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 OPENING BRIEF

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I. INTRODUCTION

In this capital case, Appellant James Chappell challenges the constitutionality of his sentence of death, which occurred as the result of a second penalty phase trial which followed a finding of ineffective assistance of counsel for the penalty phase of his first trial. Chappell was convicted of murdering his long-time girlfriend, who was also the mother of his three children. The only aggravating circumstance for the second penalty phase trial was murder committed during the perpetration of a sexual assault. As there was insufficient evidence to establish this aggravating circumstance, the sentence of death must be vacated and a sentence less than death imposed. In the alternative, Chappell is entitled to a new penalty hearing because of the substantial constitutional violations which occurred during the penalty trial. Finally, this Court should revisit two issues previously considered concerning the guilt phase of Chappell's trial based upon new authority which establishes that this Court's prior rulings were erroneous.

II. STATEMENT OF THE CASE

This is a direct appeal from a judgment of conviction, pursuant to a jury verdict, imposing a sentence of death based upon a conviction for one count of first degree murder.

III. STATEMENT OF THE ISSUES

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

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

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

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

E. Whether 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

F. Whether 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

G. Whether The District Court Erroneously Admitted Presentence Investigation Reports

H. Whether The District Court Allowed Improper Victim Impact Testimony

I. Whether The District Court Erred In Allowing Admission of Chappell's Prior Testimony

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

K. Whether The State Committed Extensive Prosecutorial Misconduct

L. Whether 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

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

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

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

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

IV. PROCEDURAL HISTORY

Appellant James Chappell was charged, on October 11, 1995, via Information with one count each of burglary, robbery with use of a deadly weapon, and open murder with use of a deadly weapon. I ROA 38. The State based its murder charge on alternative theories of felony murder and premeditated and deliberate murder. I ROA 39. On November 8, 1995, the State filed its Notice of Intent to Seek Death Penalty. I ROA 44. It charged aggravating circumstances of murder in the course of a robbery, murder in the course of a burglary, murder while the person was engaged in sexual assault or the attempt thereof, and torture or depravity of mind. I ROA 44-45. Prior to trial, Chappell filed a motion to dismiss several of the aggravating circumstances. I ROA 250. He argued in part that the aggravating circumstance of sexual assault should be dismissed because Chappell was not charged with sexual assault and no evidence was presented during the preliminary hearing that would support the aggravating circumstance. I ROA 256. The State opposed the motion, but did not address the sexual assault issue. II ROA 309-19. The Court denied the motion.

The jury trial began on October 8, 1996, and was presided over by the Honorable A. William Maupin. II ROA 355. The jury was instructed on theories of premeditated murder

and felony murder. VII ROA 1703, 1721, 1722. The premeditation instruction informed the jury that "[p]remeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing as been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder." VII ROA 1722. The jury was also instructed on robbery in general and was instructed specifically that a "taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of fear." VII ROA 1711. On October 16, 1996, the jury returned verdicts of guilty on charges of burglary, robbery and first degree murder. VII ROA 1747-49. No special verdict form was given to the jury, so it is unknown as to whether the jurors relied upon the premeditation theory, the felony murder theory, or both in finding Chappell guilty of first degree murder.

The penalty phase of the first trial began on October 21, 1996. VII ROA 1757. On October 24, 1996, the jury returned its verdicts in which it found mitigating circumstances of murder committed while the defendant was under the influence of extreme mental or emotion disturbance and "any other mitigating circumstances." IX ROA 2126, 2170-71. It found aggravating circumstances of burglary, robbery, sexual assault, and torture or depravity of mind and returned a verdict for death. IX ROA 2127-29, 2167-69. Formal sentencing took place on December 30, 1996. IX ROA 2179. The district court sentenced Chappell to the maximum terms for burglary and robbery with use of a deadly weapon and ordered that those sentences run consecutively to the death sentence. IX ROA 2188.

The judgment of conviction was filed on December 31, 1996. IX ROA 2190. Chappell filed a timely notice of appeal to this Court on January 17, 1997, which was docketed as number 29884. IX ROA 2200. On December 30, 1998, this Court issued its opinion affirming the conviction. IX ROA 2273; Chappell v. State, 114 Nev. 1403, 972 P.2d 838 (1998). This Court concluded that the district court erred in failing to hold a Petrocelli hearing, but found admission of evidence uncharged misconduct to be harmless. Id. at 1406,

972 P.2d at 840. It also concluded that there was sufficient evidence to support the aggravating circumstances of burglary, robbery and sexual assault, but insufficient evidence to support the aggravating circumstance of torture or depravity of mind. Id. at 1407, 972 P.2d at 841. In addressing the robbery aggravating circumstance, this Court noted Chappell's argument that the evidence showed that he took Panos's car as an afterthought and therefore could not be guilty of robbery, but rejected that argument because this Court had held "that in robbery cases it is irrelevant when the intent to steal the property is formed." Id. at 1408, 972 P.2d at 841. Although this Court found the torture or depravity of mind aggravating circumstance to be invalid, it reweighed the remaining three aggravating circumstances and the two mitigating circumstances, found the aggravating clearly outweighed the mitigating, and that a sentence of death was proper. Id. at 1410-11, 558 P.2d at 842. The Court also rejected other issues raised by Chappell on appeal. Id. This Court denied rehearing on March 17, 1999. IX ROA 2288.

Chappell's petition for certiorari was denied on October 4, 1999. Chappell v. Nevada, 528 U.S. 853 (1999). This Court's remittitur issued on November 4, 1999. X ROA 2353.

Meanwhile, on October 19, 1999, Chappell filed a proper person post-conviction petition for a writ of habeas corpus. IX ROA 2258. The post-conviction matter was assigned to the Honorable Mark Gibbons. X ROA 2354. A supplemental petition was filed on April 30, 2002. X ROA 2417. Among other issues, Chappell contended that his conviction was invalid because the jury instruction defining premeditation and deliberation was constitutionally infirm as it did not provide a rational distinction between first and second degree murder. X ROA 2456-59 (citing Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000)). He also asserted that the sentence of death was unconstitutional because of the use of overlapping aggravating circumstances. X ROA 2465. The State filed its response to the petition on June 19, 2002. X ROA 2481. The evidentiary hearing took place before the Honorable Michael Douglas on September 13, 2002. XI ROA 2554. Subsequently, on June 3, 2004, the district court entered its Findings of Fact, Conclusions of Law and Order. XI ROA 2745. It denied the petition as to the guilt phase issues, granted the petition as to the

sentence, and ordered a new sentencing hearing. XI ROA 2748, 2778.[1] On June 18, 2004, the State filed a notice of appeal to this Court. XI ROA 2757. On June 24, 2004, Chappell filed a notice of cross-appeal. XI ROA 2761. On April 7, 2006, this Court issued its Order of Affirmance in which it upheld the district court's decision. XI ROA 2783. Of relevance to this appeal is this Court's conclusion that there was no merit to the arguments presented concerning jury instructions. XI ROA 2790 n.20 (citing Garner v. State, 116 Nev. 770, 788-89, 6 P.3d 1013, 1025 (2000)). This Court also found the aggravating circumstances of burglary and robbery to be invalid under McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004). XI ROA2792-95. The remittitur issued on May 4, 2006. XI ROA 2797.

Prior to the second penalty hearing, several pretrial motions were filed which are relevant to this appeal.[2] Chappell filed a motion to strike the sexual assault aggravator. XII ROA 2801. The State opposed the motion. XII ROA 2890. The district court denied the motion. XII ROA 2905, 3019; XV ROA 3840.

Chappell filed a motion to remand for consideration by the Clark County District Attorney's Death Review Committee. XII ROA 2817. The State opposed the motion. XII ROA 2884. The district court denied the motion. XII ROA 2905, 3015; XV ROA 3837.

Chappell filed a motion for discovery of potential penalty hearing evidence. XII ROA 2826. The State opposed the motion. XII ROA 2888. The district court denied the motion. XII ROA 3026. On February 23, 2007, the State filed its notice of evidence in support of aggravating circumstances. XII ROA 3032.

Jury selection began on March 12, 2007. XIX ROA 3932. During the course of the trial, Chappell objected to the use of hearsay evidence during the penalty hearing on

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[1]The parties stipulated that these were the findings, conclusions and order of Judge Douglas and agreed that the order should be executed by the Chief Judge of the Eighth Judicial District Court due to Judge Douglas's appointment to this Court. XI ROA 2748.

[2]Judge Cherry briefly presided over the case and heard procedural matters, such as the setting of the trial date. XII ROA 2912, 2915, 2921. It appears that he may have reviewed the pretrial motions, but he did not rule upon them. XII ROA 2919, 2922.

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. Chappell also objected to the presentation of victim impact evidence by persons who were not family members of Panos. XIII ROA 3107-08, 3177; XV ROA 3678. The district court found that it had discretion to admit victim impact evidence from non-family members. XIII ROA 3272-73. Over an objection by defense counsel, the district court permitted the State to use Chappell's testimony from the first trial. XV ROA 3632. Defense counsel had argued that the testimony was the result of ineffective assistance of counsel. The district court also overruled defense counsel's objection to questions asked by the prosecution and answered by Chappell concerning the allegation that Chappell had a lot of time to think about his testimony and to decide what he would say. XV ROA 3632. Chappell's counsel argued that this was a comment on Chappell's 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.

Jury instructions were read in open court on March 21, 2007. XV ROA 3742. Following closing arguments, the jury returned their verdicts. XV ROA 3737, 3821. They found the aggravating circumstance of murder committed during the perpetration of a sexual assault. XV ROA 3737, 3822. The mitigating special verdict form listed the following mitigators: (1) Chappell suffered from substance abuse; (2) he has had no father figure in his life; (3) he was raised in an abusive household; (4) was the victim of physical abuse as a child; (5) he was born to a drug/alcohol addicted mother; (6) he suffered from a learning disability; and (7) was raised in a depressed housing area. XV ROA 3739-40, 3822-23. The jury did not find the mitigating circumstance that Chappell's mother was killed when he was very young, that he was the victim of mental abuse as a child, and other mitigating circumstances that were asserted to exist by Chappell's counsel. XV ROA 3755. The jury found that the mitigating circumstances did not outweigh the aggravating circumstance. XV ROA 3738, 3822-23. The special verdict form for the weighing equation did not indicate that it was the State's burden to establish beyond a reasonable doubt that the mitigating

circumstances did not outweigh the aggravating circumstance. XV ROA 3738. The jury returned a sentence of death. XV ROA 3741.

Formal sentencing took place on May 10, 2007. XIX ROA 4015, 4018. The judgment of conviction was filed the same day. XV ROA 3854. The district court ordered the judgment stayed pending appeal. XIX ROA 4019; XV ROA 3861. A timely notice of appeal was filed on June 8, 2007. XIX ROA 3872. This Opening Brief now follows.

V. STATEMENT OF THE FACTS

The State alleged that Chappell killed his girlfriend, Deborah Panos, who was also the mother of his three children, because she intended to end their relationship. IV ROA 864. In support of this theory, the State claimed that Chappell had a history of violence toward Panos and that on August 31, 1995, after he was released from jail, he entered her trailer through a window, had a fight with Panos that resulted in her being beaten and stabbed to death, and then stole her car and social security cards belonging to her and their children. IV ROA 864-86 (guilt phase opening statement). The State also noted that Chappell's semen was found in Panos's body. IV ROA 887-88. It asserted that Chappell was guilty of burglary, robbery with use of a deadly weapon, and first degree murder with use of a deadly weapon. IV ROA 889. It relied upon theories of both premeditated murder and felony murder in urging the jury to return a verdict of first-degree murder. VII ROA 1627-29 (closing argument). In support of the felony-murder by robbery theory, the State relied upon Chappell's taking of Panos's car and social security card, which occurred after her death. VII ROA 1623-24, 1629. In support of its premeditation theory, the State relied upon Jury Instruction Number 22 which stated that "premeditation need not be for a day, an hour, or even a minute. It may be an instantaneous as successive thoughts of the mind." VII ROA 1630. See also VII ROA 1689. The State also argued that evidence of premeditation existed because Panos was stabbed 13 times, he did not seek medical attention for her after she had been stabbed, and he got high on crack cocaine following her death. VII ROA 1635-36.

Chappell acknowledged responsibility for Panos's death, but asserted that he did not commit the offense of burglary because he lived in the trailer and entered through a window

only because he did not have a key, and no one was home when he arrived at the trailer after having been in jail. IV ROA 892 (opening statement). The defense case was that Panos arrived home and was happy to see him, they had consensual sex, and then later had an argument because Chappell was jealous over the fact that Panos was seeing other men while Chappell was in jail. IV ROA 892-93. Later, Chappell discovered a letter by another man that implied sexual things to Panos, he went into a fit of rage, and killed Panos by stabbing her. IV ROA 894. Chappell contended that the evidence did not support a finding of first degree murder, that he took the car after Panos was dead because he did not know what to do besides leaving, and he was not guilty of burglary because he entered his home without any intent to commit an offense. IV ROA 892, 895. He asked the jury to return a verdicts of guilty on the lesser included charges of voluntary manslaughter with use of a deadly weapon and grand larceny auto. IV ROA 896; VII ROA 1660. During closing arguments, Chappell's counsel noted that he took full responsibility for killing Panos and therefore the issue at hand concerned premeditation, deliberation and intent. IV ROA 1641, 1645.

The State and Chappell's trial counsel entered into a stipulation as to certain facts concerning August 31, 1995: Chappell entered a trailer rented to Panos through a window; Chappell engaged in sexual intercourse with Panos; Chappell caused the death of Panos by stabbing her with a kitchen knife and the act was not an accident; and Chappell was jealous of Panos because he believed she was giving attention to or receiving attention from other men. IV ROA 844-45, 850; VI ROA 1312-13.

Evidence introduced at trial which is relevant to this appeal includes the following: A "sexual assault kit," which consisted of samples of biological evidence was taken from Panos's body. IV ROA 998. There was no testimony by either the coroner or the crime scene analyst assigned to assist with the autopsy which suggested in any way that there was bruising, cuts or other trauma in the area of Panos's vagina. IV App 962-1003. Panos was fully clothed when her body was discovered. IV ROA 996, 1024.

Chappell and Panos began dating in high school and had three children together. V ROA 1231, 1279; VI ROA 1367-68. They began their relationship in Michigan and

continued it as they lived in Arizona and Nevada. V ROA 1234-35, VI ROA 1368, 1372-74, 1383. There were previous occasions in which the two fought, broke-up and then reunited. V ROA 1235-40, 1257, 1311, 1321; VI ROA 1357, 1376-78, 1390. Chappell was possessive of Panos. V ROA 1247. Panos loved Chappell. V ROA 1250.

Chappell testified that after he was released from jail, he returned home to the trailer that he shared with Panos. VI ROA 1397. He climbed through the window because he had called shortly before and Panos did not answer and he had lost his key to the trailer. VI ROA 1397. Upon entering, he learned that Panos was in fact already home. They talked and everything was okay between them. VI ROA 1398. They then had sex on the couch. He began to think that she had been messing around on him, so he grabbed her and asked her who she had been with. VI ROA 1399. She said she had not been with anyone else and then performed oral sex on Chappell. VI ROA 1400. The sexual acts were consensual and he did not pressure her into having sex with him. VI ROA 1400. They got dressed, called the daycare center, and then left the trailer to pick up the children. VI ROA 1401-03. While in the car he found a letter to Panos from another man and read about the man having sex with her. VI ROA 1404-05. He was shocked and devastated, so he returned the car to their home, went back inside with her, and stabbed her with the knife. VI ROA 1405. Chappell did not recall details about the stabbing, did not know how many times he stabbed her or hit her and did not know why he killed her. VI ROA 1406. He was very upset, blacked out during the attack and then left immediately when he realized what had happened. VI ROA 1407, 1464. The letter that he read in the car was found next to her body. VI ROA 1407.

Dr. Lewis Etcoff, a psychologist, testified that Chappell was remorseful over Panos's death and sad over her death. VI ROA 1543. He noted that Chappell had an IQ of 80, which means that 91 out of 100 people have more intellectual skills. VI ROA 1546. His language score was especially low. VI ROA 1548-49. Dr. Etcoff described Chappell's personality issues, which includes low self-worth, little self-respect, social awkwardness, distrust of others, and fear of humiliation and rejection. VI ROA 1553. He had no relationship with his father and his mother died before he was three years old. He had a personality

characteristic of being hugely frightened and enormously afraid of being abandoned in a relationship, and was paranoid as a result. VI ROA 1554, 1571.

As noted above, the first jury considered this evidence and returned verdicts of guilty on the charges of first degree murder, robbery and burglary.

The testimony presented by the State during the second penalty hearing largely followed the evidence presented at the first trial, though a significant amount of hearsay evidence was also admitted that was not presented during the guilt phase of the first trial.

Michele Mancha testified that she worked with Panos and they were friends. XIII ROA 3089. Panos confided in her and told her about various incidents concerning Chappell: he broke her nose with a plastic cup; he took things of value from her trailer after climbing in through her window as he did not have a key to the trailer; he slapped her in the face while in the parking lot of her work. XIII ROA 3089-95. Mancha believed that Panos was trying to distance herself from Chappell. XIII ROA 3092. She testified that in June 1995, Panos said that Chappell choked her and the next day Mancha saw marks on her neck. XIII ROA 3096-97. Mancha also reported that Panos told her in June 1995 that Chappell sat on her and put a knife to her throat. XIII ROA 3098. She next asserted that Panos planned to move from her trailer and thought she had 90 days to do so as Chappell was supposed to be in custody, but he was let out less than 24 hours later. XIII ROA 3099. They had also planned to send Chappell back to Michigan, but he refused to go unless he could take his daughter with him. XIII ROA 3099. She asserted that Panos called the jail everyday to make sure that Chappell was still in custody and she was in the process of leaving her trailer and moving with the children. XIII ROA 3101.

