ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 49478

JAMES M. CHAPPELL

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Appeal from a Judgment of Conviction and Sentence of Death
Eighth Judicial District Court, Clark County
The Honorable Douglas Herndon, District Judge

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Appellant James Chappell presented persuasive argument in his Opening Brief which established that his judgment of conviction and sentence of death are unconstitutional. The State addresses these issues in its Answering Brief but fails to adequately refute the arguments raised by Chappell. He respectfully submits that his judgment of conviction and sentence of death must be vacated.

II. REPLY TO THE STATE'S ARGUMENT

A. Chappell's Conviction For First Degree Murder Must Be Reversed Because The Jury Was Not Properly Instructed On The Elements Of The Capital Offense

Chappell contended in his Opening Brief that the failure of the trial court to instruct the jury on the element of deliberation violated Chappell's rights to due process, equal protection, and a reliable sentence under the state and federal constitutions. In response the State contends that this issue is not properly before this Court as this is an appeal from Chappell's sentence of death. Answering Brief at pages 7-8. It also argues that "any new challenges to Chappell's guilt must be raised by collateral attack through a post-conviction writ of habeas corpus." Answering Brief at page 8.

Chappell respectfully submits that this issue is properly presented in this appeal. Chappell is on direct appeal and does not yet have a final judgment. See Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987); Berman v. U.S., 302 U.S. 211, 212 (1937) ("Final judgment in a criminal case means sentence. The sentence is the judgment"); Johnson v. State, 118 Nev. 787, 802 n.31, 59 P.3d 450, 460 n. 31 (2002) (a conviction becomes 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 such a petition has expired); Doyle v. State, 116 Nev. 148, 157, 995 P.2d 465, 471 (2000) (same); NRS 176.105 ("If a defendant is found guilty and is sentenced as provided by law, the judgment of conviction must set forth: (a) The plea; (b) The verdict or finding; (c) The adjudication and sentence, including the date of the sentence, any term of imprisonment, the amount and terms of any fine, restitution or administrative assessment, a reference to the statute under which

the defendant is sentenced and, if necessary to determine eligibility for parole, the applicable provision of the statute; and (d) The exact amount of credit granted for time spent in confinement before conviction, if any." A judgment of conviction is not final until there is a written judgment setting forth the plea; the verdict or finding; and the adjudication and sentence, including the date of sentence and a reference to the statute under which the defendant is sentenced. Bradley v. State, 109 Nev. 1090, 1094, 864 P.2d 1272, 1275 (1993) (citing NRS 176.035(1)). See also Browning v. State, 188 P.3d 60, 69 (Nev. 2008) (considering merits of defendant's guilt phase argument in the context of a direct appeal from a sentence of death, but rejecting the merits of the argument).

The State cites to Edwards v. State, 112 Nev. 704, 918 P.2d 321 (1996) in support of its claim that the premeditation issue should be addressed in habeas proceedings. Answering Brief at page 8. Edwards, however, does not address this issue. In that case, this Court considered the defendant's appeal from a district court order denying a "motion for modification of an illegal sentence." Edwards, 112 Nev. at 705, 918 P.2d at 323. The defendant in that case had been convicted pursuant to a guilty plea and his conviction had been affirmed on direct appeal, in post-conviction proceedings, and on appeal in post conviction proceedings. Id. The issue presented in Edwards concerned whether a notice of appeal was timely under NRAP 4(b) and addressed the defendant's argument that his motion to modify his sentence should be treated as a petition for post-conviction relief in the nature of habeas corpus. Id. at 706, 918 P.2d at 323. The opinion in no way addressed the finality of a judgment of conviction in a case where the sentence was vacated and remanded for new proceedings and in no way addressed the issue of whether a guilt phase issue could be considered within this context. Likewise, the State's reliance on NRS 34.724(2)(b), cited at page 8 of the State's Answering Brief, is misplaced as this statute does not in any way address the issue presented here.

the State argues that this issue should be addressed in habeas proceedings. Principles supporting the efficient and fair administration of justice, however, warrant this Court's consideration of this issue in this proceeding. It makes no sense for this issue to be ignored

now, presented to the trial court in habeas proceedings, and then presented to this Court again in an appeal following resolution of the habeas proceedings. All of the relevant facts and law are available now. There is no need for an evidentiary hearing or further development of the record concerning this issue. See Byford v. State, 156 P.3d 691, 692 (Nev. 2007). Accordingly, there is no need to delay this Court's consideration of this legal issue.

As to the merits, the State argues that relief is not warranted because Chappell did not raise this issue at trial or on direct appeal. Answering Brief at page 8. Good cause exists, however, for Chappell's failure to raise this issue as this Court has repeatedly rejected arguments concerning the premeditation instruction prior to Chappell's trial. See Kazalyn v. State, 108 Nev. 67, 75, 825 P.2d 578, 583 (1992); Powell v. State, 108 Nev. 700, 708-10, 838 P.2d 921, 926-27 (1992), vacated on other grounds by 511 U.S. 79 (1994). Under these circumstances, it is understandable that counsel did not object to the instruction and did not raise the issue on direct appeal. See Doyle v. State, 116 Nev. 148, 995 P.2d 465 (2000).

> This court may consider constitutional challenges on appeal despite an appellant's failure to make timely objections at trial, and has often elected to consider such appeals. See, e.g., Geary v. State, 112 Nev. 1434, 930 P.2d 719 (1996); Lord v. State, 107 Nev. 28, 806 P.2d 548 (1991); Jones v. State, 101 Nev. 573, 707 P.2d 1128 (1985); McCullough v. State, 99 Nev. 72, 657 P.2d 1157 (1983); Dias v. State, 95 Nev. 710, 601 P.2d 706 (1979). Consideration of [this] appeal comports with precedent, as "we have previously recognized the futility of objecting to an instruction whose validity has been consistently upheld." Jones, 101 Nev. at 576, 707 P.2d at 1130. The reasoning in Jones stems from our earlier reliance on federal authority to excuse failure to request jury instructions which, at the time of . . . trial, would have been inconsistent with the law as it then existed." St. Pierre v. State, 96 Nev. 887, 892, 620 P.2d 1240, 1243 (1980) (quoting United States v. Wanger, 426 F.2d 1360 (9th Cir. 1970)). We conclude that this reasoning is directly applicable in the instant case, as it would have been futile for Sereika to object to an instruction that merely recited the requirements for conviction under the applicable statute."

Sereika v. State, 114 Nev. 142, 144-145, 955 P.2d 175, 176-77 (1998). Under this authority, this issue is properly considered despite the objection at trial.

The State next argues that this issue is barred by the doctrine of law of the case because this Court found the issue to be without merit on appeal in habeas corpus proceedings. Answering Brief at page 8. The doctrine of law of the case, however, does not preclude this Court's consideration of this issue.

"Under the law of the case doctrine, '[w]hen an appellate court states a principle or rule of law necessary to a decision, the principle or rule becomes the law of the case and must be followed throughout its subsequent progress, both in the lower court and upon subsequent appeal.' Hsu v. County of Clark, 173 P.3d 724, 728 & n.11 (Nev. 2007) (quoting Wickliffe v. Sunrise Hospital, 104 Nev. 777, 780, 766 P.2d 1322, 1324 (1988)). "The law of the case doctrine 'is designed to ensure judicial consistency and to prevent the reconsideration, during the course of a single continuous lawsuit, of those decisions which are intended to put a particular matter to rest.'" Id. & n.12 (quoting U.S. v. Real Property Located at Incline Village, 976 F.Supp. 1327, 1353 (D. Nev. 1997)). "The law of the case doctrine, therefore, serves important policy considerations, including judicial consistency, finality, and protection of the court's integrity." Id. & n.13 (citing Poet v. Thompson, 144 P.3d 1067, 1072 (Or. Ct. App. 2006)). "However, the law of the case doctrine is not a jurisdictional rule." Id. & n. 14 (citing Columbus-America Disc. Group. v. Atlantic Mut. Ins., 203 F.3d 291, 304 (4th Cir. 2000)). "Rather, as observed by the United States Supreme Court, it 'merely expresses the practice of courts generally to refuse to reopen what has been decided[:] [it is] not a limit to their power.'" Id. & n.15 (quoting Messenger v. Anderson, 225 U.S. 436, 444 (1912)). "Accordingly, the United States Supreme Court has concluded that '[u]nder law of the case doctrine, as now most commonly understood, it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice.'" Id. at 728-29 & n.16 (quoting Arizona v. California, 460 U.S. 605, 618 n.8 (1983)). "Based on statements such as these, federal courts have adopted three specific exceptions to the law of the case doctrine, concluding that a court may revisit a prior ruling when (1) subsequent proceedings produce substantially new or different evidence, (2) there has been an intervening change in controlling law, or (3) the prior decision was clearly erroneous and would result in manifest injustice if enforced." Id. at 729 & n.17 (citing numerous cases). "Nevertheless, as the United States Supreme Court has noted, absent those 'extraordinary circumstances,' a court should be loathe' to revisit its prior decisions." Id. & n.18 (quoting Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 817 (1988)).

as set forth in the Opening Brief, the recent decision of the United States Court of Appeals for the Ninth Circuit in Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007) is an intervening change in the controlling law that warrants consideration of this Court's prior decision on this issue. In the alternative, this Court's prior decision was clearly erroneous under In re Winship, 397 U.S. 358 (1970) and Sandstrom v. Montana, 442 U.S. 510 (1979). It would be a manifest injustice to enforce the prior decision under the facts of this case.

The State next argues that relief is not warranted because at the time of Chappell's trial in 1996, Nevada defined murder in accord with the Kazalyn instruction. Answering Brief at page 9. This argument is without merit. The elements of first degree murder did not change with the Byford decision. The current statutory definition of first degree murder, NRS 200.030(1)(a), includes the same language relating to premeditation and deliberation that was first enacted by the territorial legislature in 1861. The original statute provided:

> All murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful deliberate, and premeditated killing, or which shall be committed in the perpetration, or attempt of perpetrate, any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree....

1861 Nev. Stat. § 17 at 58-59. The relevant language has remained in all versions of the statute. See 5 Hillyer, Nevada Compiled Laws § 10068 at 3077 (1920), 2 Revised Laws of Nevada, § 6386 at 1832 (1912), Cutting, Compiled Laws of Nevada § 4672 at 910 (1900), Baily and Hammond, General Statutes of Nevada § 4581 at 1018 (1885).

