distinct elements. Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). It is only under Byford's new definition of murder that the 9th Circuit found the *Kazalyn* instruction to violate federal law. Unlike Chappell, Polk was entitled to the Byford change in law because Polk's case was not yet final on direct appeal when Byford was published in 2000. The Polk decision does not address retroactivity and the law remains that Nevada's change in the premeditation/deliberation instruction has only prospective application. Garner v. State, 116 Nev. 770, 6 P.3d 1013 (2000).

Even if Byford and the new definition of murder were to apply to Chappell's case, any error in the *Kazalyn* instruction would be harmless beyond a reasonable doubt. Chappell was prosecuted under alternative theories of premeditated murder and felony-murder. 7 ROA 1703, 1721. Although there was no special verdict distinguishing these two theories, because the jury unanimously found Chappell guilty of the underlying burglary and robbery charges, the jury also agreed unanimously upon the associated felony-murder theories. 7 ROA 1747-49. For example, in Bridges v. State, 116 Nev. 752, 6 P.3d 1000, 1008 (2000), the defendant argued that the jury was improperly instructed as to premeditation and deliberation. This Court ruled that the defendant was not entitled to relief on this issue because the Byford

instruction was not retroactive and the evidence of first degree murder under a felony murder theory was overwhelming. Id. The felony-murder rule was a valid independent basis to uphold the jury's verdict. Id. The same applies to Chappell.

B. The Alleged Failure to Properly Instruct on Felony-Murder is a Guilt Phase Issue Not Properly Before the Court

Chappell alleges that the felony-murder instructions used to obtain his murder conviction in 1996, 7 ROA 1711, 1721, allowed the jury to convict him of murder based on an "after-thought" robbery in violation of new case authority. See Nay v. State, 123 Nev. ___, 167 P3d 430 (2007). However, as in Claim A above, the instant appeal is from the retrial of the penalty phase only and guilt phase issues are not properly before this Court. To avoid repetition, the State incorporates by this reference its arguments and authority from Claim A above concerning the finality of Chappell's convictions and the need to comply with important procedural safeguards contained in the post-conviction provisions of NRS Chp. 34.

Should this Court hold otherwise and unwisely reach the merits of the issue, the State offers the following argument out of an abundance of caution and to avoid waiving any further argument on the matter. Notably, Chappell did not object to the felony-murder instructions at trial, 7 ROA 1605-7, although he did raise the "after-thought" robbery issue on direct appeal. 9 ROA 2277-8. At that time this Court held that in robbery cases it was irrelevant when the intent to steal is formed and affirmed the sufficiency of the robbery conviction as well as the robbery aggravator which required the killing be "in the commission" of the robbery. Id. Accordingly, law of the case controls.

In the present argument, Chappell relies upon the new authority of Nay v. State, 123 Nev. ___, 167 P.3d 430 (2007), for raising the issue again. However, the Nay opinion in 2007 has no application to Chappell's murder conviction which was final on October 26, 1999, upon issuance of remittitur following direct appeal. Chappell does not raise and this Court has yet to reach the issue of retroactivity. In Nay v.

State, this Court was under the impression it was deciding an issue of first impression. Nay, 167 P.3d at 433. The State would argue otherwise and that this Court overruled prior precedent. Whether Nay announced a new rule or was simply a clarification of law should not be addressed in this appeal where the only issues properly before the Court concern the retrial of the penalty phase.

Even if Nay v. State were to apply to Chappell's case, any error would be harmless beyond a reasonable doubt. Chappell was prosecuted under alternative theories of felony-murder involving burglary and robbery, either one of which would be sufficient for first degree murder. 7 ROA 1703, 1721. Although there was no special verdict distinguishing these two felony-murder theories, because the jury unanimously found Chappell guilty of the underlying burglary charge, the jury also agreed unanimously upon the associated burglary felony-murder theory. 7 ROA 1747. Any error in the robbery felony-murder theory is of no consequence because the burglary felony-murder theory is a valid independent basis to uphold the jury's verdict.

C. NRS 177.055(3) Was Not the Basis for Granting Chappell a New Penalty Hearing

Chappell complains that NRS 177.055(3) under which this Court allegedly gave him a new penalty hearing instead of a lesser sentence upon the finding of error, is unconstitutional. However, Chappell's new penalty hearing had nothing to do with NRS 177.055, but was the result of the district court's grant of a petition for writ of habeas corpus due to ineffective assistance of counsel which decision this Court simply affirmed on appeal. 11 ROA 2782-2797. Mandatory review of a death sentence under NRS 177.055 and the discretion to impose a sentence less than death only applies to direct appeals, not post-conviction appeals. Because the reversal of Chappell's original death sentence did not implicate NRS 177.055, Chappell was not wrongly deprived of a lesser sentence and his claim must fail.

Turning to the merits, this Court has previously rejected a similar challenge to the constitutionality of NRS 177.055(3) when reversing for a new penalty hearing after the three-judge panel system was declared unconstitutional:

> Johnson stresses that when a jury deadlocks in a capital penalty phase, Nevada statutes provide for only one sentencing procedure [the three-judge panel] and that one procedure is now unconstitutional. He argues therefore that after vacating his death sentences, this court cannot create another sentencing procedure ad hoc and must simply impose a sentence of life in prison without possibility of parole under NRS 177.055(3)(c). This argument is meritless. When this court vacates a death sentence and the original penalty hearing was before a jury, NRS 177.055(3) provides two options: this court can either remand the case for a new penalty hearing before a newly empanelled jury or impose a sentence of life in prison without possibility of parole. If we choose the first option and remand for a new penalty hearing, we need not invent any ad hoc procedures--the normal procedures for a death penalty hearing before a jury apply. We therefore vacate Johnson's death sentences and remand for a new penalty hearing before a new jury.

Johnson v. State, 118 Nev. 787, 803-4, 59 P.3d 450, 461 (2002). Chappell mischaracterizes NRS 177.055(3) as a capital "sentencing scheme" which must comport with Furman's capital sentencing standards. But when this Court orders a new penalty hearing under NRS 177.055(3), it is not acting as a "sentencing body," but as an appellate court ordering the "normal procedure" of reversal upon a finding of error.

D. The State Did Not Abuse its Prosecutorial Discretion in Re-Seeking the Death Penalty

Chappell filed a motion below to have the district court judge order the Clark County District Attorney's Death Review Committee to reconsider the decision to seek the death penalty in this case in light of this Court's decisions striking all but one of the aggravating circumstances. 12 ROA 2817-25. The State opposed the motion on grounds that the decision to seek the death penalty is a discretionary function of the prosecution protected by the doctrine of separation of powers. 12 ROA 2885. The district court agreed and denied the motion because "it's a discretionary function at the DA's office whether they have the Committee, and what the Committee reviews, and what the Committee allows you to do." 12 ROA 3015-6. In accord, this Court

has held that "the decision to seek the death penalty is a matter of prosecutorial discretion, to be exercised within the statutory limits set out in NRS 200.030 and NRS 200.033 and reviewable for abuse of that discretion, such as when the intent to seek the death penalty is not warranted by statute or is improperly motivated by political considerations or race, religion, color or the like." Thomas v. State, 122 Nev. 1361, 148 P.3d 727, 736 (2006). Chappell's claim in this appeal that the State abused its discretion in re-seeking the death penalty is not supported by the record.

Contrary to Chappell's representations, at no time did the State refuse to re-submit the case to the death review committee or otherwise fail to evaluate the viability of re-seeking the death penalty. Just because a criminal defendant has no right to enforce or demand prosecutorial review of a decision to seek the death penalty, does not mean that the State failed to engage in such a re-evaluation in the present case. The State is well-aware of its ethical obligations in this regard and has withdrawn notices of intent to seek the death penalty pursuant to SCR 250(4)(e) in other cases where the death penalty was no longer viable. There is no allegation or support in the record for any improper motivation in re-seeking the death penalty in this particular case. Even though the State had only one aggravator remaining, the facts of the case had not changed and the death penalty was still warranted under the circumstances as evidenced by the jury's return of yet another death sentence. Chappell's argument that the State refuses to re-evaluate a decision to seek the death penalty once it is made even in light of intervening changes in the law or aggravating circumstances is not supported by the record.

