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IN THE SUPREME COURT OF THE STATE OF NEVADA

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ZANE MICHAEL FLOYD,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36752

FILED

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APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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APPELLANT'S OPENING BRIEF

STATEMENT OF THE ISSUES

1. The trial court committed constitutional error in denying Defendant's motion to sever counts for trial.

2. The trial court committed constitutional error in denying Defendant's motion for a change of venue.

3. The trial court committed constitutional error in denying Defendant's motion to dismiss statutory aggravators based on a failure to find probable cause for existence of such aggravating circumstances.

4. The trial court committed constitutional error by improperly requiring Defendant to disclose expert witness test results and allowing the state to make use of that data in presenting penalty phase rebuttal evidence.

5. The trial court committed constitutional error in denying Defendant's motion to suppress Defendant's statements.

6. Prosecutorial misconduct during closing argument requires that a new trial be conducted.

. . .

. . .

7. Prosecutorial misconduct during the presentation of victim-impact testimony at the penalty hearing requires that a new penalty hearing be conducted.

STATEMENT OF THE CASE

This is an appeal from the judgment of conviction filed September 5, 2000, wherein Appellant was adjudged guilty of Count I: burglary while in possession of a firearm; Counts II - V: murder of the first degree with use of a deadly weapon; Count VI: attempt murder with use of a deadly weapon; Count VII: first degree kidnaping with use of a deadly weapon; and Counts VIII - XI: sexual assault with use of a deadly weapon; and sentenced to serve the following sentences: Count I: a maximum term of one hundred eighty (180) months in the Nevada Department of Prisons with a minimum parole eligibility of seventy-two (72) months; Counts II - V: death by lethal injection; Count VI: two consecutive maximum terms of two-hundred forty (240) months with minimum parole eligibility of ninety-six (96) months, consecutive to Count I; Count VII: two consecutive terms of life imprisonment with a minimum parole eligibility of sixty (60) months, consecutive to Count VI; Counts VIII - XI: as to each count, two consecutive terms of life imprisonment with a minimum parole eligibility of one hundred twenty (120) months, Count VIII to be served consecutive to Count VII, and the remaining counts to be served consecutive to each other (ROA, vol. 14, pp. 2732-35).

STATEMENT OF FACTS

Appellant, Zane Michael Floyd, was charged by Information and two subsequent amendments thereto, by Stewart L. Bell, District Attorney, Clark County, Nevada with the following crimes: Count I:

burglary while in possession of a firearm; Counts II - V: murder with use of a deadly weapon; Count VI: attempt murder with use of a deadly weapon; Count VII: first degree kidnaping with use of a deadly weapon; and Counts VIII - XI: sexual assault with use of a deadly weapon (ROA, vol. 1, pp. 1-6; vol. 4, pp. 842-47; vol. 5, pp. 910-13). On July 11, 2000, Appellant's jury trial began before the Honorable Jeffrey D. Sobel, District Judge in the Eighth Judicial District Court of the State of Nevada. As a result of that trial, Defendant was found guilty and sentenced as set forth above.

This case centers around the June 3, 1999 multiple shooting incident at an Albertson's supermarket in Las Vegas, and the sexual assault upon an escort service employee earlier that same day. The evidence adduced at trial was as follows:

Ricky Workman, criminalistics bureau supervisor for the Henderson Police Department, testified that he responded to the Albertson's scene on June 3rd (ROA, vol. 8, p. 1407). Upon entering the store, he observed Thomas Darnell lying face down with a shotgun wound to the back. There was a multi-colored robe on the floor near the entrance. Farther to the north, Chuck Leos was lying face up in the center of an aisle, with two separate wounds. An expended shotgun shell was recovered from that area. Moving even further to the north, Workman observed Dennis Sargent lying on his side, with an expended 12-gauge shotgun shell near his feet. Sargent had sustained a shotgun wound to the center of the chest (ROA, vol. 8, pp. 1412 & 1414). In the party tray preparation area, victim Luci Tarantino was located on the floor (ROA, vol. 8, pp. 1416-17). In all, eighteen shotgun rounds or casings were recovered. This left one expended shotgun shell that could not be accounted for (ROA,

vol. 8, pp. 1420-22). Of these, Workman recovered eight expended shell casings and removed seven live rounds from the shotgun (ROA, vol. 8, p. 1409).

Detective David Mesinar of the Las Vegas Metropolitan Police Department testified that a "multiplex" videotape was recovered from the store's surveillance system, containing images recorded from seven cameras placed throughout the store (ROA, vol. 8, p. 1428). A review of this tape showed that five minutes passed between Defendant's entry and ultimate exit from the grocery store. The video recording included images of one of the employees being shot, of Defendant reaching into his pocket and apparently reloading the shotgun, and of Floyd leaving the store just prior to surrendering to officers (ROA, vol. 8, pp. 1432-33 & 1447). Other than the five shooting victims, there were at least twenty-four other people present in the store at the time of the incident. Describing the location of these individuals, the witness testified:

> Seven of them were able to run out of the store. One was, I believe her name is Ms. Goldsworthy was up on the office making the 911 call; two were hiding in a semi-trailer that was parked backed up to the loading dock at the back of the store and milk delivery vehicle.
> . . . .
> One was hiding in the dairy cooler; two were hiding in a bakery freezer, a bakery cooler; five were in a produce cooler; four were in an air-conditioning compressor room upstairs above the grocery freezer, and there were two hiding in the beer cooler. (ROA, vol. 8, p. 1435).

Christine Goldsworthy, the store bookkeeper, testified that she was in the upstairs portion of the store when she heard a loud bang which scared her. Looking down onto the sales floor through the window, she saw two customers running, and then saw Defendant Floyd running through checkstand seven and aisle seven

firing the shotgun. He was dressed in black pants, an army fatigue jacket and was bald. She ran into the manager's office and called 911. Ms. Goldsworthy also testified to having identified Defendant in a line-up (ROA, vol. 8, pp. 1455-57).

Police dispatcher Samantha Cooper testified that the first 911 call on the shootings was received at 5:16 a.m. and that Zane Floyd was taken into custody at 5:30 a.m. (ROA, vol. 9, pp. 1759-60).

Produce manager Steven Johnson was one of those who hid in the produce cooler after hearing what he concluded were several gunshots. He testified that while in the cooler, he heard the following:

> Then seconds after I ducked down behind [milk crates] I heard a gentleman say something like how are you, or what's going on this morning, or something like that, something very cordial. And then I heard a women's voice, which at that time at that moment I realized Luci was still back here, Luci Tarantino, and then a gun fired, just seconds later, not even that. (ROA, vol. 8, p. 1465).

Johnson never saw the shooter (ROA, vol. 8, p. 1468).

Mark Schmitt, the store meat manager, testified that he and three others hid in the air conditioning compressor room after having been alerted by a customer. He was the last of the four to climb up into the compressor room, and as he did so he saw the gunman walking by below. He later identified the man in a lineup, and made an in-court identification of Defendant as the person he had picked out of the lineup (ROA, vol. 8, pp. 1482-83).

Linda Torres, the bakery manager, hid in the bakery cooler after hearing several bangs. She saw a bald white male, wearing a

. . .

camouflage jacket and carrying a shotgun, chase another man. She did not see the gunman's face (ROA, vol. 8, pp. 1494, 1496 & 1499).

Kelly Pearce, a clerk at the service deli, identified Defendant as the person wearing the camouflage jacket, explaining that she had seen him twice - once when he came through the checkstands and a second time in the produce department (ROA, vol. 8, pp. 1505, 1507 & 1511).

Twenty-two year old Zachary Emenegger testified that at approximately 5:15 a.m., he was stocking shelves on the sales floor when he started hearing gunshots. As he moved, he saw Chuck Leos lying on the ground (ROA, vol. 8, pp. 1525-27). Recounting what happened thereafter, the witness explained:

> I see Zane, he comes after me with a shotgun, sort of chasing me. Right here he takes a shot and I duck and it goes ever my head. He chases me around the table, and I'm scrambling. Immediately I get shot right here.
> . . . .
> It hit me under my arm in my back. Then he stands over me and takes another shot.
> . . . .
> That shot hit me in the forearm.
> . . . .
> After that second shot he leaned over me and says, "yeah, you're dead." And then I heard him move away. (ROA, vol. 8, pp. 1529-30).

Emmenegger identified Defendant as the gunman (ROA, vol. 8, p. 1534).