Mancha also testified about court proceedings, even though she was not present at those proceedings. XIII ROA 3102. She asserted that Panos had a restraining order against Chappell and that Panos had been subpoenaed to testify against Chappell based upon the choking incident. XIII ROA 3103. Mancha claimed that Panos told her that Chappell threatened to kill Panos after she told him that it was over, that he was supposed to go to a 90-day drug rehabilitation program, and that they had time to get her possessions from the

trailer and move. XIII ROA 3103-04. Mancha stated that they were all scared and she tried to call Chappell's probation officer, Charlene Sumner, to tell her about the threat to Panos. XIII ROA 3105. On cross-examination Mancha acknowledged that Chappell had a problem with drugs and that he stole stuff from the trailer to buy drugs. XIII ROA 3109.

The Court permitted Mancha to give victim impact testimony, over an objection by the defense. XIII ROA 3107-08. She 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.

Mike Pollard's testimony from the first penalty hearing was read into the record. XIII ROA 3114. He testified that he worked with Panos and was friends with her. XIII ROA 3115-16. He did not ever meet Chappell, but he did see Chappell slap Panos while in the parking lot of her employer. XIII ROA 3118. This incident happened after the time that he broke her nose. XIII ROA 3119. There were other times when Panos was upset and Pollard believed this to be because of conversations or interactions with Chappell. XIII ROA 3120. Pollard asserted that Panos told him she was planning to move from her trailer and wanted to be gone before Chappell was released from custody. XIII ROA 3125. Pollard recited incidents in which Panos told him that Chappell took items from her and their children and either returned them to stores to receive cash or sold the items to other people. XIII ROA 3125. Pollard asserted that Panos was concerned about Chappell's release and that she repeatedly called the jail to find out when he would be released. XIII ROA 3128. Pollard claimed that Panos had tried to get Chappell to leave the state and had purchased a ticket for him to go to Michigan. XIII ROA 3128. Pollard also testified that Panos realized that Chappell would not leave, so she was planning to move out of the trailer even though she was in the process of buying it. XIII ROA 3129.

Pollard saw Panos on August 31, 1995. XIII ROA 3129. They got off work around noon and planned to barbecue at a park. XIII. ROA 3131. She left Pollard's house and returned about 20 minutes later. XIII ROA 3131. Pollard claimed that she sat in a ball, held her knees and shivered. XIII ROA 3131. She said that Chappell was out and that he had left

a message on her voice mail. XIII ROA 3131. Pollard told her to wait a few minutes until he was out of the shower and he planned to go with her to her trailer so she could pick up clothing, pick up the children from daycare, and then stay with him for a few days. XIII ROA 3132. She had stayed with Pollard in the past when she was afraid. XIII ROA 3132. Nonetheless, when Pollard got out of the shower, Panos was gone. XIII ROA 3133. He did not have a car so he could not follow her. XIII ROA 3133. He tried to phone her, but did not get a response. XIII ROA 3133. Pollard never met Chappell because he was always in and out of jail, but he was aware of claims that Chappell took Panos's furniture, televisions and VCRs. XIII ROA 3135.

After Pollard's testimony was read, he was located and then called as a witness for the purpose of giving victim impact evidence. XV ROA 3678. This testimony was given over a defense objection. XV ROA 3678. He testified that upon learning of Panos's death he was saddened for Panos and especially sad for her kids because they had to grow up without a mother. XV ROA 3679. 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.

Lisa Larsen (formerly Duran), a co-worker and friend of Panos's, testified that she lived with Panos in the summer of 1995. XIII ROA 3169. She recalled the incidents in which Chappell slapped Panos, he broke her nose, and she arrived at work with bruises on her arms. XIII ROA 3170. She asked Panos why she did not get out of the relationship and Panos responded that she could not because her kids needed their father. XIII ROA 3170. Chappell was incarcerated during most of the summer of 1995. XIII ROA 3170. Panos instructed Larsen to accept his telephone calls and try not to make him angry. XIII ROA 3170. Larsen recited details from telephone calls and noted once incident in which Chappell asked "what other nigger she was laying up with underneath" when told that Panos was not home. XIII ROA 3171. After Larsen responded that she would not tell him anything like that, he told her to tell Panos that he called and that when he got out, she was not going to

have any kind of life or anything. XIII ROA 3171. In a later call, Chappell told Larsen that once he got out, Panos would not have any friends and that he was upset because Panos had stopped accepting his calls and writing. XIII ROA 3171. Larsen also described Panos's plan to move from her trailer before Chappell got out of custody. XIII ROA 3172.

Larsen testified that on August 30, 1995, Panos told Larsen she had been to court and she told Chappell it was done, it was over with, and she wanted to get on with her life. XIII ROA 3172. The next day Panos and Larsen planned to meet at the trailer in the afternoon. XIII ROA 3172. She saw Chappell driving Panos's car, tried to reach Panos by telephone, then went to the trailer and eventually called the police. XIII ROA 3173.

Over a defense objection, Larsen testified that she shut down after Panos's death, went to therapy for about a year, 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. 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.

On cross-examination Larsen acknowledged that Panos was planning to move in with J.R., who was a man that she had been dating while Chappell was in custody. XIII ROA 3182. On occasions, Panos had told Larsen that she loved Chappell. XIII ROA 3183.

Charmaine Smith, a Parole and Probation Officer, testified that she was assigned to be Chappell's probation officer on April 27, 1995. XIII ROA 3235. He had been convicted of the gross misdemeanor offense of possession of burglary tools. XII ROA 3235. He was allowed to plead to that offense after being charged with two felonies and a gross misdemeanor. XIII ROA 3235. Smith claimed that Chappell did not report for probation and did not meet the conditions of his probation. XIII ROA 3236. She talked with Panos three or four times. XIII ROA 3236. Panos came to her office on one occasion and was upset because of Chappell and she said she was in fear for her life. XIII ROA 3236. Smith recited

allegations that Panos told her that Chappell once straddled her and held a knife to her. XIII ROA 3236. Smith suggested that Panos move away and return to Arizona.

Based upon Chappell's failure to comply with the terms of his probation, Smith sought revocation of his grant of probation. XIII ROA 3237. The court reinstated Chappell to his probation with an added condition that he enroll and successfully complete an impatient substance abuse program. XIII ROA 3237. The judge ordered that he be released only to the Department of Parole and Probation and then the department was to take him to the impatient treatment program. XIII ROA 3237. Smith explained the 90 day program to Panos when they were in court. XIII ROA 3237. On cross-examination Smith testified that Chappell listed Panos's address as his address. XIII ROA 3239.

William Duffy, a former Parole and Probation Officer, testified about his failure to place Chappell in the custody of an impatient drug treatment center, as ordered by the court as a condition of Chappell's release from custody. XIV ROA 3407-13.

Latrona Smith, a daycare director, testified about her conversation with Panos on the day she was killed. XIII ROA 3190. Smith asserted that Panos called, was crying, and asked her to call Panos with some kind of excuse so that she could leave the house. She called Panos five minutes later and Panos said she was on her way. XIII ROA 3191-92.

The testimony of Deborah Turner was read into the record. XIII ROA 3194. She testified that on the afternoon Panos was killed, Chappell sold shrimp and a pie to her and she rented the car he was driving for $15. XIII ROA 3195. His demeanor did not seem different than other days when she had seen him. XIII ROA 3196. On cross-examination Turner acknowledged that Chappell was a crack head. XIII ROA 3197. She was aware of other occasions in which Chappell rented out the car for an hour or two in exchange for rock cocaine. XIII ROA 3198.

The testimony of Ladonna Jackson was read into the record. XIII ROA 3198. She saw him on the afternoon of August 31, 1995, and he behaved as he usually did. XIII ROA 3201. She testified about renting Chappell's car and the fact that he made his money stealing. XIII ROA 3203. He also traded items that he stole for crack. XIII ROA 3204. She

testified that Chappell sold his children's diapers because he wanted drugs (but she did not provide explanation as to how she knew the diapers belonged to his kids). XIII ROA 3204.

Kimberly Sempson testified that she detained Chappell on charges of shoplifting on August 31, 1995. XIII ROA 3205. She saw him drop a social security card. XIII ROA 3207. On cross-examination she noted that Chappell had a small metal pipe in his pocket that was probably used to smoke crack. XIII ROA 3207.

Paul Osuch, a LVMPD detective, testified that in September, 1995, he was dispatched to the Lucky store at Lamb and Bonanza on a shoplifting call. XIV ROA 3275. He decided to arrest Chappell, who was the suspect in the shoplifting case, because he had drug paraphernalia in his possession. XIV ROA 3276. He mentioned the killing at the trailer park, which was nearby, and noticed that Chappell became nervous. XIV ROA 3276. He later saw four social security cards that had been in Chappell's possession and noticed the last name of Panos on the cards. Osuch confirmed that this one the last name of the person killed at the trailer and notified the homicide detectives. XIV ROA 3284.

Detective James Vaccaro testified as to details concerning his investigation. XIV ROA 3413-25. Relevant to this appeal are the facts that a sexual assault kit was collected at the autopsy, XIV ROA 3420; he knew that Chappell stated he had both consensual vaginal and consensual oral intercourse with Panos, XIV ROA 3415; a torn up letter was found near Panos's body, XIV ROA 3423-24; the letter was written to Panos from someone named Devon and a portion of the letter was found outside, XIV ROA 3429; Chappell's DNA was found inside of Panos's vagina, XIV ROA 3425; and letters from Chappell to Panos during the period of his incarceration were recovered, XIV ROA 3426-27. He also testified that the presence of semen indicated that Chappell ejaculated into Panos. XIV ROA 3425.

Russell Lee testified about his discovery of Panos's body inside the trailer. XIII ROA 3186. She was dressed and he observed a puncture mark in her clothing. XIII ROA 3187.

Dr. Green, a pathologist, testified as to details concerning Panos's injuries. XV ROA 3670. She had bruises on her neck and face, right arm, shoulder, right hand and the back of her right wrists. XV ROA 3671. She also had 13 stab wounds. XV ROA 3671. The cause

of death was knife wounds to the neck. XV ROA 3674. He believes the bruises were probably caused 15 to 30 minutes prior to the stabbings. XV ROA 3674.

Substantial evidence was also presented by the State concerning allegations about matters took place prior to the events of August 31, 1995:

Clair McGuire testified she worked with Panos in Tucson in the 1990s. XIII ROA 3242. She met Chappell and knew him to be Panos's boyfriend. XIII ROA 3243. She sometimes saw bruises on Panos's body and once saw Chappell trip Panos and push her into the wall. XIII ROA 3243. While Panos worked several jobs, she recalled that Chappell only had one job and was there less than a month. XIII ROA 3244. Panos had worked as a 911 operator but had to quit because she was involved with Chappell and she was not allowed to hang around with people who had a criminal record. XIII ROA 3244. McGuire visited with Panos in Las Vegas in March of 1995. XIII ROA 3244. She noticed that Panos did not have very much furniture and she said that Panos said that Chappell had taken it out of the house. XIII ROA 3244. She assumed he was selling it to get money for drugs. XIII ROA 3245. She also said that Panos said that new jackets she purchased for the kids had disappeared.

McGuire moved to Las Vegas in May 1995, and stayed with Panos. XIII ROA 3245. When she returned from a trip to Tucson she noticed that someone had been through her boxes and some items were missing. XIII ROA 3245. She discussed the missing items with Chappell and he said that he knew where they were and that for a small amount of money he would be able to return them to her. XIII ROA 3245. She did not give him the money. XIII ROA 3245. To her knowledge, Chappell did not have a key to the trailer. XIII ROA 3245. He stayed at the trailer on and off and would sometimes break in. XIII ROA 3246. She claimed that Panos was upset on one occasion in which Chappell tried to come into the trailer and noted that there was another occasion in which she talked with Panos on the telephone, Panos said that Chappell had gotten out of jail and wanted Panos to come home to the trailer, but Panos stayed at a friend's house instead. XIII ROA 3246. McGuire said that Panos told her that Chappell would rape McGuire and burn the house down so that Panos did not have a house to come home to. XIII ROA 3246. McGuire locked all of the doors and windows

and was still on the telephone with Panos when she heard Chappell trying to come inside the house through the front window. XIII ROA 3246. They used three-way calling to call 911 and then McGuire told Chappell that the police were at the door after Chappell came into her locked bedroom. XIII ROA 3246. The officers could not get inside because the doors were locked. XIII ROA 3247. Chappell then talked with Panos on the telephone as McGuire unlocked the door. XIII ROA 3247. The police entered and arrested Chappell. XIII ROA 3247. She noticed that there was a knife next to her bed and it was not there before he came in. XIII ROA 3247. There was another incident in June 1995 in which Chappell was angry and told Panos to go into her bedroom with him. XIII ROA 3247. McGuire called 911 and the police came to the trailer. XIII ROA 3247. Panos told them that Chappell held a knife to her throat and pinned her down while sitting on top of her chest. XIII ROA 3247. The police arrested Chappell. XIII ROA 3247.

Over a defense objection, McGuire testified that it was a very frightening situation and she could not believe that anybody could be in that situation for such a long period of time. XIII ROA 3248. She recalled that Panos was fun, happy, and she would do anything for her kids. XIII ROA 3248.

On cross-examination, McGuire testified that Chappell never threatened her and did not threaten her on the night he came into her bedroom. XIII ROA 3248. She did not ever see the knife in his hands. XIII ROA 3249. In regards to the incident in which McGuire claimed that Chappell pinned down Panos, McGuire acknowledged that she was unaware that when Panos wrote her statement to the police about that matter that she did not state that Chappell pinned her down or that he had a knife. XIII ROA 3249.

The testimony of Detective Paul Weidner, of the Lansing Michigan Police Department, was read into the record. XIII ROA 3251. He testified that on August 18, 1988, he arrested Chappell for assault. XIII ROA 3251. The arrest was based upon the allegation that Chappell and a friend threw a brick at a man's car and threw a brick or rock at the man after he got out of his car. XIII ROA 3252. Chappell gave a statement in which he said that his friend threw a brick at the car, but did not hit it, after the man drove his car down an alley

and almost ran them over. XIII ROA 3253. The man came out of his house with a bat and said "come on, you niggers, I'm not afraid of you" and then the friend threw a brick at the man and knocked him down. XIII ROA 3253. The friend picked up the man's bat when he went back into his house and then the man came out of the house with a gun. XIII ROA 3253. Other friends were present when this happened, but some of them ran off when the police arrived. XIII ROA 3253. The man identified Chappell as the person who threw a brick. XIII ROA 3253. The officer was not called to testify at court and did not know the disposition of the charges. XIII ROA 3253. The officer did not personally witness anything. XIII ROA 3253. Another witness to the incident reported that it was another man, not Chappell, who threw the brick at the man. XIII ROA 3253. There were no injuries to the man who was hit. XIII ROA 3253.

Dina Richardson testified that she knew Panos for five or six years in Tucson and they both worked with the police department in the 911 department. XIV ROA 3294. She learned of Panos's murder after being contacted by the Tucson Police Department out of concern that they had not yet caught the person who murdered Panos and they thought he might try to look for Richardson or Panos's mother. XIV ROA 3295. She met Chappell through Panos but did not spend much time with him. XIV ROA 3295. Richardson's perception of the relationship between Chappell and Panos was that he ran the relationship, was controlling, and she did what he wanted her to do. XIV ROA 3296. She noted an incident in which Panos asserted that Chappell sold t-shirts which Panos had purchased in San Diego and times when Panos came to work with bruises. XIV ROA 3298. Richardson claimed that Panos eventually told her that she had been assaulted by Chappell and it usually happened when he was high on drugs or wanted to be high on drugs and if she did not give him money, they would end up in an argument and he would assault her. XIV ROA 3299.

Richardson testified about a time in 1994 when Panos called her and claimed that Chappell had left her stranded at a grocery store after it refused to cash a check. XIV ROA 3300. She was then able to cash the check and she took the money to Richardson before going home to her kids because she believed that Chappell would beat her up if she came

home with the cash. XIV ROA 3301. Richardson recalled another time in 1994 when she was on the telephone with Panos and she could hear Chappell calling Panos names in the background because he was upset that she dated another man while he was in Michigan. XIV ROA 3301. She heard Chappell say that he did not care what she did, but she could not fuck around in front of his children or he would kill her ass. XIV ROA 3302. She recalled another telephone call around August 1994 in which she heard him in the background as he told Panos that he wanted the car or wanted some money or was going to do an O.J. Simpson on her ass. XIV ROA 3302.

Panos decided to move to Las Vegas and told Richardson that she was doing so because she wanted to have a new start and felt that if she brought Chappell here with her that he would not know anyone, he would get off the drugs, and they would live happily ever after. XIV ROA 3303. In November 1994, Richardson was talking on the telephone with Panos and heard Chappell say that he wanted her car keys or he was going to do an O.J. Simpson on her ass. XIV ROA 3303. She also heard the voices of their children in the background. XIV ROA 3303. Richardson heard things about Chappell from officers at the police department. She recalled a time or two when she heard that he was stopped in high drug activity areas. XIV ROA 3305. She also heard that there was also a domestic violence call. XIV ROA 3306.