E. The Court Did Not Err in Denying Challenges for Cause to Three Prospective Jurors

Chappell argues that the district court judge improperly denied challenges for cause by the defense as to three prospective jurors who each allegedly indicated a "firm intent to impose a sentence of death." Opening Brief, p. 39, lns 21-3. But "the proper standard for determining when a prospective juror may be excluded for cause

because of his or her view on capital punishment . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526 (1980)).

District courts have "broad discretion" in deciding whether to remove prospective jurors for cause. Leonard v. State, 117 Nev. 53, 67, 17 P.3d 397, 406 (2001). The trial judge's "predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record. Witt, supra. These are 'factual issues' . . . ." Id. at 429, 105 S.Ct. at 854. The trial court is better able to view a prospective juror's demeanor than a subsequent reviewing court. See Darden v. Wainwright, 477 U.S. 168, 178, 106 S.Ct. 2464 (1986). On appeal, if the prospective juror's responses are equivocal, i.e., capable of multiple inferences, or conflicting, the trial court's determination of the juror's state of mind is binding. Walker v. State, 113 Nev. 853, 944 P.2d 762 (1997) quoting People v. Livaditis, 2 Cal.4th 759, 9 Cal.Rptr.2d 72, 831 P.2d 297 (1992).

Chappell first alleges that prospective juror "Bundren" would not consider sentences of life with or without the possibility of parole. Although this juror initially said she would automatically pick the death penalty and would not change her mind, she clarified several times that this opinion was based solely on the information provided to her in the questionnaire. 19 ROA 3908. Once it was explained to her that any verdict in the case must be based on the forthcoming evidence, not the questionnaire, she agreed she could listen to the evidence presented and could consider all forms of punishment:

> THE COURT: Let me ask you a question, Ms. Bundren, because a couple of times you kind of put a caveat to your statement about saying, off the questionnaire. You understand there's going to be a hearing where witnesses, evidence is going to come in. Both sides have to

present whatever they want to examine the witnesses on. And that's the evidence that you're going to rely upon to make a decision, not - -

PROSPECTIVE JUROR: Not the questionnaire. Right.

THE COURT: That being the case, can you listen to the evidence presented in the hearing?

PROSPECTIVE JUROR: I could.

* * *

THE COURT: . . . . So what I need to know is if you'll be able to consider all forms of punishment.

PROSPECTIVE JUROR: I could consider it.

THE COURT: Okay, yes or no?

PROSPECTIVE JUROR: Yes.

19 ROA 3908-09. Notably, the defense then passed on the opportunity to ask any more questions of the juror. Id. Chappell's challenge for cause was denied without comment. 19 ROA 3916.

Although this juror's initial responses indicate that she had settled on death to the exclusion of other possible penalties, this was before the penalty phase procedure and her role as a juror was explained to her. A prospective juror's expression of a "qualified" opinion in voir dire that a defendant is guilty does not disqualify them if after further colloquy they agree to render a decision based on the evidence. Blake v. State, 121 Nev. 779, 795, 121 P.3d 567, 577 (2005). To the extent her answers in the transcript are viewed by this Court as equivocal or conflicting, deference must be given to the district judge below whose factual determination is binding. Walker, supra. Under these circumstances, it was not error to deny the challenge for cause.

Chappell next alleges that juror Hibbard was unwilling to consider mitigating circumstances other than insanity. That mischaracterizes Hibbard's actual voir dire testimony:

MR. PATRICK: Would you say you'd vote automatically for the death penalty?

PROSPECTIVE JUROR: I would have to hear the facts. Murder is a pretty severe action. Unless there's insanity at the time of committing it, I don't know how you justify that.

MR. PATRICK: So besides insanity, you wouldn't be able to find any mitigating circumstances?

PROSPECTIVE JUROR: It would be difficult.

19 ROA 3957-8. The district court judge denied the challenge for cause reasoning that a juror was not required to prospectively guess what weight a particular piece of evidence would or would not have in mitigation. 19 ROA 3966.

While the defense is permitted to inquire whether a juror would automatically vote for death regardless of the facts of the case, they may not question a prospective juror about whether specific facts would or would not mitigate a death sentence. Such "stake-out" questions which reveal how a juror would vote during the penalty hearing were condemned by this Court in Witter v. State, 112 Nev. 908, 914, 921 P.2d 886, 891 (1996). A juror is free to reject the proposed mitigating circumstances in a particular case and is only bound to consider the evidence proffered. Middleton v. State, 114 Nev. 1089, 968 P.2d 296 (1998) (A jury's rejection of any mitigating factors does not demonstrate the sentence is unreliable or the product of passion or prejudice). Chappell's trial counsel twice conceded that Hibbard would consider the mitigation evidence presented:

MR. PATRICK: Again, on the mitigation, you were asked there's mitigating circumstances and aggravating circumstances. You wrote [in the questionnaire] that you could somewhat listen to both sides of that?

19 ROA 3957.

MR. PATRICK: Yes, Judge. He said he would look at the mitigating evidence. But he said, nothing short of insanity would count as mitigating evidence.

19 ROA 3965.

The trial judge denied the cause challenge reasoning that Hibbard said he could consider all forms of punishment, follow the court instructions, and consider all the evidence. 19 ROA 3966. Just because Hibbard could not articulate on his own what particular mitigating factors other than insanity might reduce a death sentence, does not mean he was subject to being stricken for cause:

THE COURT: . . . . Whether somebody agrees or disagrees with whether or not they think, you know, prospectively some type of mitigation is a good or bad thing they're going to give weight to is really kind of a little lower down because you can't tell them the evidence yet. So they're kind of having to guess, well, do I think there's mitigation for a murder or not, without having heard any facts of the case.

I don't think the jurors need to say your mitigation is going to be good or bad to make them eligible to sit on the case. It's important that they indicate they will consider all the evidence, consider all forms of punishment and are not foreclosed to imposing just one penalty or another. So I think that he sufficiently answered things, so I'll deny the challenge for cause as to Mr. Hibbard.

19 ROA 3966. To the extent answers in the cold transcript are viewed by this Court as equivocal or conflicting, deference must be given to the district judge below whose in the best position to judge juror credibility and whose factual determination is binding. Walker, supra.

Finally, Chappell alleges that juror Ramirez clearly indicated that he would only impose the death penalty. Although Ramirez agreed and was familiar with the death penalty as implemented in Texas, a pro-death penalty opinion or ex-military

background does not disqualify one from being a juror in a capital case. There is no requirement under Nevada law that jurors accord the same consideration to each of the possible penalties. Leonard v. State, 117 Nev. 53, 65, 17 P.3d 397, 405 (2001). Rather, the purpose of voir dire is to discover "whether a juror will consider and decide the facts impartially and conscientiously apply the law as charged by the court." Johnson v. State, 122 Nev. 1344, 148 P.3d 767, 774 (2006). To hold that the mere existence of any preconceived notion as to the appropriate penalty for murder, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. Blake v. State, 121 Nev. 779, 795, 121 P.3d 567, 577 (2005). Rather, it is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. Id. Ramirez said he could do that:

> MS. WECKERLY: Are you someone that can listen to all the information presented?
>
> PROSPECTIVE JUROR: I will try to do that, yes.
>
> MS. WECKERLY: You'll listen to the information presented from both sides?
>
> PROSPECTIVE JUROR: Yes, ma'am.
>
> MS. WECKERLY: Then I assume after that you'll make what you believe to be a fair decision?
>
> PROSPECTIVE JUROR: Yes, I can do that.
>
> MS. WECKERLY: And applying the law that the judge gives you?
>
> PROSPECTIVE JUROR: Yes.

19 ROA 3976-77. The judge denied the cause challenge reasoning as follows:

> THE COURT: I'm going to deny as it pertains to Mr. Ramirez. I agree that his personality would appear to be what you would consider somebody with a hardcore military veteran. But we can't kind of look at

people and excuse them because our personal opinions as to their type of personality is such that we believe they'll never change their minds.

