JoNell Thomas
NV State Bar #4771
Office of The Clark County Special Public Defender
330 South 3rd Street
Las Vegas, NV 89155
(702) 455-6270
Attorney for James Chappell

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES CHAPPELL, Appellant, v. STATE OF NEVADA, Respondent.	CASE NO. 49478

PETITION FOR REHEARING

Comes now Appellant James Chappell, by and through his counsel JoNell Thomas, and respectfully requests rehearing, pursuant to NRAP 40, of this Court's Order of Affirmance, entered on October 20, 2009.

Chappell was sentenced, pursuant to a jury verdict, to death for first-degree murder with use of a deadly weapon. Following full briefing and oral argument, this Court, sitting en banc, entered an Order of Affirmance. Chappell respectfully submits that this Court misapprehended the facts and overlooked controlling legal authority and that rehearing should be granted.

This Court Misapprehended The Facts In Finding That The State Proved The Aggravating Circumstance of Sexual Assault

In his Opening Brief, Chappell contended both that (1) the State failed to prove any of the elements of a sexual assault; and (2) the evidence failed to establish, beyond a reasonable doubt, that Panos was killed during the course of the alleged sexual assault. In addressing this issue, this Court finds that there was sufficient evidence of sexual assault but it fails to address the second contention presented by Chappell. This Court's own summary of the facts supports Chappell's argument in that it states Panos was beaten approximately 15 to 30 minutes prior to being stabbed to death. At trial, the State argued that she was beaten in association with the sexual assault. There was no connection made between the alleged

sexual assault and subsequent stabbing. Panos was fully clothed when her body was found and the stab wounds were inflicted while she was fully clothed. IV App. 996, 1024. Although evidence was presented that Chappell and Panos had difficulties in their relationship, the evidence also revealed that they had been together for nearly 10 years and they had reconciled numerous times following previous disputes during that 10 year period. VI ROA 1357, 1367, 1376-78, 1390. See also Order of Affirmance page 5 (finding that the sexual assault was committed with a criminal purpose distinct from the burglary and robbery). This Court should grant rehearing so that this issue may be addressed.

This Court Misapprended the Facts In Finding That The Sexual Assault Aggravating Circumstance Was Proper Under McConnell

In his Opening Brief, Chappell contended that the sexual assault aggravating circumstance is invalid under McConnell because it fails to narrow application of the death penalty in these circumstances, and because it permits the State to divide felony murder aggravating circumstances in that it allowed two to be used for the basis of felony murder and one to be used as an aggravating circumstance. In its Order of Affirmance, at pages 4-5, this Court addressed the second contention but did not address the first contention. Rehearing should be granted so that this Court may address this issue.

Under the facts of this case, the original jury may have found Chappell 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, Chappell 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 v. Stephens, 462 U.S. 862, 877 (1983), 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.

This Court Misapprehended the Facts In Finding That Hearsay Evidence Was Admissible

In his Opening Brief, Chappell contended that the admission of hearsay evidence in the penalty trial violated his confrontation rights under the constitution. This Court addressed the issue presented as it pertained to the Crawford v. Washington, 541 U.S. 36 (2006) issue. Answering Brief at pages 11-12. Chappell also argued the following:

> Chappell further contends that both the testimonial and non-testimonial hearsay statements which were introduced here were unreliable and rose to the level of highly suspect and impalpable evidence, which may not be introduced in a capital case. See Gallego v. State, 117 Nev. 348, 369, 23 P.3d 227, 241 (2001); Leonard v. State, 114 Nev. 1196, 1214, 969 P.2d 288, 289 (1998). Unverified and unreliable evidence of a suspect nature must not be allowed in a capital penalty hearing. D'Agostino v. State, 107 Nev. 1001, 1003-04, 823 P.2d 283, 285 (1991). As a matter of Due Process and the right to a fair trial, both of which are guaranteed by the state and federal constitutions, this evidence should not have been permitted. See Hicks v. Oklahoma, 447 U.S. 343 (1980) (a federal due process violation may be caused by depriving a person of a liberty interest under state law).
>
> Particularly prejudicial here was the repeated 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. 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. Likewise, this Court may 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). 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.

This Court did not address this issue in its Order of Affirmance. Chappell respectfully submits that this Court should grant rehearing so that it may do so.

This Court Misapprehended The Facts And Overlooked Controlling Authority Concerning The Admission of Presentence Investigation Reports

In his Opening Brief, Chappell contended that admission of two confidential presentence investigation reports was improper under NRS 175.552 and Herman v. State, 122 Nev. 199, 208-09, 128 P.3d 469, 474-75 (2006). As part of that contention, he argued that it was improper to admit the statement of the victim's mother that "the SOB does not deserve to live." In response, this Court finds as follows:

> Chappell argues that the statement was inadmissible but does not explain how this statement affected his substantial rights. This statement was not brought to the jury's attention and it is clear from the context that this statement was a mother's expression of grief and not the government's sentencing recommendation. We therefore conclude that admission of this statement was not plain error.

