ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

ZANE MICHAEL FLOYD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 36752

APPELLANT'S REPLY BRIEF

(Appeal from Judgment of Conviction)

MARCUS D. COOPER
CLARK COUNTY PUBLIC DEFENDER
309 South Third Street, #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

Attorney for Appellant

STEWART L. BELL
CLARK COUNTY DISTRICT ATTORNEY
200 South Third Street
Las Vegas, Nevada 89155
(702) 455-4711

FRANKIE SUE DEL PAPA
Attorney General
Nevada Bar No. 000192
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

IN THE SUPREME COURT OF THE STATE OF NEVADA

ZANE MICHAEL FLOYD, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 36752

APPELLANT'S REPLY BRIEF

MARCUS D. COOPER
CLARK COUNTY PUBLIC DEFENDER
309 South Third Street, #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

Attorney for Appellant

STEWART L. BELL
CLARK COUNTY DISTRICT ATTORNEY
200 South Third Street
Las Vegas, Nevada 89155
(702) 455-4711

FRANKIE SUE DEL PAPA
Attorney General
Nevada Bar No. 000192
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF NEVADA

ZANE MICHAEL FLOYD, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 36752

APPELLANT'S REPLY BRIEF

ARGUMENT

I.

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

Respondent claims that Nevada law is "overwhelmingly supportive of joinder under the facts of this case," and goes on to cite several Nevada Supreme Court decisions presumably in support of this proposition. The first such case, **Middleton v. State, 114 Nev. 1089, 968 P.2d 296 (1998)**, upheld joinder where evidence of the two separate murders charged would have been cross-admissible to prove the defendant's identity and intent. Contrary to Respondent's reasoning, the factual pattern of **Middleton** is quite unlike that in the case at bar. As opposed to the sexual assault-kidnap and Albertson's shooting scenarios here involved, the **Middleton** case involved two murder incidents with remarkable similarities. This Court's ruling on the joinder issue was based, to a large extent, upon these similarities. The Opinion reads:

> Here, joinder was proper under NRS 173.115(2) because the acts charged constituted parts of a common scheme or plan on Middleton's

> part to meet women, abduct and hold them captive, abuse and kill them, and then dispose of their bodies. The similarities between the crimes against Davila and Powell [Middleton's victims] include: both victims were unmarried females of similar age (one was forty-two and the other forty-five); both were alone at home when they disappeared; both homes had been serviced by Middleton's employer, TCI Cable; Middleton had met both victims before their disappearance (the evidence that Middleton met Davila is not conclusive, but strong); neither victim's home showed evidence of a forced entry; Middleton went to his storage unit on the day that each victim disappeared; his storage unit yielded DNA evidence from each of the victims and property belonging to each; and the remains of each victim were found dumped in remote or concealed locations, wrapped in plastic garbage bags and bound with rope similar to rope found in Middleton's storage unit.

114 Nev. at 1107.

This abundance of similarities, evidencing a common scheme or plan, warranted the Court's cross-admissibility ruling in **Middleton**. This Court reasoned:

> [W]e conclude that the evidence of the kidnapping and murder of each victim was cross-admissible to prove Middleton's identity, method, intent, and absence of mistake or accident in regard to the kidnapping and murder of the other. "If . . . evidence of one charge would be cross-admissible in evidence at a separate trial on another charge, then both charges may be tried together and need not be severed." Mitchell [v. State], 105 Nev. at 738, 782 P.2d at 1342.

114 Nev. at 1108.

Such extensive factual similarities do not exist in the case at bar. The details of the Carter assault and the grocery store shootings reflect no common modus operandi, nor the existence of a common scheme or plan. There is nothing in the method or intent of either offense that would bear upon those same elements in

the other offense. Even if identity was determined to be a permissible purpose for cross-admission under **NRS 48.045(2)**; ultimate admissibility, as well as joinder of the underlying offenses for trial, would still be defeated because of the unfair prejudice such cross-admission or joinder would inflict upon defendant.

In a separate trial of the murder charges, the video surveillance, eyewitnesses, testimony of Defendant exiting Albertson's with the shotgun in hand, as well as his subsequent statements and failure to contest the identity issue, would have provided such extensive proof of identity, that testimony of the sexual assault/kidnap victim would have held little additional probative value. Such minimal probative value would be substantially outweighed by the danger of unfair prejudice that would result from jurors learning of the sexual assault / kidnap.

And in the reverse situation, any semblance of a constitutionally fair trial on the sexual assault incident would be obliterated by the overwhelming prejudice that would result from introducing evidence of multiple murders, even though the evidence somehow tangentially bore upon the issue of identity.