The legal and dictionary definitions of these terms at the time the statute was adopted are indistinguishable from their common meanings. Premeditation is:

> [a] design formed to commit a crime. . . before it is done. . . . Premeditation differs essentially from will, because it supposes besides an actual will, a deliberation and continued persistence which indicate more perversity. The preparation of arms or other instruments required for the execution of the crime, are indications of a premeditation, but are not absolute proof of it. . . . Murder by poisoning must of necessity be done with premeditation.

John Bouvier, Law Dictionary (1856), s.v. premeditation. Deliberation means "[t]he act of the understanding, by which the party examines whether a thing proposed ought to be done or not to be done. . . ." Id., s.v. deliberation. See also 2 Charles E. Torcia, Wharton's

Criminal Law § 140 at 181-184 (14th ed. 1979) (footnotes omitted); id. § 142 (15th ed. 2007); 2 Wayne R. LaFave, Substantive Criminal Law § 14.7(a) at 477-478 (2d ed. 2003).

The original statute was a virtual copy of the 1794 act adopted in Pennsylvania, which was the first American statute to divide murder into degrees, and which was adopted at a time when death was the prescribed penalty for all murders. The enactment of the 1794 statute followed a report by a justice of the Pennsylvania Supreme Court to the Governor, recommending that the death penalty as a punishment for murder should be reserved for "deliberate assassination." William Bradford, An Enquiry how far the Punishment of Death is Necessary in Pennsylvania 35 (1793); see Edwin R. Keedy, History of the Pennsylvania Statute Creating Degrees of Murder, 97 U. Pa.L.Rev. 759, 770-773 (1949). That statute was the progenitor of the majority of the state murder statutes, including those of California and Nevada. See Suzanne Mounts, Premeditation and Deliberation in California: Returning to a Distinction Without a Difference, 36 U.S.F.L.Rev. 261, 262-263, and n. 5 (2002). The stated purpose of the Pennsylvania statute was to limit the scope of the death penalty, which was then the mandatory punishment for murder, but it also recognized the broader principle of distinguishing between degrees of culpability: "the several offenses, which are included under the general denomination of murder, differ so greatly from each other in the degree of their atrociousness that it is unjust to involve them in the same punishment." Keedy, 97 U.Pa.L.Rev. at 772-773, quoting 4 Journal of the Senate 242 (Pa. 1794).

Almost as soon as the statutory language was enacted, however, judicial decisions began to confuse the elements of premeditation and deliberation with each other and with intent to kill, apparently as a means of perpetuating the common law predominance of malice rather than accepting the statutory requirement of premeditation and deliberation. See Samuel H. Pillsbury, Evil and the Law of Murder, 24 U.C.DavisL.Rev. 437, 453-454(1990). In Pennsylvania itself, courts practically eliminated any temporal element of premeditation and deliberation by holding that "no time is too short for a wicked man to frame in his mind his scheme of murder, and to contrive the means of accomplishing it," Commonwealth v. Drum, 58 Pa. 9, 16 (1868), and ultimately eliminated any substantive content those elements

had by identifying premeditation as requiring nothing more than a "conscious purpose to bring about death," Commonwealth v. O'Searo, 352 A.2d 30, 37-38 (Pa. 1976). At the same time, however, the same court tried to give some content to premeditation and deliberation by recognizing that, even when there was time for reflection, "causes may affect the offender's intellect, preventing reflection, and hurrying onward his unhinged mind to rash and inconsiderate resolutions, incompatible with the deliberation and premeditation defining murder in the first degree." Jones v. Commonwealth, 75 Pa. 403, 406 (1874). Other early state decisions continued to insist that premeditation and deliberation did have substantive meaning. See, e.g., Lewis v. State, 3 Head. 127 (Tenn. 1859); State v. Johnson, 8 Clarke 525 (Iowa 1859); Fouts v. State, 4 Greene 500 (Iowa 1854).

The same tension evolved in the Nevada caselaw, as it did in did in most states that adopted the Pennsylvania statute. See Mounts, Premeditation and Deliberation in California, U.S.F.L.Rev. at 263-264. In State v. Millain, 3 Nev. 409, 450 (1867), this Court held:

> "that willful, deliberate and premeditated killing might take place in cases where the design to kill was formed at the very moment of striking the fatal blow [was] settled law. [citations]."
>
> We apprehend the true difference between simple murder, or murder in the second degree, and murder in the first degree, under our statute, does not consist in the length of time the murderer must have deliberated, but whether he had, at or before striking the fatal blow, formed the design to slay his victim. If such design was formed, however recently, it will be murder in the first degree.

Id. at 450-451; see People v. Sanchez, 24 Cal. 17, 30 (1864).

In State v. Ah Mook, 12 Nev. 369 (1877), however, this Court reviewed a second degree murder conviction in which instructions apparently based on Millain were given. The Court noted that the second instruction,

> whether a lawyer would or would not understand from it that a bare intent to kill makes the killing murder, it is certainly not improbable that a jury might understand it in that sense. Of course, if a jury were so instructed in a case like this, it would be error. It requires something more than bare intent to kill to make a killing murder in any degree.

12 Nev. at 376. The Court reasoned, however, that the jury understood the necessity of premeditation and deliberation, based in part on the instructions on heat of passion, because

it returned a conviction of only second degree murder, and thus it must have recognized that the defendant did not deliberate "under the dominion of reason." 12 Nev. at 376. The Court went on to disapprove of the use of the language from the decision in Millain in jury instructions:

> The first instruction is neither a full nor a perfectly clear statement of the distinction between the two degrees of murder, and there are many cases in which it would be confusing, if not absolutely erroneous. The second is still more objectionable. Its meaning is not clear, but ambiguous and indefinite. It is susceptible of a construction according to which it would be erroneous, and, but for the clear and definite instruction on the subject of voluntary manslaughter by which it was accompanied and qualified in this case, must have been construed.

12 Nev. at 378.

In some subsequent cases, this Court maintained the position that the distinct elements of premeditation and deliberation stated in the statutory language must be shown to establish first-degree murder. Hern v. State, 97 Nev. 529, 532, 635 P.2d 278 (1981); State v. Salgado, 38 Nev. 413, 418, 150 P. 764 (1915); State v. Wong Fun, 22 Nev. 336, 341, 40 P. 95 (1895); see Byford v. State, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000). In some cases, the Court continued to emphasize the necessity that the intent to kill "be the result of deliberate premeditation. It must be formed upon preexisting reflection," State v. Hymer, 15 Nev. 49, 51 (1880), and that the "instantaneous thoughts of the mind" language referred only to the "space of time between the intention to kill and the act of killing." Id. This language was repeated in subsequent cases which purported to retain the requirement of premeditation and deliberation, but which perpetuated the idea of "instantaneous" premeditation. State v. Randolph, 49 Nev. 241, 247, 242 P.2d 697 (1926). Over time the requirement that "deliberate premeditation" which must be "formed upon a preexisting reflection and not upon sudden heat of passion sufficient to preclude the idea of deliberation" was lost from the analytical discourse. E.g. Scott v. State, 92 Nev. 552, 554-555, 554 P.2d 735 (1976); Ogden v. State, 96 Nev. 258, 262-263, 607 P.2d 576 (1980).

The idea that premeditation and deliberation did not have to precede the act of killing at all, but could be formed at the very moment the act causing the death took place, also took

hold. See State v. Hall, 54 Nev. 213, 239, 13 P.2d 624 (1932); Briano v. State, 94 Nev. 422, 425, 581 P.2d 5 (1978). The degree of confusion in this area is exemplified by Payne v. State, 81 Nev. 503, 406 P.2d 922 (1965). There, this Court reasoned that deliberation and premeditation did not require "any considerable length of time" but it emphasized that there must be some time "for the mind to think upon or consider the act, and then determine to do it. . . .[i]f there is hesitation or doubt to be overcome, a choice made as the result of thought, however short the struggle between the intention and the act - - it is sufficient to characterize the crime as deliberate and premeditated murder." Id. at 509 (citation omitted). The Court then, in a complete non sequitur, continued: "In other words, one may be guilty of murder in the first degree although the intent to commit the act is formed at the very moment that fatal shot [is] fired." Id., (emphasis supplied), citing Hall, 54 Nev. at 239.

The low point of premeditation and deliberation in Nevada was Powell v. State, 108 Nev. 700, 838 P.2d 921 (1992), vacated on other grounds, 511 U.S. 79 (1994), in which this Court followed Briano and held that the jury did not need to be instructed on deliberation as long as premeditation was defined, because they are a "single term". It concluded that an instruction complying with Briano, including the "instantaneous as successive thoughts of the mind" language, and specifying that premeditation could arise "at or before the time the fatal blows were struck", 108 Nev. at 709 (emphasis added), quoting Briano, 94 Nev. at 425, adequately defined premeditation. The Powell court stated its view of the distinction between intent to kill and premeditation and deliberation as "simply a rhetorical expression used for emphasis. . . . 'The trilogy of terms connotes the same general idea - - the intention to kill. The use of all three words would seem to us to serve no purpose other than to shroud the intention in an aura of redundancy so as to convey the seriousness of the matter.'" id., (quoting Brown v. State, 410 A.2d 17, 22 (Md. 1979)). Thus the crucial distinction which makes a murder first rather than second degree was reduced merely to "emphasis" on mental states which were explicitly equated with intent to kill. See Byford, 116 Nev. at 235, citing State of Nevada v. Harris, 12 Nev. 414, 416 (1877); State v. Scott, 92 Nev. at 554 n. 2; Powell v. State, 108 Nev. at 708-10; Greene v. State, 113 Nev. 157, 168, 931 P.2d 54 (1997).