Officer Andrew Tedesco was the first car on the scene in response to the shots fired dispatch at the grocery store (ROA, vol. 9, pp. 1771-73). He testified that Defendant exited the store, ran back inside, and then five to ten seconds later, again exited with the shotgun pointed at his head (ROA, vol. 9, pp. 1774-75). "He was saying to shoot him. He put the gun in his mouth. He put it at his

head. Officer Mees was talking to him, trying to get him to put the gun down." (ROA, vol. 9, p. 1776). After approximately eight minutes of Mees talking to him, Defendant put the shotgun down and was taken into custody (ROA, vol. 9, pp. 1777-78). Tedesco patted down Defendant and located four unexpended shotgun shells in his pants pocket (ROA, vol. 9, p. 1781). The witness testified that Defendant made the unsolicited remark, "I can't believe I shot those people." (ROA, vol. 9, p. 1782).

Minoru Aoki, a police department criminalist, analyzed a blood sample drawn from Defendant at 8:00 a.m. on June 3rd. The blood alcohol level in the sample was 0.09. The witness extrapolated this result to conclude that Floyd's blood alcohol level at 5:15 or 5:30 a.m. would have been .14 (ROA, vol. 8, pp. 1538 & 1540). A test for controlled substances yielded negative results (ROA, vol. 8, p. 1543).

Criminalist Torrey Johnson gave details concerning the various rounds recovered at the shooting scene. The shells included seven fired double aught buck, one number six, four live Federal double aught buck cartridges, two Federal number six live rounds and one Winchester double aught buck cartridge, in addition to the three rounds impounded by Officer Tedesco; for a total of eighteen recovered rounds (ROA, vol. 8, pp. 1586-87). The witness also opined that the shotgun recovered from Defendant fired the cartridge cases gathered at the market (ROA, vol. 8, p. 1598).

Crime scene analyst Larry Morton testified that he went to Defendant's residence at 4101 West Oakey on June 3rd, pursuant to a search warrant (ROA, vol. 9, pp. 1606-07). Items seized from the residence included a shotgun stock and receipts from the Olympic

Gardens cabaret - a $15 receipt dated June 2nd at 8:01 p.m. and an $11 receipt marked June 3rd at 12:04 a.m. Empty beer bottles were observed in the livingroom (ROA, vol. 9, pp. 1612 & 1616-17).

Twenty-one year old Tracie Rose Carter testified that on June 3rd she worked as a dancer for an outcall service called "Love Bound". (ROA, vol. 9, p. 1621). In addition to a set fee that went to her employer, she would sometimes receive tips for engaging in sexual activity with customers (ROA, vol. 9, p. 1624). Ms. Carter testified that on June 3rd she arrived at Zane Floyd's residence between 3:00 and 3:30 a.m., having been driven there by a friend. She stayed there for an hour and a half to two hours (ROA, vol. 9, p. 1629). As soon as she walked up to Floyd, he allegedly grabbed her, pushed her into the house, locking the door behind him, and held a 12-gauge shotgun on her. He ordered her to take her clothes off (ROA, vol. 9, pp. 1630-32). The witness added that when she asked Defendant why he was doing this, "[h]e tells me it's just his sick little fantasy that I happen to become a part of. He mentions this, numerous things about how he, he, he wants to know what it's like to kill." (ROA, vol. 9, p. 1634). Defendant also stated that he didn't know what was wrong with him, and that it was the military that had made him a killer (ROA, vol. 9, pp. 1696-98). The witness further explained that Floyd was angry at the military because he couldn't understand why they let him go (ROA, vol. 9, p. 1699). Subsequently, Ms. Carter removed her clothing in the bedroom (ROA, vol. 9, p. 1638). Defendant had sexual intercourse, anal intercourse and digitally penetrated her vagina. The couple also engaged in fellatio (ROA, vol. 9, pp. 1639-1646). Describing what happened just prior to her release, the witness explained:

> At the end he also,. . . he was showing me the bullets he said, you know, like this one has your name on it, you know. If you're lucky, you know, you run, run fast enough or whatnot. He's going to let me go. So, he was saying, this is at the very end. He says he has 19 bullets. He's going to kill the first, whatever people he sees then he, then take his life, (ROA, vol. 9, p. 1649).

Ms. Carter denied that either of them ingested any alcohol or drugs during the time that they were together (ROA, vol. 9, p. 1676). However, she did admit that at the time she was into using drugs and had been convicted of a drug offense in Oregon at age eighteen (ROA, vol. 9, p. 1621). She had taken methamphetamine earlier that morning and was still under the influence of the drug while at Defendant's house (ROA, vol. 9, p. 1702).

On cross-examination, the witness acknowledged that in her statement of June 6th, she had made no mention of Defendant saying that he wanted to know what it was like to kill (ROA, vol. 9, pp. 1711-12). The witness made an in-court identification of Defendant (ROA, vol. 9, pp. 1725-26).

Linda Ebbert, a registered nurse at University Medical Center, testified that shortly after midnight on June 5th, she performed a sexual assault examination on Tracie Carter, some 42 to 43 hours after the alleged assault (ROA, vol. 9, pp. 1740-41). Describing Ms. Carter's demeanor, the witness told the jury : "She was very anxious. She appeared frightened. She was a bit uncooperative at times during her examination, and she was also rather hostile." (ROA, vol. 9, p. 1740).

The nurse noted that there was no trauma to the vaginal area or orally, but that there was irritation around the entire sphincter of the rectum, including a slight tearing, which would

have been consistent with rectal penetration (ROA, vol. 9, pp. 1742-43).

Crime scene analyst, Maria Thomas, was present when a second search warrant was served at the Floyd residence on June 5th. At that time, she impounded a shirt and Vaseline bottle located underneath a bed. Videos bearing apparently pornographic titles were also removed from the residence (ROA, vol. 9, pp. 1747-51).

Dr. Gary Telgenhoff, a forensic pathologist and deputy medical examiner for the Clark County Coroner's Office, testified that he performed autopsies on the bodies of Dennis Troy Sergent and Lucille Tarantino. Mr. Sergent died as a result of penetrating gunshot wounds to the chest; and Ms. Tarantino died of a shotgun wound to the head (ROA, vol. 10, pp. 1923, 1927 & 1930).

Dr. Lary Simms performed autopsies on Chuck Leos and Thomas Darnell. Mr. Leos' cause of death was multiple gunshot wounds. Mr. Darnell died of a shotgun wound to the back (ROA, vol. 10, pp. 1935 & 1937-40).

Officer Christopher Catanese was one of the officers who arrested Defendant and placed him in the back seat of a patrol car. Once so situated, Officer Catanese took a tape recorded statement from Zane Floyd (ROA, vol. 10, pp. 1954-55). The witness noted that Defendant smelled of alcohol, but did not stagger nor slur his speech (ROA, vol. 10, p. 1958). A tape recording of the interview was played for the jury (ROA, vol. 10, p. 1963). On cross-examination, the witness acknowledged that Defendant mentioned that he had been drinking Jack Daniels; and stated, "Why did I shoot those people?" "I don't know why." (ROA, vol. 10, pp. 1966-67). At times during the interview, Officer Catanese would tell Defendant to

"relax" or "It's all right, Zane." Describing what was going on at these times, the witness recounted:

> He was at a point where he was hyperventilating. He was excitable. The adrenalin rush of being in a shooting or a catastrophic incident. He built up and built up and built up and got to a point where he was almost hyperventilating. I needed to calm him down. I didn't want him to hurt himself or go into a seizure or heart attack. (ROA, vol. 10, p. 1968).

Officer Paul Bigham conducted a seconded recorded interview with Defendant once at the Clark County Detention Center. (ROA, vol. 10, pp. 1974-75). This tape was also played for the jury (ROA, vol. 10, p. 1979).

The jury returned guilty verdicts on all counts, including four counts of first degree murder with use of a deadly weapon. A penalty hearing was subsequently convened.

Rene Sanchez, who was employed by Pacific Floral Services and inside the Albertson's store on June 3rd gave penalty hearing testimony that she is affected by the incident every day and that the image never leaves her mind. She said that she had not slept one full night since the day of the shootings, and had been put on antidepressants and high blood pressure medication (ROA, vol. 11, p. 2052). Shari Seech, an Albertson's employee, told the jury that after the incident she couldn't sleep in the dark for a long time, and that she will be at work and just begin crying thinking about it (ROA, vol. 11, p. 2059). A family member of each of the decedents also gave victim-impact testimony at the penalty hearing.