His questionnaire was one which he indicated he'd consider all forms of punishment. He did not indicate that he would vote automatically one way or the other.

19 ROA 3990. Notably, the defense did not provide this Court with the juror questionnaires. To the extent the juror's answers in the transcript are viewed by this Court as equivocal or conflicting, deference must be given to the district judge below. Walker, supra. The trial judge was privy to additional information in the questionnaires and was in the best position to judge the juror's credibility.

Contrary to Chappell's representations, none of the above three prospective jurors were actually seated as jurors in this case and there is no prejudice. Any claim of constitutional significance must focus on the jurors who were actually seated, not on excused jurors. Weber v. State, 121 Nev. 554, 581, 119 P.3d 107, 125 (2005). Because Chappell fails to establish that any of the jurors who sat in judgment against him were not fair and impartial, his claim warrants no relief. See Ross v. Oklahoma, 487 U.S. 81, 88-9, 108 S.Ct. 2273 (1988).

Chappell's sole contention in this regard is that the juror referenced as "Bundren" above sat on the jury which imposed the death sentence. Opening Brief, p. 42, ln 10-11. This is inaccurate. While a juror by the name of "Christine Bundren" served on the jury, 12 ROA 3046, she was examined by the parties on the first day of voir dire and was passed for cause. 19 ROA 3984-87. Her badge number was "039". 19 ROA 3916, 3939. In contrast, the cause challenge in question occurred on the second day of voir dire and is associated with badge number "088". 19 ROA 3916. In this context, "Bundren" is followed by "(sic)" in the transcript indicating the court reporter recognized the name was in error.[1] 19 ROA 3907, 3916. Because the jurors

[1] Considering appellate counsel's knowledge and understanding of the "sic" annotation as demonstrated in the opening brief on pages 57-8, it is curious how appellate counsel failed to recognize its repeated use in regard to this juror.

were examined in the order of their roll call, it appears that badge number "088" belongs to juror Linda Duran who did not sit on the final jury. 19 ROA 3946. Even if the court erred in denying any of the three cause challenges, Chappell fails to establish that any of the empanelled jurors were not fair and impartial and he is not entitled to relief.

F. There Was No Confrontation Clause Violation Nor Admission of Unreliable Hearsay

In this claim, Chappell complains of four alleged Confrontation Clause violations as well as the presentation of impalpable and highly suspect hearsay testimony. The short answer to Chappell's claim of confrontation violations is that the Sixth Amendment Confrontation Clause does not apply to capital sentencing hearings. Summers v. State, 122 Nev. 1326, 148 P.3d 778 (2006). In Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), the United States Supreme Court held that admission of testimonial hearsay ***at trial*** violates the Confrontation Clause unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. However, this ruling "does not alter the pre-Crawford law that the admission of hearsay testimony ***at sentencing*** does not violate confrontation rights." United States v. Chau, 426 F. 3d 1318, 1323 (11th Cir. 2005), citing United States v. Roche, 415 F.3d 614, 618 (7th Cir. 2005), cert. denied, --- U.S. ---, 126 S.Ct. 671 (2005); see also Gaxiola v. State, 121 Nev. 638, 119 P.3d 1225 (2005). In Summers, supra, this Court held that Crawford does not apply to capital penalty hearings and that Williams v. New York where the Confrontation Clause was held inapplicable to capital sentencing remains viable.

Chappell acknowledges the Summers opinion, but argues it should be overruled and that confrontation rights should be extended to either the eligibility phase or the entirety of a capital sentencing hearing as some jurisdictions have done. This Court recently declined a similar invitation to re-visit its precedent on this issue. Browning v. State, 124 Nev.Adv.Op. 50 (July 24, 2008). Furthermore, in Summers, supra, this

Court cited to and considered every one of the cases from other jurisdictions now relied upon by Chappell.[2] This is not new authority warranting reconsideration of this Court's precedent. The United States Supreme Court has not provided any further guidance on the issue since this Court last addressed it in Summers. It remains that "no federal circuit courts of appeals have extended Crawford to a capital penalty hearing, and the weight of authority is that Crawford does not apply to a noncapital sentencing proceeding." Summers, supra [citations omitted].

Even if this Court were inclined to revisit the holding of Summers, this is not the case to do so because no hearsay was used to establish Chappell's death eligibility. That issue is simply not presented on the facts of this case. See U.S. v. Fields, 483 F.3d 313 (5th Cir. 2007) (Holding that Confrontation Clause does not apply to death selection decision, but declining to reach issue of applicability to death eligibility decision where challenged evidence was relevant only to selection and was not used to establish aggravating circumstance).

Nor has Chappell adequately preserved the issue for appellate review. Prior to opening statements, Chappell's counsel made only a general objection without regard to specific pieces of evidence:

> MR. SCHIECK: Yes, your Honor. For the record, rather then objecting to various pieces of evidence as they come in on the basis of the Sixth Amendment confrontation clause issue, which was decided by our Supreme Court in Marlo Thomas and Dante [sic] Johnson case on December 18th, the court ruled that hearsay is admissible at penalty hearing in a capital case, and the Sixth Amendment protections of confrontation don't apply at that proceeding.

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[2] Russeau v. State, 171 S.W.3d 871 (Tex.Crim.App. 2005); State v. Bell, 603 S.E.2d 93, (N.C. 2004); U.S. v. Jordan, 357 F.Supp.2d 880 (E.D. Va. 2005; U.S. v. Johnson, 378 F.Supp.2d 1051 (N.D. Iowa (2005); State v. McGill, 140 P.3d 930 (Ariz. 2006); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982); U.S. v. Brown, 441 F.3d 1330 (11th Cir. 2006); U.S. v. Mills, 446 F.Supp.2d 1115 (C.D. Cal. 2006); Rodgers v. State, 948 So.2d 655 (Fla. 2007).

However, for the record, we want to preserve that we are objecting on those bases to any hearsay or similar testimony by way of documentary evidence coming in in this case.

13 ROA 3050. The failure to make contemporaneous objections to specific evidence in the case prevented the district court from making a ruling from which the defense can appeal. Notably, the district court below never held that Crawford was inapplicable to the penalty hearing, nor did the court rule that testimonial hearsay was admissible. The defense can not sit idly by and consent to the admission of specific evidence only to challenge that evidence later on appeal. Without a specific and contemporaneous objection to each of the below instances, the prosecutor was never given the opportunity to curtail or present evidence through non-hearsay means. Raising only a "general objection" to a constitutional issue is insufficient to preserve the issue for appeal. See e.g., Hernandez v. State, 118 Nev. 513, 50 P.3d 1100 (2002). The defense is limited to a plain error analysis on such evidence admitted without a contemporaneous objection.

Three of the four alleged confrontation violations were not relevant to the State's sole remaining aggravator that the murder was committed while Chappell was engaged in the commission of or an attempt to commit any sexual assault. 11 ROA 2795-6. Charmaine Smith and Clare McGuire both testified that Deborah Panos had told them of an incident where Chappell had straddled her, sat on her chest, and held a knife to her throat. 13 ROA 3236-7, 3247-8. In fact, a police officer also testified to these facts and arrested Chappell for battery domestic violence. 15 ROA 3640-1. The incident occurred in June of 1995 three months before the sexual assault in this case and served as the basis for a probation violation report as well as an order for in-patient drug treatment. Id.; 13 ROA 3237. Chappell's attorney had previously told the jury they would not contest such prior incidences of domestic violence, 13 ROA 3077-8, and Chappell himself fully admitted what he had done. 15 ROA 3658-9.

Any hearsay regarding this incident was relevant to showing Chappell's character or "other matter" evidence pertaining to penalty selection.

Likewise, Det. Weidner testified he arrested Chappell for felonious assault in 1988, eight years before the alleged sexual assault in this case. 13 ROA 3251-2. Although Weidner described details of the offense as related by the victim, Chappell's counsel also elicited hearsay from Weidner as to Chappell's version of what happened. 13 ROA 3252-4. The incident was part of Chappell's criminal history and related solely to his character, not the sexual assault.