Before this Court decided Byford, other courts recognized the problem with eliminating the content of premeditation and deliberation: to "speak of premeditation or deliberation which are instantaneous or take no appreciable time. . . destroys the statutory distinction between first and second degree murder." Bullock v. United States, 122 F.2d 213, 213-214 (D.C. Cir. 1941); United States v. Shaw, 701 F.2d 367, 395 (5th Cir. 1983). In State v. Brown, 836 S.W.2d 530 (Tenn. 1992), the Tennessee Supreme Court faced a history of analytical confusion over the concept of premeditation and deliberation, similar to Nevada's, particularly in "invocation of the rule that 'premeditation can be formed in an instant,' and omission of any discussion of deliberation as a necessary element of murder in the first degree". State v. Brown, 836 S.W.2d at 542; see also id. ("intent to kill, if formed during a deadly struggle, would support only a conviction for second-degree murder, *unless* the state could show that premeditation and deliberation had preceded the struggle.") The court concluded that :

> we should abandon the modern tendency to muddle the line between first-and second-degree murder. . . .[W]e think it is time to recognize, as Justice Brock argued in Evertt v. State, that "[m]ore than a split-second intention to kill is required to constitute premeditation, which by its very nature is not instantaneous, but requires *some* time interval." 528 S.W.2d 25, 28-29 (Tenn. 1975) (Brock, J., dissenting; emphasis in original).

836 S.W.2d at 543. See also Midgett v. State, 729 S.W.2d 410, 413-414 (Ark. 1987); State v. Stenback, 2 P.2d 1050, 1056-1057 (Utah 1931)

Modern commentators also recognized the necessity of giving substance to the elements of premeditation and deliberation in order to maintain a rational distinction between first and second degree murder. See 2 LaFave, Substantive Criminal Law, § 14.7(a) at 478-479, 482; 2 Torcia, Wharton's Criminal Law § 142; David Crump, "Murder Pennsylvania Style": Comparing Traditional American Homicide Law to the Statutes of Model Penal Code Jurisdictions, 109 W.Va.L.Rev. 257, 275 (2007) ("'premeditation' that appears 'instantaneously' is an oxymoron.").

Finally, in Byford this Court confronted the analytical confusion in the case law and clarified the law. It recognized the two major flaws in the existing rule, that is, the

elimination of any substantive content from the statutory elements of premeditation and deliberation, and the resulting loss of the rational distinction between first and second degree murder. Following the analysis of the Tennessee Supreme Court in Brown, this Court rejected the cases conflating premeditation and deliberation with intent to kill:

> By defining only premeditation and failing to provide deliberation with any independent definition, the Kazalyn instruction blurs the distinction between first- and second-degree murder. *Greene*'s further reduction of premeditation an deliberation to simply "intent" unacceptably carries this blurring to a complete erasure.
>
> . . . .
>
> In sum, the Kazalyn instruction and Powell and its progeny do not do full justice to the phrase "willful, deliberate, and premeditated." Deliberation remains a critical element of the *mens rea* necessary for first-degree murder, connoting a dispassionate weighing process and consideration of consequences before acting.

Byford, 116 Nev. at 235. Because it found sufficient evidence of premeditation in Byford itself, it did not grant relief on the basis of the instructions, id. at 233, and it did not explicitly address the issue as a constitutional one. See White v. Warden, 96 Nev. 634, 637, 614 P.2d 536, 537 (1980) (duty to avoid decision of constitutional question if other grounds available).

Unfortunately, after Byford, this Court decided Garner v. State, 116 Nev. 770, 6 P.3d 1013 (2000), disapproved on other grounds, Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002). There the Court rejected the application of Byford because the Kazalyn instruction had not been objected to at trial and the use of the instruction was not "plain or constitutional error," remanding that Byford was decided simply on statutory grounds. Id. at 787-788. The Court summarily rejected the appellant's unidentified constitutional claims on the issue, ruling only that "[w]e are unpersuaded by his arguments and conclude that giving the Kazalyn instructions was not constitutional error." Id. at 788. Despite rejecting the application of Byford, the Garner decision also held that Byford "interprets and clarifies the meaning of a preexisting statute by resolving conflicting lines in prior case law. Therefore, its reasonable is not altogether new." Garner,116 Nev. at 789 n. 9. This Court should now reconsider Garner in light of Polk v. Sandoval.

In Polk v. Sandoval, the Ninth Circuit did what this Court did not do in Garner: it analyzed the substantive of the Byford decision and the Kazalyn instruction under the federal

constitution, and it identified the constitutional rights that the instruction violated:

> It is clearly established federal law, as determined by the Supreme Court, that a defendant is deprived of due process if a jury instruction "ha[s] the effect of relieving the State of the burden of proof enunciated in Winship on the critical question of petitioner's state of mind."

503 F.3d at 909, quoting Sandstrom v. Montana, 442 U.S. 510, 521 (1979).

> Under Nevada Revised Statutes § 200.030(1)(a), first-degree murder is a willful, deliberate, and premeditated killing. In Byford, the Nevada Supreme Court reaffirmed that "[i]t is clear from the statute that *all three elements*, willfulness, deliberation, and premeditation, must be proven beyond a reasonable doubt before an accused can be convicted of first degree murder." 994 P.2d at 713-14 (internal quotation marks and citation omitted). It is not sufficient for the killing simply to be premeditated. The court held:
>
> > Deliberation remains a critical element of the *mens rea* necessary for first-degree murder, connoting a dispassionate weighing process and consideration of consequences before acting. "In order to establish first-degree murder, the premeditation killing must also have been done deliberately, that is, with coolness and reflection."
>
> Id. at 714 (citation omitted).
>
> Yet, Polk's jury was instructed to find "willful, deliberate, and premeditated murder" if it found premeditation: "For if the jury believes from the evidence that the act constituting the killing, it is willful, deliberate and premeditated murder." Instruction No. 14; see Byford, 994 P.2d at 714 ("direct[ing] the district courts to cease instructing juries that a killing resulting from premeditation is 'willful, deliberate, and premeditated murder.' ").
>
> This instruction is clearly defective because it relieved the stat of the burden of proof on whether the killing was deliberate as well as premeditated. See id. at 713 ("By defining only premeditation and failing to provide deliberation with any independent definition, the Kazalyn instruction blurs the distinction between first-and second-degree murder.").

Polk, 503 F.3d at 910-911. The court concluded:

> Instead of acknowledging the violations of Polk's due process right, the Nevada Supreme Court concluded that giving the Kazalyn instruction in cases predating Byford did not constitute constitutional error. In doing so, the Nevada Supreme Court erred by conceiving of the Kazalyn instruction issue as purely a matter of state law. Rather, the question of whether there is a reasonable likelihood that the jury applied an instruction in an unconstitutional manner is a "federal constitutional question." The state court failed to analyze its own observations from Byford under the proper lens of Sandstrom, Franklin, and Winship, and thus ignored the law the Supreme Court clearly established in those decisions-that an instruction omitting an element of the crime and relieving the state of its burden of proof violates the federal Constitution. [citation].

Id. at 911.

The primary relevance of Polk is not that it requires this Court, by its own force, to do anything in this case. Rather, it alerts this Court, and potential litigants, to the relevant

United States Supreme Court authority recognizing the necessity of instructing all elements of a criminal offense, which all courts are bound to follow under the supremacy clause, U.S. Const. Art. VI, and which requires this Court to revisit Garner. Although decisions of the Ninth Circuit are not binding upon this Court, as decisions of the United States Supreme Court are, see Freeman v. Lane, 962 F.2d 1252, 1258 (7th Cir. 1993), this Court could conclude, merely as a practical matter, that it is counter-productive to have a rule that differs from the federal rule applied in the Ninth Circuit, as it has before. See Riley v. Warden, 89 Nev. 510, 513, 515 P.2d 1269, 1270 (1973) (adopting federal rule to avoid waste of resources if defendant had to enforce rights in federal habeas proceedings).

This Court should revise its position in Byford and Garner in light of Polk, however, because it is simply the right thing to do. The Polk analysis is compelling: "clearly established federal law," 28 U.S.C. § 2254(d), does require adequate instruction on each element of a criminal offense; and the Kazalyn instruction does, as this Court recognized in Byford, eliminate the elements of deliberation and confuse the distinction between first and second degree murder. The imposition of additional penalties for first degree murder - - including potential imposition of the death penalty - - rather than second degree murder requires that there be a rational means for distinguishing between the two degrees of murder. Without giving some content to the elements of premeditation and deliberation, there is simply no rational way of satisfying that constitutional demand. This Court should therefore begin by overruling Garner and by recognizing that Byford does have a constitutional basis, even though the decision in Byford did not have to reach that issue in disapproving the Kazalyn instruction.

As the Polk decision points out, this Court in Byford held that deliberation is an element of first degree murder, and that the Kazalyn instruction failed to give content to premeditation and thus erased the distinction between first and second degree murder. The Byford decision did not impose new law: rather, it simply returned to the original meaning of the statutory language, which had never changed; and even Garner recognized that Byford only "clarifies the meaning of a preexisting statute." 116 Nev. at 789 n. 9. The federal

constitutional analysis of that error is a question of federal, not state, law. Polk, 503 F.3d at 911. The State here makes no attempt to explain how the Byford reasoning does not implicate federal constitutional rights. This Court concluded in Byford that the Kazalyn instruction failed to require a finding of deliberation as an element of first degree murder, and the State offers no explanation why the failure to instruct on a statutorily-prescribed element of the offense would not violate Sandstrom.

If this Court were to disagree with the decision in Polk, it would have to address a host of other constitutional issues. Although this Court did not address other issues in Byford, and the Polk court did not have to because it found error under Sandstrom, the Kazalyn instruction also violates the due process guarantee against vague enactments, because it results in the "complete erasure" of the distinction between first and second degree murder. Byford, 116 Nev. at 235. Under the state and federal constitutions, penal statutes must give "fair notice" of what is forbidden, e.g., Gallegos v. State, 163 P.3d 456, 458-459 (Nev. 2007); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); and "the more important aspect of the vagueness doctrine 'is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement.'" Kolender v. Lawson, 461 U.S. 352, 358 (1983), quoting Smith v. Goguen, 415 U.S. 566, 574-575 (1974). "[A]bsent adequate guidelines, a criminal law may permit a standardless sweep, which would allow the police, prosecutors, and juries to 'pursue their personal predilections.'" Silvar v. Dist. Ct., 122 Nev. 289, 293, 129 P.3d 682, 685 (2006), quoting Kolender, 461U.S. at 358; Gallegos, 163 P.3d at 461.