Carolyn Smith, a neighbor of the Floyd family, was called as a defense witness at the penalty hearing. She testified that she had known the Floyd's from the time they first moved to Las Vegas,

and lived by them for two or three years (ROA, vol. 11, pp. 2109-10). She added, "[m]y daughter is an only child and Zane was like a big brother to her, so they played together sometimes. When he was older sometimes he would watch her for us." (ROA, vol. 11, p. 2112). When asked if Zane had ever exhibited any violence toward her daughter, Mrs. Smith replied, "No, actually just the opposite, he was like just a big teddy bear with her." (ROA, vol. 11, p. 2115).

Jorge Abreu, a clinical social worker and psychoanalyst, testified that his employer, Alfonso Associates, had been hired by the defense to conduct a psychosocial evaluation of Defendant Zane Floyd (ROA, vol. 11, p. 2127). He noted that many of the people in Floyd's family had alcohol and substance abuse problems (ROA, vol. 11, p. 2131). His mother, Valerie Floyd used alcohol and marijuana and then moved on to LSD, reporting having done more than a hundred LSD trips. Her drug of choice was basically alcohol (ROA, vol. 11, p. 2134). It was also reported that there were many domestic violence episodes (ROA, vol. 11, p. 2135). Many details were missing from the mother's historical account of her life because by age 22 she had become so depressed that she was admitted to a psychiatric hospital in which electroconvulsive therapy was administered, resulting in the side-effect of a loss of memory (ROA, vol. 11, p. 2139). Michael Floyd married Valerie before Zane's third birthday and had adopted the boy by age four (ROA, vol. 11, p. 2142). The witness also mentioned that Zane was held back to repeat the second grade (ROA, vol. 11, p. 2146). By age thirteen, Zane continued having problems with concentration and with doing homework. There was also fighting in the home and domestic violence

(ROA, vol. 11, p. 2147). On one particular occasion, Zane witnessed Mike Floyd head-butt the boy's mother. Also, by age thirteen, Zane had seen Mike throw his mother through a wall and threaten to get the shotgun and kill her. This incident resulted in Mike Floyd's arrest (ROA, vol. 11, p. 2150). The witness also reported that by age fifteen Defendant had begun drinking, and that he was using drugs, including methamphetamines, at age sixteen (ROA, vol. 11, p. 2151). Additionally, Defendant had been expelled from public school because of suspected drug use and for fighting on a school bus (ROA, vol. 11, p. 2152).

At age seventeen, Zane enlisted in the Marine Corps. (ROA, vol. 11, p. 2153). A devastating blow in his life came at age twenty-two when he attempted to contact his biological father with the result that his father refused any contact (ROA, vol. 11, p. 2160). After having problems with alcohol in the Marine Corps., he was offered an honorable discharge, if he promised not to reenlist. In fact, he was told that he would not be able to reenlist (ROA, vol. 11, p. 2161). Zane was very frustrated with having to come home from the military and live with his parents. He had been a Marine, and should have been able to be on his own. However, because of a driving under the influence incident, he did not have a driver's license, and was quite dependent at that point. (ROA, vol. 11, p. 2162). Shortly after beginning a job at Costco, he was terminated (ROA, vol. 11, p. 2163).

The witness also referenced the following series of events: Zane learned that his best friend, Robert J. Hall, was gay and was living with a lover. Zane felt very betrayed by this. The same week he learned this, he purchased the shotgun. Zane obtained

employment as a security guard, but a discrepancy regarding pay led to the job being terminated in May of 1999. That same month, his closest cousin, Clayton Hodson, was killed. Zane's mother described him as being "intensely stricken" by this loss (ROA, vol. 11, pp. 2163-65). The psychoanalyst added that he did not get the impression that Zane was fabricating as he spoke of the above-described events (ROA, vol. 11, p. 2174).

Dr. Norton Roitman, psychiatrist, testified that Zane Floyd was referred to him by a neurologist who was treating him for attention deficit hyperactivity disorder (ROA, vol. 12, pp. 2182-83). His evaluation of Zane revealed that "in his case there was plenty to suggest learning disabilities, home trouble, a residual depression and anxiety." (ROA, vol. 12, p. 2193).

Laurel Lane worked with Zane at Costco. She told the jury that everyone loved working with him (ROA, vol. 12, pp. 2213-14). Floyd had never talked to her about any violent-type fantasies, and she never saw him act violently toward others (ROA, vol. 12, p. 2219). During the first three months of 1999, when she would pick him up for work, Ms. Lane noticed that Zane "would look really bad" and suspected that he had been doing a lot of drugs (ROA, vol. 12, pp. 2215-17). When she saw him on television after the Albertson's incident, she did not recognize him. The next day, she visited him in jail. "He was just like a zombie. . .he was just in like total shock." She further described him as being nonresponsive and out of it. "It was really scary. It wasn't even him." (ROA, vol. 12, pp. 2218-20).

Brian Miller was in the Marine Corps. with Zane. The two served together as instructors in combat skills training school

(ROA, vol. 12, p. 2227). He described Zane as being good at teaching the students, and as being happy, having a good sense of humor (ROA, vol. 12, pp. 2230-31). He added that the two of them would drink a lot together, starting on Friday and continuing all day Saturday (ROA, vol. 12, p. 2232). Miller offered the following insights into Defendant's character:

> We always said if we kept Zane in the field, he would be a perfect Marine. . .[H]e didn't do well when he was on his own. Like out at the barracks or out in the town, he just didn't do well.

When he was acting as one of those in charge of students, he would take the responsibility and do a good job (ROA, vol. 12, p. 2236).

Robert Hall met Zane when he was eleven or twelve years old. The two attended junior high school together for six months, but maintained their friendship even after Hall had moved away. While in the same school, they would walk home together. They spent a lot of time at Zane's house (ROA, vol. 12, pp. 2252-2255). "[W]e hung out and played basketball." (ROA, vol. 12, p. 2253). Hall recounted that the two of them started doing drugs at age fifteen or sixteen, smoking a lot of marijuana and using a lot of methamphetamine (ROA, vol. 12, p. 2256). With alcohol available at Mike and Valerie Floyd's house, the two youths were also drinking (ROA, vol. 12, p. 2257). The witness went on to explain that he would see Valerie drunk; and that on Zane's sixteenth birthday, "a few of us got kind of plastered" participating in drinking games that Mike Floyd, Defendant's adoptive father, was in charge of conducting (ROA, vol. 12, pp. 2261-62).

When Zane returned from the Marines, he was still drinking, but was not using marijuana or methamphetamines. In

Hall's company, Zane returned to heavy use of these drugs. He would go to work, but at the same time would go for three, four or five day stints without sleep because of the drug use (ROA, vol. 12, pp. 2273-74). Floyd seemed more obsessed with firearms after his service in the Marines (ROA, vol. 12, p. 2275).

Michael Floyd, Defendant's adoptive father, testified that Zane had behavioral problems when the family lived in Colorado. He was taken out of public school and placed in a private school. Zane continued to have problems in school after the family had moved to California. According to the witness, "[h]e would blow up in class from frustration. He would scream, run sentences together." (ROA, vol. 12, p. 2287). Mr. Floyd added that Zane's mother was way over-protective of the boy, attributing this attitude to the fact that her first child had died (ROA, vol. 12, p. 2291).

Defendant hereby incorporates by reference all additional facts initially referenced in the argument portion of this brief.

ARGUMENT

I.

THE TRIAL COURT COMMITTED CONSTITUTIONAL ERROR IN DENYING DEFENDANT'S MOTION TO SEVER COUNTS FOR TRIAL.

The trial court committed constitutional error in denying Defendant's motion to sever counts, in which separate trials were sought for the two distinct criminal episodes here involved.

The Fifth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, provides that no person shall be deprived of liberty without due process of law. The Due Process Clause requires that . . . "criminal prosecutions must comport with prevailing notions of fundamental

fairness." **California v. Trombetta, 467 U.S. 479, 485 (1984).** This Court has interpreted that due process right to include "the right to a fair opportunity to defend against the State's accusations." **Brown v. State, 107 Nev. 164, 167, 807 P.2d 1379 (1991).** In the case at bar, the trial court's failure to grant Defendant's motion to sever the trial of the kidnapping and sexual assault counts from that of the unrelated murder counts, deprived Defendant of a fair opportunity to defend against the State's allegations, thereby denying him his constitutional right to a fair trial under the Due Process Clause.

NRS 173.115, allows charges to be joined in certain circumstances:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are: 1. Based on the same act or transaction; or 2. Based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

NRS 174.165(1), however, outlines limitations to joining offenses:

> If it appears that a defendant or the State of Nevada is prejudiced by a joinder of offenses or of defendants in an indictment or information, or by such joinder for trial together, the court may order an election or separate trials of the counts, grant a severance of defendants or provide whatever other relief justice requires.