Finally, Det. Vaccaro testified that DNA tests showed Chappell's semen was found in Deborah Panos' vagina. 14 ROA 3425-6. Although this testimony did in fact pertain to the sexual assault aggravator, the DNA evidence was not in controversy and had been conceded by the defense. For example, the day prior to Det. Vaccaro's testimony, the defense had called its own expert, Dr. Todd Grey, who confirmed the State's DNA evidence:

> Q. Now you indicated that you had reviewed some reports concerning the presence of DNA.
>
> A. Yes.
>
> Q. Okay. Did you form any conclusion from those reports?
>
> A. That there was material, genetic material from the suspect present within the vagina of the victim.

13 ROA 3227. The defense elicited this testimony from its own witness eliminating the State's obligation to prove it up by non-hearsay means. Also, at the original trial in 1996, Chappell was afforded an opportunity to confront and cross-examine the State's DNA expert, Thomas Wahl, but elected not to:

> MR. BROOKS: We're not going to oppose this. We are not contesting any of this DNA evidence, so there is no objection at all.

6 ROA 1475. The DNA reports were then admitted into evidence during Wahl's testimony without objection. 6 ROA 1503-26. For the defense to now assert a

confrontation violation for Det. Vaccaro re-stating the DNA results in the penalty hearing based on the admitted reports and prior testimony is disingenuous. The defense elicited and conceded the DNA evidence and waived any possible confrontation right.

Aside from the confrontation clause violations discussed above, Chappell also challenges in this claim several non-testimonial hearsay statements which he argues were unreliable. But hearsay is admissible in a capital penalty hearing subject to the restriction that it not be impalpable or highly suspect. NRS 175.552(3); Summers v. State, supra. Again, the failure to object to the admission of evidence generally precludes review by this Court absent plain or constitutional error affecting Chappell's substantial rights. Leonard v. State, 117 Nev. 53, 63, 17 P.3d 397, 403-04 (2001). The decision to admit specific evidence is within the sound discretion of the trial judge. McKenna v. State, 114 Nev. 1044, 968 P.2d 739 (1998).

Certainly, the State elicited testimony from several of Deborah Panos' friends and co-workers who described Panos' relationship with Chappell including things that Panos had told them. Much of this testimony had been admitted at the original 1996 trial pursuant to the State's motion to admit prior bad acts and had been established by clear and convincing evidence. This included Chappell beating Deborah Panos in the face, Chappell breaking her nose, the June 1995 domestic violence where Chappell sat on her chest and threatened her with a knife, and another domestic violence occurring in Arizona. 1 ROA 217-26. In particular, testimony was adduced in the 1996 trial that Chappell had made threats against Deborah Panos, that she did not want to continue the relationship with Chappell and was planning on moving before he got out of jail. 4 ROA 911-12, 915, 938-9. Additionally, it was testified to at trial that Deborah Panos had called Latrona Smith and asked her to call back with some kind of excuse so that she could leave the house. 5 ROA 1307-8. Any objections to this testimony at trial were overruled and on appeal the Nevada Supreme Court found no merit in Chappell's claim of error in admitting these hearsay statements or Chappell's

prior acts of domestic violence. 9 ROA 2282-3, 2289. Because this evidence was admitted at trial and upheld on appeal, it was properly used in the new penalty hearing.

In regards to threats, the most damning were heard first-hand from Chappell's own mouth and involved no hearsay. Lisa Larsen received a message directly from Chappell to tell Debbie "that when he got out, that she wasn't going to have any kind of life or anything . . . she wouldn't have any friends." 13 ROA 3171. Dina Freeman-Richardson twice overheard Chappell threaten Deborah Panos that he would "do an OJ Simpson on your ass." 14 ROA 3302-3. Finally, Chappell himself admitted writing a letter to Deborah Panos threatening that "One day soon I'll be at that front door, and what in God's name will you do then." 15 ROA 3668. Chappell's allegations questioning the credibility of yet another threat made in court are based on speculation and matters not supported by the record. Prior testimony reveals the witness was not sure whether the threat was made in court or during a jail visit. 8 ROA 1861-2. Chappell has failed to show that any of this evidence was impalpable or highly suspect or that the district court abused its discretion in admitting it.

G. Court Did Not Err in Permitting the State to Present a Redacted Pre-Sentence Investigation Report in Rebuttal to Chappell's Case in Mitigation

Chappell challenges the State's introduction of two pre-sentence investigation reports for the jury's consideration in the penalty hearing. In its rebuttal case, the State sought and obtained a ruling from the Court to introduce redacted copies of the two reports. 16 ROA 3770. Notably, the defense had no objection to the admission of the presentence report from Chappell's prior gross misdemeanor case, and objected to the 1996 presentence report prepared for the instant case only as to Chappell's handwritten statement.[3] Id. The district court found that Miranda did not apply to such a statement and further found it to be freely and voluntarily made. Id.

[3] Copies of the actual exhibits are found at the end of Volume 18 in the ROA.

Accordingly, the claim now being presented to this Court that the reports contained unreliable hearsay and arrests for which there were no convictions was not raised below.

In a capital sentencing hearing, the rules of evidence do not apply and hearsay is allowed. NRS 47.020(3)(c); NRS 175.552(3). However, evidence may not be offered in violation of the Constitution and must still be relevant and not impalpable or highly suspect. Id.; Hollaway v. State, 116 Nev. 732, 746, 6 P.3d 987, 997 (2000). The failure to object to the admission of evidence generally precludes review by this Court absent plain or constitutional error affecting Chappell's substantial rights. Leonard v. State, 117 Nev. 53, 63, 17 P.3d 397, 403-04 (2001). The decision to admit specific evidence is within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion. McKenna v. State, 114 Nev. 1044, 968 P.2d 739 (1998); Wesley v. State, 112 Nev. 503, 519, 916 P.2d 793, 804 (1996).

In Herman, this Court held that a presentence report could not be made part of the public record and was erroneously read to the jury in a capital sentencing hearing. Herman v. State, 122 Nev. 199, 128 P.3d 469 (2006). However, in the present case, the report was redacted to exclude any mention of the prior jury's death verdict, to correct an error about Chappell being found guilty as opposed to pleading guilty, and to remove the department's sentencing recommendation. 16 ROA 3770. Also, the certified copies of the presentence reports were only used by the State in its rebuttal case. 16 ROA 3772. In closing argument, the prosecutor explained that the presentence reports rebutted Chappell's case in mitigation, especially in blaming the victim for their abusive relationship, in making allegations against his own grandmother for child abuse and neglect in his upbringing, and in his request for the justice system to give him another chance. 16 ROA 3780-1. This Court recognizes that evidence relevant in capital sentencing includes rebuttal evidence which the State

can offer to rebut proof of mitigating circumstances. Hollaway v. State, 116 Nev. 732, 745, 6 P.3d 987, 996 (2000).

Insofar as the presentence reports contain arrest information for charges for which Chappell was not convicted, this Court has long held that such information is relevant and properly considered by a capital jury. Gallego v. State, 117 Nev. 348, 369, 23 P.3d 227, 241 (2001) (testimony regarding police investigations of defendant's other crimes is admissible at a capital penalty hearing so long as the evidence is not impalpable or highly suspect); Leonard v. State, 114 Nev. 1196, 969 P.2d 288 (1998) (allowing police officer to give hearsay testimony in penalty phase of capital murder trial regarding another murder of which defendant had not yet been convicted was not abuse of discretion where detective's testimony was not impalpable or highly suspect); Homick v. State, 108 Nev. 127, 825 P.2d 600 (1992) (evidence of California homicides, concerning which charges were pending, was neither impalpable nor highly suspect, and thus could be admitted in penalty phase of Nevada murder trial).