This Court's analysis in Byford essentially acknowledged, in reviewing the previous case law, that there was no coherent definition of the premeditation and deliberation elements of first degree murder; and if this Court could not harmonize its precedents, there is no possibility that "ordinary people can understand what conduct is prohibited" as first degree murder under the Kazalyn definition. Kolender, 461 U.S. at 357. Even more important, however, is that the "complete erasure" of the distinction between first and second degree murder left juries with no "adequate guidelines" for determining when a homicide is first rather than second degree murder. The absence of such adequate standards does not merely

"encourage arbitrary and discriminatory enforcement," Kolender, 461 U.S. at 357 (citations omitted), but virtually ensures it. This constitutional violation leads, in turn, to two other constitutional violations. First, the "standardless sweep" of the definition will result in disparate treatment of similarly-situated defendants, whose offenses will be indistinguishable but whose treatment, by conviction of first or second degree murder, will be determined by the "personal predilections" of juries. This gives rise to a violation of the equal protection guarantee that "all persons similarly situated should be treated alike," Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985), unless there is a "rational basis for the difference in treatment." Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000)) (per curiam) (citations omitted). Second, Nevada law restricts imposition of the death penalty to cases involving convictions of first degree murder. NRS 200.030(4)(a). A state system that limits the application of the death penalty to first degree murders, but then erases the distinction between first and second degree murders, necessarily results in arbitrary imposition of the death penalty in violation of the Eighth Amendment. Basing death-eligibility on a vague aggravating factor invites "arbitrary and capricious application of the death penalty." Stringer v. Black, 503 U.S. 222, 228, 235-236 (1992). Basing it on conviction of a capital offense when the conviction is based upon a vague definition of the elements that are supposed to distinguish it from second-degree murder, is even more arbitrary and capricious.

Ultimately, the issue is one of substance, not form. Whether premeditation and deliberation are separate elements of first degree murder, or a single element with a collective meaning, see Byford, 116 Nev. at 246-249. (Maupin, J. concurring), the problem is that the Kazalyn instruction, and the previous decisions applying the statute, erase the distinction between first and second degree murder. That is federal constitutional error under Sandstrom and Polk, because of the lack of adequate instruction on the elements of the offense, and it violates the equal protection clause and the Eighth Amendment as well.

The conflation of premeditation and deliberation with simple intent to kill also has the effect of eliminating any necessity of showing any actual evidence from which the jury could infer that the defendant actually premeditated and deliberated. The "instantaneous"

premeditation theory has the practical effect of eliminating the necessity for any such evidentiary showing from which premeditation and deliberation can be inferred. If a court can simply recite that premeditation can be instantaneous, and essentially identical to, and arising at the same time as, simple intent to kill, it can completely ignore the absence of any evidence that would support an inference that premeditation and deliberation actually occurred.

All of these constitutional difficulties compel the conclusion that the use of the Kazalyn instruction violates the substantive provisions of the state and federal constitutions. The analysis in Byford thus implicated constitutional principles, and the decision in Polk expressly relied upon the federal constitution. Accordingly, this Court should recognize that, on the merits, the use of the Kazalyn instruction in this case was constitutionally impermissible.

In order to resolve the issue raised by Chappell, who has invoked the Polk decision as a basis of finding constitutional error due to the use of the Kazalyn instruction, this Court technically need not conduct any retroactivity analysis. The elements of premeditation and deliberation have always been included in the Nevada definition of first degree murder, and the federal constitutional right to adequate jury instructions on all elements of a charged offense has been recognized at least since the Sandstrom decision in 1979. No state retroactivity rule can affect this Court's duty to apply Sandstrom to Chappell's case. Powell v. Nevada, 511 U.S. 79, 83-84 (1994).

To the extent that this Court considers the issue as requiring an application of Byford, it must still apply the rule of that case here. This Court could re-evaluate the basis of Byford and conclude that its analysis, while not explicitly addressing constitutional issues, is constitutional in substance; or it could view the decision as one purely of state statutory interpretation; but in either event, the Byford decision must be applied to Chappell's case, because it is a substantive rule limiting the scope of the statutory definition of first degree murder, and such substantive rules are necessarily applied to all cases. Support for this principle is found in this Court's decision in Bejarano v. State, 146 P.2d 265 (Nev. 2006):

> McConnell concerned the reach of Nevada's death penalty law, determining under what circumstances and to whom it could be constitutionally applied. Applying constitutional strictures, McConnell proscribed the punishment of death based on a felony that is used to establish both first-degree felony murder and aggravated capital murder. Absent retroactive application of this rule, there would be "a significant risk that a defendant. . . faces a punishment that the law cannot impose." Thus we conclude that McConnell announced a substantive rule of law that must be applied retroactively.

Bejarano, 146 P.3d at 274 (footnote omitted), quoting Schriro v. Summerlin, 542 U.S. 384, 352 (2004).

Even if this Court were to consider Byford only a procedural decision on the way in which a jury should be instructed on the elements of first degree murder, it must still apply Byford to Chappell's case. For the purpose of this argument, amici will assume arguendo that Byford imposed a "new rule" because it overruled previous authority accepting the Kazalyn instruction. See Byford, 116 Nev. at 235. It is equally plausible, however, that Byford amounted to a clarification of the law - - a clarification, of a clarification, as this Court characterized its decision in Sharma - - since the previous case law was both confusing and contradictory. Byford, 116 Nev. at 235; see Mitchell, 149 P.3d at 37-38. In the Garner decision, this Court itself held that Byford "clarifies the meaning of a preexisting statute." 116 Nev. at 789 n. 9. Thus although Byford overruled Kazalyn and its progeny, it also revived the original rule of Ah Mook, which is based on the plain language of the statute.

> We conclude that, although Sharma overruled Mitchell, Sharma did not announce a new rule, but merely clarified the law. In adopting the natural and probable consequences doctrine in Mitchell, we stated that we were "clarify[ing]" whether aiding and abetting could establish the requisite specific intent for an attempted murder charge. Sharma overruled Mitchell not to announce a new rule, but to expressly disavow Mitchell's "clarification" of the law and to itself properly clarify what the law was when Mitchell was charged and tried. Thus, Sharma was a clarification of the law, not a new rule, and it should therefore be applied to Mitchell.

Mitchell, 149 P.3d at 38. This point is not determinative, however, since the Byford rule is both substantive in nature, as noted above, and accuracy-enhancing in effect.

In Colwell v. State, 118 Nev. 807, 59 P.3d 463 (2002), this Court adopted a retroactivity analysis that is less restrictive than the federal standard under Teague v. Lane, 489 U.S. 288, 299-310 (1989) (plurality opn.). The Colwell standard provides:

> When a rule is new, it will still apply retroactively in two instances: (1) if the rule establishes that it is unconstitutional to proscribe certain conduct as criminal or to impose a type of punishment on certain defendants because of their status or offense; or (2) if it establishes a procedure without which the likelihood of an accurate conviction is seriously diminished. These are basically the exceptions defined by the Supreme Court. But we do not limit the first exception to "primary, private individual" conduct, allowing the possibility that other conduct may be constitutionally protected from criminalization and warrant retroactive relief. And with the second exception, we do not distinguish a separate requirement of "bedrock" or "watershed" significance: if accuracy is seriously diminished without the rule, the rule is significant enough to warrant retroactive application.

118 Nev. at 820. The Byford rule requires adequate instructions for the elements of premeditation and deliberation. A decision requiring accurate instructions on elements of the offense necessarily improves the accuracy of the proceedings, and it therefore must be applied retroactively under Colwell, even if it is a "new rule." The Byford rule clearly does fit the accuracy exception.

> Under the Teague/Colwell framework, even if we were to conclude that Sharma announced a new rule, it would be retroactive because, by requiring that the jury be correctly informed of the elements of the offense, Sharma "establishes a procedure without which the likelihood of an accurate conviction is seriously diminished." Colwell, 118 Nev. at 820, 59 P.3d at 472. As the Supreme Court noted in Schriro v. Summerlin, 542 U.S. 348, 352 & n. 4 (2004), rules like that of Sharma, which address the elements of an offense, are perhaps more accurately characterized as new substantive rules, which are generally applied retroactively, not as new procedural rules that are applied retroactively only if they fall under an exception to the general bar on retroactive application of new procedural rules. Thus, whether Sharma's rule is considered procedural or substantive, it would be retroactive.

Mitchell, 149 P.3d at 38 n. 25; see Bejarano, 146 P.3d at 274.

Finally, a fundamental miscarriage of justice would result if this Court failed to consider his challenge to the premeditation instruction. As set forth in previous proceedings and in the Opening Brief, the evidence of premeditation in this case was weak. The defense theory at trial was that Chappell acted without premeditation and deliberation upon a sudden fit of anger because he believed that his long-term girlfriend, who was the mother of his three children, was involved with another man. The requirement of a "cold, calculated judgement and decision" as an element of first degree murder would have in all probability resulted in a verdict of second-degree murder under the facts of this case. Second degree murder, is of course, not punishable by the death penalty. Pursuant to its mandatory review in capital

cases, this Court must sua sponte review the record to determine whether there is a "high degree of premeditation" in order to sustain a death sentence:

> We are required to determine whether a death sentence has been imposed under the influence of passion, prejudice or any arbitrary factor. NRS 177.055(2). . . .
>
> Our examination of all cases reported since 1977 reveals that the State of Nevada has not imposed a sentence of death in a first degree murder case similar to the one at hand, but reserves capital sentencing for cases which exhibit a high degree of premeditation coupled with aggravating circumstances such as brutality, torture or depravity.

Jones v. State, 101 Nev. 573, 581-82, 707 P.2d 1128 (1985).

Pursuant to Jones, the instructional error itself combined with the harmfulness of the error in Chappell's case is sufficient to establish a miscarriage of justice, and a corresponding reasonable probability that the jury would not have imposed the death penalty if it had been properly instructed. Under Jones, a finding of a "high degree of premeditation" is just as much of an element of death eligibility as a finding of a valid aggravating circumstance under Leslie.[1] Chappell's case shows even less premeditation than the defendant in Jones, who got into an argument with the victim, then left the scene, then returned to kill the victim. Jones, 101 Nev. at 575. Chappell, on the other hand, was not able to reach a position of safety in between his fight with the victim and the fatal stabbing that killed her. The first trial jury found a mitigating circumstance of murder committed while the defendant was under the influence of extreme mental or emotion disturbance, thus establishing that the jury had significant concerns about Chappell's mental state at the time of the offense. IX ROA 2126, 2170-71. Had the jury been properly instructed, there is a reasonable likelihood that they would have found him guilty of a lesser offense of second-degree murder or voluntarily manslaughter. In cases such as Chappell's where the premeditation instruction was defective

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[1]It is the existence of a special finding of premeditation that determines whether the use of a felony murder aggravating circumstances by the jury is improper when the State proceeds on a felony murder theory during the guilt phase of the trial. See McConnell v. State, 120 Nev. 1043, 1069,102 P.3d 606 (2004) ("This decision has no effect in a case where the State relies solely on a theory of deliberate, premeditated murder to gain a conviction of first degree murder.").

and the facts in the case reveal that the error was not harmless, he can show a reasonable probability of a more favorable outcome, both at trial and independently on direct appeal pursuant to this Court's mandatory review in death penalty cases.