Order of Affirmance at page 16. Chappell respectfully submits that rehearing should be granted as to this issue. In his Opening Brief, Chappell noted 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. See 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). Although this evidence was not focused upon by a testifying witness, the PSI report was admitted as evidence and the jury therefore had full access to it. Presumably the jury, in a case in which the defendant is facing the death penalty, takes its responsibilities seriously and reviews the evidence admitted at trial during deliberations. Moreover, the government's sentencing recommendation was not at issue as the State made it abundantly clear that it wished to have the death penalty imposed. It is the fact that the victim's mother also wanted that sentence, and that the jury may have believed it would bring comfort and relief to a grieving mother, that is prejudicial.

Next, in addressing Chappell's contention that it was error to admit his statement from a PSI interview in which he was not represented by counsel and no Miranda warnings were given, this Court finds in part as follows:

> Moreover, NRS 175.552(3) states that a district court has discretion to admit any evidence "which the court deems relevant to sentences, whether or not the evidence is ordinarily admissible." Thus, even if Chappell's statement was normally inadmissible due to the failure to give Miranda warnings, it was relevant

> and admissible evidence at the penalty hearing. We therefore conclude that the district court did not abuse its discretion in admitting Chappell's statement.

Order of Affirmance at page 18. The quotation to NRS 175.552(3) is incomplete. The statute also provides the following:

> No evidence which was secured in violation of the Constitution of the United States or the State of Nevada may be introduced.

NRS 175.552(3). Miranda announced a constitutional rule, see Dickerson v. United States, 530 U.S. 428, 444 (2000), so the limitation of NRS 175.552(3) applies and the evidence was not admissible by virtue of the fact that it may have been relevant.

This Court Misapprehended the Facts and Overlooked Controlling Law In Finding That the Prosecutor Did Not Commit Misconduct By Arguing That the Jury Should Not Be "Conned" by Chappell

In his Opening Brief, Chappell contended that the prosecutor 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

> Don't be coned. (sic) It's interesting, Dr. Etcoff in the beginning of his testimony said, you know, the defendant, he's just not sophisticated enough to lie. I would know that. Then we heard on cross-examination all of these things the defendant flat out liked to him about, that the doctor didn't know. And here's a Ph.D. person who just got totally coned (sic) by the defendant, and he coned (sic) the system, and he coned (sic) the system, and he coned (sic) Mr. Duffy, sat across from him for two hours saying he really wanted to do something about that drug problem enough that Duffy let him go, and he went straight out over to kill Debbie.
>
> He would like to see you coned (sic) in this case, ladies and gentlemen. Don't be coned. (sic) Don't sell it short. Please, don't go for the lesser things because it's easier. Do the right thing, even though it's the harder thing, and that would be an imposition of the death penalty. Because ladies and gentlemen, the evidence in this case indicates this is the appropriate penalty in this case. It is the only appropriate penalty in this case.

XVI ROA 3786-87.

> And it wasn't just Dr. Duffy that got snowed by the defendant. Dr. Etcoff was snowed just as well. . . .

XVI ROA 3801. In addressing this issue, this Court found as follows:

> The State's argument was based on the evidence presented to the jury and was not inflammatory as Chappell suggests. Therefore we conclude that Chappell fails to demonstrate plain error.

Order of Affirmance at page 24.

This Court did not cite any authority supporting this conclusion and did not address the substantial authority cited by Chappell holding that arguments of this type are improper. See Cristy v. Horn, 28 F.Supp.2d 307, 318-19 (W.D. Pa. 1998) (argument that labeled the defendant as "the Great Manipulator," to whom prison was just a "revolving door," only served to inflame the jurors); U.S. v. Gonzalez, 488 F.2d 833, 836 (2d Cir. 1973) (condemning remarks such as "you have to be born yesterday" to believe appellant's defense, and the defense is "an insult to your intelligence,"); U.S. v. Drummond, 481 F.2d 62, 64 (2d Cir. 1973) (condemning remarks such as the defendant's "testimony is so riddled with lies it insults the intelligence of 14 intelligent people sitting on the jury"). Inflammatory arguments of this type misdirect the focus of jurors away from the facts and the law. Miller v. Lockhart, 65 F.3d 676, 684 (8th Cir. 1995); Tucker v. Zant,724 F.2d 882, 889 (11th Cir. 1984) (Due Process Clause does not tolerate misleading arguments). 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) (improper to suggest that defendant was trying to "sucker us," because the "message was that although the defendant has rights, those rights must be carefully measured because it is 'us' against him."). Rehearing should be granted on this basis.

Conclusion

For each of the reasons set forth herein, Chappell respectfully submits that rehearing should be granted pursuant to NRAP 40.

Dated this 28th day of October, 2009.

/s/ JONELL THOMAS

By:_____

JONELL THOMAS

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 28th day of October, 2009 a copy of the foregoing Petition for Rehearing was served as follows:

BY ELECTRONIC FILING TO

District Attorney's Office
200 Lewis Ave., 3rd Floor
Las Vegas, NV 89155

Nevada Attorney General
100 N. Carson St.
Carson City NV 89701

/s/ JONELL THOMAS

JONELL THOMAS