The alleged author's "opinion" in the presentence report merely summarized facts and evidence the jury had already heard about the murder and contains no opinion. Even if it did, this Court has upheld the relevance and lack of prejudice in a police officer's opinion in a capital sentencing hearing that the defendant was street smart, manipulative, and highly dangerous. Sherman v. State, 114 Nev. 998, 965 P.2d 903 (1998). Any objections as to bias and lack of adequate knowledge went to the weight, not the admissibility of the opinion. Id. The presentece report correctly reflected the belief of Michele Mancha that there was a restraining order in effect at the time of the murder. 13 ROA 3102, 3111. But there is no indication the jury was misled in light of other testimony in the case that the restraining order had lapsed by that time. 13 ROA 3060-1; 14 ROA 3453-68. Finally, there is no evidence the jury was ever aware of or considered the mother's short statement buried on page 5 of the 1996 presentence report that Chappell did not deserve to live. The statement was

never highlighted nor brought to the jury's attention. In context, the statement was not an opinion on the appropriate sentencing option directed at the jury, but was an expression of grief from a mother during an interview.

In the event this Court does not find the facts of this case distinguishable from Herman, supra, the State urges reconsideration of any rule that would allow a judge but not a jury to consider information contained in a presentence report. See State v. Morrow, 968 S.W.2d 100 (Mo. 1998); Conyers v. State, 345 Md. 525, 693 A.2d 781 (Md. 1997) (presentence report presumptively admissible in capital sentencing). If anything, capital sentencing procedures allow a jury to consider more, not less, information than a judge in making a sentencing determination. NRS 175.552. If presentence reports are deemed impalpable or highly suspect, then no judge could ever rely upon them in any sentencing matter. Nor can it be seriously argued that character information and criminal history, even for non-violent offenses, is not relevant when the legislature has mandated the inclusion of such information in every presentence report. NRS 176.145. Although presentence reports in general are confidential and not to be made a part of any public record, there is an obvious exception for their use by law enforcement agencies in "performing their duties, including, without limitation, conducting hearings that are public in nature." NRS 176.156(2). The discretion to admit all or portions of presentence reports is properly left to the trial judge,[4] there was no constitutional or plain error in the jury's consideration of these reports, and the holding of Herman, supra, should be revisited.

H. The Court Did Not Err in Allowing Victim Impact Testimony

On appeal Chappell challenges the amount of victim-impact testimony allowed in the penalty hearing as well as the alleged inadequacy of the notice of evidence in aggravation. But in the proceedings below, Chappell never complained about lack of notice nor did he object to the excessiveness of the victim impact testimony. Rather,

[4] The ability of the trial judge to perform this gatekeeping function is illustrated by the court's refusal in this case to allow the State to present probation violation reports in its rebuttal case. 16 ROA 3773-4.

the objection below was limited to relevance and whether non-family members could properly give victim impact statements. 13 ROA 3167. Raised in this way, the trial judge properly overruled the objection reasoning he had discretion in a capital sentencing hearing to allow non-family members to testify. 13 ROA 3167-8; 14 ROA 3271-4.

Questions regarding the admissibility of evidence during the penalty phase of a capital trial are left to the discretion of the trial court and will not be disturbed absent an abuse of discretion. Smith v. State, 110 Nev. 1094, 1106, 881 P.2d 649, 656 (1994); see NRS 175.552(3). According to the U.S. Supreme Court's holding in Payne v. Tennessee, 501 U.S. 808, 823, 111 S.Ct. 2597, 2607 (1991), the admission of victim impact evidence during a capital penalty hearing does not violate the Eighth Amendment and is relevant to show each victim's "uniqueness as an individual human being." There is no equal protection or due process violation where even in non-capital sentencing hearings, the court is not restricted from hearing "any reliable and relevant evidence." NRS 176.015.

The trial judge was mindful of the potential for excessive or cumulative victim impact, 13 ROA 3168, and took steps to limit it where appropriate. 14 ROA 3306. Although the victim came from a large, close-knit family, 15 ROA 3685, only two family members were actually called to give testimony, the victim's aunt, Carol Monson, and the victim's mother, Norma Penfield. 15 ROA 3681-90. During her testimony, Carol Monson read short letters from the victim's cousin Christina Reese, and another aunt, Doris Waskowski. 15 ROA 3684-5. None of the victim's three children were called as witnesses, although they were discussed during Norma Penfield's testimony. 15 ROA 3681-90. No objection was made to the family's victim impact testimony. Considering the length of the penalty hearing, the numerous witnesses called in the case, and the victim's large family, the relatively brief victim impact statements by family members were not excessive.

Appellate counsel acknowledges that victim impact statements may extend to non-family members. Wesley v. State, 112 Nev. 503, 519-20, 916 P.2d 793, 804 (1996); Lane v. State, 110 Nev. 1156, 1166, 881 P.2d 1358, 1365 (1994). This explains why the claim has been expanded on appeal to include other issues. Several close friends and co-workers were asked to briefly explain how the murder affected them. These witnesses were primarily called as percipient witnesses to the murder and to discuss the relationship of Chappell and the victim. Unlike the family members who were all called at the end of the penalty hearing solely for victim impact purposes, the non-family members gave very short victim statements at the end of their respective testimonies throughout the penalty hearing. 13 ROA 3107-8, 3167-8, 3177-8, 3248. At least one of these witnesses gave victim impact testimony at the first penalty hearing in 1996 belying any claim of lack of notice. 8 ROA 1895-6. As it was not consolidated together and was not the primary focus of their testimony, it did not have the same emotional effect as that offered by the family members. Under these circumstances, there was no abuse of discretion in allowing this testimony.

I. The Court Did Not Err in Allowing Admission of Chappell's Prior Testimony

In the guilt phase of the 1996 trial, Chappell took the stand and testified in his own defense. 6 ROA 1367-1470. In the recent re-do of the penalty hearing this testimony was read-in to the record for the benefit of the newly empanelled penalty jury. 15 ROA 3641-68. In objecting, Chappell's trial attorney acknowledged that prior sworn testimony is generally admissible, but wanted to preserve an issue regarding ineffective assistance of counsel in the 1996 trial for allowing Chappell to testify as he did. 15 ROA 3632. In allowing the prior testimony, the district court reasoned that ineffectiveness in allowing Chappell to testify had not been raised in the post-conviction proceedings and was procedurally barred. 15 ROA 3632-3. Also, the guilt phase had been affirmed twice on appeal. Id.

Generally, a defendant's testimony at a former trial is admissible against him in later proceedings. Harrison v. United States, 392 U.S. 219, 222, 88 S.Ct. 2008 (1968); Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). However, prior testimony that is compelled by constitutional violations is not admissible. Id. In this appeal, Chappell complains that the court should have held a hearing on the ineffective assistance claim. However, the claim was only generally asserted without any particularity of how counsel was ineffective. Making only a general objection to a constitutional issue is insufficient to preserve the issue for appeal. See e.g., Hernandez v. State, 118 Nev. 513, 50 P.3d 1100 (2002). A defendant claiming ineffective assistance of counsel must allege with specificity the failings of counsel and how he was prejudiced under Strickland. Evans v. State, 117 Nev. 609, 28 P.3d 498 (2001). Bare claims not supported by specific factual allegations are not entitled to relief. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Furthermore, the decision to testify belongs to the defendant, not his attorney. Ingle v. State, 92 Nev. 104, 546 P.2d 598 (1976).

Factually, this case is distinguished from the authority relied upon by Chappell. Unlike the prior testimony in Harrison and Byford, supra, which was from a conviction that had been reversed, Chappell's prior testimony was from the guilt phase in the same case that had been affirmed and was a final adjudication. It was simply being repeated in the penalty hearing for the benefit of the new jury. The U.S. Supreme Court has approved of the practice of admitting guilt-phase transcripts at a capital resentencing. Oregon v. Guzek, 546 U.S. 517, 522, 126 S.Ct. 1226, 1230 (2006). Chappell can not collaterally challenge his trial counsel's effectiveness in this manner.