Just as any attempt at cross-admission of other crimes evidence would ultimately be defeated by undue prejudice considerations, these same concerns would preclude joinder of the same offenses for trial, under **NRS 174.165.**

Respondent also cites the case of **Tillema v. State, 112 Nev. 266, 914 P.2d 605 (1996).** In **Tilemma**, this Court did conclude that two vehicle burglaries seventeen days apart could be properly joined for trial because the two burglaries evidenced a common

scheme or plan, and evidence of the first burglary would be cross-admissible at a separate trial to show defendant's felonious intent in entering the second vehicle. Also, evidence of a store burglary committed the same day as the second vehicle burglary "could clearly be viewed by the district court as `connected together' with the second vehicle burglary because it was part of a `continuing course of conduct.'" **112 Nev. at 269.** The Court further reasoned that Tilemma's acts on the second date "demonstrate[d] that he had an intent to steal something, anything, that he could subsequently sell." **Id.** However, nowhere in the Court's treatment of the issue in **Tilemma** is there analysis on the question of potential prejudice. Apparently, this was not a crucial factor in evaluating the various offenses in the **Tilemma** case; and that is the critical distinction between that case and the case at bar. The extreme prejudice generated through trial joinder of the Floyd offenses makes the **Tilemma** decision virtually inapplicable to the present situation, and certainly not to be construed as precedential authority dictating the result to be reached in the present case.

The facts involved in **Graves v. State, 112 Nev. 118, 912 P.2d 234 (1996)**, another case cited by Respondent, evidenced a far greater degree of similarity in the two charged offenses, than that which exists in the case at bar. The **Graves** Court found that joinder was not improper inasmuch as the two charged offenses were part of a common scheme or plan and factually connected. The Court described this commonality as being that "Graves systematically walked from casino to casino and acted similarly suspicious at each casino." **112 Nev. at 128.** Such a factual connection or common scheme or plan does not exist between the sexual assault/kidnapping

incident and the Albertson's shootings involved in the case at bar. Absent such a connection, joinder for trial was improper.

Gibson v. State, 96 Nev. 48, 604 P.2d 814 (1980) fits into the category of those cases where the two offenses joined for trial are of the same type, in this case auto thefts, and could therefore properly be deemed part of a common scheme or plan of escape. Also, the **Gibson** decision makes no mention of any potential prejudice being created by the joinder.

Even in the case of **Howard v. State, 102 Nev. 572, 729 P.2d 1341 (1986)**, there was at least some factual connection between the two crimes: the defendant used the equipment taken from the Sears employee to validate his status as a security officer to the murder victim; and defendant first noticed the murder victim's "for sale" van in the Sears parking lot. There was some factual predicate for finding that "one crime `flowed' into the other." **102 Nev. at 575.** In the case at bar, although Zane Floyd's acts were close in time, there was no interconnecting or "flowing" of one offense into the other such as to make joinder appropriate; and certainly any such connection would be superseded by the overwhelming prejudice generated by such a joint trial.

Respondent also cites **Powell v. State, 108 Nev. 700, 838 P.2d 921 (1992)**, in support of joinder. The Powell case did not involve a joinder issue, but rather the introduction of evidence of a prior bad act under **NRS 48.045(2)**. This Court ruled that admission was proper under that statute, as well as under the "complete story of the crime" doctrine. As explained in the **Powell** opinion, "[t]hat doctrine provides that under certain circumstances, evidence of another crime may be introduced at trial when the other

crime is interconnected to the act in question *such that a witness cannot describe the act in controversy without referring to the other crime.*" **108 Nev. at 707-708** (emphasis added). In the case at bar, this doctrine would not justify joinder of offenses for trial nor cross-admissibility of those offenses at separate trials. The sexual assault and the grocery store shootings were separate and distinct offenses committed at different times and in different locations. Giving a complete description of either incident would not require reference to the facts of the other offense. As such, the "complete story of the crime" doctrine is inapplicable; and Respondent's citation of the Powell case is irrelevant to the present issue.

In light of the inapplicability of the various authorities cited by Respondent, and 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.

Respondent cites the case of **Kaplan v. State, 96 Nev. 798, 618 P.2d 354 (1980)**, and correctly states that Kaplan did not contend that the content of news media releases in that case were so biased or inflammatory that they utterly corrupted the trial proceedings. This is a pivotal difference between **Kaplan** and the facts of the case at bar - a distinction which virtually negates the **Kaplan** opinion having any precedential value in the current case. Under the circumstances before this Court, prejudice should be

presumed inasmuch as the extent of media publicity was so pervasive that its influence utterly corrupted the trial atmosphere. The voluminous pre-trial news articles (forty-seven) and television spots (seventy-nine) on the Floyd case make it wholly unrealistic to expect that Clark County jurors would be able to put aside such exposure and the inevitable prejudgments flowing therefrom, and render an unbiased verdict.

Respondent also cites the Ninth Circuit case of **Gallego v. McDaniel, 124 F.3d 1065 (9th Cir. 1997)** for the proposition that a defendant is not entitled to a jury completely ignorant of the facts and that not all publicity causes prejudice to a defendant. (Respondent's Answering Brief, p. 16). However, the recitation of the law on change of venue given by the Ninth Circuit in Gallego extends far beyond the brief reference cited by the State.