Over objection, Richardson gave a victim impact statement and testified that Panos's death was devastating for her as they had daily contact and were friends. XIV ROA 3307. She talked with her department psychologist and attended a debriefing with about 40 other people who were affected by Panos's death so they could all talk about their feelings. XIV ROA 3307. There is a portrait of Panos that hangs in the police department briefing room that is in her honor. XIV ROA 3307.

On cross-examination Richardson testified that based upon her experiences with 911 she is aware of how dangerous domestic violence incidents can be, but she did not ever call the police after talking with Panos or hearing the telephone calls with Chappell speaking in the background. XIV ROA 3309. There were times when Chappell would leave messages

on Richardson's answering machine and would say things like "I love you Debbie, please come home." XIV ROA 3310. She also saw Chappell in person at some birthday parties. XIV ROA 3310. Richardson thought that Chappell was more violent when he was on drugs. XIV ROA 3310. She was unaware of details concerning Panos's urging of Chappell to move back to Tucson from Lansing Michigan and the fact that Panos visited Chappell in Lansing and became pregnant with their third child during that visit. XIV ROA 3312. She testified that Panos left the children with Chappell when she went on vacation to San Diego. XIV ROA 3313. When Panos stayed the night at Richardson's house, the children stayed home with Chappell. XIV ROA 3315.

Tanya Hobson testified that in 1995 she worked at Safe Nest, which was a temporary shelter for domestic violence victims. XIV ROA 3454. She assisted Panos in obtaining a temporary protective order on January 9, 1995 after Panos claimed that Chappell hit her. XIV ROA 3460. A hearing date was scheduled for January 11, 1995, but Panos did not appear. XIV ROA 3464. It is not unusual for a person to fail to appear at the hearing because of reconciliation with the other party. XIV ROA 3464. The protective order became void after she did not appear. XIV ROA 3465. On cross-examination Hobson testified that the application for the protective order was taken over the telephone and she did not conduct any investigation concerning the allegations. XIV ROA 3467.

The testimony of Jeri Earnst was read. XV ROA 3633. He was a police officer in Tucson and had contact with Panos in 1994. XV ROA 3634. She told him that she had a fight with her boyfriend because he sold a new dresser that she had purchased for their daughter and he hit her and knocked her to the floor. XV ROA 3635. She refused to get medical help. XV ROA 3635. She would not return to her trailer until Chappell was gone. XV ROA 3635. He was arrested for domestic violence. XV ROA 3636. Earnst offered to help Panos get into a shelter, but she never called him. XV ROA 3636.

Officer Dan Giersdorf testified that he was dispatched to the trailer on January 9, 1995. XV ROA 3637. He saw Panos being loaded into an ambulance and saw that she had a large cut over her eye and a swollen nose. XV ROA 3638. She stated that she got into a

fight with Chappell and he hit her in the face with a cup. XV ROA 3638. Giersdorf went inside the trailer and Chappell said that he "hit that bitch in the face." XV ROA 3638. Chappell was then arrested. XV ROA 3639. On cross-examination, he testified that Panos stated that she had been in her relationship with Chappell for nine years and they had three children together. XV ROA 3639. In his previous testimony he did not state that Chappell referred to Panos as a bitch. Giersdorft did not perform a field sobriety test. XV ROA 3639.

The testimony of Officer Allen Williams was read. XV ROA 3640. He testified about the June 1, 1995, incident in which it was alleged that Panos said that she got into an argument with her boyfriend, he pinned her arms down with his knee and threatened her with a knife. XV ROA 3640. He arrested Chappell for domestic violence. XV ROA 3641.

The State presented additional victim impact evidence through Panos's aunt, Carol Monson. XV ROA 3681. She testified that they had a very close family and always did everything together. XV ROA 3681. Panos was a sweet person, very giving, generous and would think of others before herself. XV ROA 3681. She loved elderly people and was close with her grandmother. XV ROA 3682. Monson described how she learned of Panos's death, her immediate reaction, and the reaction in the following days. XV ROA 3682-83. She described the impact of the loss on Panos's mother and other family members and the toll on her marriage. She read letters from other family members that were written both at the time of the first trial and at the time of the current hearing. XV ROA 3683-84. These letters referenced family get-togethers, Christmas and birthdays. XV ROA 3685. Monson also read her own letter, which also referenced past family gatherings at birthdays and holidays and discussed the fact that Panos's children had a difficult time handling the fact that their mother was not there for birthdays, holidays, school events and other major things that occurred in their growing years.[3] XV ROA 3685-86.

Norma Penfield, Panos's mother, also gave a victim impact statement. XV ROA

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[3]During pretrial proceedings the district court ordered that the State talk to Monson and explain the legalities of what she could and could not say. XV ROA 3843.

3686. She discussed Panos's childhood, her love for children and older people, and her personality. XV ROA 3687. Penfield asserted that Panos moved to Las Vegas because the police advised her to leave Arizona for her own safety. XV ROA 3687. Penfield noted the financial assistance that she gave to Panos. XV ROA 3687. She then told the jury about how she learned of Panos's death, how she acquired custody of the children, and Panos's funeral. XV ROA 3688. She discussed the reactions on Panos's three children to her death and noted that her daughter Chantelle, who was then three years old said she wanted to die so she could go to heaven and be with her mom. XV ROA 3688. She testified that the children do not want any mention of Chappell, they get angry, and the oldest child signed a letter stating that he did not want any contact with Chappell. XV ROA 3688. Penfield also read a letter that she prepared. XV ROA 3689. She remarked that Panos's death was brutal and senseless and she could not image how one human being could be so harmful to another. XV ROA 3689.

In response to questions from jurors, Penfield testified that Panos always had excuses for helping out Chappell and that Penfield told Panos to get away but Panos did not listen. XV ROA 3690.

Chappell's testimony from the first trial was then read to the jury. XV ROA 3641-68. The testimony is set forth above and is not repeated here. The State read in an exchange, which is set forth in the argument section below, concerning the fact that Chappell has had a lot of time to think about his testimony. XV ROA 3654. Chappell's counsel had objected to this testimony. XV ROA 3632, but the district court found the testimony to be admissible. XV ROA 3632.

Chappell's counsel called several witnesses to testify on his behalf. Dr. Todd Grey, a chief medical examiner for the state of Utah, testified that he reviewed the autopsy report, investigative reports of the Coroner's office, photographs on Panos's body at the scene of death, a transcript of the testimony of the autopsy doctor, and transcripts of the opening and closing statements of the prosecution and defense from the first trial. XIII ROA 3225. It was clear that Panos died as the result of multiple stab wounds. XIII ROA 3225. In making an assessment as to whether she was sexually assaulted prior to her death, Grey considered the

DNA recovered from Panos's vagina, the description of the vaginal area in the autopsy report and the autopsy photographs. XIII ROA 3225-26. He did not find any evidence of sexual assault during the course of the homicide. XIII ROA 3226. Coroner Green's report did not denote any findings that would indicate a sexual assault. If such findings were present, Dr. Green would have noted them in his report. XIII ROA 3226. Photographs of the scene of death supported his conclusion as Panos was fully dressed and there were stab wounds in the clothing that matched stab wounds to the body, all of which indicated that she was fully clothed when she was killed. XIII ROA 3226. There was no evidence that she was killed while being raped and no evidence of a sexual assault. XIII ROA 3227. On cross-examination Grey explained that he was using the medical definition of sexual assault, which would be forceful penetration. XIII ROA 3228. Bruises on Panos's upper body could have been caused 15 minutes or more prior to her death. XIII ROA3234.

Dr. William Danton, a clinical psychologist, testified that he reviewed Dr. Etcoff's report and talked with Chappell. XIV ROA 3321. He explained the circle of domestic violence and noted that typically the abuser controls the finances in the relationship. XIV ROA 3322. He also explained the "motorcycle syndrome" in which some women have a cold or distant relationships with their fathers, they want love and attention, and then unconsciously seek out cold and distant men because of the need to have the need for love and approval, rather than actual love and approval. XIV ROA 3323. If the man in this type of relationship converts and determines that he loves the woman and wants to be with her, then the woman rejects the man. XIV ROA 3323. He then analyzed the relationship between Panos and Chappell and explained Chappell's drug use in this context. XIV ROA 3324. Because of Chappell's borderline personality disorder, the threat of abandonment or less could be so intense for him that he would be prone to using drugs. XIV ROA 3325. Dr. Danton also explained the reasons why a person might stay in an abusive relationship and why such a person might engage in sex with the other person in the relationship. XIV ROA 3325. The primary reason is that the person still loves the other person. XIV ROA 3325. Other reasons might include feelings of guilt, appeasement, helplessness, or force. XIV

ROA 3326-27. Based upon his review of materials in this case, he believed that guilt/appeasement theory made the most sense. XIV ROA 3327. He also noted that Chappell described a relationship with Panos which was very poor in communication but which was good physically, and noted that this situation would be consistent with Chappell's very low IQ. XIV ROA 3328.

Dr. Danton further explained that Chappell had a sense of abandonment which was caused in part by the death of his mother at age two, the lack of a father figure, and the fact that his grandmother had a lot of kids to take care of and used corporal punishment. XIV ROA 3329. The early loss of his mother resulted in an abandonment anxiety, which happens with borderline personality and the person becoming very dependant on external anchors too feel okay. XIV ROA 3329. He would also rely on others to soothe because he is not able to soothe himself on the inside, resulting in a dependant personality type . XIV ROA 3329. Chappell would use sex as a type of soothing. XIV ROA 3330. Panos could have used sex as a way to calm Chappell down if he was angry and might do so even if there was not an immediate coercive threat. XIV ROA 3330.

On cross-examination Dr. Danton recited details of his conversation with Chappell, including his recitation of facts concerning the night Panos was killed. XIV ROA 3345-49. Chappell told him that they initially argued, but then they talked and she then initiated sex. XIV ROA 3349. Chappell stated that they first had vaginal sex, he then became upset because he believed that she had had sex with another man, and she then offered fellatio. XIV ROA 3351. She then went to the bathroom, cleaned up and talked to the woman from the day care center. XIV ROA 3352. They then went to the car where Chappell discovered a sexually explicit letter and went into a rage. XIV ROA 3354.

Dr. Lewis Etcoff, a psychologist, testified about his evaluation of Chappell prior to the first trial. XIV ROA 3476. Etcoff learned of Chappell's childhood history and noted the following facts: Chappell's father had no involvement in his life, though he did have a criminal record and a lot of other behavioral and substance related problems. XIV ROA 3481. Chappell first met his father when he was 10 years old, at which time his father asked

him to help rob a bank. XIV ROA 3481. Chappell declined to do so. XIV ROA 3482. Chappell's mother died in an automobile accident when he was about two and a half years old. XIV ROA 3482. He then moved with his siblings to the home of his grandmother, who was physically abusive and neglectful. XIV ROA 3482. His school records support a finding that he was psychologically disturbed early on and had difficulty forming attachments. XIV ROA 3483. School records further indicated that he was placed in special education classes very early on. XIV ROA 3483. Records from a social worker stated that in only grade two, Chappell was moody, had trouble fitting in with other kids, was not performing well at academic subjects, was wetting himself and sucking his fingers, which are indicative of a serious anxiety and possibly an attachment disorder. XIV ROA 3484. He was evaluated again in fourth grade, at which time he was functioning on a second grade level and he did not play with other kids. He built a relationship with a new teacher, but she suddenly left and he regressed to his old behaviors of not talking to anyone. The school isolated him to get his work done and recognized that he had a great deal of difficulty in forming meaningful relationships. XIV ROA 3485. The social worker recommended that he be placed in a smaller classroom and that he receive individual therapy outside of the school setting. XIV ROA 3485. He was classified as severely learning disabled and placed in a special class. There was no record indicating that he received the recommended therapy. XIV ROA 3486.

Chappell was later evaluated by a school psychologist when he was in high school. XIV ROA 3486. The psychologist noted that Chappell was in an emotionally handicapped classroom and that he felt he had little hope of succeeding lin life, especially in academics, and that he did not appear to have coping skills to deal with problems he encountered. XIV ROA 3486. He further noted that Chappell had a low self-concept, distrusted others, and had problems with attendance and motivation. XIV ROA 3487.

These findings were consistent with Etcoff's evaluation. XIV ROA 3487. Etcoff further noted that Chappell began using alcohol at 13 or 14 years old and was using rock cocaine on a regular basis by age 18. XIV ROA 3488. He became hooked on crack cocaine.

Etcoff informed the jury that with regular use of cocaine, there is a real good likelihood that the person will get psychotic, have paranoid delusions, become frazzled, and have trouble sleeping. XIV ROA 3488. It is a psychologically destructive drug which makes the person out of control of his behaviors and thoughts and can make the person think that things are real when in fact, they are not. XIV ROA 3488. Chappell had a verbal IQ of 77, which is lower than 94 out of 100 people his age. XIV ROA 3490. His overall IQ was 80, which is lower than 91 out of 100 people his age. XIV ROA 3491. Chappell's language deficit had an effect on his ability to think things through rather than just act, especially in stressful situations. XIV ROA 3493. Additional tests were conducted on Chappell which resulted in findings that he felt worthless, inadequate, was guilt ridden, sensitive to humiliation, had low self-esteem, and did not trust others. XIV ROA 3501. He was dependent on others, mistrustful, apprehensive, and easily humiliated. XIV ROA 3501. He was extremely dependant on Panos for his emotional support. XIV ROA 3502. Etcoff believed that Chappell was especially anxious because he was dependant on a woman who starting withdrawing from him, which would also result in the withdrawal of their three children from his life, and he was using cocaine. XIV ROA 3503. His drug use would help suppress his emotions and suppress disturbing memories. XIV ROA 3503.

Chappell described his relationship with Panos to Etcoff. XIV ROA 3504. He loved her and believed that she loved him, but acknowledged that they were having problems and that he had been abusive. XIV ROA 3504. He felt that she began to withdraw from their relationship when he was in jail on burglary charges and he concocted fantasies of her doing things that made him really upset. XIV ROA 3504. By the time of his release, he worked himself into a very irrational frenzy as he believed that Panos had cheated on him, and just as his mother had left him, the only person in his life he could depend on was also leaving and he lost it. XIV ROA 3505. His thoughts in jail would be especially painful for him to handle because he was not able to suppress them with drugs. XIV ROA 3506.

When Chappell met with Etcoff he broke down crying, was remorseful and was a wreck. XIV ROA 3506. He was angry at himself and very emotional. XIV ROA 3507.

Etcoff believed that if Chappell could turn back the clock and undue his actions he would as he now knows that it was the worst thing he could have done for her, their children, and himself. XIV ROA 3507. Etcoff believes that Chappell was delusional when he stated that he did not ejaculate when he had vaginal sex with Panos. XV ROA 3587.

During cross-examination the State focused on impeaching Etcoff's testimony on direct examination that Chappell's free will was limited because of his IQ, mental state and experiences. XV ROA 3518-25. The State also focused upon the fact that information concerning Chappell's criminal history and full details concerning his relationship with Panos were not given to Etcoff. XV ROA 3548-56.

Chappell's older brother Rick testified that their mother was killed in 1973, when Rick was about three and a half and Chappell was two years old. XV ROA 3690. They have an older brother, an older sister and one younger sister. XV ROA 3691. Their father was not around much and did not live with them. XV ROA 3691. After their mother was killed they lived with their grandma in Lansing Michigan. XV ROA 3691. Rick lived there until he was around 14 years old, when he went to a juvenile boys facility. XV ROA 3691.

Their grandmother was very abusive and hit Rick with broom sticks, a bed board, extension cords and her hands. XV ROA 3691-92. Rick did not know if his grandmother also beat Chappell with extension cords. XV ROA 3692. Chappell was beat with bed boards, branches or switches and belts. XV ROA 3693. There was no real father figure in their home, though they did have a couple of uncles. XV ROA 3691. Their home was not nurturing. XV ROA 3693. In addition, their grandmother worked a lot and had a lot of other personal time to herself. XV ROA 3693. She provided a shelter, food and clothing for the children but did not talk with them, help with schoolwork, get involved in activities or with friends. XV ROA 3693. There was not much supervision in their home, though their two uncles would sometimes stay with them. XV ROA 3694. Their uncle Anthony was killed, which was difficult on all of them, including Chappell. XV ROA 3694.

They did not speak about their mother in their home. Rick was told to shut-up when he asked questions about her. XV ROA 3694. They learned from people on the streets that

their mother had a drug problem. XV ROA 3694. His grandmother talked about their father and was really negative, saying that he was a "no good nigger" and that he was always a liar, he was no good, and "you're going to be just like your dad." XV ROA 3694.

Chappell did not do well in school and attended a special education school for his elementary education. XV ROA 3692. Rick was unable to help Chappell with his schoolwork because he had his own problems with homework and their grandmother also refused to help them with schoolwork. XV ROA 3692. Chappell also had problems with his urine and problems with his development. XV ROA 3693.

The neighborhood they lived in was a low income area that eventually had a lot of vacant houses as no one wanted to live in that neighborhood. Eventually his grandmother had to leave her house because the housing project was condemned. XV ROA 3692.

Chappell had a few friends from the neighborhood. XV ROA 3693. Drugs were easily accessible in the neighborhood and Rick started using drugs when he was around nine years old. XV ROA 3693. He did not know Chappell to be involved with drugs prior to the time that Rick left for the boys school. XV ROA 3693. Rick and their sister Carla both had problems with cocaine and he believes their sister Mira had problems with alcohol and marijuana. XV ROA 3695. Rick was on parole for an armed robbery offense and also had a stolen vehicle offense. XV ROA 3693. He believes that Chappell was internally angry and that it took a lot for him to express his anger. XV ROA 3695. He did not communicate to express himself or talk about his problems. XV ROA 3695. There was no adult in the house to go to if they had problems. XV ROA 3695.