J. The Prosecutor Did Not Make a Comparative Worth Argument

In this claim Chappell argues the State engaged in misconduct using victim impact testimony to make an improper "comparative worth" argument. This issue was not raised or objected to below. In Payne v. Tennessee, the United States

Supreme upheld the admissibility of victim impact testimony in a capital sentencing hearing despite arguments that it might permit a jury to find that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. Payne v. Tennessee, 501 U.S. 808, 823, 111 S.Ct. 2597, 2607 (1991). The Court noted that "[a]s a general matter, victim impact evidence was not offered to encourage comparative judgments of this kind – for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but the murderer of a reprobate does not." Id.

Certainly, the prosecutor in the present case drew a distinction between the character of Chappell and that of the victim and her mother in how each dealt with negative circumstances in their lives. 16 ROA 3778-87. But Payne does not hold that all comparative worth arguments are unconstitutional. Humphries v. Ozmint, 397 F.3d 206, 224 (4th Cir. 2005), *cert. denied*, 546 U.S. 856, 126 S.Ct. 128 (2005). In fact, the Payne Court recognized that some comparisons would be made between the defendant and the victim. Payne, supra, 501 U.S. at 825, 111 S.Ct. 2597. At most, the Payne Court disapproved of comparisons between the victim and other victims of society. Humphries, supra, 397 F.3d at 224. No such argument was made in the present case.

Nor was the prosecutor in the present case comparing the relative worth of the defendant and victim. See Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004). The words, "compare," worth," and "value" appear no where in the State's closing argument. Instead, the State was contrasting the character of each to show how the exercise of free will and choice affected behavior. Such an argument was fairly supported by the evidence and was in rebuttal to Chappell's mitigation evidence. The State has a legitimate interest in counteracting the defendant's mitigating evidence. Payne, supra. 501 U.S. at 825, 111 S.Ct. at 2608; see also U.S. v. Fields, 483 F.3d 313, 340-1 (5th Cir. 2007) (holding that victim-to-defendant comparison is permissible). Chappell introduced evidence of his own "uniqueness" through the

testimony of his mitigation witnesses regarding his own difficult childhood and background, thereby inviting a comparison between Chappell and the victim's respective characters even before the prosecutor gave his closing remarks.

In this appeal, Chappell views the victim's evidence solely in terms of victim impact and overlooks its relevance "to rebut specific mitigating evidence" which is also permitted and appropriately considered by a capital sentencing jury. Thomas v. State, 122 Nev. 1361, 148 P.3d 727 (2006). In his closing argument, the prosecutor specifically referred to the defense's expert, Dr. Etcoff, who had testified at length that Chappell's conditions in life had impaired his ability to make free will decisions thereby making him less culpable. 16 ROA 3781. In fact, not only was it the defense who first introduced the concepts of free will and choice to the jury, the defense culminated its examination of Dr. Etcoff by directly eliciting testimony that compared Chappell's relative free will with others in the courtroom even though such was not in evidence. 14 ROA 3514-17. The State was entitled to rebut this mitigation testimony that negative life experiences reduces free will, and did so with specific examples based on facts in evidence properly before the jury.

K. Any Prosecutorial Misconduct Was Harmless

Chappell admits that none of the instances of alleged prosecutorial misconduct raised in this appeal were objected to at trial. The Nevada Supreme Court has consistently held that "failure to object during trial generally precludes appellate consideration of an issue." Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001). In Miller v. State, 121 Nev. 92, 110 P.3d 53 (2005), this Court stated:

> Timely objections enable the district court to instruct the jury to disregard improper statements, thus remedying any potential for prejudice. Judicial economy requires that this court encourage good trial practice, and granting new trials for error that could have been corrected with a simple objection by an alert attorney does not encourage good trial practice.

In failing to object to the alleged improper statements, Defendant has waived appellate review. Id. Where Defendant did not object, his challenge to the prosecutor's remarks is subject to plain error review. United States v. Olano, 507

U.S. 725, 733-35, 113 S.Ct. 1770, 1777-78 (1993); United States v. Severino, 316 F.3d 939, 947 (9th Cir. 2003). Plain error exists only in exceptional circumstances when a substantial right of a defendant is affected. Olano, 507 U.S. at 733-35; United States. v. Mendoza-Reyes, 331 F.3d 1119, 1121 (9th Cir. 2003).

In reviewing allegations of prosecutorial misconduct "the relevant inquiry is whether a prosecutor's statements so infected the proceedings with unfairness as to make the result a denial of due process." Hernandez v. State, 118 Nev. 513, 50 P.3d 1100, 1108 (2002) citing Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464 (1986); *See also* Witter v. State, 112 Nev. 908, 923, 921 P.2d 886, 897 (1996). The statement should be considered in context and "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comment standing alone." Hernandez, 118 Nev. 513, 50 P.3d 1100, 1108; citing United States v. Young, 470 U.S. 1, 11 S.Ct 1038 (1985). Comments that are harmless beyond a reasonable doubt do not warrant a reversal of a defendant's conviction. Witter, 112 Nev. 908, 921 P.2d 886; Witherow v. State, 104 Nev. 721, 765 P.2d 1153 (1988). "If the prosecutor's reasoning is faulty, such faulty reasoning is subject to the ultimate consideration and determination by the jury." Green v. State, 81 Nev. 173, 176, 400 P.2d 766, 767 (1965).

"Inappropriate prosecutorial comments, standing alone, would not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding." United States v. Young, 470 U.S. 1, 11-12, 105 S.Ct. 1038, 1044 (1985). The comments must be viewed in context of the trial to determine if the proceeding was prejudiced so as to preclude a fair trial. Id. Thus, an exceptionally strict standard governs courts in granting reversals of verdicts based upon prosecutorial misconduct.

First, Chappell argues the State improperly commented on his right to remain silent. This claim refers to the prosecutor's 1996 cross-examination of Chappell which was considered by the district court judge in admitting the transcript of his prior testimony. 15 ROA 3632; see also, Claim "I" above. In his 2002 post-conviction,

Chappell raised a claim of ineffective assistance of counsel for failing to object to the State's cross-examination of Chappell. 10 ROA 2447-8. Although Chappell now argues that the judge did not rule on the merits of this claim, that is only true as to deficient performance under the first prong of Strickland for not objecting. 11 ROA 2745-6. As to the second prong of Strickland, the trial court plainly ruled on the merits that all claims of attorney error were harmless due to the overwhelming evidence and none of the claims prejudiced the outcome of the case. Id. On appeal, this Court carefully reviewed each of the claims of ineffective assistance including "the failure to object to portions of Chappell's cross-examination by the prosecutor" and found no prejudice whether objected to or not. 11 ROA 2789-90. It was upon this basis that the testimony was admitted in the new penalty hearing and the alleged misconduct in 1996 was of no prejudice.[5]

Next, Chappell claims the prosecutor misstated the role of mitigating circumstances, commented on matters that were not in evidence, and improperly minimized the mitigating evidence. The jury was correctly instructed by the court on the role of mitigating circumstances belying any claim they were confused or misled by the arguments of counsel. 15 ROA 3747, 3753-5, 3758. While a prosecutor may not foreclose consideration of mitigating circumstances proposed by the defense or suggest that a causal connection is required, the State has a right to counter the defense's mitigation case with evidence and argument in rebuttal. Thomas v. State, 122 Nev. 1361, 148 P.3d 727 (2006).

In this case, Chappell affirmatively presented evidence of his character and childhood as diminishing his culpability or ability to exercise free will in mitigation of the murder. 14 ROA 3514-17. The State had a right to rebut this evidence with

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[5] A finding of no prejudice constitutes law of the case as to prejudice under Strickland when the same issue is re-raised as an ineffective assistance of counsel claim. See Foster v. State, 121 Nev. 165, 176, 111 P.3d 1083, 1090-1 (2005).

argument based on common experiences in dealing with adversity. A jury is not limited solely to the evidence but must bring to the consideration of the evidence their "everyday common sense and judgment" and may draw reasonable inferences "in light of common experience." 15 ROA 3761. While a defendant may have a constitutional right to presentation and consideration by the jury of proposed mitigation evidence, it is not immune from challenge or rebuttal by the prosecutor. There is a difference between telling a jury they can not consider mitigating evidence offered by the defense versus arguing the weight, or lack thereof, such evidence should hold in mitigation.