The State next asserts that reversal is not required because Chappell was prosecuted under alternative theories of premeditated murder and felony-murder. Answering Brief at page 9. In his Opening Brief, Chappell anticipated that the State would make this argument. He noted that the jury did not return a special verdict, so it is impossible to know the basis of the jury's decision. He also noted that his Court has recently issued conflicting decisions on the standard to be utilized in this situation. Cf. Nay v. State, 167 P.3d 430 (Nev. 2007) (using a "beyond a reasonable doubt" standard and citing Neder v. U.S., 527 U.S. 1 (1999)) with Bolden v. State, 124 P.3d 191 (Nev. 2005) (using a "absolute certainty" standard and citing Keating v. Hood, 191 F.3d 1053 (9th Cir. 1999)). The State does not address this issue in its Answering Brief. As noted in the Opening Brief, the Bolden standard is correct. Stromberg v. California, 283 U.S. 359 (1931); Ficklin v. Hatcher, 177 F.3d 1147, 1152 (9th Cir. 1999); Lara v. Ryan, 455 F.3d 1080, 1085-1086 (9th Cir. 2006). It cannot be said with absolute certainty that the jury did not find Chappell guilty of first degree murder based on the erroneous instruction. Accordingly, his judgment should be reversed.

B. Chappell's Conviction For First Degree Murder Must Be Reversed Because The Jury Was Not Properly Instructed On The Elements Of Felony Murder

Chappell contended in his Opening Brief that the failure of the trial court to instruct the jury on the element of felony murder violated his rights to due process, equal protection, and a reliable sentence under the state and federal constitutions. In response, the State contends, as it did with Issue A above, that this issue is not properly before this Court. Answering Brief at page 10. Just as the State incorporated its response in Issue A, so too does Chappell incorporate his reply.

The State notes that this issue was raised on direct appeal and contends that the doctrine of law of the case controls. Answering Brief at page 10. The State, however, fails to address authority holding that the law of the case doctrine does not always apply and fails

to address the impact of the change of law established by Nay v. State, 167 P.3d 430 (Nev. 2007). See Hsu, 173 P.3d at 728 & n.11-18; Arizona v. California, 460 U.S. at 618 n.8.

The State next claims that Nay is not retroactive and it asserts that Chappell's judgment became final on October 26, 1999, upon issuance of the remittitur following direct appeal. Answering Brief at page 10. It is Chappell's position, based upon the authority cited in the Opening Brief and above, that his conviction is not yet final as his sentence of death was vacated and there can be no judgment without a sentence. See Griffith, 479 U.S. at 321 n.6; Berman, 302 U.S. at 212; Johnson, 118 Nev. at 802 n.31; Doyle, 116 Nev. at 157, 995 P.2d at 471. In any event, based upon the same analysis applicable to the premeditation instruction, the instruction concerning robbery, and the concept that felony murder may not be based upon an afterthought to take robbery, directly concern the elements of felony murder and Nay therefore must be applied to this case.

Finally, the State asserts that the evidence of first degree murder under a felony murder theory was overwhelming. There is no support for this assertion. The State's theory was that Chappell was guilty of robbery based upon his act of taking Panos's car after her death. I ROA 39. The jury was instructed that it could find Chappell guilty of robbery even if the intent to commit robbery was formed after the murder and it could find Chappell guilty of felony murder based upon that robbery. VII ROA 1711, 1721; 1623, 1628-29 (State's closing argument). Under these circumstances, it cannot be said with absolute certainty that the jury would have found Chappell guilty of felony-murder had it been properly instructed on the elements of the offense. Moreover, there is no support for the State's claim that the jury found him guilty of felony-murder based upon the burglary theory. See State's Answering Brief at page 11. There was no special verdict as to this issue. Given Chappell's history of entering his home through the window, it is probable that the jury found burglary. Also, the jury could have relied upon robbery as the felony used to support the burglary charge. It is impossible to know which theory the jury relied upon in reaching its verdict. The judgment of conviction for the offense of first degree murder must be reversed. Bolden; 124 F.3d 191; Stromberg, 283 U.S. 359; Ficklin, 177 F.3d at 1152; Lara, 455 F.3d at 1085.

C. Chappell's Sentence of Death Must Be Vacated Because NRS 177.055(3) Is Unconstitutional

Chappell contended in his Opening Brief that NRS 177.055(3) is unconstitutional because it grants this Court the unfettered discretion to impose a sentence of less than death upon the finding of a constitutional violation. In response, the State argues that NRS 177.055(3) was not the basis upon which this Court granted a new penalty hearing as the sentence of death was vacated during post-conviction proceedings. Answering Brief at page 11. Chappell respectfully submits that his state and federal constitutional rights would be violated if this Court were allowed, on direct appeal, to impose a sentence of less than death upon the finding of a constitutional violation but not allowed to impose such a sentence on appeal of an order in post-conviction proceedings. Whether it is on direct appeal or in post-conviction proceedings, if there has been a finding of constitutional error, this Court should be able to employ the same remedy. See generally Ross v. Moffitt, 417 U.S. 600, 609 (1974) ("equal protection" emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable).

The State next argues that this Court has rejected a similar challenge to the constitutionality of NRS 177.055(3). Answering Brief at page 12 (citing Johnson v. State, 118 Nev. 787, 803-04, 59 P.3d 450, 461 (2002)). Chappell acknowledged such in his Opening Brief, but reasserts his contention that Johnson should be overruled based upon the grounds set forth in the Opening Brief.

D. Chappell Was Entitled To Review By The District Attorney's Death Review Committee

Chappell contended in his Opening Brief that his state and federal constitutional rights to due process and equal protection, and his right to be free from cruel and unusual punishment were violated because the State refused to submit this case for consideration before the District Attorney's Death Review Committee, even though similarly situated defendants received such review. In response, the State argues that "at no time did the State refuse to resubmit the case to the death review committee or otherwise fail to evaluate the viability of re-seeking the death penalty." Answering Brief at page 12. A review of the

record reveals that there is no indication that this matter was reconsidered by the State's death review committee. To the contrary, the State refused to resubmit this matter to its death review committee and instead relied upon the original 1995 decision to seek death against him. XII ROA 2885 (citing Schoels v.State, 114 Nev. 981, 966 P.2d 735 (1998)).

Chappell contended in his Opening Brief that in evaluating whether a defendant should be subject to the death penalty, considerations of *contemporary* standards of decency must be considered. See Roper v. Simmons, 543 U.S. 551, 594 (2005); Atkins v. Virginia, 536 U.S. 304, 311 (2003); Woodson v. North Carolina, 428 U.S. 280, 301 (1976). The 1995 decision to seek the death penalty should not govern the 2007 prosecution as the intervening twelve years render the former decision dated and an unreliable reflection upon the contemporary standards of decency. The State fails to address this issue in its Answering Brief. Likewise, the State fails to address Chappell's argument that a prosecutor's discretion, however, is subject to constitutional constraints. See U.S. v. Armstrong, 517 U.S. 456, 464 (1996) (citing U.S. v. Batchelder, 442 U.S. 114, 125 (1979)). Chappell submits that his due process rights, as well as his rights against cruel and unusual punishment, were violated by the State's arbitrary decision not to submit cases that were reversed on appeal for review by the prosecutor's death review committee. He further submits that the failure of the State to treat him in the same manner as other defendants who faced capital proceedings at the same time as his trial resulted in a violation of his rights to equal protection of the laws.

E. Chappell's Death Sentence Is Unconstitutional Because of the Trial Court Failed to Dismiss Jurors For Cause Who Would Always Impose A Sentence of Death

Chappell contended in his Opening Brief that the trial court violated Chappell's state and federal constitutional rights an impartial jury, and a reliable sentence by refusing challenges for cause of potential jurors who indicated their firm intent to impose a sentence of death. In response, the State argues that the views expressed by the potential jurors at issue would not prevent or substantially impair the performance of their duties as juror in accordance with the instructions and oath. Answering Brief at page 14. As to juror Bundren, the State asserts that the district court did not abuse its discretion in denying the defense

cause challenge. Answering Brief at pages 14-15. The colloquy established, however, that she would not fairly consider a sentence of less than death. The relevant exchange is set forth in the Opening Brief and is not repeated here. Chappell reasserts his contention that although the juror stated that she could listen to the evidence and consider a lesser sentence, it was clear she would not give fair consideration to sentences less than death. See Leonard v. State, 117 Nev. 53, 67, 17 P.3d 397, 406 (2001); Wainwright v. Witt, 469 U.S. 412, 424-26 (1985).

Chappell next contended in his Opening Brief that the district court erred in failing to grant a defense challenge for cause of prospective juror Hibbard as he was unwilling to consider mitigating circumstances other than insanity. The State argues in response "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)." Answering Brief at page 16. Chappell respectfully submits that Witter is no longer controlling in light of this Court's recent opinion in Browning v. State, 188 P.3d 60, 69-70 (Nev. 2008). In Browning, the defendant argued that the district court erred in removing a juror for cause and erred in asking the potential juror whether "he could consider the death penalty in a case where, as here, the defendant was convicted of first-degree murder by entering a jewelry store, stealing jewelry, and stabbing the owner to death. The juror responded that he could not impose death in that circumstance. The prosecutor challenged the juror for cause. Defense counsel objected, arguing that the jury only expressed a reservation about rendering a death verdict in certain cases. The district court determined that the challenge was proper and excused the juror." Id. The State argued in Browning that the question presented to the juror was proper and that the cause challenge was proper. It's position here is exactly the opposite and cannot be reconciled with its position in Browning. In Browning, this Court affirmed the sentence of death and found that the district court was not wrong in asking a detailed question about

the particular facts of the case and was not wrong in granting the State's cause challenge. Under Browning, Chappell's counsel was entitled to ask detailed questions about the potential juror's views on the death penalty under the facts of this case and the district court was obligated to grant the cause challenge because it was apparent that the juror would not fairly consider sentences of less than death under the facts of this case.