In the case at bar, Defendant was prejudiced by the joinder of offenses for trial. The impact of that prejudice significantly increased since the State was seeking the death penalty in the case. Ensuring a fair jury necessitates eliminating . . .

any undue prejudice if it can be handled in some other forum, i.e. a separate trial.

The Supreme Court of California propounded the following standard for deciding whether a severance motion is appropriate:

> When a trial court considering a defendant's motion for severance of unrelated counts has determined that the evidence of the joined offenses is not "cross-admissible," it must then assess the relative strength of the evidence as to each group of severable counts and weigh the potential impact of the jury's consideration of "other crime" evidence. I.e., the court must assess the likelihood that a jury not otherwise convinced beyond a reasonable doubt of the defendant's guilt of one or more of the charged offenses might permit the knowledge of the defendant's other criminal activity to tip the balance and convict him. (Citation omitted). If the court finds a likelihood that this may occur, severance should be granted.

People v. Bean, 760 P.2d 996, 1006 (Cal. 1988).

In the instant case, there is little question that the Defendant was prejudiced in the manner contemplated by the Bean Court, as a result of the failure to sever. First, there was nothing suggestive of the fact that the offenses were "cross-admissible". These offenses were totally different actions, committed at two different locations. The sexual assault charges existed independent of the murder and burglary charges. The State did not need one incident to prove the other. Moreover, there was nothing unique about the manner in which they occurred. The Defendant was identified by store employees, was on video surveillance at the store and was stopped as he exited the store with the gun in his hand. Thus, the prosecution certainly did not need the exotic dancer, Tracie Carter, to identify the Defendant. If, however, she were needed for identification, the sexual assault . . .

counts could still be tried separately, with the witness testifying in a limited fashion.

The Nevada Supreme Court has considered severance of counts on prior occasions. One recent opinion is **Brown v. State, 114 Nev. 1118, 967 P.2d 1126 (1998)**, wherein the Nevada Supreme Court held that ex-felon in possession of a firearm charges must be severed from other counts in order to ". . . ensure fairness and avoid prejudice to the defendant."

The Nevada Supreme Court's earlier opinion in **Fairman v. State, 83 Nev.137, 425 P.2d 342 (1967)** is also noteworthy. In **Fairman**, a police informer arranged to purchase marijuana from Fairman on two occasions. On the first occasion, the informer contacted Fairman at a Las Vegas hotel. Fairman then drove the informant to a house, obtained some marijuana, then sold the marijuana to the informant for five dollars. A few days later, the identical series of events was repeated. Fairman went to trial on, and was convicted of, two counts of sale of a controlled substance. **Id.**

The **Fairman** Court held that joinder of the two offenses was inappropriate, stating that: ". . . evidence of the perpetration of distinct crimes from those for which a defendant is being tried will not be considered [by the trier of fact]." **Id. at 139** (quoting **State v. McFarlin, 41 Nev. 486, 172 P. 371 (1918)**). The Court held that Fairman's alleged drug transactions did not constitute a "common scheme or plan," (an exception to the rule) and accordingly, should not have been adjudicated together. The Court further reasoned that, although the two transactions were "similar in plan or modus operandi," they were separate and different acts which could be proven independently of one another. **Id.**

In the case at bar, we not only have two crimes that can be proven independently of one another, but also two crimes/incidents that are totally distinct and different from one another. If it is improper to try two identically perpetrated drug sale counts together, clearly the crimes alleged in this case warranted severance.

The multiple unrelated charges were replete with unfair prejudice to the Defendant. The door was opened for the jury to infer that if the Defendant committed the murders then he committed the sexual assaults or vice versa. This is exactly what **NRS 48.045** was designed to prevent. A jury hearing evidence on all of the charges, at the same time, would be hard-pressed to disregard the highly inflammatory sexual assault charges from the emotionally-charged murder counts. If admissible at all, any such "bad act" evidence should have been allowed only to rebut a defense alleging mistake, erroneous identification, etc. No such defenses were offered.

The Supreme Court of Montana has given further guidance by articulating the possible prejudice to a defendant when offenses are joined for trial:

> The first kind of prejudice results when the jury considers a person facing multiple charges to be a bad man and tends to accumulate evidence against him until it finds him guilty of something. The second type of prejudice manifests itself when proof of guilt on the first count in an information is used to convict the defendant of a second count even though the proof would be inadmissible at a separate trial on the second count. The third kind of prejudice occurs when the defendant wishes to testify on his own behalf on one charge but not on another.

State v. Campbell, 615 P.2d 190, 198 (Mont. 1980).

Defendant's case falls into the prejudicial areas noted above. The Defendant faced a jury deciding not only guilt or innocence, but also life or death. Having been forced to go to trial on the kidnaping and sexual assault charges, at the same time as the burglary and murder charges, the jury was likely prejudiced by multiple violent charges of an unrelated nature, thus causing them to see the Defendant as a "bad man" versus looking at the evidence itself. It is highly likely that this affected the jury's ability to make a fair decision in the case.

Moreover, if the jury was going to convict the Defendant of the murder counts, they would be much more likely to just throw in the "less serious" charges of sexual assault, under the **Campbell** decision's line of reasoning. (See also **Drew v. United States, 118 U.S. App. D.C. 11, 331 F.2d 85, 88 (D.C. Cir. 1964)** wherein the court acknowledges that with multiple charges, ". . . a jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find. . . .").

Based upon the trial court's constitutional error in failing to grant Defendant's motion to sever counts, the judgment of conviction must be vacated and the case remanded for conducting of a new trial.

II.

THE TRIAL COURT COMMITTED CONSTITUTIONAL ERROR IN DENYING DEFENDANT'S MOTION FOR A CHANGE OF VENUE.

Defendant filed a pre-trial motion for change of venue (ROA, vol. 1, pp. 207-241; vol. 2, pp. 447-464). The trial court committed constitutional error in denying that motion.

. . .

In addition to the police arriving at the Albertson's market scene, the news media had also been alerted to the shootings. As the Defendant exited the store, the cameras captured him on video and continued to film the entire incident from that point on. Those video clips were shown on local news stations that day and on subsequent days.

The media followed the story extensively. As of the date that Defendant's motion for change of venue was filed, approximately forty-seven news articles had appeared in local newspapers. Summaries and excerpts from these articles were included in the exhibits attached to Defendant's motion. Additionally, more than seventy-nine television news spots highlighted the case. Again, listings of these broadcasts were contained in the exhibits accompanying the motion. The news media successfully petitioned the justice court to allow a live video feed of gavel-to-gavel coverage of the preliminary hearing. After exhausting all appellate remedies, to no avail, Defendant was forced to waive the preliminary hearing in order to avoid the live feed broadcast.

Media coverage included photographs, articles on the victims of the shootings, interviews with individuals who knew the Defendant, coverage of in-court proceedings, pending motions, comments by prosecutors and defense attorneys, and interviews and analyses of counselors and psychiatrists as to "how this could have all happened."

Pursuant to **NRS 174.455**, the place of a trial may be changed ". . .on the ground that a fair and impartial trial cannot be had in the county where the indictment, information or complaint is pending." Where the defendant meets this burden of showing that

a fair and impartial trial cannot be held in the county, the defendant is entitled to a change of venue. See, **Hale & Norcorss Gold & Silver Mining Co. v. Bajazette & Golden Era G. & S. M. Co., 1 Nev. 322 (1865).**

> The preeminent issue in a motion seeking a transfer of trial site is whether the ambiance of the place of the forum has been so thoroughly perverted that the constitutional imperative of a fair and impartial panel of jurors has been unattainable.

Ford v. State, 102 Nev. 126, 129, 717 P.2d 27 (1986). Additionally, the trial should be moved to a location where it is clear that the jury would not be intimidated by the public furor. **State v. Millain, 3 Nev. 409 (1867).**

In **Corona v. Superior Court, 24 Cal.App.3d 872, 877-79, 101 Cal.Rptr. 411 (Cal.App.3d Dist. 1972)**, the court found that an honest juror may admit knowledge, or even a prejudgment, and find himself excluded. Other jurors will sincerely try to set aside their preconceptions and give assurances of impartiality. The Court recognized, however, that subconsciously, the jurors will be influenced by the initial impressions gained from the news media.