Next, Chappell asserts it was misconduct for the prosecutor to argue that the jurors would be conned by Chappell and would be taking the easy way out if they imposed a sentence less than death. Unlike at trial, in a capital penalty hearing the defendant's character is directly in issue. In allocution to the jury, Chappell claimed he spoke honestly, insisted that his childhood experiences contributed to his wrong choices, and promised to work better and improve himself so he could help others. 16 ROA 3769. The prosecutor's comments were in rebuttal to the defense's mitigation case and did not cross the line into name-calling as in the case authority cited by the defense. Notably, such arguments were soundly based on evidence presented in the case that Chappell had misled his own expert, Dr. Etcoff, as well as his parole officer, Mr. Duffy, with similar claims of honesty and a desire to change. 16 ROA 3786-7. Appropriately, Chappell's attorney responded at length to the State's "conning" argument further diminishing any claim of impropriety or prejudice. 16 ROA 3795-6. The prosecutor urged the jury not to select a verdict just because it was "easier," but to "do the right thing" even though it may be "harder." 16 ROA 3787. There is nothing in such an argument that is contrary to law or which constitutes impermissible argument.

Finally, Chappell claims the prosecutor argued that the jury should not consider mercy. This claim is directly belied by the record:

> Is there a place for mercy in murder cases. There is. There is. That's something that you need to consider.

16 ROA 3786. The jury was instructed that the desire to extend mercy could be considered as a mitigating factor. 15 ROA 3753. The prosecutor's argument acknowledged the role of mercy but sought to balance it with the consideration of justice in reaching a fair and individualized verdict – "You don't just owe Chappell the consideration of mercy, you owe the victims and the State of Nevada a just sentence as well." 16 ROA 3802. The balancing of justice and mercy is an appropriate argument as a theory of penology. See Witter v. State, 112 Nev. 908, 924, 921 P.2d 886, 897 (1996); Evans v. State, 117 Nev. 609, 632, 28 P.3d 498, 514 (2001). This is not a case where the prosecutor asked the jury to show the defendant the "same mercy" that he showed his victim. See Thomas v. State, 120 Nev. 37, 83 P.3d 818 (2004). Rather, the prosecutor properly argued based on the evidence that mercy did not outweigh the demands of justice in this case, not that sympathy or mercy could not legally be entertained. See People v. Demetrulias, 39 Cal.4th 1, 137 P.3d 229 (2006).

Misconduct is not specifically a prosecutor problem. The Nevada Supreme Court has discouraged defense misconduct, stating that "[i]f an appeal is taken in the case, the State may appropriately direct this court's attention to the misconduct by defense counsel." Williams v. State, 103 Nev. 106, 111, 734 P.2d 700, 703-04 (1987). The State now takes this opportunity to highlight the defense misconduct in this case and seeks redress from this Court. Certainly, the State concedes that defense misconduct does not give the State *carte blanche* to commit misconduct in response. However, because Chappell claims in this appeal that the State's alleged instances of prosecutorial misconduct so infected the proceedings with unfairness as to entitle him to a reversal, the defense attorney's misconduct is highly relevant:

> So what they tried to do is to confuse you, to mix it up and go off on tangents, because there was a lot of evidence presented that they could

not impeach. They tried to hide the ball from you, and possibly the worst they took every opportunity they could to show you gruesome photographs . . .

* * *

I'm going to talk to you about the State's arguments, how they tried to hide the ball . . .

* * *

But again, it's an attempt by the State to hide the ball, go off on tangent to get you too confused . . .

* * *

So they went out on tangents in cross-examination, simply trying to confuse the situation and get you off point . . .

* * *

They had to attack Dr. Denton. And, again, trying to deflect your attention away from the facts.

* * *

We brought him up to show you once again the tactics used by the State to confuse and mislead you. . . .

* * *

They did that simply for shock affect, to hide the ball . . .

16 ROA 3787-91. These disparaging comments were neither isolated nor merely made in passing, but served as the central theme of the defense's summation argument. Disparaging remarks directed toward opposing counsel "have absolutely no place in a courtroom, and clearly constitute misconduct." McGuire v.State, 100 Nev. 153, 158, 677 P.2d 1060, 1063-4 (1984). It is not only improper to disparage opposing counsel personally, but also to disparage counsel's legitimate tactics. See Leonard v. State, 114 Nev. 1196, 1212-3, 969 P.2d 288, 298-9 (1998).

Chappell's attorney portrayed the State's presentation of evidence and tactics as a dirty technique in an attempt to fool and distract the jury, implying that the prosecutors acted unethically. See Butler v. State, 120 Nev. 879, 102 P.3d 71 (2004). The prosecutor not only has an obligation to present evidence to seek justice but an ethical duty to "prosecute with earnestness and vigor." Berger v. United States, 295 U.S. 78, 55 S.Ct. 629 (1935). This Court has previously condemned referring to opposing counsel's case as "smoke and mirrors," Rose v. State, 123 Nev. 24, 163 P.3d 408 (2007), or a "hustle," Barron v. State, 105 Nev. 767, 783 P.2d 444 (1989), or a "red herring," Pickworth v. State, 95 Nev. 547, 598 P.2d 38 (1978), or "putting on a show," Shannon v. State, 105 Nev. 782, 783 P.2d 942 (1989).

L. The Reasonable Doubt Standard Does Not Apply to the Weighing Process

Nevada's death penalty statute indicates that a person is death eligible if one or more aggravating circumstances are found beyond a reasonable doubt and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances. See NRS 200.030(4)(a). The jury in this case was properly instructed in this regard:

> If you find unanimously and beyond a reasonable doubt that at least one aggravating circumstance exists and each of you determines that any mitigating circumstances do not outweigh the aggravating circumstances, the defendant is eligible for a death sentence.

15 ROA 3758. Chappell did not object to this instruction nor did he proffer an alternative instruction. In fact, in argument to the jury Chappell's counsel acknowledged that no particular standard or burden of proof applied to the weighing process. 16 ROA 3792-3. Accordingly, the defense is precluded and estopped from asserting a contrary position in this case.

Now for the first time on appeal, Chappell contends that the jury was required to be instructed specifically that it find the aggravators outweighed the mitigators beyond a reasonable doubt. Any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a

reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348 (2000). In a capital sentencing hearing, aggravating factors operate as the "functional equivalent" of an element of a greater offense and must be found by a jury beyond a reasonable doubt. Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002). From this case authority, Chappell extrapolates that the reasonable doubt standard applies to Nevada's weighing process as well. However, the weighing of aggravating and mitigating circumstances is a "process" a jury must engage in prior to death eligibility, it is not a "fact" subject to proof by the State beyond a reasonable doubt. Rather, the weighing is subjective to each individual juror who must be satisfied the aggravators outweigh any mitigators. There is no such thing as "outweighing beyond a reasonable doubt" and Chappell can point to no authority for his novel proposition that a jury must be so instructed.

M. A Jury is Not Required to Find Every Mitigating Circumstance Proposed by the Defense

Not only does Chappell want to preclude the State from challenging his proposed mitigators (see Claim K above), he also wants to dictate to the jury what mitigating circumstances they must agree with and find in their verdict. In this case, the jury was instructed on thirteen mitigating circumstances proposed by the defense, including the "any other mitigating circumstances" catch-all phrase. 15 ROA 3755. However, in a special verdict form, the jury only found seven mitigating circumstances. 15 ROA 3739-40. Specifically, the jury did not find that Chappell attempted to be a good father, that his mother was killed when he was very young, that he was the victim of mental abuse as a child, that he was involved in a racially tense relationship, or that he was taken away from his support system by his relationship with the victim. Id. Whether these facts were contested or not, only the jury can determine what facts actually mitigate the particular murder under the circumstances:

> In determining whether mitigating circumstances exist, jurors have an obligation to make an independent and objective analysis of all the relevant evidence. Arguments of counsel or a party do not relieve jurors of this responsibility. Jurors must consider the totality of the circumstances of the crime and the defendant, as established by the evidence presented in the guilt and penalty phases of the trial. ***Neither the prosecution's nor the defendant's insistence on the existence or nonexistence of mitigating circumstances is binding upon the jurors.***

15 ROA 3754 [emphasis added]; see also, Hollaway v. State, 116 Nev. 732, 6 P.3d 987 (2000). Mitigating circumstances were also defined for the jury as those factors which may be considered "***in the estimation of the jury***, in fairness and mercy, as extenuating or reducing the degree of the Defendant's moral culpability." 15 ROA 3753 [emphasis added]; see also, Thomas v. State, 122 Nev. 1361, 148 P.3d 727 (2007). So, even though it may have been uncontroverted factually that Chappell's mother was killed when he was young, the jury was not obligated in their individual estimation to find that such facts extenuated or reduced the degree of Chappell's moral culpability for the murder under the facts of this particular case. It is that kind of individualized and independent analysis by the jury that Chappell seeks to avoid by mandating that uncontested mitigating circumstances be found as a matter of law. Such is contrary to the law of Nevada.