Rick knew Panos, saw her together with Chappell, saw that they got along and did not ever see him get violent with her while in Lansing. XV ROA 3694. Chappell lived with Rick and his wife for a few weeks after he returned from Tucson. XV ROA 3696. Panos called Chappell and sent him money so that he could return to Tucson. XV ROA 3696.

Fred Dean was a friend of Chappell's from Lansing Michigan. XV ROA 3697. They were about the same age and lived near each other. XV ROA 3697. They were not in the same class because Chappell attended special education classes. XV ROA 3697. As

children they hung out together almost every day. XV ROA 3698. Chappell was not allowed to have friends over to his house until after his grandmother was gone. XV ROA 3698. The only supervision was by Chappell's brother Ricky. XV ROA 3698. Chappell's uncles would sometimes be there. XV ROA 3699. One of his uncles was killed near the neighborhood after he was stabbed to death. XV ROA 3699. He recalled that Chappell's grandmother would whoop him with an extension cord. XV ROA 3699. Chappell and Fred spent time trying to get alcohol and marijuana while they were in junior high and high school. XV ROA 3699. Fred recalled that Chappell met Panos after he moved to South Lansing from the housing project. XV ROA 3700. Chappell still visited Fred after moving away from the old neighborhood and he socialized with Chappell and Panos as she was often with Chappell and their group. XV ROA 3700.

Benjamin Dean, who is Fred's brother, also knew Chappell as they grew up near each other in Lansing. XV ROA 3706. As children they hung out at Chappell's house because there were no adults there. They knew his grandmother's work and bingo and horse track schedule and would leave before she returned. XV ROA 3707. As teenagers they would smoke weed and sometimes drink. XV ROA 3707. Chappell started using marijuana around age 13 or 14. XV ROA 3708. Benjamin recalled that Chappell was in special education classes during elementary school. XV ROA 3708. Benjamin knew Panos and saw her with Chappell. XV ROA 3708. He did not see any problems between them. XV ROA 3709.

Charles Dean, who is a brother of Benjamin and Fred, testified that he knew Chappell from Lansing. XV ROA 3718. The neighborhood they lived in abutted the train tracks, was one of the worse off of the neighborhood areas, and was a pretty bad place to live. XV ROA 3719. Their friends and neighbors James Ford and Ivory Morrell were in Las Vegas to testify for Chappell but had to return to Michigan. XV ROA 3708, 3719.

Mira Chappell King testified that she is Chappell's younger sister. XV ROA 3710. She lived with Chappell and their siblings with their grandmother. XV ROA 3710. They had necessities but their grandmother did not give them affection or attention, kiss them, say "I love you," tuck them into bed or things like that. XV ROA 3170. Their grandmother was

rarely at home as she worked and went to the horse races and bingo. XV ROA 3711. Their neighborhood consisted of run down houses and many of the houses were empty and abandoned. XV ROA 3711. Their grandmother used extension cords and switches to discipline Chappell and his siblings. XV ROA 3711. She never had anything nice to say and always said "stupid" and "idiot." XV ROA 3712. Chappell went to special education classes and was teased by his friends because of that. XV ROA 3712. Their grandmother did not put much effort into helping Chappell and did not help the four children with their homework. XV ROA 3712. While they were growing up she did not see Chappell have any problems with being violent. XV ROA 3712. Their grandmother did not talk about their mother or explain how she was killed. XV ROA 3712.

Mira saw Chappell and Panos while they were dating in high school. XV ROA 3714. They later lived together with Chappell and Mira's grandmother. XV ROA 3714. They lived together when Chappell and Panos's oldest child was a baby. XV ROA 3715. She saw Chappell as being very loving to the baby, cooked for him, watched him and cared for him while Panos worked. XV ROA 3715.

All four siblings had problems with drugs. They all used marijuana and alcohol as teenagers. XV ROA 3714. As she was growing up she saw Chappell be argumentative, but not violent. XV ROA 3715. She also learned that their mother had been involved with drugs. XV ROA 3715.

Marabel Rosales, a defense investigator, testified that Ford and Morrell had been present in Las Vegas to testify but had to return to Michigan because of job commitments and fear that they would be fired if they did not return. XVI ROA 3767. They were both very upset and very disappointed that they could not testify. XVI ROA 3767. They would have testified that they knew Chappell as a child and as a teenager. XVI ROA 3767. They also knew Chappell when he was dating Panos. XVI ROA 3767. There was great animosity from Panos's parents because Chappell was black, so they had to sneak around to date and then Panos was kicked out of her parent's home after JP was born. XVI ROA 3768. Chappell and Panos then lived with Ford for awhile. XVI ROA 3768. Chappell was a great father to

JP, he loved his son, took care of him, made sure that he was fed and pretty much lived for his son. XVI ROA 3768. After hearing about everything that happened in Las Vegas and Tucson, they said that he was not the person they knew in Lansing. XVI ROA 3768. On cross-examination Rosales was questioned about an affidavit which Ford had signed in which he stated that Panos was very controlling of Chappell, he had heard her screaming and recalled an incident in which she referred to Chappell using "the N word." XVI ROA 3768.

Chappell gave a statement in allocution in which he expressed his remorse. XVI ROA 3769.

In its rebuttal case the State presented a reading of the prior testimony of Chappell's grandmother, Clara Axam. XVI ROA 3771. She testified that Chappell's mother was killed in a car accident when he was two years old and that he had a hard reaction to her death. XVI ROA 3771. He did not talk for a year or more after her death. XVI ROA 3771. Chappell treated his grandmother well as a child and was not violent, but was slow and did not understand things as fast as a normal child. XVI ROA 3771. He was sent to special education classes in fifth grade and stayed there until high school. XVI ROA 3771. Axam knew Panos and felt that she was a very nice lady. XVI ROA 3771. Axam believed that Chappell should be punished based upon what happened to Panos but wanted Chappell to continue to be a part of her life. XVI ROA 3772.

The State introduced a presentence investigation report (PSI) for a gross misdemeanor offense, a PSI for this case, and a prison visiting log. XVI ROA 3772. Trial counsel did not object to the admission of the two PSIs, but did object to admission of Chappell's statements that were given during the PSI interviews.[4] XVI ROA 3770. The reports include information about arrests for which Chappell was not convicted and his statement. There was no indication that Chappell was given Miranda warnings prior to his interview for the presentence investigation report, no indication that his counsel was present, and no indication

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[4]The presentence reports are included in the Record on Appeal near the end of unnumbered Volume XVIII, immediately prior to the district court's minutes.

that the statement was not required. Page 5 of the 1996 report includes a statement by Panos's mother in which she stated "The SOB does not deserve to live."

Norma Penfield, Panos's mother, then took the stand again in response to the testimony that Penfield did not like Chappell because of his race. XVI ROA 3772. She stated that she did not like Chappell because he did not support Panos or the kids and because of his actions. XVI ROA 3772.

VI. 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

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. U.S. Const. Amends. V, VIII, XIV; Nev. Const. Art. I, Secs. 3, 6, 8; Art. IV, Sec. 21.

The premeditation and deliberation instruction used at the guilt phase of Chappell's trial for first-degree murder (the Kazalyn instruction), VII ROA 1722, misstated the law and allowed the jury to issue a finding of guilt, and ultimately impose the death penalty, in an unconstitutional manner.[5] The concept of "instantaneous" premeditation creates a reasonable

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[5]This issue is properly presented in this appeal as Chappell is on direct appeal and does not yet have a final judgment. See 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) (citing Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987)); Doyle v. State, 116 Nev. 148, 157, 995 P.2d 465, 471 (2000) (same); Berman v. U.S., 302 U.S. 211, 212 (1937) ("Final judgment in a criminal case means sentence. The sentence is the judgment"). See also 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

likelihood of convictions and sentences for first-degree murder without any rational basis for distinguishing it from second degree murder. See NRS 200.030; State v. Thompson, 65 P.3d 420, 425-29 (Ariz. 2003) (defining premeditation simply as "instantaneous" constitutes due process violation). The definition of first-degree murder is contrary to the statutory definition of first degree murder because it fails to include both the elements of "premeditation and deliberation" contained in NRS 200.030(1); Byford, 116 Nev. 215, 994 P.2d at 712-13; cf. Laird v. Horn, 414 F.3d 419, 425-28 (3rd Cir. 2005) (due process violation from jury instruction omitting intent element of offense).

This Court has held that Byford is not a constitutional ruling and is not to be given retroactive application. Garner, 116 Nev. at 782, 6 P.3d at 1025. This Court's holding in Garner, however, should be reconsidered in light of the recent decision of the Ninth Circuit Court of Appeals in Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007). In Polk, the Ninth Circuit held that this Court's holdings in Byford and Garner, that no constitutional violations occurred due to the use of the Kazalyn instruction, was contrary to clearly established federal constitutional law as determined by the United States Supreme Court. Polk, 503 F.3d at 909-11 (citing Sandstrom v. Montana, 442 U.S. 510, 521 (1979); Francis v. Franklin, 471 U.S. 307, 326 (1985); In re Winship, 397 U.S. 858 (1970)). If Garner is not overruled by this Court, defendants will have no choice but to pursue their federal constitutional claims in federal court, where they will obtain relief from their judgments upon a showing of prejudice. This process will result in unnecessary delay and expense, will deprive this Court of the opportunity to make the first assessment of prejudice, and will greatly delay the time for retrials. Accordingly, reconsideration is warranted.[6]

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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)).

[6]Chappell recognizes that this Court found this issue to be without merit during the post-conviction appeal. XI ROA 2790. Reconsideration is warranted, however, based upon the Ninth Circuit's subsequent decision in Polk and because it would be a fundamental

Reconsideration is also warranted because this Court's holdings in Byford and Garner that constitutional rights were not implicated by the Kazalyn instruction were erroneous. A ruling that a definition confuses the distinction between first degree, capital-eligible murder, and second degree murder, is necessarily a ruling that implicates the federal constitutional guarantees cited. Consequently, the State is given virtually unlimited discretion in charging because there is no way to distinguish between first and second degree murder, Byford, 994 P.2d at 713, and it is also likely that the jury will arbitrarily convict similarly situated defendants for first-degree murder and impose the death penalty in violation of the equal protection guarantee of the constitution.

Chappell was prejudiced by the use of the Kazalyn instruction. The record reflects that Chappell, a man with a low IQ and substantial mental or personality disabilities, killed his long time girlfriend, who was the mother of their three children, during the heat of an argument over a letter to her from another man that Chappell discovered shortly before she was killed. IV ROA. 892-94; VI ROA. 1403-05, 1546. He used a common kitchen knife that was found in their home and did not bring a weapon with him. 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.

The State was relieved of its burden of proving each of the material elements of felony murder. Chappell's conviction must therefore be reversed. Sandstrom, 442 U.S. at 521; Francis, 471 U.S. at 326; In re Winship, 397 U.S. 858. Under these circumstances, the State cannot establish beyond a reasonable doubt that the unconstitutional jury instruction did not

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miscarriage of justice not to do so. See Arizona v. California, 460 U.S. 605, 618 n.8 (1983) (it is not improper to depart from the law of the case if a court believes its prior holding is "clearly erroneous and would work a manifest injustice"); Leslie v. Warden, 118 Nev. 773, 780, 59 P.3d 440, 445 (2002); Tien Fu Hsu v. County of Clark, 173 P.3d 724 (Nev. 2007).

contribute to the jury's verdict. See Chapman v. California, 386 U.S. 18 (1967); Neder v. U.S., 527 U.S. 1, 18 (1999).[7]

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

The failure of the trial court to instruct the jury on the element of felony murder violated Chappell's rights to due process, equal protection, and a reliable sentence under the state and federal constitutions.[8] U.S. Const. Amends. V, VIII, XIV; Nev. Const. Art. I, Secs. 3, 6, 8; Art. IV Sec. 21.

The State charged Chappell with felony murder based in part upon robbery, argued that he was guilty of felony murder based upon robbery, obtained an instruction on felony murder, and obtained a verdict of first degree murder which was likely premised on the robbery allegation. I ROA 38-39; VII ROA 1711, 1747-49. The felony murder theory was

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[7]It is anticipated that the State will argue that Chappell's conviction may still stand based upon a belief that the first jury may have found Chappell guilty under a theory of felony murder. The jury did not return a special verdict, so it is impossible to know the basis of the jury's decision. This 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 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).

[8]Just as the lack of proper instruction on premeditation and deliberation issue is properly before this Court, so to is this issue. Chappell is on direct appeal and does not yet have a final judgment. See Johnson, 118 Nev. at, 802 n.31, 59 P.3d at 460 n. 31; Griffith, 479 U.S. at 321 n.6 (1987); Doyle, 116 Nev. at 157, 995 P.2d at 471; Berman, 302 U.S. at 212; NRS 176.105.

Chappell recognizes that this Court found that felony murder could be premised on afterthought robbery, albeit in the context of the discussion of aggravating circumstances, on direct appeal. Chappell, 114 Nev. at 14087, 972 P.2d at 841. Consideration of this issue as it concerns the conviction for first degree murder is warranted because it would be a fundamental miscarriage of justice not to do so. See Arizona v. California, 460 U.S. at 618 n.8; Leslie, 118 Nev. at 780, 59 P.3d at 445; Tien Fu Hsu, 173 P.3d 724.

premised on the theory that (1) Chappell entered the trailer through a window with intent to commit an offense; and (2) he took Panos's car after she had been killed. I ROA 39. The jury was specifically 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. See also VII ROA 1623, 1628-29 (State's closing argument)

On direct appeal this Court considered this issue in the context of reviewing the aggravating circumstance of the felony murder robbery. Chappell, 114 Nev. at 1408, P.2d at 841. It rejected Chappell's argument that the aggravating circumstance was invalid because the evidence showed that Chappell took the car as an afterthought and found that "it is irrelevant when the intent to steal the property is formed." Id. This theory, however, was soundly rejected in Nay v. State, 167 P.3d 430 (Nev. 2007) as Chappell was essentially overruled on this point. In Nay, this Court found that "[r]obbery does not support felony murder where the evidence shows that the accused kills a person and only later forms the intent to rob that person." Id. at 435.

The jury here was instructed that it could find felony murder based upon afterthought robbery and the jury returned a verdict of guilty on the charge of first degree murder. As it is impossible to know which theory the jury relied upon in reaching its verdict, Chappell's judgment of conviction cor 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

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. This Court's failure to impose a lesser sentence here violated Chappell's rights to due process, equal protection, and a reliable sentence and the state and federal constitutions. U.S. Const. Amends. V, VIII, XIV; Nev. Const. Art. I, Secs. 3, 6, 8; Art. IV Sec. 21.

Chappell was sentenced to death by the first jury. IX ROA. 2127, 2167. On direct

appeal this Court struck the aggravator based on torture or depravity of mind, but affirmed Chappell's conviction and sentence. Chappell, 114 Nev. 1403, 972 P.2d 838. On appeal from the partial grant and partial denial of his post-conviction petition for a writ of habeas corpus, he raised constitutional issues concerning his conviction and death sentence. This Court did not address all of these issues, but did reverse his death sentence based upon a finding of ineffective assistance of trial counsel. XI ROA 2783-96. This Court did not elect to set aside Chappell's death sentence and impose a sentence of imprisonment for life without the possibility of parole, as it was entitled to pursuant to NRS 177.055(3). Chappell's sentence of death is unconstitutional because NRS 177.055(3) is invalid on its face and as applied under the facts of this case.

NRS 177.055(3) grants this Court two options upon finding constitutional error in a capital case. It may a remand case for a new penalty hearing or set aside the death sentence and impose a sentence of life without the possibility of parole. This remand procedure provided this Court with complete and unfettered discretion to re-sentence Chappell to life imprisonment or to subject him to the risk of another death sentence after remand. See Johnson v. State 118 Nev. 787, 803-04, 59 P.3d 450, 461 (2002). The absence of standards and the absence of any rational narrowing of death eligibility in the statute renders NRS 177.055(3) unconstitutional.

NRS 177.055(3) allows this Court to act as a sentencer, see Sochor v. Florida, 504 U.S. 527, 539 (1992). Under Furman v. Georgia, 408 U.S. 238 (1972), a sentencing scheme in a capital case must channel the discretion of the sentencing body, comport with contemporary standards of decency and allow the sentencer to make an individualized sentencing determination. Lewis v. Jeffers, 497 U.S. 764, 774 (1990); Barclay v. Florida, 463 U.S. 939, 960 (1983). The sentencing scheme of NRS 177.055(3) fails to comport with any of Furman's constitutional principles: it does not supply any standards to channel the sentencer's discretion; its arbitrariness is offensive to contemporary standards of decency; and there are no criteria to allow the court to arrive at an individualized sentence by considering mitigators. The absence of any standards to guide the court's discretion is

exacerbated by the inherent limitations on an appellate court's ability to weigh the mitigators presented to the jury. Caldwell v. Mississippi, 472 U.S. 320, 330 (1985); Cabana v. Bullock, 474 U.S. 376, 388 n.5 (1986). This procedure also violates the Eighth Amendment's requirement of meaningful appellate review of death sentences. Clemons v. Mississippi, 494 U.S. 738, 749 (1990); Zant v. Stephens, 462 U.S. 862 875-76, 890 (1983).