The message from the California courts is clear: in an age of pervasive mass communications, trial courts can no longer look to judicial admonitions as a cure to prejudicial pretrial publicity. The conclusion is also clear that, notwithstanding the usual sincere expressions by prospective jurors that they can not only sincerely "put aside" prejudgments, but affirmatively sit throughout the trial with the presumption of innocence, it is unrealistic to expect that any normal human being will be able to do that. In this case, in particular, the Defendant contends that the voluminous news articles

and television spots on this case establish the unrealistic nature of these expectations, and that an unbiased verdict, could not be reasonably expected in Clark County. Accordingly, the granting of a change of venue was required.

The fair trial right protected by the change of venue statute is a fundamental right guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by the Nevada Constitution. As a matter of constitutional law, it is well settled that the accused is entitled to a change of venue if he produces evidence of "inflammatory, prejudicial pretrial publicity that so pervades or saturates the community as to render virtually impossible a fair trial by an impartial jury drawn from that community, [since jury] `prejudice is [then] presumed and there is no further duty to establish bias.'" **Coleman v. Zant, 708 F.2d 541, 544 (11th Cir. 1983)**(quoting **Mayola v. Alabama, 623 F.2d 992, 997 (5th Cir. 1980), cert. denied, 451 U.S. 913 (1981))**.

It is equally well settled that a change of venue is constitutionally required when it is demonstrated that jurors called for the case entertain an opinion on guilt or punishment and are unable to lay aside their opinions and render a verdict based on the evidence. See **Irvin v. Dowd, 366 U.S. 717, 723, 727 (1961); Coleman v. Zant, 708 F.2d at 544; Ross v. Hopper, 716 F.2d 1528, 1541 (11th Cir. 1983), modified on other grounds, 756 F.2d 1483 (1985)(en banc), remanded on other grounds, 785 F.2d 1467 (1986)**. The Fourteenth Amendment's due process clause safeguards a defendant's Sixth Amendment right to be tried by "a panel of impartial, `indifferent' jurors." **Irvin v. Dowd, 366 U.S. at 722.** When prejudicial pretrial publicity or an inflamed community atmosphere

precludes seating an impartial jury, due process requires the trial court to grant a defendant's motion for a change of venue. **Rideau v. Louisiana, 373 U.S. 723 (1963).** Where there has been such prejudicial pretrial publicity, voir dire is not adequate to protect the accused's right to a fair trial by an impartial jury. See **Coleman v. Kemp, 778 F.2d 1487, 1542 (11th Cir. 1985).**

In the context of a death penalty case, the principle that a defendant is entitled to a fair and impartial jury takes on additional importance because of Eighth Amendment considerations. The jury not only decides the issue of the guilt or innocence of the defendant, but, if he is found guilty, will also decide whether he should live or die. **Id. at 1541; Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Gardner v. Florida, 430 U.S. 349, 357-58 (1977).**

In the case at bar, the charged crimes ignited community shock, fear and indignation. The fact that these shootings took place in an "average neighborhood", at a public place, namely a supermarket, caused the media to pay much closer attention to the event and to give much more media coverage than with other shootings. The publicity made the members of the community so aware of the alleged circumstances that an impartial jury could not be obtained.

Media coverage included front page pictures, feature stories, and in depth analyses about how service in the Marine Corps does or does not affect a person. Defendant's motion was accompanied by an exhibit showing that media polls ranked the shooting as the number five top story of the year.

. . .

Defendant argued to the trial court that the two largest Clark County newspapers, the Las Vegas Sun and the Las Vegas Review Journal, with a combined daily circulation of some 209,000 and Sunday circulation of 222,000, blanketed the area with coverage of the Zane Floyd case and related incidents and issues. As of the filing date of Defendant's motion to change venue, approximately twenty-eight articles had been printed in the Las Vegas Sun and nineteen articles appeared in the Review Journal.

The case also received massive television news coverage. In fact, media attention was so pervasive that Defendant was forced to waive his preliminary hearing in order to avoid a live, gavel-to-gavel broadcast of the preliminary hearing. Defendant's motion pointed out that more than seventy-nine news stories had been aired locally; and at least one news channel, Channel 1, included the Defendant walking in the store parking lot on their nightly promotional spots.

The overwhelming impact of the media coverage was well illustrated in a jury questionnaire for an unrelated death penalty trial in 1999, the year before the trial in the case at bar. That potential jury was asked to comment on the death penalty. One prospective juror wrote: "They say it's not a deterrent but I believe it is necessary but I don't think I could recommend it unless it was beyond a shadow of a doubt, i.e. Albertsons supermarket shooting." (ROA, vol. 1, p 236).

It is obvious that the pretrial publicity in this case was prejudicial. Such unfair prejudice could not be cured during voir dire to such an extent that the Defendant could be guaranteed his constitutional entitlement to trial before a fair and impartial

jury, to confrontation of witnesses, and to a jury selected from a fair cross-section of the community as guaranteed by the Sixth, Eighth and Fourteenth Amendments. In light of these deficiencies, the lower court committed constitutional error in denying Defendant's motion for change of venue. Based upon that error, the judgment of conviction must be vacated, and the case remanded to district court for conducting of a new trial.

III.

THE TRIAL COURT COMMITTED CONSTITUTIONAL ERROR IN DENYING DEFENDANT'S MOTION TO DISMISS STATUTORY AGGRAVATORS BASED ON A FAILURE TO FIND PROBABLE CAUSE FOR EXISTENCE OF AGGRAVATING CIRCUMSTANCES.

State and federal constitutions require the State to submit a criminal charge to a grand jury or to a neutral magistrate for a finding of probable cause. Since that was not done in the case at bar with regard to those allegations contained in the State's notice of intent to seek the death penalty, that notice of intent should have been dismissed or stricken. The trial court committed constitutional error in denying Defendant's motion to strike the notice of intent to seek the death penalty.

On June 25, 1999, the State filed in open court an Amended Criminal Complaint charging Defendant with twelve felonies, including four counts of murder with use of a deadly weapon..

No allegation was made in the criminal complaint filed in justice court of any aggravating circumstances which, if supported by a finding of probable cause by a magistrate and ultimately proven beyond a reasonable doubt to a jury, could subject Defendant Floyd to a sentence of death. The defense waived the preliminary hearing in this case, and the magistrate bound Defendant over to district

court to face trial on all the charges and facts alleged in the Amended Criminal Complaint. The magistrate made no finding supporting probable cause for any allegation of aggravating circumstances.

The State subsequently filed, in district court, an Information, Amended Information, and Second Amended Information. The Second Amended Information repeated the allegations in the Amended Criminal Complaint with the exception that one count of attempted murder with use of a deadly weapon was abandoned by the State.

The State also filed in district court a Notice of Intent to Seek the Death Penalty, as mandated by **Nevada Supreme Court Rules, Rule 250.** The Notice of Intent contained allegations of aggravating circumstances which, if proven beyond a reasonable doubt, could subject Defendant to the death penalty. In the absence of the charged facts in the notice of intent, Mr. Floyd could only face a maximum penalty of life in prison without the possibility of parole.

The Fifth Amendment to the United States Constitution and Article 1, Section 8, of the Nevada Constitution provide that no person shall be held to answer to criminal charges without a finding of probable cause by a grand jury. The United States Supreme Court has endorsed a probable cause finding by a neutral magistrate by way of a preliminary hearing as a constitutionally permissible alternative to a Grand Jury Indictment. See, **Hurtado v. California, 110 U.S. 516 (1884)** (upholding California's preliminary hearing process against a due process challenge).

. . .

The preliminary hearing process in Nevada requires the State to present legal evidence that a crime occurred and that the charged Defendant committed the crime. **Thedford v. Sheriff, 86 Nev. 741, 476 P.2d 25 (1970).** If the State fails to meet that burden, the case must be dismissed. **NRS 171.206.** The purpose of requiring a probable cause finding is to ensure that a Defendant has the benefit of a pre-trial review of the sufficiency of the evidence before having to face the same charges at an actual trial. Issues can be narrowed, and charges and allegations having no basis in fact can be eliminated. The probable cause hearing process has been characterized as a "shielding function" whereby individuals are protected from vindictive prosecution by private enemies, political partisans, or vindictive government officials. **Hurtado v. California, 110 U.S. at 555 (1984)** (J. Harlan, dissenting).