Chappell next argued that the district court erred in failing to grant a defense challenge for cause of potential juror Ramirez. Ramirez expressed his belief that the death penalty was not enforced enough; that he comes from Texas and the concept that certain factors would have to be considered before a sentence of death could be imposed was news to him; that it was hard for him to say whether he would be able to follow the judge's instructions and hold the State to its burden; that he believes in an eye for an eye; that he agreed with the system in Texas where jurors did not have four choices as to the punishment, but only one choice which was the death penalty; and he doubted that if he were in Chappell's position that he would want 12 people like him sitting on the jury. 19 ROA 3976-78. The State argues that the cause challenge against Ramirez was properly rejected because he stated that he would try to listen to the information presented, that he would make what he believed to be a fair decision, and would apply the law that the judge gave him. Answering Brief at page 18. Based upon the colloquy with Ramirez, it was clear that he would not fairly consider sentences of less than death and the challenge for cause should have been granted.

The State next claims that there was no prejudice to Chappell because it believes that none of these three prospective jurors were actually seated on the jury. Answering Brief at page 19. It argues that Christine Bundren, who sat on the jury, was not the person identified in the transcripts as "Bundren," but instead that person was actually Linda Duran, who did not sit on the jury. Answering Brief at page 19-20. Chappell respectfully submits that this factual dispute cannot be resolved by the cold record and that this matter should be remanded for a brief evidentiary hearing to determine the accuracy of the record on appeal. If in fact the record is wrong, Chappell requests the opportunity to supplement this argument in light of the corrected record.

F. Chappell's Conviction Is Unconstitutional Because The State Was Permitted To Introduce Unreliable Hearsay Evidence During The Penalty Hearing In Support of The Aggravating Circumstance and as Other Matter Evidence

Chappell contended in his Opening Brief that his conviction and death sentence are invalid under state and federal constitutional guarantees of confrontation, cross-examination, compulsory process, due process of law, equal protection, and a reliable sentence due to the trial court's improper admission of testimonial hearsay statements. Likewise, Chappell's constitutional rights to due process, a fair penalty hearing, and a reliable trial were violated by the introduction of unreliable hearsay statements. In response, the State first asserts that Crawford v. Washington, 541 U.S. 36 (2006), does not apply to the penalty phase of a capital trial. Answering Brief at page 20. Chappell acknowledges here, as he did in the Opening Brief, that this Court ruled that Crawford does not apply to penalty hearings in Summers v. State, 122 Nev. __, 148 P.3d 778 (2006). Nonetheless, this issue has not yet been squarely resolved by the United States Supreme Court and it is presented here to preserve the issue for future review. See U.S. v. Fields, 483 F.3d 313, 364 (5th Cir. 2007) (Benavides, J. dissenting and noting conflict in courts on this issue). Chappell also respectfully submits that this Court's decisions in Summers and its progeny should be overruled as to this issue.

The State next contends that no hearsay was used to establish Chappell's death eligibility. Answering Brief at page 21. There is no merit to this argument. Significant testimonial hearsay evidence was used to establish the sexual assault aggravating circumstance. Charmaine Smith, a Parole and Probation Officer, testified that Panos told her that she was upset with Chappell and in fear for her life. XIII ROA 3236. She also reported a claim that Panos said Chappell had previously held a knife to her. XIII ROA 3236. Detective Vaccaro testified about tests revealing the presence of DNA in Panos's vagina and the meaning of those tests. XIV ROA 3425. Clair McGuire testified about statements that Panos made to police officers in which she stated that Chappell held a knife to her throat and pinned her down while sitting on top of her chest. XIII ROA 3247. Lansing Police Department Detective Weidner testified about statements made by a man who was allegedly assaulted by Chappell in 1988. XIII ROA 3251-53. The State now argues that three of these

incidents were not relevant to the sexual assault aggravator. Answering Brief at page 22. At no point, however, was the jury instructed that these matters were not relevant to the aggravator and could be considered only as "other matter" evidence. It is likely that the jury considered this evidence in reaching its verdict that the murder occurred in the course of a sexual assault.

The State next argues that this issue was not preserved for appellate review. Answering Brief at pages 21-22. During the course of the trial, Chappell objected to the use of hearsay evidence during the penalty hearing on Confrontation Clause grounds and noted that this Court had recently rejected this argument, but presented it so as it preserve the issue for further review. XIII ROA 3050. In light of this Court's decision in Summers, it was futile for Chappell to make additional objections to each piece of evidence as it was introduced. The State and district court were fully aware of Chappell's objection to this evidence.

Chappell also contended that his state and federal constitutional rights to due process of law and rights to be free from cruel and unusual punishment were violated by the admission of non-testimonial hearsay statements. The State argues in response that the evidence presented was not highly suspect and impalpable. Answering Brief at page 24. The record, as set forth in the Opening Brief, establishes that substantial evidence was introduced against Chappell which was of a nature that allowed easy fabrication and for which Chappell was provided no real opportunity of cross-examination and confrontation.

Of particular significance was the testimony by Panos's friends that Chappell threatened to kill her the day before she was murdered and that Panos told Chappell that their relationship was over and she wanted to get on with her life. XIII ROA 3103-04 (Mancha); XIII ROA 3172 (Larsen). The friends were not present when these statements were allegedly made by Chappell, but were instead assertions by the friends of what they claim Panos said she heard Chappell say while they were in court. No evidence was introduced by any person who was present in court, including Chappell's probation officer who was present for the court proceeding. XIII ROA 3237. Chappell noted in his Opening Brief that although this

testimony was highly damaging, it is highly suspect in that Panos did not make this statement to the probation officer, prosecutor, bailiff or judge at a time when they were agreeing that Chappell should be sent to a drug rehabilitation program rather than prison or jail. Had Chappell actually threatened to kill Panos in this context, it is probable that she would have told one of these people about his threat and urged them to keep him in custody. In his Opening Brief, Chappell asked that this Court take judicial notice of the fact that it is the general policy of the courts of this jurisdiction that inmates who are in custody are not allowed conversations with their girlfriends, or anyone else other than counsel, during court proceedings and it is therefore highly unlikely that such a conversation actually took place between Chappell and Panos. See Caballero v. Seventh Judicial Dist. Court, 167 P.3d 415, 419 n.21 (Nev. 2007); NRS 47.130(a). In response, the State argues that "Chappell's allegations questioning the credibility of yet another threat made in court are based on speculation and matters not supported by the record." Answering Brief at page 25. Chappell submits that it is the allegations of a threat that are not supported by the record and are only supported by second-hand hearsay. Under the circumstances presented here, this evidence was highly suspect and impalpable. The State does not contest Chappell's assertion that the general policy of the courts of this jurisdiction is that conversations are not allowed in court between inmates in custody and their girlfriends. Rather, the State speculates that this conversation may have taken place during a jail visit. Answering Brief at page 25 (citing testimony from the original trial that the threat may have been made during a jail visit). There was no testimony at the penalty hearing at issue here that the alleged conversation took place at the jail and there was no testimony that Panos had visited Chappell at the jail during the time at issue. Chappell submits that under these circumstances, the district court abused its discretion, and violated Chappell's constitutional rights, by permitting this testimony. The State relied extensively on this evidence during the closing arguments and relied upon this evidence in arguing that Panos would not have had consensual sex with Chappell as it asserted the existence of the aggravating circumstance. See e.g. 16 ROA 3785. Reversal is warranted based upon the introduction of this highly prejudicial testimony.

G. The District Court Erroneously Admitted Presentence Investigation Reports

Chappell contended in his Opening Brief that his conviction and death sentence are invalid under state and federal constitutional guarantees of due process of law, equal protection, and a reliable sentence due to the trial court's improper admission of two presentence investigation reports. He argued that introduction of this evidence was plain error under this Court's recent opinion in Herman v. State, 128 P.3d 469 (Nev. 2006). In response, the State first notes that Chappell did not object to introduction of the two reports, but only to Chappell's handwritten statement in the second report. Answering Brief at page 25. This same situation was presented in Herman, but this Court found the introduction of the reports in that case to be plain error. Id. at 474-75.

The State next argues that Chappell was not prejudiced by the introduction of the reports. Answering Brief at pages 26-27. Like the defendant in Herman, however, Chappell was prejudiced by the introduction of this evidence as it included information about arrests for which he was not convicted, including charges of possession of narcotics, criminal trespass, battery domestic violence and possession of narcotics for sale. XVIII ROA (1995 report). One report noted that Chappell had been arrested 17 times and convicted five times. XVIII (1996 report). The State also introduced written statements by Chappell that were included in the PSI and then used these statements against Chappell. XVI ROA 3780; XVIII ROA (1995 and 1996 reports). The report included incorrect information, including a statement by Panos's friend that she was worried when she saw Chappell driving near Panos's home because she "had a Protective Order stopping the defendant from coming to her house." XVIII ROA (1996 report at page 4). The report also includes a statement by the PSI author that Chappell "battered this woman repeatedly for several years and when she finally attempted to make him stop by complaining to the police and obtaining [a] Protective Order, he went to her house, entered through a bedroom window, and killed her with a steak knife." XVIII ROA (1996 report at page 7). The author was not called as a witness and did not have any direct knowledge of the events at issue. His opinion was not fairly supported by the evidence and should not have been presented to the jury.

The most significant prejudice caused by the introduction of the 1996 report was its inclusion of a statement from Panos's mother as to her thoughts on whether Chappell should receive the death penalty: "The SOB does not deserve to live." XVIII ROA (1996 report at page 5). The State speculates that "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." Answering Brief at page 27. There is no merit to this argument. The report was admitted as evidence and was given to the jury for review during its deliberations. There is no question that such evidence is inadmissible as the State is not entitled to present evidence of the views of the victim's family concerning the death penalty. Floyd v. State, 118 Nev. 156, 174, 118 Nev. 156, 42 P.3d 249, 261 (2002), Kaczmarek v. State, 120 Nev. 314, 339, 91 P.3d 16, 33 (2004). While the State guesses that the jury may not have reviewed the report, there is no evidentiary support for its guesswork and opinion. It is well established that such evidence is not admissible and this statement would not have been before the jury had the PSI been excluded as evidence.