NRS 177.055(3) grants this Court unfettered discretion to sentence a defendant to life imprisonment or to remand the case and allow the State to seek another death sentence. Such unfettered discretion is unconstitutional. See Harris v. Blodgett, 853 F.Supp. 1239, 1287-91 (W.D. Wash. 1994); Ortega-Rodriguez v. U.S., 507 U.S. 234, 246-49 (1993); NAACP v. Alabama, 357 U.S. 449, 456-58 (1958). The failure to channel the Court's discretion violates the Eighth Amendment because it may literally mean the difference between life and death. Chappell's sentence of death is unconstitutional because NRS 177.055(3) is unconstitutional.

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

Chappell's 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. U.S. Const. amend. V, VI, VIII, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

Chappell contended that the Committee should review the prosecution's original 1995 decision to seek the death penalty because three of the four original aggravating circumstances were no longer applicable and because Chappell had adjusted well to prison and had not been subject to disciplinary actions during his decade of incarceration. XII ROA 2821. Despite the fact that over a decade had lapsed since Chappell was initially charged with death penalty, 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)). The district court denied Chappell's motion. XII ROA 2905, 3015; XV ROA 3837.

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 relied upon the Separation of Powers doctrine in arguing that it should not have been required to submit this matter to further review by its Committee. XII ROA 2885. A prosecutor's discretion, however, is subject to constitutional constraints. U.S. v. Armstrong, 517 U.S. 456, 464 (1996) (citing U.S. v. Batchelder, 442 U.S. 114, 125 (1979)). The Due Process Clause of the federal constitution prohibits a prosecutorial decision that is based on "'an unjustifiable standard such as race, religion, or other arbitrary classification[.]'" Id. (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)). Chappell respectfully 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.[9]

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

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. U.S. Const. Amends. VI, VIII,

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[9]The State's reliance on Schoels was misplaced. First, the State cited to a concurring opinion of one justice without noting that limitation in its opposition. See Schoels, 114 Nev. at 990-91, P.2d at 741-42 (concurring opinion of Justice Shearing). In addition, the Schoels court did not address the issue of whether the State is required to reconsider its decision to seek the death penalty upon reversal of a sentence of death.

XIV; Nev. Const. Art. I, Secs. 3, 6, 8.

The district court erred, and violated Chappell's constitutional rights, by failing to grant a challenge for cause of prospective juror Bundren. The following exchange makes it clear that the potential juror would not consider sentences of life with or without the possibility of parole:

MS. WECKERLY [The Prosecuting Attorney]: You think you'd automatically pick out a punishment without hearing the information?

PROSPECTIVE JUROR [Ms. Bundren]: I think I would.

MS. WECKERLY: And I take it, it didn't matter what the judge's instructions would be, you (sic) do it anyway?

PROSPECTIVE JUROR: I'd do what I thought was right.

MS. WECKERLY: So there is no way you could see yourself looking at all four punishments in this situation?

PROSPECTIVE JUROR: I don't think so. I can't say positive, but I don't think so.

MS. WECKERLY: That's sort of the question.

PROSPECTIVE JUROR: I really don't think so. I quite honestly cannot see how I could not punishment (sic) somebody that committed a murder.

MS. WECKERLY: You understand that not all murders are eligible for the death penalty?

PROSPECTIVE JUROR: I'm not familiar with things like that. I was just, off the questionnaire it said he used a weapon, things like that. And he murdered her, so that's what I would be going by.

MS. WECKERLY: And there are people that commit first degree murder with a weapon that are not eligible, legally, for the death penalty. Is that something you could accept?

PH: I would have to, if it's not an option.

MS. WECKERLY: Okay. So in that type of situation, you're saying you'd follow the law?

PROSPECTIVE JUROR: I can follow the law, sure.

MS. WECKERLY: And the law also tells you in and (sic) penalty hearing or this type of situation that you have to at least consider -- not telling you what weight you have to give certain pieces of information -- but you have to at least listen to information that's presented in a hearing like this. Would you be able to do that?

PROSPECTIVE JUROR: I could always listen.

MS. WECKERLY: After that, of course, the decision is left to you and your fellow jurors. I assume you can make a decision at that point?

PROSPECTIVE JUROR: I could.

MS. WECKERLY: Thank you, ma'am. Pass for cause, your Honor.

THE COURT: Mr. Patrick.

MR. PATRICK: Ms. Bundren, Ms. Weckerly asked you, you said you would automatically pick a penalty.

JP: I would automatically pick a penalty -- just off the questionnaire.

MR. PATRICK: What penalty would you automatically pick?

PROSPECTIVE JUROR: Death.

MR. PATRICK: In your questionnaire you said you've always thought this way about the death penalty?

PROSPECTIVE JUROR: I have.

MR. PATRICK: I think the last think you wrote on the questionnaire was that you are not open minded enough to think there's an excuse?

PROSPECTIVE JUROR: I'm very narrow minded about that.

MR. PATRICK: What you're telling us is your mind is made up?

PROSPECTIVE JUROR: It pretty much is.

MR. PATRICK: There's not much chance we'll change that, is there?

PROSPECTIVE JUROR: Not by going off the questionnaire, no.

MR. PATRICK: We'd challenge for cause, your Honor.

THE COURT: Let me ask you a question, Ms. Bundren, because a couple of times you kind of put a caveat to your statement about saying, off the questionnaire. You understand there's going to be a hearing where witnesses, evidence is going to come in. Both sides have to present whatever they want to examine the witnesses on. And that's the evidence that you're going to rely upon to make a decision, not --

PROSPECTIVE JUROR: Not the questionnaire. Right.

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

PROSPECTIVE JUROR: I could.

THE COURT: And after having listened to that evidence, is it your statement today that you would be able to consider all of the forms of punishment?

PROSPECTIVE JUROR: I could if it was different from the statement.

THE COURT: I don't know that it's different from the statement, but obviously it's more expansive. You're going to get more information about things during the penalty hearing. So I don't want to say it's going to be different. I'm just going to say that I would expect

you'll receive more information about everything involved here.

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

PROSPECTIVE JUROR: I could consider it.

THE COURT: Okay, yes or no?

PROSPECTIVE JUROR: Yes.

19 ROA 3907-09. Chappell respectfully submits that it is clear from this exchange that prospective juror Bundren would always return a sentence of death in the case of first degree murder and that she would not sincerely consider the alternative sentences of life with or without the possibility of parole. The district court erred in failing to grant the defense motion for cause. 19 ROA 3916. Ms. Bundren sat on the jury which imposed the sentence of death against Chappell. 12 ROA 3046.

Likewise, 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:

MR. PATRICK [defense counsel]: Just because somebody was on drugs, would you still be able to keep an open mind about things they had to say?

PROSPECTIVE JUROR: If you're asking if it mitigates what they do, no it doesn't. They have to control their actions and make decisions. They've got to be accountable for those decisions.

MR. PATRICK: In your questionnaire when they asked you what your feelings were about the death penalty, you put, good.

PROSPECTIVE JUROR: If the penalty meets the crime. That's what I'm trying to say, the penalty should fit the crime.

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

PROSPECTIVE JUROR: Yeah. Mitigation seems to be a broad spectrum now a days to justify a lot of things. I don't believe that mitigating circumstances for death penalty murder. I would have a hard time accepting mitigating circumstances for murder.

MR. PATRICK: So anything in a person's background or any drug activity, doesn't make any difference to you?

PROSPECTIVE JUROR: No.

MR. PATRICK: At all?

PROSPECTIVE JUROR: Not at all.

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

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

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

PROSPECTIVE JUROR: It would be difficult.

MR. PATRICK: Court's indulgence.

THE COURT: Okay.

MR. PATRICK: I'll challenge at this time.

THE COURT: Let me ask you a question, Mr. Hibbard. The question isn't so much whether you think there are mitigating circumstances for the murder that justify a crime. The question here is sentence, punishment. Are there things out their in your mind that you would be able to consider that you think would be appropriate consideration as to mitigate what sentence somebody receives?

PROSPECTIVE JUROR: I think pretty hard about the victim, not so much the person. The victim doesn't have a lot of choices left.

THE COURT: In understand. But the question in terms of how he gets punished, both sides might be able to present evidence that they think --

PROSPECTIVE JUROR: The victim didn't choose his or her punishment.

THE COURT: I realize that. Would you be able to consider things that the defense brings up that they argue in mitigation of what sentence somebody should receive, or are you saying you wouldn't consider those at all?

PROSPECTIVE JUROR: I'm saying that I think that bringing up a cover for justifying committing murder is very difficult for me to understand.

THE COURT: All right. Thank you.

19 ROA 3957-58. The court denied the challenge for cause after concluding the following:

> Well, I'm going to deny the challenge as to Mr. Hibbard. There's a difference – there's several levels of what they need to be able to do here. Number one is can they consider – do they recognize and consider all four forms of punishment. And he indicated he could.
>
> Two, will you follow the instructions of the court. He indicated he would. And will you consider all the evidence. He indicated he would. Whether somebody agrees or disagrees with whether or not they think, you know, prospectively some type of mitigation is a good or a bad thing they're going to give weight to is really kind of a little lower down because you can't tell them the evidence yet. So they're kind of having to guess, well, do I think there's mitigation for murder or not, without having heard any facts of the case.

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

19 ROA 3966. Chappell respectfully submits that it was clear from the record that prospective juror Hibbard was unwilling to consider mitigating evidence and that he was therefore not eligible to serve on the jury. The district court erred in failing to grant the defense challenge for cause of this juror.

Finally, 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. Despite his strong convictions and the clear message that he would impose the death penalty, the district court denied the defense challenge for cause. 19 ROA 3990. The district court erred in doing so.

In Wainwright v. Witt, 469 U.S. 412 (1985), the United States Supreme Court held that "the proper standard for determining when a prospective juror may be excused for cause because of his or her views on capital punishment . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Id. at 424 (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)). It is apparent from voir dire that these three jurors should have been dismissed for cause because their views would prevent or substantially impair the performance of their duties. It is well settled that the Sixth and Fourteenth Amendments guarantee a defendant on trial for his life the right to an impartial jury. Witt, 469 U.S. at 424; Irvin v. Dowd, 366 U.S. 717,

722 (1961). Because Juror Bundren actually sat on Chappell's jury, his sentence of death must be overturned. Ross v. Oklahoma, 487 U.S. 81, 85 (1988). Likewise, Chappell was prejudiced by the failure to remove Hibbard and Ramirez from the jury panel because Chappell had to use his peremptory challenges against these prospective jurors and had they been removed for cause he could have used those challenges against other prospective jurors, such as Juror Bundren. Finally, Chappell was prejudiced because the examination of these jurors took place in the presence of the other potential jurors, and by failing to remove these jurors for cause the jurors who sat on Chappell's jury received the implicit message that the views of these jurors were acceptable under the law.

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's 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. U.S. Const. Amends. V, VIII & XIV; Nev. Const. Art. I, Secs. 3, 6, 8; Art. IV, Sec. 21.

Chappell was deprived of his constitutional rights due to the admission of testimonial hearsay statements by declarants that he received no opportunity to confront or cross-examine. Out-of-court statements by witnesses that are testimonial are barred, under the Confrontation Clause, unless witnesses are unavailable and petitioner had prior opportunity to cross-examine them, regardless of whether such statements are deemed reliable by court. Considered singly and cumulatively, the introduction of inadmissible hearsay against petitioner was prejudicial. 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. These statements were introduced both as evidence of the alleged aggravating circumstance and as "other matter" or character evidence.

Chappell was also deprived of his constitutional rights due to the admission of non-testimonial hearsay statements. Chappell had no opportunity to confront or cross-examine the declarants of these statements. Moreover, much of this evidence was unreliable, highly suspect and impalpable. Substantial evidence of this nature was introduced during the second penalty phase trial. Specifically, Michele Mancha testified that Panos told her about various incidents involving Chappell, Panos's alleged plan to leave Chappell, Panos's report of calling the jail to ensure that Chappell was still in custody. XIII ROA 3089-3101. She was also permitted to testify as to Panos's reports regarding court proceedings, even though Mancha was not present at those proceedings; report that Panos had a restraining order against Chappell, even though in fact that restraining order was no longer in effect as Panos did not appear for her court appearance; and report an alleged threat to Panos by Chappell, while he was in custody, during a court proceeding for which Mancha was not present. XIII ROA 3102-05. Mike Pollard also testified as to conversations he had with Panos in which she allegedly claimed that she was leaving Chappell, that he stole items from her and their children, and that Panos repeatedly called the jail because she was concerned about Chappell's release. XIII ROA 3114-29. Pollard also claimed that Panos said that she received a telephone message from Chappell and recited the contents of that alleged message. XIII ROA 3131. Lisa Larsen also presented testimony about her conversations with Panos, including Panos's alleged plan to move before Chappell got out of custody and her alleged conversation with Chappell in court the day before she was killed. XIII ROA 3169-72. Latrona Smith testified that on the day Panos was killed, she called Smith and asked her to

call back with some kind of excuse so that she could leave the house. XIII ROA 3191-92. Clair McGuire testified about statements that Panos had to quit her job as a 911 operator in Tucson because of Chappell's criminal record and statements by Panos that Chappell had sold her furniture and their children's jackets to get money for drugs. XIII ROA 3244-45. McGuire further stated that Panos said that Chappell would rape McGuire and burn the house down so that Panos would not have a house to come home to. XIII ROA 3246. These statements were introduced both as evidence of the alleged aggravating circumstance and as "other matter" or character evidence.

Chappell was prejudiced by this highly inflammatory and inadmissible evidence. Although this evidence was highly damaging, Chappell was not able to challenge it through cross-examination of the persons making the statements.

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The United States Supreme Court has repeatedly recognized that a defendant's Sixth Amendment right to confront his accusers "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." Crawford v. Washington, 541 U.S. 36, 54 (2004). See also Salinger v. U.S., 272 U.S. 542, 548 (1926); U.S. v. Reid, 53 U.S. 361, 364-65 (1851) (overruled on other grounds by Rosen v. U.S., 245 U.S. 467, 470 (1918)). Under the common law, the rule governing testimony by deceased witnesses was clear: absent a prior opportunity for cross-examination, a deceased's statements were inadmissible. As incorporated into the Sixth Amendment, this rule recognized only two exceptions: when that testimony consisted of the "dying declaration of a party murdered," 1 Joseph Chitty, a Practical Treatise on the Criminal Law 390 (London 1819), and "when it can be proved on oath, that the witness is detained and kept back from appearing by the means and procurement of the prisoner." Geoffrey Gilbert, the Law of Evidence 125 (6th ed. London 1801); see also Crawford, 541 U.S. at 56 n.6 (dying declarations), 62 (forfeiture by wrongdoing).

A defendant's right to confront and cross-examine the witnesses against him is a central procedural safeguard whose "very mission [is] to advance the accuracy of the truth-determining process in criminal trials." Tennessee v. Street, 471 U.S. 409, 415 (1985) (citing Dutton v. Evans, 400 U.S. 74, 89 (1970)). It is "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Pointer v. Texas, 380 U.S. 400, 405 (1965).

Chappell recognizes that in Summers v. State, 148 P.3d 778, 782 (Nev. 2006), this Court held in a 4-3 decision, that hearsay testimony is admissible in a capital penalty hearing. In doing so, this Court relied upon the United States Supreme Court's 1949 decision in Williams v. New York, 337 U.S. 241 (1949). Williams, however, should no longer be deemed controlling. This was a due process case decided nearly six decades ago that has been repeatedly limited by subsequent cases. "The United States Supreme Court has not addressed this precise issue [of the application of Crawford to capital sentencing] but has given very clear indications that Williams v. New York is no longer viable. Summers, 148 P.3d at 785 (Rose C.J., joined by Maupin and Douglas, JJ., concurring in part and dissenting in part). Williams should not be given rigid adherence given the undeniable evolution of the United States Supreme Court's jurisprudence on this matter over the succeeding decades. Id. There are many strong arguments for reconsidering and limiting Williams' reach. First, when Williams was decided, the Supreme Court had not yet held that the Confrontation Clause applied to the states, thus the Court did not analyze the issue presented under the Confrontation Clause. Second, Gardner v. Florida, 430 U.S. 349 (1977), confirms that Williams has less sweeping application under the Court's post-Furman capital sentencing jurisprudence – indeed, the Eleventh Circuit has extended the Confrontation Clause to capital sentencing based on precisely this reading of Gardner. Proffitt v. Wainwright, 685 F.2d 1227, 1253-54 (11th Cir. 1982).

The precedential force of Williams, at least with respect to capital cases, cannot be evaluated outside the context of the Supreme Court's ongoing reevaluation of the Sixth Amendment in recent years. When Williams was issued, capital sentencing proceedings

looked nothing like today's proceedings. They were formally characterized as informal procedures, with extraordinary discretion, and the Supreme Court's holding was premised on the idea that there was no real distinction between capital sentencing and ordinary sentencing. Williams, 337 U.S. at 252. That premise is no longer valid. See Barefoot v. Estelle, 463 U.S. 880, 898-03 (1983) (upholding the admission of demonstrably unreliable evidence against a due process attack because of "the benefit of cross-examination" to expose the flaws in such testimony); Specht v. Patterson, 386 U.S. 605 (1967) (non-capital defendant was entitled to procedural protections, including the right of confrontation, in facing an enhanced sentence for his crime which was contingent on proof of additional facts in a separate proceeding); Bullington v. Missouri, 451 U.S. 430, 446 (1981).