In the event a criminal charge survives the probable cause scrutiny of a grand jury or neutral magistrate, and the Defendant is bound over to face a criminal charge in District Court, Nevada procedure requires the State to file an Information or Indictment containing a plain, concise, and definite written statement of the essential facts constituting the offense charged. **Sheriff v. Levinson, 95 Nev. 436, 596 P.2d 232 (1979).** In cases where the allegations go beyond alleging a simple crime, and instead allege a set of facts to which different statutes apply, the key inquiry is what facts or allegations must ultimately be proven to a jury beyond a reasonable doubt. For example, the allegation of "robbery with use of a deadly weapon" must be alleged in the charging document, and both the "robbery" and the "use of a deadly weapon" must ultimately be proven to a jury for a conviction to occur. See,

e.g., **Bartle v. Sheriff, 92 Nev. 459, 552 P.2d 1099 (1976)** (Magistrate was required to find some evidence supporting enhancement as well as underlying crime, and Information must reflect both allegations).

No Nevada statute or any interpretative opinion by the Nevada Supreme Court has ever required that "sentencing factors" be subjected to the same pre-trial scrutiny that applies to elements of a criminal offense. Indeed, when this argument has been made in the past, the Nevada Supreme Court has summarily rejected the argument that "sentencing factors" such as aggravating circumstances be subject to the same process. **Schoels v. State, 114 Nev. 981, 966 P.2d 735 (1998)** [overturned on other grounds by **Schoels v. State, 115 Nev.Adv.Op.No. 8, 975 P.2d 1275 (1999)**].

Nevada statutory law requiring allegations of "essential facts" in the Information has only been applied to the "essential facts" of the criminal offense, not to any "essential facts" regarding sentencing.

Instead, **Nevada Supreme Court Rule 250** allows the State to file the notice of intent to seek the death penalty, thereby alleging the aggravating circumstances, without any pre-trial scrutiny such as would occur, if the allegation of the aggravating circumstances were submitted to the grand jury or neutral magistrate for a finding of probable cause. This procedure not only deprives the defense of the opportunity of testing probable cause for the finding of aggravating circumstances, but also deprives the defense of the opportunity to challenge a magistrate's ruling using an actual record of testimony.

In light of recent decisions of the United States Supreme Court, Nevada's Rule 250 notice of intent procedure must be deemed

unconstitutional, as violative of the Due Process Clause of the Fifth and Fourteenth Amendments. The United States Supreme Court, in **Jones v. United States, 526 U.S. 227 (1999)**, ruled that the Due Process Clause of the Fifth Amendment and the Notice and Jury Trial provisions of the Sixth Amendment require the State to allege any fact (other than prior conviction) that increases the maximum penalty for a crime in the Indictment and that fact must then be tried before a jury and proven beyond a reasonable doubt.

The Supreme Court reiterated this holding in **Apprendi v. New Jersey, 530 U.S. 466 (2000)**. In **Apprendi**, the Court rejected any distinction between "sentencing enhancements" and "elements of the offense":

> Any possible distinction between an "element" of a felony offense and a "sentencing factor" was unknown to the practice of criminal indictment, trial by jury, and judgment by court-as it existed during the years surrounding our Nation's founding. As a general rule, criminal proceedings were submitted to a jury after being initiated by an indictment containing "all the facts and circumstances which constitute the offense,...stated with such certainty and precision, that the defendant...may be enable to determine the species of offence they constitute, in order that he may prepare his defense accordingly . . . and that there may be no doubt as to the judgment which should be given, if the defendant is convicted. [authority omitted]. The defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime..."

530 U.S. at 478.

Under **Apprendi** and **Jones**, the State must charge aggravating circumstances in the criminal complaint or proposed Indictment so there can be no doubt "as to the judgment which should be given, if the defendant is convicted."

In the present case, it is undisputed that the State did not allege aggravating circumstances in the complaint submitted to the justice court. It is also undisputed that the magistrate bound over the case to district court without any finding of aggravating circumstances. Under **Apprendi** and **Jones**, the State's notice of intent was a fugitive document and should have been dismissed, leaving the State with the charges that were subjected to a finding of probable cause, that being those charges contained in the Second Amended Information.

Relying on the legal charges in the Second Amended Information, which is devoid of any allegations of aggravating circumstances, the defense submits that this case was not one which allowed for jury consideration of the death penalty, there being no probable cause finding of any aggravating circumstances.

The trial court committed constitutional error in allowing the penalty-hearing jury to consider the death penalty as a possible sentence. And the death penalty having been imposed by the jury, the judgment of conviction must be reversed and the case remanded for conducting of a new penalty hearing.

IV.

THE TRIAL COURT COMMITTED CONSTITUTIONAL ERROR BY IMPROPERLY REQUIRING DEFENDANT TO DISCLOSE EXPERT WITNESS TEST RESULTS AND ALLOWING THE STATE TO MAKE USE OF THAT DATA IN PRESENTING PENALTY PHASE REBUTTAL EVIDENCE.

Defendant originally filed a notice of expert witnesses, pursuant to **NRS 174.234(2)**, which included the names of two psychiatrists/psychologists (ROA, vol. 4, p. 778). Based upon this notice, the State filed a motion to compel independent psychological/psychiatric examination of Defendant and requested

reciprocal discovery of the defense experts' reports (ROA, vol. 1, p. 88). Over defense counsel's objection, the district court ordered reciprocal discovery (ROA, vol. 4, p. 823). The trial court also ordered independent examination of Defendant by psychologist Louis Mortillaro and psychiatrist Thomas Bittker (ROA, vol. 4, pp. 880 & 882). Defendant subsequently filed a supplemental notice of expert witness, naming neuropsychologist David L. Schmidt. This notice was filed on June 13, 2000 (ROA, vol. 4, p. 863). Dr. Schmidt administered some standardized psychological tests to Defendant Floyd. Again, over defense counsel's objection, the trial court ordered that Schmidt's report concerning his examination of Defendant be provided to the State (ROA, vol. 4, p. 873). Pursuant to this order, the report and testing materials were delivered to the prosecution.

Note must be taken that Defendant did not pursue an insanity defense at trial; and did not call Dr. Schmidt as a defense witness. Not only was the forensic psychologist not called during Defendant's case-in-chief, but he was not called as a rebuttal witness nor during the penalty phase of trial. Indeed, prior to trial defense counsel unendorsed Dr. Schmidt as an expert witness. This occurred some two weeks after his report had been delivered to the State pursuant to the lower court's reciprocal discovery order.

Dr. Schmidt never was called by either party as a trial witness. During the penalty phase, the defense called psychologist Edward Dougherty to testify. In rebuttal, the State called Dr. Mortillaro to testify concerning his examination of Defendant and the conclusions he had reached. The State's expert used the standardized tests administered by Schmidt as part of the materials

that he reviewed. He also based his conclusions, in part, upon this testing; and, explained the testing in his penalty phase rebuttal testimony. All of this testimony was given over defense counsel's objection. The district court reviewed the issue prior to Dr. Mortillaro testifying and specifically approved reliance upon and reference to the Schmidt-administered tests. In so ruling, the trial court committed constitutional error, depriving Defendant of his Fifth and Fourteenth Amendment right to a fair trial, and specifically contravening Nevada statutory authority.

The genesis of the problem lies in the lower court's March 9, 2000 ruling that **NRS 174.234(2)** required disclosure of defense experts' reports, regardless of whether that expert would be testifying in defendant's case-in-chief, as a rebuttal witness, or even at the penalty hearing. This interpretation, and the court's resultant orders, are completely inconsistent with the law as set forth in **NRS 174.234(2)**. The trial court completely mis-read and mis-applied the statute, rendering entirely to broad an interpretation of its applicable scope. **NRS 174.234(2)** reads as follows:

> If the defendant will be tried for one or more offenses that are punishable as a gross misdemeanor or felony and a witness that a party intends to call during the case in chief of the state or ***during the case in chief of the defendant*** is expected to offer testimony as an expert witness, the party who intends to call that witness shall file and serve upon the opposing party, not less than 21 days before trial or at such other time as the court directs, a written notice containing:
>
> (a) A brief statement regarding the subject matter on which the expert witness is expected to testify and the substance of his testimony;
>
> (b) A copy of the curriculum vitae of the expert witness; and
>
> (c) A copy of all reports made by or at

the direction of the expert witness. (Emphasis added).