Although not cited to by the defense, this Court has previously held that jurors are not required to find some or all of a defendant's proffered mitigating circumstances in a penalty phase of a capital murder prosecution, even though he may have presented unrebutted evidence to support them. Gallego v. State, 117 Nev. 348, 23 P.3d 227 (2001). In fact, under Nevada law there is not even a requirement that a jury specify the mitigating circumstances it has found. Id. Furthermore, a jury's rejection of any mitigating factors does not demonstrate the sentence is unreliable or the product of passion or prejudice. Middleton v. State, 114 Nev. 1089, 968 P.2d 296 (1998). Chappell's authority to the contrary is from a few other jurisdictions that pre-dated Ring v. Arizona and involved findings by judges, not juries, under different statutory schemes.

N. The Sexual Assault Aggravator is Supported by Sufficient Evidence

This Court has previously upheld the sexual assault aggravator on the specific facts of this case against claims of insufficiency of the evidence which ruling now constitutes law of the case. The doctrine of the "law of the case" holds that the law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same. Bejarano v. State, 122 Nev. 1066, 146 P.3d 265 (2006). On direct appeal in 1998, this Court found as follows:

> The evidence at trial and during the penalty hearing showed that Panos and Chappell had an abusive relationship, that Panos had ended her relationship with Chappell, that Chappell was extremely jealous of Panos' relationship with other men, and that Panos was involved with another man at the time of the killing. ***We conclude that a rational trier of fact could have concluded that either Panos would not have consented to sexual intercourse under these circumstances or was mentally or emotionally incapable of resisting Chappell's advances and that Chappell therefore committed sexual assault.***

9 ROA 2279-80 [emphasis added]. Also, in its recent order of remand this Court specifically held that the sexual assault aggravator remained viable if the State elected to re-seek the death penalty on remand. 11 ROA 2796. Two separate juries have now heard the evidence and found unanimously in favor of the sexual assault aggravator beyond a reasonable doubt. 9 ROA 2168; 15 ROA 3737.

In Nevada, the standard of review for sufficiency of evidence on appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992); McNair v. State, 108 Nev. 53, 825 P.2d 571 (1992). Furthermore, where there is substantial evidence to support the jury's verdict it will not be disturbed on appeal. Id. The test for sufficiency is therefore not whether this Court "is convinced of the defendant's guilt beyond a reasonable doubt, but whether the jury, acting reasonably, could be convinced to that certitude by evidence it had a right to accept." Crowe v. State, 84 Nev. 358, 441 P.2d 90 (1968). It is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses. Walker v. State, 91 Nev. 724, 726, 542 P.2d 438, 438-39 (1975). This Court's inquiry

thus becomes whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Koza v. State, 100 Nev. 245, 681 P.2d 44 (1984), quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2788-2789 (1979).

The addition of any new evidence or testimony in the recent penalty hearing which may have rebutted the sexual assault aggravator is of no consequence. A sufficiency of evidence analysis is not concerned with conflicting or disputed evidence, because only the jury can determine weight and credibility. The evidence in support of the sexual assault aggravator viewed in a light most favorable to the prosecution has not substantially changed since this Court previously ruled on the issue. A rational trier of fact could have found the existence of the sexual assault aggravator upon evidence which it had a right to accept.

O. The Sexual Assault Aggravator is not Impacted by McConnell

Chappell raised this same issue previously with this Court and it is now controlled by law of the case. Bejarano, supra. In the recent 2006 appeal, Chappell argued that all three of his felony-aggravating circumstances were invalid based on the new case authority of McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004). 11 ROA 2792-96. After careful analysis, this Court struck two of the felony aggravators as a matter of law because they were duplicative of the State's theory of felony-murder and failed to provide constitutional narrowing. Id. However, unlike burglary and robbery, sexual assault was not a theory of felony-murder relied upon by the State to obtain the first degree murder conviction. 1 ROA 38-9. Although McConnell disproved of the State selecting among multiple felonies and using one to establish felony murder and another to support an aggravating circumstance, the omission in Chappell's case was not an attempt to circumvent McConnell since Chappell's trial was held long before that opinion. 15 ROA 2795. But even more important, this Court found not only that Chappell committed a sexual assault "but

that he did so with a criminal purpose distinct from the burglary and robbery." Id. Thus the sexual assault aggravator remained viable.

Although Chappell re-raised this issue in the recent proceedings below, it was properly denied by the district court judge based on law of the case and this Court's remand order. 12 ROA 2801; 3016-19. McConnell only prohibits splitting up felonies that occur during "an indivisible course of conduct having one principal criminal purpose." McConnell, supra. Chappell provides no new argument or case authority that undermines this Court's prior conclusion that the sexual assault aggravator provides constitutional narrowing in the circumstances of this case where it was not the basis of the felony-murder theory and where it served a criminal purpose distinct from the burglary and robbery.

P. There is No Cumulative Error

This Court has held under the doctrine of cumulative error, "although individual errors may be harmless, the cumulative effect of multiple errors may deprive a defendant of the constitutional right to a fair trial." Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361 (1994); see also Big Pond v. State, 101 Nev. 1, 3 692 P.2d 1288 (1985). The relevant factors to consider in determining "whether error is harmless or prejudicial include whether 'the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.'" Big Pond, 101 Nev. at 3. The doctrine of cumulative error "requires that numerous errors be committed, not merely alleged." People v. Rivers, 727 P.2d 394, 401 (Colo. App. 1986); see also People v. Jones, 665 P.2d 127, 131 (Colo. App. 1982). Evidence against the defendant must therefore be "substantial enough to convict him in an otherwise fair trial and it must be said without reservation that the verdict would have been the same in the absence of error." Witherow, 104 Nev. 724.

Insofar as Chappell has failed to establish any error which would entitle him to relief, there is no cumulative error. Furthermore, a defendant is not entitled to a perfect trial, but only a fair trial. Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114

(1975), citing Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974). Here, Chappell received a fair penalty hearing. Because Chappell failed to raise any issue that has merit, his claim of cumulative error must be denied.

CONCLUSION

While the first death verdict by a jury twelve years ago was reversed due to ineffective assistance of counsel, another jury has now also heard the evidence and likewise returned a death verdict against Chappell. Even though this Court's changes in the law over time have invalidated four of the original five aggravating circumstances in this case, the essential facts have not changed and still warrant the death penalty. This Court's previous determination that the failure to call certain witnesses at the first penalty hearing prejudiced Chappell is refuted by the return of yet another death verdict from a new jury. Notably, the defense called only two out of the original nine witnesses for which the new penalty hearing was ordered belying the defense's previous claims of prejudice. 16 ROA 3803-4. This Court was previously misled to believe that original trial counsel was ineffective for not calling the witnesses and that their testimony probably would have affected the outcome of the case. Such has been disproved. While death may be "different," reviewing courts should not place the bar so high that achieving a valid death verdict becomes impossible. Chappell had a fair and constitutional new penalty hearing and the jury's verdict of death must stand.

Dated this 8th day of August, 2008.

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BY 
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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 8th day of August 2008.

Respectfully submitted,

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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 8th day of August 2008.

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