Other courts recognize that Crawford applies to the eligibility phase of a capital penalty trial. See Russeau v. State, 171 S.W.3d 871 (Tex. Crim. App. 2005); State v. Bell, 603 S.E.2d 93, 115-116 (N.C. 2004); U.S. v. Jordan, 357 F.Supp.2d 880 (E.D. Va. 2005); U.S. v. Johnson, 378 F.Supp.2d 1051, 1059-62 (N.D. Iowa 2005); State v. McGill, 140 P.3d 930 (Ariz. 2006). Still other courts have found that the Confrontation Clause applies to both the eligibility and selection phases of a capital penalty trial. Proffitt, 685 F.2d at 1254-55; U.S. v. Brown, 441 F.3d 1330, 1361 (11th Cir. 2006); U.S. v. Mills, 446 F.Supp.2d 1115, 1135 (C.D. Cal. 2006); Rodgers v. State, 948 So.2d 655, 663 (Fla. 2007).

Again, Chappell recognizes that in Summers, 148 P.3d at 779, this Court held, in a 4-3 decision, that Crawford does not apply to the penalty phase of a capital trail. See also Johnson v. State, 148 P.3d 767, 773 (2006); Thomas v. State, 148 P.3d 727, 733-34 (2006). He respectfully submits that these decisions are erroneous, clearly contrary to controlling federal authority, and should be overruled. In the alternative, he presents this issue here so that it may be preserved for federal review.

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.

G. The District Court Erroneously Admitted Presentence Investigation Reports

Chappell's 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. U.S. Const. Amends. V, VIII & XIV; Nev. Const. Art. I, Secs. 3, 6, 8; Art. IV, Sec. 21.

The State introduced a presentence investigation report for a gross misdemeanor offense and a presentence investigation report for this case as evidence. XVI ROA 3772. Introduction of this evidence was plain error as such evidence is not admissible under Nevada law.

Shortly before the penalty phase trial, this Court reversed a defendant's conviction after it found that the prosecution committed plain error when it read a presentence report to the jury during the penalty phase of the defendant's trial. Herman v. State, 122 Nev. __, 128 P.3d 469 (2006). In Herman, the prosecutor read from the presentence report during the penalty phase, providing the jury with specific instances of his 17 prior arrests. Id. at __, 128 P.3d at 474-75. On appeal, this Court noted that pursuant to NRS 175.156(5), a presentence report cannot be made part of the public record. Id. at __, 128 P.3d at 474. Although the State did not submit the presentence report as a formal copy, the fact that the report was "essentially read into the record and transcribed" was "tantamount to entering it into and making it part of the public record." Id. at __, 128 P.3d at 474. This Court also noted that "[w]hile some of these arrests tend to indicate a pattern of conduct by [the defendant], ... the totality of their presentation makes the recitation substantially more prejudicial than probative." Id. at __, 128 P.3d at 475.

Chappell was prejudiced by the introduction of this evidence. The reports 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). The 1996 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. Most significantly, the 1996 report included 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). 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).

Chappell objected to the introduction of his statements on the grounds that no Miranda warnings were given prior to the time that they were obtained and it was unfair to introduce the statements under these circumstances. XVI ROA 3770. It does not appear that Chappell's counsel from his first trial was present when this statement was given and there is no indication on the statement form that it is a voluntary or elective statement, that the defendant has the right to decline writing a statement, or that he has a right to consult with counsel while writing the statement. Under these circumstances, as well as the reasons set forth in Herman, the district court erred and violated Chappell's constitutional rights by allowing these statements to be introduced at trial.

H. The District Court Allowed Improper Victim Impact Testimony

The trial court violated Chappell's state and federal constitutional rights to 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. U.S. Const. Amends. VI, VIII, XIV. Nev. Const. Art. I, Secs 6, 8; Art. IV Sec. 21.

An extraordinary amount of victim impact evidence was introduced against Chappell. As set forth in detail above, the jury heard victim impact evidence not only from Panos's mother, who testified to the impact of Panos's death upon herself, her sister Carol Monson and brother-in-law Maynard Monson, and the three children of Panos and Chappell; but also heard victim impact testimony from Panos's aunt Carol Monson (who also testified as to impact on Panos's mother and other family members), cousin, friend Michele Mancha, friend Mike Pollard, friend Lisa Larsen, friend Clair McGuire, friend Dina Richardson (who also testified as to victim impact on 40 additional people at the Tucson Police Department). XIII ROA 3107-08, 3177-78, 3248; XIV ROA 3307; XV ROA 3678-79, 3681-89. In addition, letters from Panos's cousin and aunt were read into the record and admitted as exhibits. XV ROA 3694-85. These letters referenced family gatherings at birthdays and holidays. XV ROA 3685. Chappell objected to the presentation of victim impact evidence by persons who were not family members of Panos. XIII ROA 3107-08, 3177; XV ROA 3678. The district court found that it had discretion to admit victim impact evidence from non-family members. XIII ROA 3272-73.

This victim impact evidence exceeded that for which notice was provided in the State's Notice in Evidence in Support of Aggravating Circumstances as the State only referenced victim impact evidence by Panos's mother, aunt and uncle, children and family members Al Granger, Christina Rees and Doris Wichtoski. XII ROA 3037. The State made no mention of its intention to elicit victim impact testimony from Panos's friends and co-workers. "SCR 250(4)(f) requires the State to file, no later than 15 days before trial, a notice of evidence in aggravation 'summarizing the evidence which the state intends to introduce at the penalty phase of trial . . . and identifying the witnesses, documents, or other means by which the evidence will be introduced.'" McConnell, 120 Nev. at 1071, 102 P.3d at 626. See also Mason v. State, 118 Nev. 554, 561-62, 51 P.3d 525 (2002) (finding that SCR 250(4)(f) applies to any evidence which the State intends to introduce at the penalty phase

of trial and rejecting the State's 'substantial compliance' argument). "Consistent with the constitutional requirements of due process, defendant should be notified of any and all evidence to be presented during the penalty hearing." Emmons v. State, 107 Nev. 53, 62, 807 P.2d 718, 724 (1991), 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.

Chappell's rights were further violated by the introduction of this evidence because it exceeded the limited scope of victim impact evidence allowed by Payne v. Tennessee, 501 U.S. 808 (1991). This Court recognizes that in Payne, the United States Supreme Court held "that there is no per se Eighth Amendment bar to a capital jury's consideration of a prosecutor's argument or evidence related to the victim's personal characteristics or the emotional impact of the crime on the victim's family." Kaczmarek, 120 Nev. at 338, 91 P.3d at 33. This Court has held that "the district courts have discretion to admit such evidence under NRS 175.552, so long as it does not render the proceeding fundamentally unfair." Id. (citing Floyd, 118 Nev. at 174, 42 P.3d at 261). NRS 175.552(3)[10] provides that "evidence may be presented concerning aggravating and mitigating circumstances relevant to the offense, defendant or victim and on any other matter which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible." "Nevertheless, NRS 48.035(1) remains applicable in a capital penalty proceeding and provides that even relevant evidence 'is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, or confusion of the issues or of misleading the jury.'" Floyd, 118 Nev.

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[10]In contrast, NRS 176.015 limits victim impact evidence to the direct victim, the surving spouse, parents or children of a person who was killed as a direct result of the commission of the crime, and any other relative or victim who requests in writing to be notified of the hearing. Chappell submits that it is a violation of his state and federal constitutional rights to due process of law and equal protection to limit victim impact testimony for non-capital cases while not limiting victim impact evidence in capital cases. But see Hardison v. State, 104 Nev. 530, 763 P.2d 52 (1988).

at 174-75, 42 P.3d at 261. In Floyd, this Court approved of the district court's ruling limiting victim impact witnesses to one per murder victim and prohibiting victim impact evidence from other people who were at the scene. Id. at 175, 42 P.3d at 262.

Chappell recognizes that this Court has previously permitted victim impact testimony by neighbors, co-workers, and other persons outside of the victim's family. Wesley v. State, 112 Nev. 503, 519-20, 916 P.2d 793, 804 (1996); Lane v. State, 110 Nev. 1156, 1166, 881 P.2d 1358, 1365 (1994). The testimony here, which was presented by both family and non-family members, exceeded that in Wesley and Lane and should not have been permitted. In the alternative, Wesley and Lane should be overruled as to this issue in that they permitted victim impact testimony beyond that allowed by Payne.

This evidence was unduly prejudicial to Chappell and therefore violated the due process clause. Payne, 501 U.S. at 825. As set forth in detail below, at pages 56 to 63, the State's closing argument built an entire theme around this evidence as it argued that Panos was a worthwhile person and Chappell was not. The evidence here went far beyond briefly portraying Panos's character to the jury and informing the jury of the impact of her loss, and instead became a primary focus of the penalty hearing. Chappell's sentence of death must therefore be vacated

I. The District Court Erred In Allowing Admission of Chappell's Prior Testimony

The trial court violated Chappell's 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 Chappell's testimony from his original trial. U.S. Const. Amends. VI, VIII, XIV; Nev. Const. Art. I, Secs. 6, 8; Art. IV Sec. 21.

Over Chappell's objection, the district court permitted the State to use his testimony from the first trial. XV ROA 3632. Defense counsel had argued that the testimony was the result of ineffective assistance of counsel. The district court did not hold a hearing regarding this issue or otherwise hear argument concerning the claim of ineffective assistance of counsel, but instead permitted the State to introduce this evidence. It was error to do so.

Prior testimony is not admissible if it implicates a constitutional violation during the trial in which it was obtained. Byford, 116 Nev. at 225, 994 P.2d at 707; Harrison v. U.S., 392 U.S. 219, 222 (1968); U.S. v. Pelullo, 105 F.3d 117, 125 (3d Cir. 1997). An assertion of ineffective assistance of counsel is a claim of a constitutional violation under the Sixth Amendment. See Strickland v. Washington, 466 U.S. 668 (1984). Under these circumstances, the district court should have conducted a full inquiry concerning whether the decision to testify, and preparation for testimony at the first trial, were the result of the effective assistance of counsel. Its failure to do so warrants reversal of the sentence of death.

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

The State violated Chappell's 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. U.S. Const. Amends. VI, VIII, XIV. Nev. Const. Art. I, Secs. 3, 6, 8; Art. IV, Sec. 21.

Chappell's death sentence is unconstitutional because of prosecutorial misconduct in argument at sentencing comparing his worth to that of the victim. During closing arguments of the penalty phase the prosecutors made repeated and extensive comparisons between the life of the defendant and the life of the victim in arguing that the death penalty should be imposed against Chappell:

> Debbie loved life. She loved life. She loved people, but she was afraid. She was very scared and had a lot of reason to be afraid.
>
> Look how she chose to live her life over that then years of what was a living hell with the defendant. This thing of weekly beatings by him, the pain, the concern for her children. She had every reason to want to give up. She had every reason to take it out on other people, but how did she respond to that. I don't think of all of the misery, but the beauty that still remains. A quote from a young woman that lived decades ago that suffered a lot of pain and anguish and fear for an extended period of time, as well.
>
> And yet the beauty that still remains. You know it really is a matter of perspective. It's a matter of how people pick themselves up and go on with their lives. And we've got the whole spectrum of that in this case. The whole spectrum.
>
> We have in Debbie Panos an individual who had every reason to be bitter and dysfunctional. Yet, what did we hear about her. She not only was up, she was a person that other people loved to be around. She loved people.

She worked at jobs. She worked two jobs. Sometime she worked three jobs to take care of her family, her three little children that she dearly loved.

She was enough of a giver beyond this, outside of this sphere and difficulty she had, that people liked being around her. How did they describe her. That she was giving. That she was compassionate. That she would do anything for other people.

It was just the way that Debbie was. That was how she chose to be in her life. She was even a giving person with regard to the defendant, Mr. Chappell, the person that killed her, the person that took her life. And what a difference we see there. He is the total opposite end, because he chose evil. He chose evil.

He chose, rather than to make the best of his situation, to love other people, to be kind to other people, he chose to abuse other people, to take advantage of them. He chose to only think of himself. And in the end he chose to take the life of Debbie Panos.

There are heroes in these lives that we've heard about. There are smaller heroes and there are greater heroes. We heard about a grandmother who received a call about the death of her daughter it cost her the anguish in her heart to fall to the floor and began screaming. The picked herself up, went and got her three little grandchildren and has raised them in a home of love and compassion. And what is really a great tribute to the life that Debbie led.

What an amazing difference of choices we have in this case, ladies and gentleman. Debbie loved clowns. That makes sense, doesn't it. She liked things that made her happy. She liked things that made other people happy.

We were told how she loved older people. How she loved younger people. How she adored her own children. We saw the pictures how she liked to dress up like a clown. We heard about how she liked to collect clowns. We heard about how she liked hanging out with people from work. How she liked to take her children and they would go on picnics, go the (sic) Disneyland and all the other activities she had to work so hard as a single mother to be able to provide for them. And still deal with the things that the defendant put her through over this entire time. It's just stunning, what she went through.

XVI ROA 3778-79.

We've listened to days now, from people that knew him, both sides of this, and some people in the middle of it, some people that just went out there. The police, observed it. Weren't friends of Debbie. Weren't friend (sic) of his. Other individuals that saw this think, and the way that he was acting and the way he was treating Debbie. And there was nothing, nothing redeeming about this man that came out.

We had days to present that. He's a despicable human being. We're talking about a guy that sells his baby's diapers. It's just appalling. You've got little children, they get some shoes from the shoe store. And this guy is out there taking all the children's shoes back. Their mother goes to Disneyland and gets shirts for the kids. Takes them home. The defendant takes the shirts out and sells them so he can get money form himself, take care of his needs, because he thinks he's more important and his needs should come first.

XVI ROA 3779.

Opposition is a principle that has always been with us. And a lot of times, when you really think about it, it's the decisions we make against opposition that really define us, do (sic) they. It's choices that people make

in times of difficulty. Those are the people we call heroes. Like the grandmother here, maybe both grandmothers, who stepped in a situation that was thrust upon them and stood up and did a very heroic thing for these children.

The ripple affect (sic) of the defendant's actions are just amazing. I mean, it's more than just Debbie's death and the horrible way she died. It's a horror, that she was gurgling in her own blood. There is no way to sugarcoat that. I don't care if it was 15 second (sic) of (sic) 15 minutes, it was a horror. And like her mother said on the stand or her aunt, probably the last thing she was thinking of was her children. What would she be thinking. Who is going to take care of them. I'm not going the (sic) be there to take care of them. I love them so much - the ripple effect.

XVI ROA 3781-3782.

There's nothing about this man that recommends to you mercy in this particular case. He had a mother that died at an early age. Are we prepared to immunize everybody from the death penalty that had a mother that died at an early age or didn't know their father. maybe he had a father that wasn't nice to them, or say that's enough right there, not going to get the death penalty.

Everybody has mothers. All mothers and father (sic) are different. All grandmothers, grandfathers are different. Some people have ups, some people have downs. And it's what you do with it, that makes all of the difference.

But those things do not recommend and compel mercy. We have that phone off the hook. Debbie tried to crawl or get over to that area again, maybe after she set up the plan, she didn't get all the way outside the door. The mercy the defendant gave her, the jury trial the defendant gave her, the sentence the defendant gave her, ladies and gentlemen, this is Debbie Panos' parole eligibility right here, none.

What about her family. What about her little children. Her daughter said she wanted to die so that she could be with her mother. The ripple affect (sic) in this, where is the parole for the rest of her family. They have no parole.

They can't go and visit Debbie in an institution. They can't give her presents that she could respond to. They can't have conversations with her. If you put the defendant in jail or (sic) the rest of his life, his family will still have those opportunities. We put the visitations (sic) logs in pertaining to this defendant. There's been just a few people that have come over the years to visit with him, but he has that access in the prison system. Where is that access for the family members that are left picking up the pieces of their lives.

I don't care if it's ten minutes after the crime, ten years after the crime, the enormity of what he did is no different. Nothing has changed and we saw that as these people where (sic) on the stand. We saw their anguish, even after all this time they're living with in Tucson. They keep her picture in the police department.

Some of these people held up well. Some lost it right toward the end. It's amazing after this much time this woman's life still has this kind of affect on people. Made all the worse by the fact she was so violently taken from them.

We're back to blame. We're back, hopefully, now to choice and accountability, because that's what this is about. Choices the defendant made and you're holding him accountable for those choices with the ultimate punishment here, and that is the death penalty. That is the penalty that is fair and appropriate. And anything else is selling short what he did.

> It's time to put the blame where the defendant does not want to put it, to put it back on Mr. James Chappell and nobody else. And your verdict of the death penalty, will do that. And it will be a verdict that speaks to fairness in this case, and a verdict that speaks to equality under the law, and a verdict that speaks to being balanced with the totality of what he did in wrecking and destroying so many lives, and, yet, lives so different from his, these people have been able to stand up and do everything that he didn't do, and rise above it.

XVI ROA 3786-87.

The United States Supreme Court has concluded that a prosecutor may appropriately argue, and a jury may appropriately consider, "victim impact" evidence concerning the victim's personal characteristics at a capital sentence hearing. Payne, 501 U.S. at 823. The use of victim impact evidence in this case, however, far exceeded that authorized by Payne and Chappell is therefore entitled to a new penalty hearing.

In his closing arguments, the State repeatedly emphasized the comparative worth of the lives of the Panos and Chappell. The State consistently and systematically contrasted the apparently virtuous and productive life of Panos with Chappell's allegedly worthless existence, and asked jurors to impose a death sentence on that basis.