The sentence of the defendant in Herman was vacated because the presentence report was read to the jury. The prejudice here far exceeds that in Herman. Chappell's sentence of death must be vacated.

The State next argues that this Court should reconsider a rule which allows a judge but not a jury to consider information contained in a presentence report. Answering Brief at page 28. The State's proposal should be rejected for two reasons. First and foremost, separation of powers principles preclude the relief sought. The Legislature enacted NRS 176.156(5), which provides that presentence investigation reports are confidential and must not be made a part of any public record. The State fails to explain how this Court could evade this clearly applicable statute. Likewise, the State fails to explain why this Court should do so. The second reason why this State's suggestion should be rejected is that judge's understand the limited reliability of a presentence investigation report. Judges, far more than lay jurors, understand that information about arrests that did not lead to conviction are of negligible worth, that the person writing the PSI may have incomplete or limited

information and may be working under incredible caseloads and other demanding circumstances, and understands that a PSI does not always contain accurate information. Moreover, the PSI may include, as is the case here, statements from victims that are not admissible or other inadmissible matters. Accordingly, this Court should firmly reject the State's argument that juries should be entitled to review presentence investigation reports.

H. The District Court Allowed Improper Victim Impact Testimony

Chappell contended in his Opening Brief that the trial court violated his state and federal constitutional rights a fair and reliable sentencing hearing, due process and right to be free from cruel and unusual punishment by permitting the State to introduce excessive victim impact testimony. The State argues in response that this issue was not preserved on the grounds that victim impact evidence from non-family members was not noticed in the State's Notice of Evidence in Aggravation and was not objected to on grounds of excessiveness. Answering Brief at pages 28-29. The State acknowledges, however, that Chappell objected to the testimony on grounds of relevance and he contended in the court below that non-family members were not entitled to give victim impact statements. 13 ROA 3167. Chappell submits that these objections were broad enough to encompass the issue presented here. He also contends that it is the State's obligation to ensure that the evidence which it presents is included within its Notice of Evidence in Aggravation under SCR 250. See also Emmons v. State, 107 Nev. 53, 62, 807 P.2d 718, 724 (1991) ("Consistent with the constitutional requirements of due process, defendant should be notified of any and all evidence to be presented during the penalty hearing."), modification on other grounds recognized by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000). Chappell's due process rights were violated by the admission of victim impact evidence from witnesses who were not identified as giving this evidence in the State's notice.

The State next asserts that victim impact evidence presented by Panos's family members was not excessive. Answering Brief at page 29. The State fails to address, however, Chappell's contention that the victim impact evidence exceeded that which is admissible under Payne v. Tennessee, 501 U.S. 808 (1991) by including references to family

gatherings at birthdays and holidays. XV ROA 3685.

The State next contends that the district court did not abuse its discretion in allowing victim impact testimony by non-family members. Answering Brief at pages 29-30. The State offers no explanation as to why no notice was provided concerning the testimony of these witnesses. It instead argues that the testimony was not prejudicial as it "did not have the same emotional effect as that offered by the family members." Answering Brief at page 30. The record does not support this argument. Panos's friend Mancha testified about her feelings at the time she learned that Panos had been killed, informed the jury that she was a wreck for days after, and that even ten years later it was still awful and that she misses Panos every day. XIII ROA 3108. Pollard testified that upon learning of Panos's death he was saddened for her and especially sad for her kids because they had to grow up without a mother. He quit his job because he could no longer concentrate when he looked over and saw her empty desk. XV ROA 3679. He moved out of Nevada and still thinks of Panos and is still angry over the fact that if she would have waited for him he might have been able to save her. XV ROA 3679. Larsen, a co-worker and friend of Panos's, testified that she shut down after Panos's death, went to therapy, and learned information about domestic violence because she felt guilty that she did not help Panos after she told Larsen that Chappell was going to get her. XIII ROA 3177. Larsen was in therapy for about a year after Panos's death. XIII ROA 3177. She could not be in the house anymore and could not be at work because she was reminded of Panos. Larsen was afraid that Chappell would get out of custody and then come after her, so she started seeing a therapist and got on medication. XIII ROA 3178. This caused her to miss seven or eight months of work. XIII ROA 3178. Although Panos was killed almost a decade earlier, Larsen still has anger issues. XIII ROA 3178. Likewise, Dina Richardson testified as to victim impact on 40 additional people at the Tucson Police Department. XIV ROA 3307. Contrary to the State's argument, this testimony was highly prejudicial. Chappell's sentence should therefore be reversed.

I. <u>The District Court Erred In Allowing Admission of Chappell's Prior Testimony</u>

Chappell contended in his Opening Brief that the trial court violated his state and

federal constitutional rights a fair and reliable sentencing hearing, due process, right to be free from cruel and unusual punishment and right to effective assistance of counsel by permitting the State to introduce his testimony from his original trial. The State argues in response that the district court was not obligated to conduct an evidentiary hearing on Chappell's assertion that his counsel was ineffective in preparing him for his testimony. Answering Brief at page 31. Chappell submits that under the circumstances presented here, he should have been allowed to present evidence and testimony at an evidentiary hearing to establish that his original trial counsel did not adequately prepare him for testimony and did not adequately consult with him concerning the decision to testify. Harrison v. U.S., 392 U.S. 219, 222 (1968); U.S. v. Pelullo, 105 F.3d 117, 125 (3d Cir. 1997); Strickland v. Washington, 466 U.S. 668 (1984).

J. The State Committed Prosecutorial Misconduct By Making Arguments Based Upon Comparative Worth Arguments

Chappell contended in his Opening Brief that the State violated his state and federal constitutional rights a fair and reliable sentencing hearing, due process, right to be free from cruel and unusual punishment, and right to be free from prosecutorial misconduct by making arguments comparing Chappell's worth to the worth of Panos. In response, the State first argues that this issue was not raised below. Chappell submits that this issue should be considered as a matter of plain error.

The State next acknowledges that "[c]ertainly, 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." Answering Brief at page 32. Nonetheless, the State argues that this type of argument is permissible under Payne v. Tennessee, 501 U.S. 808, 823 (1991). The State cites to Humphries v. Ozmint, 397 F.3d 206, 224 (4th Cir. 2005) in support of its claim. It is important to note, however, that Humphries was an appeal under 28 U.S.C. 2254, which severely limits review by federal courts of state court judgments. In Humphries, the Fourth Circuit was not presented the issue here of whether comparative worth arguments are permissible. Rather, the Humphries court

addressed the issue of whether the South Carolina Supreme Court was unreasonable when it determined that the government's argument did not render the defendant's trial fundamentally unfair. Thus, Humphries is by no means controlling, or even persuasive, on the issue presented here.

The State next asserts that the prosecutor in this case was not presenting a comparison of the relative worth of the defendant and victim. Answering Brief at page 32. It notes that the words "compare," "worth," and "value" do not appear in the argument and claims that the prosecutor was merely "contrasting the character of each of show how the exercise of free will and choice affected behavior" as the State was counteracting the defendant's mitigating evidence. Answering Brief at page 32. A simple review of the State's closing argument, however, refutes the State's position on appeal. The argument is set forth in length in the Opening Brief and is not repeated here. The argument was not merely addressed at refuting the defense mitigation evidence, but was instead aimed at minimizing the importance of that evidence by contrasting the lives of Panos and her family. This exceeded the argument allowed under Payne, 501 U.S. at 823.

In his Opening Brief, Chappell set forth substantial authority concerning comparative worth arguments. See e.g. Johnson v. Mississippi, 486 U.S. 578, 584-85 (1988); State v. Storey, 901 S.W.2d 886, 902 (Mo. 1995); Hall v. Catoe, 601 S.E.2d 335, 340-41 (S.C. 2004); State v. Koskovich, 776 A.2d 144, 182 (N.J. 2001). The State fails to address this authority.

Chappell also contended that the comparative worth argument presented by the State also influenced the jurors to improperly use mitigation evidence under McKoy v. North Carolina, 494 U.S. 433, 444 (1990); Mills v. Maryland, 486 U.S. 367, 375 (1988); and Lockett v. Ohio, 438 U.S. 586, 608 (1978). The State fails to address this argument.

The misconduct which occurred here was pervasive and constituted the theme of the prosecutor's closing argument. As a matter of plain error, this Court should reverse Chappell's judgment based upon the extreme prejudice to the jury's deliberations caused by this patently improper argument.

K. The State Committed Extensive Prosecutorial Misconduct

Chappell contended in his Opening Brief that the State violated his state and federal constitutional rights a fair and reliable sentencing hearing, due process and right to be free from cruel and unusual punishment by committing prosecutorial misconduct throughout the closing arguments. The State argues in response that the misconduct did not amount to plain error and that the misconduct was harmless. Answering Brief at pages 33-34. Both arguments are without merit.

Comment on Chappell's Right To Remain Silent

Chappell contended on direct appeal that the State committed misconduct by commenting on his right to remain silent through introduction of Chappell's prior testimony which included cross-examination concerning the amount of time that Chappell had to consider his potential testimony. XV ROA 3654. Chappell's counsel argued that this was a comment on his right to remain silent but the district court rejected the argument after noting that the claim was found to be without merit in post-conviction proceedings. XV ROA 3632-33. The district court's reliance upon these ruling was misplaced as the post-conviction rulings do not support this conclusion. In its post-conviction ruling, the district court concluded that issues concerning the guilt phase of the trial were without merit because of overwhelming evidence of guilt. XI ROA 2746. The court did not rule on the merits of this issue. On appeal from the district court's order granting in part and denying in part Chappell's post-conviction petition, this Court noted "that overwhelming evidence supported Chappell's conviction and that any errors in . . . the prosecutor's remarks were harmless beyond a reasonable doubt, whether Chappell's trial counsel objected to them or not." XI ROA 2790. The fact that this Court may have considered this testimony to be harmless in the context of a claim of ineffective assistance of counsel, as it concerned the guilt phase of the trial, had no bearing on the issue of admissibility of this testimony during the penalty phase and this Court's ruling was not an invitation to repeat this testimony in this context. The use for impeachment purposes of a defendant's silence at the time of arrest and after receiving Miranda warnings violates the Due Process Clause of the Fourteenth Amendment.