The federal appellate court declared that, "a trial judge must grant a motion for change of venue if prejudicial pretrial publicity makes it impossible to seat an impartial jury. The court went on to explain the corresponding burden which a defendant must meet. Note should be taken that the federal court was reviewing a Nevada state court case:

> A defendant need only demonstrate one of two different types of prejudice in support of a motion to transfer venue: presumed or actual. Prejudice is ***presumed*** when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime. Prejudice is rarely presumed because "saturation" defines conditions found only in extreme situations. To establish ***actual*** prejudice, the defendant must demonstrate that the jurors exhibited actual partiality or hostility that could not be laid aside.
>
> . . .

124 F.3d at 1070, quoting **United States v. Sherwood**, **98 F.3d 402, 410 (9th Cir. 1996)**, emphasis added.

The federal court rejected the contention of presumptive prejudice in **Gallego**, holding that: "while there was a considerable amount of media attention devoted to **Gallego's** trial, **Gallego** has failed to show that the media publicity in his case was ***so prejudicial and inflammatory as to have constituted legal saturation***." **124 F.3d at 1071**, emphasis added.

Defendant Floyd maintains that the extensive pre-trial publicity in the case at bar constituted the extreme situation spoken of in **Gallego**. Coverage of the case, both in print and on television, amounted to "saturation" with prejudicial and inflammatory media publicity about the case. 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.

Issue III is incorporated by reference as if set forth in full in reply to the Answering Brief filed by Respondent.

. . .

. . .

. . .

. . .

. . .

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.

Issue IV is incorporated by reference as if set forth in full in reply to the Answering Brief filed by Respondent.

V.

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

Issue V is incorporated by reference as if set forth in full in reply to the Answering Brief filed by Respondent.

VI.

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

Issue VI is incorporated by reference as if set forth in full in reply to the Answering Brief filed by Respondent.

VII.

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

Admission of evidence concerning the totally unrelated kidnapping / sexual assault incident suffered by Thomas Darnell and his family, rendered the penalty hearing fundamentally unfair and therefore violative of the Due Process clauses of the Fifth and Fourteenth Amendments. **State v. Leonard, 114 Nev. 1196, 969 P.2d 288, 299-300 (1998).** Granted, the State is entitled to present evidence to establish the existence of aggravating circumstances and to present evidence of Defendant's character; but the detailed

explanation elicited by the prosecutor of crimes committed against the Nall/Darnell family by other individuals in a completely unrelated incident, did not further either of these legitimate prosecutorial objectives. What happened to Thomas Darnell, his parents and sister during a robbery and siege of their home, says nothing about Defendant Floyd's character, and is undeniably irrelevant to the establishment of any aggravating circumstance in the case at bar.

While the penalty hearing judge has discretion, pursuant to **NRS 175.552** to admit evidence "on any other matter which the court deems relevant to the sentence," there is no way that even a hint of relevance can be found in the unrelated Darnell incident description presented to the jury. The district court acknowledged this lack of relevance in its initial sustaining of Defendant's objection to the evidence. However, in an increasingly typical example of the excesses engaged in by the Clark County prosecutors in capital cases, the prosecutor ignored the sustained objection and continued to present the improper evidence.

As Respondent quoted from the case of **McNelton v. State, 111 Nev. 900, 906, 900 P.2d 934, 938 (1995):**

> The key to criminal sentencing in capital cases is the ability of the sentencer to focus upon and consider both the individual characteristics of the defendant and the nature and impact of the crime he committed. Only then can the sentencer truly weigh the evidence before it and determine a defendant's just deserts.

Nothing in this very succinct description of the sentencing process justifies the admission of the highly inflammatory evidence introduced by the prosecution. The danger of such unrelated

robbery/kidnapping/sexual assault evidence confusing the jury, inflaming their passions and unduly prejudicing them against Defendant Floyd far outweighed any probative value it might have. Again, Defendant maintains that no such probative value existed.

The prosecutor's entitlement to portray Thomas Darnell as a unique individual, facing the adversities of intellectual impairment, and to show that he was beloved of his family; does not extend to introduction of highly inflammatory, unduly prejudicial, and totally irrelevant evidence at the penalty hearing. The deputy district attorney was wrong in persisting in its introduction. There is no excuse nor justification for admission of the evidence. Given the extreme dangers of unfair prejudice which it engendered, 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.

MARCUS D. COOPER
CLARK COUNTY PUBLIC DEFENDER

By 

ROBERT L. MILLER
NEVADA BAR #1060
DEPUTY PUBLIC DEFENDER
309 SOUTH THIRD STREET, #226
LAS VEGAS, NEVADA 89155-2610
(702) 455-4685

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 8th day of January, 2002.

MARCUS D. COOPER
CLARK COUNTY PUBLIC DEFENDER

By _____
ROBERT L. MILLER
NEVADA BAR #1060
DEPUTY PUBLIC DEFENDER
309 SOUTH THIRD STREET, #226
LAS VEGAS, NEVADA 89155-2610
(702) 455-4685

RECEIPT OF A COPY of the foregoing Appellant's Opening Brief is hereby acknowledged this 8th day of January, 2002.

STEWART L. BELL
CLARK COUNTY DISTRICT ATTORNEY

By Maggie England