If the State had merely used victim impact evidence to illustrate the "victim's uniqueness as an individual human being," Payne, 501 U.S. at 823 (internal quotations omitted), his actions would be beyond scrutiny. Likewise, the State could further have independently challenged Chappell's character and criminal history, and there would be no grounds for objection. The problem is that the State did not stop there. Instead, the State drew repeated comparisons between the value and worth of the victim's life and that of the defendant, an argument which was designed to secure a death sentence from the jury. The way in which Panos led her life was repeatedly contrasted with the way Chappell had led his. Likewise, the way in which Panos's family and friends led their lives was also contrasted with the way Chappell had led his. The State purposely contrasted the life of the victim with the life of the defendant in order to exhort the jury to return a death sentence on the basis of the latter's relative lack of worth.

Chappell is not challenging the fact that victim impact evidence has an important and legitimate place in capital sentencing proceedings. The United States Supreme Court in Payne v. Tennessee made it clear that "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar." Payne, 501 U.S. at 827. "A state may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." Id. Victim impact evidence, however, is limited in that it is supposed to allow the jury "a quick glimpse of the life" that a defendant "chose to extinguish"; it demonstrates the full impact of a crime, not only on the victim, but also on loved ones left behind. Id. at 822 (internal quotations omitted). While states plainly "remain free to devise new procedures and new remedies to meet felt needs," id. at 824-25, neither Payne nor any other Supreme Court case has held that victim impact evidence may be used without limit, constraint, or reference to the harm caused by the crime to those aggrieved. To the contrary, the Payne Court clearly limited the introduction and use of victim impact evidence by prohibiting victim impact evidence "that is so unduly prejudicial that it renders the trial fundamentally unfair." Id. at 825.

Of particular importance to this case, the Supreme Court has disapproved of the use of victim impact evidence to make comparative human worth arguments. The Payne Court noted the concern "that the admission of victim impact evidence permits a jury to find that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy." Id. at 823. It concluded that "[a]s a general matter . . . victim impact evidence is not offered to encourage comparative judgments of this kind -- for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not." Id. at 823. It is designed to show instead each victim's "uniqueness as an individual human being," whatever the jury might think the loss to the community resulting from his death might be. Id.

The Payne Court also set forth a framework for determining the legitimate and illegitimate uses of victim impact evidence. The Court found that "in the majority of cases

. . . victim impact evidence serves entirely legitimate purposes." Id. at 825. But it also concluded that "in the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." Id. at 825. Victim impact evidence that emphasizes the harm a murder caused the victim, his family, and his loved ones is unquestionably legitimate. However, the comparative worth argument presented in this case, calling for a death sentence based on the relative value of Panos's and Chappell's lives, falls squarely within the category of prosecutorial conduct that may be so prejudicial that it renders a trial fundamentally unfair.

Victim impact evidence must be used to further the traditional purposes of sentencing: that a sentence reflect such factors as the nature and severity of the crime, the criminal history of the defendant, the defendant's characteristics and history, and the consequences of the crime upon the unique lives of the victim and her family. To permit a sentence of death to be returned on the explicit and pointed comparative worth argument in this case pushes Payne so far that the major objective of victim impact evidence is lost, which is "informing the sentencing authority about the specific harm caused by the crime in question." Payne, 501 U.S. at 825.

The comparison between Panos and Chappell that formed the focus of closing argument was intended to tell the jury that Panos's life was put to good use, that Chappell's was not, and that Chappell should be executed based upon their comparative worth or value. Arguments of comparative worth are not authorized by Payne and constituted prosecutorial misconduct. The comparative worth argument relied on here fell within the category of factors that the United States Supreme Court has prohibited as unduly prejudicial in the death penalty sentencing context. See Johnson v. Mississippi, 486 U.S. 578, 584-85 (1988) (quoting Zant, 462 U.S. at 885) (prohibiting death penalty decisions predicated on mere caprice or on factors that are constitutionally impermissible or totally irrelevant to the sentencing process). See also California v. Brown, 479 U.S. 538, 545(1987) (O'Connor, J., concurring). The argument here was not a permissible basis under the Due Process Clause on which to condemn Chappell to death.

In addition to violating the limits of Payne, the argument here also violated the Supreme Court's decision in Caldwell, 472 U.S. at 328-41. The law requires jurors to use a certain type of analysis in making their sentencing decision. By making a comparative value argument, the State encouraged jurors to use a different analysis. Urging jurors to misapply to the law infected the penalty phase hearing with arbitrariness in violation of the Eighth Amendment, in violation of Caldwell.

The type of analysis required of a capital jury is well established and mandated by controlling authority by the United States Supreme Court as well as state statutes. Post-Furman, the Supreme Court insists that state sentencing procedures not "create a substantial risk that the death penalty will be inflicted in an arbitrary and capricious manner." Lockett v. Ohio, 438 U.S. 586, 601 (1978). State sentencing schemes must provide a meaningful way to distinguish between "the cases in which [death] is imposed from the many cases in which it is not." Id. at 601 (citing Gregg v. Georgia, 428 U.S. 153, 158 (1976)). In Nevada, jurors must determine unanimously and beyond a reasonable doubt whether aggravating circumstances exist, determine individually whether mitigating circumstances are present, and then determine unanimously and beyond a reasonable doubt that any mitigating circumstances do not outweigh the aggravating circumstances before a sentence of death may be considered. Johnson, 118 Nev. at 802-803, 59 P.3d 450; Archanian v. State, 145 P.3d 1008, 1015 (Nev. 2006). Following that determination, jurors may consider "character" evidence or "other matter" evidence in determining the sentence to be imposed. Id. The State's comparative worth argument was contrary to this firmly established scheme in that it urged the jury to sentence Chappell to death for reasons contrary to this scheme. Instead of weighing aggravating and mitigating circumstances, the jurors were instead urged to weigh the value of Chappell's life against the value of Panos's life. Although such an argument could be made in the vast majority of murder cases, it does nothing to assist the jurors in determining if the defendant is one of the "worst of the worst," or one of the few first degree murderers who should receive the death penalty. Accordingly, no narrowing function is served by such an argument. See State v. Storey, 901 S.W.2d 886, 902 (Mo.

1995). The use of victim impact evidence in this manner taints the sentencing process with arbitrariness. See 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 comparative worth argument presented by the State also influenced the jurors to improperly use mitigation evidence. The law requires jurors to give consideration to mitigating evidence. McKoy v. North Carolina, 494 U.S. 433, 444 (1990); Mills v. Maryland, 486 U.S. 367, 375 (1988); Lockett v. Ohio, 438 U.S. 586, 608 (1978). The arguments here minimized the importance of the mitigating evidence presented by Chappell and instead urged the jurors to find that Chappell should have risen above his circumstances and bettered his life, as had his victim Panos. Arguments which create the risk that jurors will misuse mitigation evidence violate Caldwell.

Other courts recognize that arguments such as this are improper. See Hall, 601 S.E.2d at 341 (South Carolina court findsing that the prosecutor impermissibly compared the defendant's life to the victims' lives, the argument was emotionally inflammatory and directed the jurors to conduct an arbitrary balancing of worth, thus entitling the defendant to a new sentencing hearing); Koskovich, 776 A.2d at 182 (New Jersey court holds that the court's directive to jurors that they balance the victim's background against that of defendant was akin to asking the jury to compare the worth of each person, which is inherently prejudicial and might prompt jurors to impose the death penalty arbitrarily); State v. Muhammad, 678 A.2d 164, 179 (N.J. 1996) ("Victim impact testimony may not be used . . . as a means of weighing the worth of the defendant against the worth of the victim."); State v. Storey, 901 S.W.2d 886, 902 (Mo. 1995) (en banc) (finding ineffective assistance of counsel because of the failure to object to prosecutor's arguments: "Whose life is more important to you? Whose life has more value? The Defendant's or [the victim's]?"). See also State v. Gallion, 654 N.W.2d 446, 454 (Wis. Ct. App. 2002) (expressing a concern for the use of comparative value arguments at jury sentencing proceedings as an unconstitutional use of victim impact evidence, although there is no death penalty in this jurisdiction). See also Note Tipping the Scales: Seeking Death Through Comparative Value Arguments, 63 Wash.

& Lee L. Rev. 379 (2006).

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

The State violated Chappell's 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. U.S. Const. Amends. VI, VIII, XIV. Nev. Const. Art. I Secs. 3, 6, 8.

In addition to the comparative worth arguments that are set forth above, the prosecutors committed additional misconduct which warrants reversal of Chappell's conviction. It is well established that misconduct by a prosecuting attorney during closing arguments may be grounds for reversal. See Berger v. U.S., 295 U.S. 78 91935). The prosecuting attorneys represent a sovereign whose obligation is to govern impartially and whose interest in a particular case is not necessarily to win, but to do justice. Berger, 295 U.S. at 88. The prosecuting attorney may "prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Id. A prosecutor should not use arguments to inflame the passions or prejudices of the jury. Viereck v. U.S., 318 U.S. 236, 247-48 (1943). Although trial counsel did not object to this misconduct, this Court may consider this issue as a matter of plain error. U.S. v. Olano, 507 U.S. 725, 731 (1993); U.S. v. Leon-Reyes, 177 F.3d 816, 821 (9th Cir. 1999).

Comment on Chappell's Right To Remain Silent

The State introduced Chappell's prior testimony, including a cross-examination by the State that constituted commentary on Chappell's right to remain silent.:

Q You've had a substantial period of time to think about today, haven't you?

A Yes, sir.

Q You've known for quite awhile, haven't you, that at some point you would take the witness stand and give the jury your version of what happened?

A Yes, sir.

Q Once you had made that decision, whenever it was, you've given a lot of attention to what you would tell the jury?

A I didn't make up anything, sir.

Q I didn't say you made up anything, Mr. Chappell. Have you thought a lot about what you would tell the jury?

A No.

Q Have you thought a lot about how you would act on the witness stand?

A No, sir.

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 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

The prosecutor committed misconduct by misstating the role of mitigating circumstances, commenting on matters th at were not in evidence, and improperly minmizing the mitigating evidence that was presented:

> People aren't perfect. Systems aren't perfect. But it's time, ladies and gentlemen, for the blame to stop and for there to be accountability. Yes, the defendant had difficulties in his early life. But they're not uncommon things. A lot of people grow up humbly. A lot of people grow up without a mother or a father or some other parent. There's grandparents raising kids all over the place these days.
>
> One commentator once said, pain is inevitable, but suffering is optional. We come back to the individuals we got in this case. In light of all these circumstances, yes, pain is inevitable. Everybody is going to have pain. Everybody is going to have difficulty. But how do we address that. Do we go around blaming everybody else and doing whatever we selfishly want to do, or do we rise above it. Because it's possible to become a better person, as a consequence of pain, not just get through it. Everybody knows that. We know that.

XVI ROA 3781.

> It's probably a certain prejudice that we all sort of internalize to some degree the idea that a murder between two people who knew each other isn't that bad. It's not as bad or scary as a stranger murder. Because if a stranger had climbed through Debbie Panos' window, raped her, had beat her up, stabbed her to death and then stole her car, there wouldn't by (sic) a whole lot of commentary about marijuana houses on the street he grew up on. There wouldn't be a whole lot of commentary about, well, maybe she liked him, or maybe she wanted him back. Wouldn't we discussing that at all. We'd be discussing the violence of the act of that day. And that's what this case it about.

XVI ROA 3797.

> Now certainly the fact that he had this troubled up-bringing and he was in an environment that apparently a lot of people were doing drugs than (sic), would make his life more difficult. But it doesn't mean that he didn't have chance, after chance, after chance to address the very drug problems that the defense now asks you to give him some credit for.
>
> It doesn't erase what he did. It's just part of his background. And most of us have a background that is less than ideal. Most of us have had parents or were raised be (sic) people who didn't do a perfect job. But it doesn't diminish what we do as adults. It doesn't take away his actions.

XVI ROA 3799.

These arguments constituted misconduct. See Berger, 295 U.S. at 88 (describing the role of prosecutors as unique because they are "representative not of an ordinary party to a controversy, but a sovereignty whose obligation to govern impartially is as compelling as its

obligation to govern at all" and a prosecutor is a "servant of the law" meaning prosecutors must "refrain from improper methods calculated to produce wrongful conviction"); U.S. v. Agurs, 427 U.S. 97, 110-11 (1976) (directing prosecutors to serve the "overriding interest" of justice before consideration of its secondary interest – vigorous prosecution); Caldwell, 472 U.S. at 328-41 (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).

Defendants have a constitutional right to the presentation and consideration by the jury of any facts that may mitigate the jury's finding that death is the appropriate punishment. Lockett v. Ohio, 438 U.S. 586, 604 (1978). A Caldwell violation is established if the prosecutor argues in such a manner as to "foreclose the jury's consideration of . . . mitigating evidence" because the jurors are misled on their duty to consider this evidence. Depew v. Anderson, 311 F.3d 742, 749 (6th Cir. 2002); Buchanan v. Angelone, 522 U.S. 269, 277 (1998) (holding that a prosecutor's argument that undercut the defendant's mitigation case so significantly, and at times inaccurately, foreclosed the jury's consideration of mitigating evidence, thereby altering the jury's role assigned to it in violation of the Eighth Amendment). In addition to the Eighth Amendment Caldwell violation, the arguments here also violated Chappell's Fifth and Fourteenth Amendment rights. See Antwine v. Delo, 54 F.3d 1357, 1371 (8th Cir. 1995); Darden, 477 U.S. at 181.

"Don't Let The Defendant Fool You" Arguments

Additional misconduct was committed as the prosecutors argued 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.

Arguments that Chappell "conned" others constituted misconduct. See Cristy v. Horn, 28 F.Supp.2d 307, 318-19 (W.D. Pa. 1998) (holding that an argument that labeled the defendant as "the Great Manipulator," to whom prison was just a "revolving door," only served to inflame the jurors). See also 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.").

Justice and Mercy Arguments

The prosecutor committed misconduct in arguing that the jury should not consider mercy:

But you can make some corrections now. We can't bring Debbie back, but we can see that justice is done. We're going to talk about justice in a few minutes.

XVI ROA 3780.

So the question for you as jurors is not really do you have it in yourselves, or are you a merciful person because as jurors you are serving a different role in this case. You don't just owe James Chappell the consideration of mercy, you owe the victims and the State of Nevada a just sentence as well. It's probably tempting in this case to give life without, that seems like a realistic sentence. You probably would feel like you are not giving him any breaks at all with a life without sentence.

But you need to ask yourself, is that truly justice fo what he did over the years. What punishment reflects what he did to Debbie Panos, not just that day, but over time. What punishment reflects how he degraded her by calling her bitch and slut. What punishment compensates for breaking her nose. She had to go to work with that object on her nose after it was broken and tell her friends what happened. He humiliated her. What punishment compensates her for holding a knife to her in her own home so he could get information because he thought she was gone too long that day.

This from the person who spent his days taking her money and going and getting high for the day. What punishment accounts for all of that. What punishment is justified for taking the life of a 26-year-old young woman, a mother of three. Or how about what punishment accounts for Norma Penfield's loss the (sic) day. She lost her daughter. James Chappell brutally murdered her only child that day. What compensates her.

Has that changed for her over ten years. Does she still bear that loss, that burden ten years later. I mean, really the reality is it was easy for him after he got arrested on September 1st, '95. It was all done for him at that point. He didn't have to deal with the aftermath of the devastation he caused. He didn't have to look two little boys in the face and tell then (sic) their mother wasn't coming back. He didn't have to listen to an eight-year-old boy ask for sleeping pills. he didn't have to listen to any of that. He didn't have to listen to a four-year-old girl talk about -- asking her grandmother to sing like mom did. he didn't have to see any of his children's faces when they wanted their mother over the years when the missed her. He didn't have to arrange, at all, for Debbie Panos; (sic) body to be transported to Michigan. He was spared all of that. Those pieces were picked up by Norma Penfield.

He got to sit and worry about himself and formulate the best spin on events, the best version. And that's all he has ever done his whole life. He got to tell the doctors about his problems and his troubled childhood. It's so typical of how he spent his whole life.

He sells those children's coats and shoes, and Debbie works three jobs so they can buy more. He beat Debbie in Tucson and she decides to move to Las Vegas so they can get a fresh start. He treats Debbie badly, and she tells her own mother, well, his grandmother wasn't nice to him, she threw him out. But the problem is what he did on that day, on August 31st, is so treacherous and so selfish and so evil there's truly no fixing what he did.

XVI ROA 3802.

We've all said and you all know at this point that the punishment should fit the crime. And when you consider the decade of torment that he inflicted on this woman, the loss that he imposed on three young children, the loss that he imposed on her mother, and his attitude after the fact, there's only one

punishment and that's the death penalty.

XVI ROA 3802.

It was misconduct for the prosecutor to argue that mercy for Chappell was not an appropriate consideration. Presnell v. Zant, 959 F.2d 1524, 1529-31 (11th Cir. 1992); Peterkin v. Horn, 176 F.Supp.2d 342, 372-73 (E.D. Pa. 2001); Lesko v. Lehman, 925 F.2d 1527, 1545-46 (3d Cir. 1991) (holding unconstitutional an argument that urged jurors to settle the score between the defendant and the victims). This Court has also condemned arguments of this type. 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]."). It was also misconduct to argue that the only manner to achieve justice for Panos and her family was to impose a sentence of death against Chappell. These arguments acted to inflame the emotions and passions of the jury. Young, 470 U.S. at 9 n.7 (citing ABA Standards of Criminal Justice 4-7.8); see also ABA Standards for Criminal Justice 3-5.8 ("The prosecutor should not make arguments calculated to appeal to the prejudices of the jury); Floyd, 118 Nev. at 173, 42 P.3d at 261 ("any inclination to inject personal beliefs into arguments or to inflame the passions of the jury must be avoided. Such arguments clearly exceed the boundaries of proper prosecutorial conduct."). The prosecutor's comments here did nothing to aid the jury in determining whether the death penalty was an appropriate sentence under NRS 200.035, but instead urged the jurors to return a sentence of death as vindication, which was based upon the inflamed passions of the jury.