Doyle v. Ohio, 426 U.S. 610 (1976). Likewise, this Court has found that the State may not comment on a defendant's silence, even if no Miranda warnings are given. Coleman v. State, 111 Nev. 657, 662-63, 895 P.2d 653, 657 (1995). The prosecutor here committed misconduct by introducing testimony which violated Chappell's constitutional rights.

Misstating Role of Mitigating Circumstances

Chappell next asserted that the prosecutor committed misconduct by misstating the role of mitigating circumstances, commenting on matters th at were not in evidence, and improperly minimizing the mitigating evidence that was presented. The State argues in response that the jury was correctly instructed on the role of mitigating circumstances and asserts that the prosecutor's argument did not confuse or mislead the jurors. Answering Brief at page 35. This argument is without merit. The prosecutor repeatedly minimized the significant mitigation evidence by arguing that other people also suffered, that everyone had difficulties, that it is possible to become a better person. XVI ROA 3781. The prosecutor also argued that mitigation evidence such as that presented here would not have been presented had this been a case of murder by a stranger. XVI ROA 3797. He also argued that Chappell's childhood did not diminish what he did as an adult and did not take away his actions. Each of these arguments alone, and especially when combined with each other, deprived Chappell of his right to have the jury fairly consider the mitigation evidence for the purposes for which it was admitted. See Berger v. U.S., 295 U.S. 78, 88 (1935); Caldwell v. Mississippi, 472 U.S. 320, 328-41 (1985) (holding that the Eighth Amendment protects defendants from prosecutorial arguments that misinform juries on their roles in sentencing phase of capital trials); Darden v. Wainwright, 477 U.S. 168, 168 (1986) (noting protections given to defendants by the Due Process Clause's fair trial standards); Lockett v. Ohio, 438 U.S. 586, 604 (1978).

"Don't Let The Defendant Fool You" Arguments

Next, Chappell contended in his Opening Brief that the prosecutor repeatedly committed misconduct by arguing that the jurors would be conned by Chappell, and they would be taking the easy way out, if they imposed a sentence less than death. XVI ROA

3786-87, 3801. The State argues in response that this argument was proper because Chappell's character was in issue and the arguments were based upon the evidence. Answering Brief at page 36. The State fails to address the substantial authority cited by Chappell which establishes that arguments such as those here are improper. See Cristy v. Horn, 28 F.Supp.2d 307, 318-19 (W.D. Pa. 1998); U.S. v. Gonzalez, 488 F.2d 833, 836 (2d Cir. 1973); U.S. v. Drummond, 481 F.2d 62, 64 (2d Cir. 1973). The State also fails to address Chappell's contention that this argument was also improper and prejudicial because it was directed at the jurors and put them in the untenable position of "them" against Chappell. People v. Payne, 187 A.D.2d 245, 248 (N.Y. App. Div. 1993)

Justice and Mercy Arguments

Chappell contended that the prosecutor committed misconduct in arguing that the jury should not consider mercy. The State argues in response that the prosecutor's argument acknowledge the role of mercy but sought to balance it with consideration of justice. The plain language of the prosecutor's arguments, which are set forth in the Opening Brief, belies this claim as the prosecutor's argument went far beyond a mere request for justice. See Thomas v. State, 83 P.3d 818, 826 (Nev. 2004) (finding a prosecutor's argument was improper because it informed jurors that the "defendant is deserving of the same sympathy and compassion and mercy that he extended to [the victims].").

Based upon each of these incidents of misconduct, as well as the cumulative impact of the misconduct, Chappell's sentence of death should be reversed.

L. The District Court Failed To Instruct The Jury That The State Was Required To Establish Beyond On Beyond a Reasonable Doubt That Mitigating Circumstances Did Not Outweigh Aggravating Circumstances

Chappell contended in his Opening Brief that his death sentence is invalid under the reliability guarantees of the Eighth Amendment, the federal due process clause, under Blakely v. Washington, 542 U.S. 296 (2004), and under the Nevada constitution because the jury was not instructed that it was required to find that aggravating circumstances must outweigh mitigating circumstances beyond a reasonable doubt. The State argues in response that the jury was properly instructed and that the weighing equation is not subject to the

reasonable doubt standard. Answering Brief at page 39. In support of this argument, the State cites to Apprendi v. New Jersey, 530 U.S. 446 (2000) and Ring v. Arizona, 536 U.S. 584 (2002) and argues that it is only aggravating factors that operate as the functional equivalent of an element of a greater offense that must be found by a jury beyond a reasonable doubt. Answering Brief at page 40. The State is correct insofar as it describes Arizona law. Nevada, however, uses a different standard to determine death eligibility. In Nevada, in addition to the conviction on all the elements of first degree murder, death eligibility is established if the State proves beyond a reasonable doubt: (1) the existence of one or more aggravating factors, and (2) that the aggravating factors are not outweighed by the mitigation. NRS 200.030(4); Johnson, 118 Nev. at 802-803, 59 P.3d 450; Archanian v. State, 145 P.3d 1008, 1015 (Nev. 2006). The jury here was not instructed on the burden of proof as to the second element. Chappell's conviction must therefore be reversed.

M. The Jury's Failure to Find Mitigating Circumstances Was Clearly Erroneous and Requires That the Death Sentence Be Vacated

Chappell contended that the jury failed to find mitigating factors that were clearly established and uncontested. The jury's failure to find these mitigating circumstances was clearly erroneous and resulted in an unreliable sentence that must be vacated. The State argues in response that even if the facts offered in mitigation were not contested, the jury was free to find that they were not mitigation. Answering Brief at page 40. The State cites to Gallego v. State, 117 Nev. 348, 23 P.3d 227 (2001) as support. It also argues that this Court need not consider authority concerning findings made by judges rather than findings made by juries. Answering Brief at page 41. Chappell respectfully submits that there is no rational basis for requiring judges to consider mitigation evidence but not requiring juries to do the same. The legal significance of a mitigating fact, such as the fact that Chappell's mother was killed when he was a young child and he was raised without the care and affection of his parents, should not turn on whether the sentencing hearing is held before a judge rather than a jury. Likewise, there can be no rational basis for jurors in some cases to find such a fact to be mitigating while jurors in other cases, such as this case, entirely reject such mitigation.

Such a scheme violates principles of fundamental fairness and equal protection. To the extent that Gallego supports such an irrational system, it should be overruled.

N. There Is Insufficient Evidence To Support The Sexual Assault Aggravator

Chappell contended in his Opening Brief that there was insufficient evidence to support the aggravating circumstance of sexual assault. The State argues in response that because this Court affirmed the aggravating circumstance on direct appeal and on appeal of the post-conviction decision this issue is barred by the doctrine of law of the case. Answering Brief at page 42. The State cites no authority for the proposition that the doctrine of law of the case is applicable to facts brought out in a second penalty hearing based upon evidence adduced in a first penalty hearing. There is no such authority.

The State next argues that sufficient evidence was introduced to support the aggravating circumstance. Answering Brief at pages 42-43. For the reasons set forth in the Opening Brief, Chappell reasserts that the State failed to establish the elements of sexual assault and also fails to establish that the killing happened in the course of a sexual assault. The State failed to establish a nexus between the sexual assault and the killing. The record was uncontested as to the fact that Panos was fully dressed at the time she was stabbed. Even under the State's theory, the sexual assault occurred well before the stabbings and did not occur during the perpetration of the sexual assault.

As there is insufficient evidence to support the sole aggravating circumstance of murder in the perpetration of a sexual assault, Chappell's conviction must be vacated.

O. The Sexual Assault Aggravating Circumstance Is Invalid Under McConnell v. State

Chappell contended in his Opening Brief that his constitutional rights to a reliable sentence and to free from cruel and unusual punishment were violated by application of the sexual assault aggravating circumstance under the circumstances presented here under this Court's decision in McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004). The State argues in response that this issue is barred by doctrine of law of the case. Answering Brief at page 43. Chappell respectfully submits that this Court should address this issue as a matter

of fundamental fairness. As set forth in the Opening Brief, application of the sexual assault aggravating circumstance under the facts of this case serves no narrowing function and allows circumvention of this Court's decision in McConnell by dividing the underlying felonies. Although the purpose of dividing the felonies may have not been motivated by the McConnell decision, the effect is the same. In his Opening Brief, Chappell noted that under the facts of this case, the original jury may have found him guilty under a theory of felony murder and the sole aggravating circumstance found by the jury in the second penalty hearing is also a felony murder aggravating circumstance. Thus, he is facing the death penalty even though (1) there is no finding by any jury that he acted with premeditation and deliberation; and (2) there is no aggravating circumstance other than a felony murder aggravating circumstance of NRS 200.033(4) or NRS 200.033(13). As explained in McConnell, this situation fails to narrow application of the death penalty and is invalid under Zant, 462 U.S. at 877, Lowenfield v. Phelps, 484 U.S. 231, 241-46 (1988) and the Nevada Constitution. Accordingly, the aggravating circumstance is invalid and there are no remaining aggravating circumstances, so the sentence of death must be vacated.

P. The Judgment Must Be Reversed Because of Cumulative Error.

Chappell's judgment of conviction and sentence of death must be reversed based upon cumulative error. Each of the constitutional errors set forth in the Opening Brief and above warrants reversal of the judgment and sentence. The combined errors also warrant relief. Butler v. State, 120 Nev. 879, 102 P.3d 71, 85 (2004); U.S. v. Necoechea, 986 F.2d 1273, 1282 (9th Cir. 1993).

III. CONCLUSION

Chappell respectfully submits that both his judgment of conviction and sentence of death must be vacated for the reasons set forth herein.

Respectfully submitted this 8th day of October, 2008.

JoNell Thomas
Attorney for James M. Chappell

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 October, 2008.

JoNell Thomas
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of October, 2008, I duly deposited for mailing, postage prepaid, at Las Vegas, Nevada, a true and correct copy of the above and foregoing **OPENING BRIEF**, addressed to the following:

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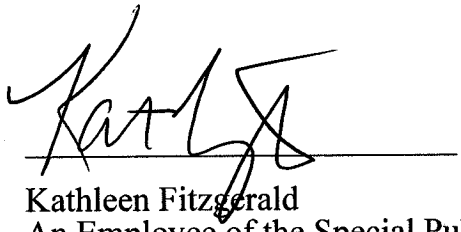

Kathleen Fitzgerald
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