The statute says nothing of witnesses who the defense intends to call on rebuttal or at the penalty hearing, instead making a very specific and limited reference to "case-in-chief" witnesses. Nevertheless, the trial court disregarded and completely contravened the statutory language, with its improper order. The trial judge's intent is readily apparent in the following quote from the district court proceedings on March 9, 2000:

> THE COURT: Okay. By the 18th of April, you write these people, say you want at least a report giving everything that they have. That's about six weeks from now, that you're going to have to turn it over to the State. I'm going to order at that time if you have any intention at all of putting this person on or any other persons having to do with his mental status at either the case-in-chief or the rebuttal, I'm going to, probably, at that time, order an independent psychiatric.
>
> If you want to address - either one of you - through further authorities before that date by at least two days so I can read it, the proposition of whether I have authority to do it, I'll be glad to read it.
>
> MR. BROWN: You had indicated "case-in-chief," or "rebuttal." Were you meaning penalty?
>
> THE COURT: Right.
>
> MR. BROWN: Okay.
>
> THE COURT: Okay, so we'll see you on April the?
>
> THE CLERK: 18th.
>
> THE COURT: Thank you.
>
> MR. KOOT: Is the Court ordering them to produce everything?
>
> THE COURT: Yes. (ROA, vol. 4, p. 821).

The court's written Order of June 15, 2000 specifically mandated that, "Dr. Schmidt shall have a written report completed on or before Thursday, June 15, 2000, a copy of which shall be provided, before the close of business on June 15, 2000, to District Attorney Stewart L. Bell and/or Chief Deputy District Attorney

William Koot, along with all back up and testing materials." (ROA, vol. 4, pp. 873-74). Although the above-quoted hearing was conducted on March 9, 2000, prior to the time of Dr. Schmidt's endorsement, the court's ruling did reference the originally noticed defense expert witnesses, and established the law of the case as to reciprocal discovery to be given the State relevant to any defense mental status witness, including the subsequently endorsed Dr. Schmidt.

The court's order not only violated the reciprocal discovery statute, but also improperly infringed upon the attorney-client privilege. The work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. **Lisle v. State, 113 Nev. 679, 941 P.2d 459 (1997).**

In this case, if the defense had never endorsed Dr. Schmidt, then the defense would not have been required to turn over his tests. If the defense were not going to use a particular witness, the State is not entitled to have any information obtained by that witness. Thus, when the defense unendorsed Dr. Schmidt, it should have been as if he never existed at all, hence, creating a logical impossibility to obtain a test which theoretically did not exist.

The State made the argument, "Well, we already have the tests results so we get to use them". However, due process requires information to be obtained legally; and that parties follow the rules of discovery. When information is obtained outside the parameters set up by statute or constitution, such information is inadmissable. Just because the State acquired the tests results of

Dr. Schmidt when the defense thought he was going to be used as a witness, does not entitle them to use that information once he became an unendorsed defense witness. The State is required to treat that information as if it never existed.

The Ninth Circuit Court of Appeals addressed a similar issue in **Smith v. McCormick, 914 F.2d 1153 (9th Cir. 1990)**. In agreeing with the above line of reasoning, the 9th Circuit cited **United States v. Kovel, 296 F.2d 918 (2d Cir. 1961)**, stating, "disclosures made to the attorney's expert should be equally unavailable, at least until he is placed on the witness stand. The attorney must be free to make an informed judgment with respect to the best course for the defense without the inhibition of creating a potential government witness". **Smith v. McCormick, 914 F.2d at 1159.**

The Court continued:

> We agree with the Third Circuit that a defendant's communication with her psychiatrist is protected up to the point of testimonial use of that communication.

See also, **United States v. Nobles, 422 U.S. 225, 240 n.15 (1975)** (order to disclose defense investigator's report "resulted from [defendant's] voluntary election to make testimonial use of [the] report"); **United States v. Talley, 790 F.2d 1468, 1470-71 (9th Cir. 1986)** (recognizing "attorney-psychotherapist-client privilege" based in common law). Confidentiality must apply not only to psychiatric assistance at trial, but also to such assistance for sentencing in capital cases, as cited in **Smith v. McCormick, 914 F.2d at 1160.**

The case law makes it abundantly clear that the use of Dr. Schmidt's report by the State's witness in giving rebuttal testimony

at penalty phase was a violation of the due process rights of the Defendant, and constituted an improper application of Nevada's reciprocal discovery statute. Based upon the trial court's erroneous orders, the judgment of conviction must be reversed and the case remanded for conducting of a new penalty hearing.

V.

THE TRIAL COURT COMMITTED CONSTITUTIONAL ERROR IN DENYING DEFENDANT'S MOTION TO SUPPRESS DEFENDANT'S STATEMENTS.

In the case at bar, it is abundantly clear that the Defendant was not free to leave after being disarmed, taken into custody and placed in the police vehicle. Therefore, prior to questioning Defendant Floyd, Officer Catanese should have read the Defendant his Miranda warnings. **Miranda v. Arizona, 384 U.S. 436 (1966).** For this reason, any statements made prior to a Miranda warning being read, must be suppressed.

The remainder of the Defendant's statement's must be suppressed as well because the Defendant did not make a knowing, intelligent and voluntary waiver of his right to remain silent. The State possesses the burden of proving, by a preponderance of the evidence, that a confession was given freely and voluntarily. **Lego v. Twomey, 404 U.S. 477, 489 (1972); Scott v. State, 92 Nev. 552, 554, 554 P.2d 735, 736-37 (1976).** In determining whether the State has established voluntariness, the Court must look at the totality of the circumstances. **Boulden v. Holman, 394 U.S. 478, 480 (1969); Franklin v. State, 96 Nev. 417, 421,610 P.2d 732, 734-35 (1980).**

The Supreme Court of the United States has held that "[a] voluntary confession is inadmissible if the accused lacks the mental capacity to make a knowing and intelligent waiver of the right to

remain silent and the right to counsel during police interrogation." **Moran v. Burbine, 475 U.S. 412, 421 (1986).** According to the Supreme Court, in order for a waiver to be valid, it ". . . must have been made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." **Id.** In the case at bar, the video tape of the Defendant in the parking lot, and the statements themselves, clearly indicate that the Defendant was not in a normal emotional state, i.e. one which would suggest a knowing, voluntary waiver. Once in custody, the Defendant was immediately taken to a police vehicle where questioning began. Although the Defendant answers "Yeah" to Officer Catanese's question about understanding his rights, the Court must look to the totality of circumstances to determine whether his emotional state allowed a valid waiver. A reading of the many nonresponsive statements made by the Defendant, reveals that the Defendant's mind was racing all over the place. Evidence on point is Officer Catanese testimony that during their interview, he had to repeatedly tell Zane to "relax" because he would be hyperventilating, was excitable, and had been subjected to an extreme adrenalin rush. The officer felt the need to calm him down because "I didn't want him to hurt himself or go into a seizure or heart attack." (ROA, vol. 10, p. 1968). And yet, in spite of these concerns, the interview continued. Such evidence tends to show that the Defendant's waiver was not knowingly, intelligently and voluntarily made.

Defendant maintains that the Court, in looking at the totality of the circumstances, must also look to the fact that the Defendant was intoxicated at the time the statements were made.

Police criminalist Minoru Aoki placed his blood alcohol level at 0.14 at the time of the shootings (ROA, vol. 8, pp. 1538 & 1540) "Whether intoxication exists and is of a degree sufficient to vitiate the voluntariness of the confession are questions of fact. The admissibility of a confession is in the first instance a question for the trial judge." **State v. Rankin, 357 So.2d 803 (La 1978)**. While statements made under the influence of alcohol are not per se involuntary, at some point in time, the degree of intoxication could prohibit a defendant from acting voluntarily. **Blackburn v. Alabama, 361 U.S. 199, 211 (1960)**. The Court must therefore look at the evidence and make a determination as to whether the Defendant was intoxicated, and, if so, whether the intoxication indicates that ". . . the confession most probably was not the product of any meaningful act of volition." **Id.**

Accordingly, Defendant's statements to the Las Vegas Metropolitan Police Department should have been suppressed. In light of the trial court's constitutional error in failing to grant Defendant's suppression motion, the judgment of conviction must be vacated and the case remanded to district court for conducting of a new trial.

VI.

PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT REQUIRES THAT A NEW TRIAL BE CONDUCTED.

The United States Constitution provides that accused individuals in criminal prosecutions ". . . shall enjoy the right to a speedy and public trial, by an impartial jury . . . .". **U.S. Const. Amend VI.** The Nevada Constitution grants the accused this right to a jury trial as well. **Nev. Const. Art. I, §3.** The right

to an impartial jury means a jury free from prejudice in favor of or against either party. **Rains v. State, 83 Nev. 58, 422 P.2d 541 (1967); State v. McClear, 11 Nev. 39 (1876).** If the trial court finds, as a matter of law, that a defendant's trial was not free from such prejudice, **NRS 176.515** gives the trial judge the authority to order a new trial.