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's 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. U.S. Const. Amends. V, VI, VIII, XIV; Nev. Const. Art. I, Secs. 3, 6, 8; Art. IV, Sec. 21.

The United States Supreme Court held in Blakely that any fact not found in the guilt phase jury instructions which operates to increase the penalty imposed above the statutory maximum must be submitted to the jury and proven beyond a reasonable doubt. Blakely, 542 U.S. at 301-02. The factors necessary to support eligibility for the death penalty in Nevada, in addition to the conviction on all the elements of first degree murder, as (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, 145 P.3d at 1015. Those factors must be proved to and found by a jury beyond a reasonable doubt. Chappell's jury was instructed that aggravating factors must be proved beyond a reasonable doubt:

> Instruction No. 6:
>
> The State has alleged that one aggravating circumstance is present in this case.
>
> The Defendant has alleged certain mitigating circusmtances are present in this case. It shall be your duty to determine:
>
> (a) whether the aggravating circumstance is found to exist; and
>
> (b) whether a mitigating circumstance or circumstances are found to exist; and
>
> (c) based upon these findings, whether the Defendant should be sentenced to a definite term of 100 years imprisonment, life imprisonment with or without the possibility of parole or death.
>
> The jury may consider a sentence of death only if (1) the jurors unanimously find at least one aggravating circumstance has been established beyond a reasonable doubt and (2) the jurors unanimously find that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.
>
> A mitigating circumstance itself need no be agreed to unanimously; that is, any one juror can find a mitigating circumstance without the agreement of any other juror or jurors. The entire jury must agree unanimously, however, as to whether the aggravating circumstances outweigh the mitigating circumstances.
>
> Otherwise, the punishment imposed shall be imprisonment in the State Prison for a definite term of 100 years imprisonment, with eligibility for parole beginning when a minimum of 40 years has been served or life with or without the possibility of parole.

XV ROA 3747. The jury was not instructed, however, that it had to find that aggravation

was not outweighed by mitigation beyond a reasonable doubt, or by any standard at all, in order to find Chappell eligible to receive the death penalty. Id. The law is now clear, however, that every fact necessary to imposition of an increased punishment must be proved to and found by a jury beyond a reasonable doubt. Ring v. Arizona, 536 U.S. 584, 589, 609 (2002); Apprendi v. New Jersey, 530 U.S. 466, 483 (2000); Johnson, 118 Nev. at 802-803. Other states are in accord. Whitfield v. State, 107 S.W.2d 253, 259 (Mo. 2003); Woldt v. People, 64 P.3d 256, 265 (Colo. 2003). See also B. Stevenson, The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing, 54 Ala. L. Rev. 1091, 1126-27, 1129 n.214 (2003).

Chappell's sentence must therefore be reversed, because an error with respect to the burden of proof is structural, which results in reversal without any attempt to analyze prejudice. Sullivan v. Louisiana, 508 U.S. 275, 281-282 (1993). In the alternative, Chappell was prejudiced by the instruction as the jury found seven mitigating circumstances, only one aggravating circumstance, and the State cannot establish beyond a reasonable doubt that the jury would have returned a death sentenced had it been properly instructed.

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

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 U.S. Const. Amends. V, VI, VIII, XIV; Nev. Const. Art. I, Secs. 3, 6, 8; Art. IV, Sec. 21.

As noted above, one or more of the jurors found seven mitigating circumstances: Chappell suffered from substance abuse; he had no father figure in his life; he was raised in an abusive household; he was the victim of physical abuse as a child; he was born to a drug/alcohol addicted mother; he suffered from a learning disability; he was raised in a depressed housing area. XV ROA 3739-40, 3822-23. The jury did not find the mitigating circumstance that Chappell's mother was killed when he was very young, that he was the victim of mental abuse as a child, and other mitigating circumstances that were asserted to

exist by Chappell's counsel. XV ROA 3755.

As set forth above, the evidence at the penalty phase trial was uncontested as to these mitigating circumstances. This evidence was clear, credible and uncontroverted. The jury's failure to find the existence of this mitigating factor was thus clearly erroneous and renders the death sentence unreliable.

The United States Supreme Court has repeatedly recognized that evidence that a defendant suffered a difficult, abusive childhood and adolescence has significant mitigating value that must be considered by the trier of fact in determining whether a sentence of death is the appropriate punishment. Thus, in Eddings v. Oklahoma, 455 U.S. 104 (1982), the Court reversed a death sentence where the trial judge refused as a matter of law to consider evidence of the defendant's troubled childhood. The Court declared: "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.... The sentencer ... may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." Id. at 113-14. The Eddings Court also expressly recognized that evidence of a defendant's turbulent childhood has mitigating weight that may not be ignored by the sentencer. Id. at 115 (citation omitted). Similarly, in Parker v. Dugger, 498 U.S. 308 (1991), the Court reversed a death sentence on the grounds that the state supreme court had erred in concluding that the trial judge, in overriding the jury's recommendation of life, had failed to find nonstatutory mitigation. In that case, the defendant had presented the testimony of numerous witnesses indicating, inter alia, "a difficult childhood, including an abusive, alcoholic father...." Id. at 314. One factor supporting the Court's conclusion that the sentencing judge must have considered this nonstatutory mitigation was the fact that "substantial evidence, much of it uncontroverted, favoring mitigation" had been presented. Id. at 318. See also Hitchcock v. Dugger, 481 U.S. 393 (1987) (reversing death sentence where advisory jury and sentencing judge did not consider nonstatutory mitigating evidence); cf. Penry v. Lynaugh, 492 U.S. 302 (1989) (reversing sentence on grounds that Texas special issues unconstitutionally precluded

jury from full consideration of evidence of childhood abuse and mental retardation). See also Smith v. McCormick, 914 F.2d 1153, 1168 (9th Cir. 1990).

Several courts have recognized that a sentencer's failure to find mitigating circumstances that are plainly supported by the evidence is reversible error. Thus, in Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990), the Florida Supreme Court reversed a death sentence and remanded for imposition of a life sentence where the trial judge erroneously rejected mitigating evidence the reviewing court concluded demonstrated that the death sentence was disproportionate, observing:

> Where uncontroverted evidence of a mitigating circumstance has been presented, a reasonable quantum of competent proof is required before the circumstance can be said to have been established. [citation omitted] Thus, when a reasonable quantum of evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved.

Similarly, in Evans v. State, 598 N.E.2d 516, 519 (Ind. 1992), the Indiana Supreme Court set aside a death sentence and remanded for the imposition of a life sentence on the grounds that the trial court erroneously rejected several nonstatutory mitigating factors. The court observed that the sentencer's rejection of uncontroverted mitigating evidence of parental neglect, abnormal behavior, psychiatric disorder and of the defendant's immediate surrender to authorities demonstrated that "the trial court's conclusion that the death penalty is appropriate was arrived at without the required discrete and individualized consideration of the character of the offender." Id. See also Magwood v. Smith, 791 F.2d 1438, 1449-50 (11th Cir. 1986) (habeas relief granted on grounds that the trial judge's rejection of mitigating circumstances was not fairly supported by the record); Gray v. Lucas, 710 F.2d 1048, 1055 n. 5 (5th Cir. 1983) (observing that had evidence of defendant's mental illness been presented at the penalty phase, he "would most probably now be entitled to a peremptory instruction to consider a mitigating circumstance that his capacity to conform his conduct to the requirements of law was substantially impaired...."); State v. Kirkley, 302 S.E.2d 144, 158 (N.C. 1983) ("when a mitigating factor is uncontroverted the trial judge must give a peremptory instruction to the jury on that circumstance. The effect of this type of instruction

is to remove the question of whether the mitigating circumstance exists from the jury's determination and to conclusively establish the existence of that factor."); Sanders v. State, 585 A.2d 117, 134 (Del. 1990) (requiring jury instruction that a finding of "guilty but mentally ill" mitigates as a matter of law).

Just as a jury's consideration of an improper aggravating factor skews its weighing process in assessing punishment and renders the sentence unreliable under the Eighth Amendment, see Stringer v. Black, 503 U.S. 222, 232 (1992), the erroneous failure to find and weigh relevant mitigation that is supported by the evidence infects the formal process of deciding whether death is the appropriate punishment.

The failure of the jury to find clearly applicable mitigators mandates one of two findings: either (1) the jurors did not understand the jury instructions defining mitigating circumstances; or (2) the jurors did understand the instructions, but they elected to disregard the instructions and the law defining mitigation. In either event, Chappell was deprived of his rights to due process, equal protection, a reliable sentence, and right to be free from cruel and unusual punishment.

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

The State alleged, and the jury found, the aggravating circumstance of murder committed in the perpetration of a sexual assault. There was insufficient evidence, however, to support the existence of this aggravating circumstance. Accordingly, Chappell's conviction is unconstitutional. U.S. Const. Amends. V, VI, VIII, XIV; Nev. Const. Art. I, Secs. 3, 6, 8; Art. IV, Sec. 21; In re Winship, 397 U.S. 358, 361-63 (1970).

This Court holds that the prosecution has the burden of proving both "act and intent beyond a reasonable doubt and that the prosecution must establish proof of every element of the crime beyond a reasonable doubt." Chambers v. State, 113 Nev. 974, 983, 944 P.2d 805 (1997). The same reasoning applies to aggravating circumstances.

NRS 200.366(1) defines sexual assault as:

> A person who subjects another person to sexual penetration, or who forces another person to make a sexual penetration on himself or another, or on a beast, against the will of the victim or under conditions in which the

> perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct, is guilty of sexual assault.

In order to find the sexual assault aggravator, the State must prove beyond a reasonable doubt: (1) forced sexual penetration (2) upon another person (3) against the will of the victim (4) or that the victim is physically incapable of resisting or understanding the nature of his conduct. Consent is recognized as a defense to a claim of sexual assault as it negates the necessary elements of the offense. See Hardaway v. State, 112 Nev. 1208, 1211, 926 P.2d 288, 290 (1996).

Here, the State not only failed to prove any of the elements of a sexual assault, the State did not even charge Chappell with a sexual assault as an offense. The evidence presented during the second penalty hearing failed to establish, beyond a reasonable doubt, that Chappell sexually assaulted Panos. Moreover, the evidence failed to establish, beyond a reasonable doubt, that Panos was killed during the course of the alleged sexual assault.

Chappell's testimony from the first trial, which was presented by the State during the second penalty hearing, was that he had consensual intercourse with Panos prior to the circumstances that led to her death. VI ROA 1398-1400. Evidence presented during the penalty phase was consistent with his testimony. Both the coroner and the defense expert acknowledged that although Chappell's DNA was found in Panos's vagina, there was no evidence of bruising or other trauma to her vaginal area. IV App. 962-1003. 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. The evidence also revealed that Panos was aware that Chappell had been released from custody prior to the time that she returned to her trailer and that she went to her trailer alone rather than taking her friend with her. XIII ROA 3131-33. Under these circumstances, the State failed to establish beyond a reasonable doubt that Panos did not consent to sexual intercourse with Chappell. Likewise,

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's 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. U.S. Const. amend. V, VIII, XIV; Nevada Const. art. I, Sec. 3, 6 and 8; art. IV, Sec. 21.

As noted above, Chappell was charged with first degree murder under theories of premeditated and deliberate murder and felony murder. I ROA 38. The felony murder claim was based upon underlying felony offenses of robbery and burglary. I ROA 39. When the State filed its notice of its intention to seek the death penalty it included aggravating circumstances of robbery, burglary and sexual assault. I ROA 44. The original jury convicted Chappell of first degree murder but did not provide a special verdict form indicating the theory or theories upon which it based its verdict. VII ROA 1747-49. The original jury also found the existence of all three aggravating circumstances. IX ROA 2127-29. In post-conviction proceedings, however, this Court found the robbery and burglary aggravating circumstances to be invalid under McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004), reh'g denied, 107 P.3d 1287 (2005). Thus, upon remand for a new penalty hearing, the State was limited to the sexual assault aggravating circumstance. Prior to trial, Chappell's counsel argued that this aggravating circumstance was invalid and they sought its dismissal. XII ROA 2801. The district court rejected the argument and ultimately the jury returned a death sentence based upon this sole aggravating circumstance. XV ROA 3737.

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.

"The Eighth Amendment prohibits the infliction of cruel and unusual punishments." McConnell, 120 Nev. at 1063, 102 P.3d at 620 (citing U.S. Const. amend VIII). "In 1972, the Supreme Court held that capital sentencing schemes which do not adequately guide the sentencers' discretion and thus permit arbitrary and capricious imposition of the death penalty violate the Eighth and Fourteenth Amendments." Id. (citing Gregg v. Georgia, 428 U.S. 153 (1976) summarizing Furman, 408 U.S. 238). "As a result, the Court has held that to be constitutional a capital sentencing scheme 'must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" Id. at 1063, 102 P.3d at 621-22 (quoting Zant, 462 U.S. at 877). This Court has also concluded that Nevada's own constitution bans against the infliction of "cruel and unusual punishments" and the deprivation of life" without due process of law" require this same narrowing process." Id. (citing Nev. Const. art. 1 §§ 6, 8(5)).

"Nevada's current definition of felony murder is broader than the definition in 1972 when Furman v. Georgia [408 U.S. 238] temporarily ended executions in the United States." McConnell, 120 Nev. at 1066, 102 P.3d at 622. "So it is clear that Nevada's definition of felony murder does not afford constitutional narrowing." Id. "As Professor Richard Rosen points out: "At a bare minimum, then, a narrowing device must identify a more restrictive and culpable class of first degree murder defendants than the pre-Furman capital homicide case. Id. (citing Richard A. Rosen, Felony Murder and the Eighth Amendment Jurisprudence of Death, 31 B.C.L. Rev. 1103, 1124 (1990)).

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). Under 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.

Chappell's sentence of death must also be vacated because the State was permitted to divide the three felony murder aggravating circumstances by using two as the basis for felony murder and one as the basis of an aggravating circumstance. In McConnell, this Court held: "We further prohibit the State from selecting among multiple felonies that occur during 'an indivisible course of conduct having one principal criminal purpose' and using one to establish felony murder and another to support an aggravating circumstance." McConnell, 120 Nev. at 1069-70, 102 P.3d at 624-25. Although the State did not divide its aggravating circumstances in response to McConnell, as known by the fact that McConnell had not been decided at the time the State performed its division, the result is the same: the State used some felony -murder circumstances to establish felony murder and used an additional felony-murder circumstance to establish an aggravating circumstance. This result is not permitted under McConnell, so the aggravating circumstance here is invalid and must be vacated.

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

Chappell's constitutional rights to a fair trial, a fair penalty hearing, due process, confrontation, cross-examination, and his right to be free from cruel and unusual punishment were denied by the multiple occurs which occurred during his trial. U.S. Const. amend. V, VI, VIII, XIV; Nevada Const. art. I, Sec. 3, 6 and 8; art. IV, Sec. 21.

"The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." Butler v. State, 120 Nev. 879, 102 P.3d 71, 85 (2004); U.S. v. Necoechea, 986 F.2d 1273, 1282 (9th Cir. 1993) (although individual errors may not separately warrant reversal, "their cumulative effect may nevertheless be so

prejudicial as to require reversal").

Chappell submits that the majority of the errors presented here are stand alone claims with sufficient prejudice to warrant reversal. If this Court concludes that no single issue, however, warrants reversal of his conviction and sentencing of death, the cumulative effect of the multiple errors which occurred before and during the first guilt phase and second penalty hearing warrant reversal of his conviction and sentence of death on federal and state constitutional grounds.

"The Supreme Court has clearly established that the combined effect of multiple trial errors violates due process where it renders the resulting criminal trial fundamentally unfair." Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007) (citing Chambers v. Mississippi, 410 U.S. 284 (1973); Montana v. Egelhoff, 518 U.S. 37, 53 (1996)). "The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." Id. (citing Chambers, 410 U.S. at 290 n.3). "[W]here the combined effect of individually harmless errors renders a criminal defense 'far less persuasive than it might [otherwise] have been,' the resulting conviction violates due process." Id. (quoting Chambers, 410 U.S. at 294, 302, 303). Reversal here should be granted because of the cumulative errors. In making this argument, Chappell incorporates each of the claims raised in this direct appeal from the original judgment and in the appeal from the order of the district court denying relief on the guilt phase issues presented in his post-conviction petition for a writ of habeas corpus.

VII. 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 19th day of May, 2008.

JoNell Thomas
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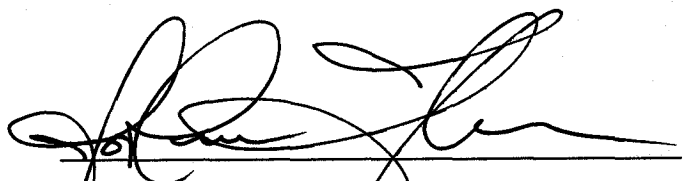
CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 19th day of May, 2008.



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CERTIFICATE OF SERVICE

I hereby certify that on the 19 day of May, 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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