On February 2, 2000, the Defendant Zane Michael Floyd, by and through his counsel of record, respectfully requested, pursuant to the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article 1, of the Nevada Constitution, an order prohibiting prosecutorial misconduct in argument. The Court denied the motion indicating that such an order is not necessary. Throughout the course of the trial, however, the State engaged in conduct, resulting in multiple violations of the due process rights of the Defendant.

The trial court has a duty to ensure that an accused receives a fair trial, and to this end the Court must exercise its discretionary power to control obvious prosecutorial misconduct sua sponte. In reviewing a prosecutor's comments, the relevant inquiry is whether the comments were so unfair that they deprived the Defendant of due process of law. **Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996).**

The Nevada Supreme Court has emphasized that a prosecutor's primary duty is to see that justice is done, not simply to convict a Defendant. **Williams v. State, 103 Nev. 106, 734 P.2d 700 (1987);** "The prosecutor represents the State and has a duty to see that justice is done in a criminal prosecution." **Jimenez v. State, 112 Nev. 610, 918 P.2d 687, 692 (1996).**

Misconduct by a prosecutor in closing argument may be grounds for reversing a conviction. **Berger v. United States, 295 U.S. 78, 55 S.Ct. 629 (1935).** Prosecutorial misconduct requires reversal when it denies a Defendant the right to a fair trial. **Jones v. State, 101 Nev. 573, 707 P.2d 1128 (1985).**

In the case at bar, the prosecutor intentionally told the jury during guilt phase closing arguments, that this was the "worst massacre in the history of Las Vegas". (ROA, vol. 10, p. 1912). The Court ruled that this statement was improper, giving the defense the option of having the jury told to disregard that statement when brought back into Court. The defense necessarily declined the Court's offer in order to avoid having any attention brought to an already prejudicial and inflammatory statement. (ROA, vol. 10, pp. 1915-16).

The most flagrant and outrageous case of prosecutorial misconduct, in which the Defendant's due process rights were unconstitutionally violated, occurred during the State's penalty phase closing argument. In one remark, the District Attorney stated, "If not this case, then when ever..." implying there would never be an appropriate time for a juror to impose the death penalty if they did not do it in this case. The State was deliberately trying to dilute and down play the responsibility of the jury.

The State also made reference to how the Defendant would be treated in prison if a death sentence was not imposed. The specific remark was as follows: "They mention a 10 by 15 cell block. Give me a break. He wants to be on the yard, he wants to play ball, he wants to watch television, have three meals a day -" (ROA, vol. 14, p. 2667). This information was not in evidence and was

clearly meant to improperly manipulate the jury and deprive the Defendant of his right to due process. Defense counsel objected , and the trial court sustained the objection, instructing the jury not to speculate about what conditions in prison would be. However, the prejudice of the prosecutor's inflammatory remark goes beyond that which could be corrected by a mere jury admonition.

This line of improper argument was furthered by the State forcing the jury to compare the murders that took place in this case, to death penalty decisions and murders being considered in other cases. The prosecutor argued:

> When I speak about proportionality of sentence, surely a quadruple murderer deserves a greater punishment than those who have murdered only once, than those who have murdered only twice, or three times, or those who have not murdered at all or raped at all. (ROA, vol. 14, p. 2668).

Defense counsel objected: "This goes beyond the idea of individualized sentencing by clumping all murderers into a group together. It's clearly against the mandates of the Supreme Court and the instruction that the jury has." (ROA, vol. 14, p. 2668). The prosecutor did not even attempt to defend his grossly inappropriate comment, conceding: "I'll move on, your Honor.". The court sustained Defendant's objection.

This improper argument was particularly egregious in light of the fact that the State was prosecuting a number of other death penalty cases close in time to the case at bar, i.e. Hernandez and Johnson. Note must be taken that the Floyd jury came back with its death penalty verdict after the death penalty verdict in the Hernandez trial was announced, wherein only one victim was killed. . . .

Finally, the State urged the jury to make sure that the next day's newspaper headline would read "death penalty", and that the accompanying article would read: "Justice was done in the Las Vegas courtroom Tuesday as a jury determined that Zane Floyd should be sentenced to death for the save killing of four innocent citizens of this community". (ROA, vol. 14, p. 2592). This is a blatant misuse of the influence of the media in a capital murder case. This evidence was so unduly prejudicial that it rendered the trial fundamentally unfair and was a clear denial of the Defendant's due process rights.

Given the improper arguments of the State's attorney during the guilt and penalty phases of trial, Defendant was deprived of his constitutional right to a fair trial. In light of this error, the judgment of conviction must be vacated and the case remanded for conducting of a new trial, or in the alternative, a new penalty hearing.

VII.

PROSECUTORIAL MISCONDUCT DURING THE PRESENTATION OF VICTIM-IMPACT TESTIMONY AT THE PENALTY HEARING REQUIRES THAT A NEW PENALTY HEARING BE CONDUCTED.

NRS 176.015(3) grants certain victims the right to express their views before sentencing. The statute does not limit the Court's existing discretion to receive other admissible evidence. Admission of victim impact information is not unconstitutional. However, if the evidence is so unduly prejudicial that it renders the trial fundamentally unfair, then its admission is a denial of due process. **McNelton v. State, 111 Nev. 900, 900 P.2d 934 (1995).**

. . .

. . .

NRS 175.522(3) governs the admissibility of evidence in the penalty phase of a capital trial. In pertinent part, that statute provides:

> In the hearing, evidence may be presented concerning aggravating and mitigating circumstances relative 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. (emphasis added)

Defendant filed a motion to limit the extent of the victim impact testimony to "one victim, one speaker," excluding testimony from individuals who were not directly related to the deceased. (ROA, vol. 5, 942-949). Although the defense argued that all additional testimony (such as that from those hiding in the coolers who were not hurt or injured in any way) would be cumulative and overly prejudicial, the motion was denied.

The State allowed a witness to testify beyond the scope of what is statutorily allowed during victim impact. The improper comments came during the testimony of Mona Nall, which was objected to by the defense, with the objection ultimately being sustained. (ROA, vol. 11, p. 2087). Ms. Nall was encouraged to describe prior acts of violence which were inflicted upon her son and her family, completely unrelated to the incident involved in the present trial. The State's witness testified as follows:

> Tommy [Darnell] was coming home from work at the bus stop and two thugs came up to him at gun and knife point. They took his wallet. Started off as a robbery, I was told, and they saw he had a local address, and they had cars, so they took and - they were transient people. And they drove to our house arriving at about one o'clock in the morning. I was up and waiting for Tommy. And I saw him get out of the car, and I saw this one person holding onto

> Tommy and Tommy was limping. He looked like he was hurt. They came to the door and I let them in naturally - (ROA, vol. 11, p. 2087).

At this point, defense counsel objected to the relevance of the testimony, and the court sustained the objection. Nevertheless, the prosecutor continued eliciting details of this totally unrelated incident. It came out that the family was held hostage for some seven hours, and that the sixteen year old daughter was repeatedly sexually assaulted. The court admonished the prosecutor to get to something relevant. However, the State's attorney went right back to this incident, bringing out that Tommy had been held hostage by the kidnappers for over thirty days and was finally released in the Utah desert. The witness included that the abductors had tried to cut off his ears, and that the unrelated incident had changed not only Tommy, but the entire family (ROA, vol. 11, pp. 2087-89).

This testimony likely had an enormously prejudicial effect on the jury, and only encouraged them to find someone to hold responsible for prior suffering endured by this family.

Viewed individually, and cumulatively, with all the other instances of prosecutorial misconduct during the penalty hearing, the judgment of conviction must be vacated, and the case remanded to district court for conducting of a new penalty hearing.

CONCLUSION

Based on constitutional errors of the trial court in denying Defendant's motions to sever counts, to change venue, and to suppress Defendant's statements; as well as prosecutorial misconduct during closing arguments, the judgment of conviction must be reversed and the case remanded for conducting of a new trial. In

the alternative, based up improprieties in the State's penalty phase closing arguments, on the introduction of improper victim-impact testimony, and the failure to establish probable cause for the finding of aggravating circumstances in justice court, a new penalty hearing must be conducted.

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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 a reference to the page of the transcript or appendix where the matter relied on is to be found. 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 30th day of April, 2001.

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RECEIPT OF A COPY of the foregoing Appellant's Opening Brief is hereby acknowledged this 30th day of April, 2001.

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