

1 on to command that a jury instruction be given in all capital
2 cases directing the jury to make an independent and objective
3 analysis of all relevant evidence and that arguments of counsel
4 do not relieve the jurors of this responsibility.

5 A prosecutor may not comment that the defendant is
6 unlikely to be rehabilitated, or that the defendant's potential
7 for rehabilitation cannot be considered as a mitigating factor.
8 Bowen v. Kemp, 769 F.2d 672, 678 (11th Cir. 1985) (improper for
9 prosecutor to express opinion about prospects for
10 rehabilitation in support of death penalty), cert. denied, 478
11 U.S. 1021 (1986). Flanagan v. State, 104 Nev. 105, 108, 754
12 P.2d 836, 838 (1988) (concluding that prosecutor's reference to
13 defendant's improbable rehabilitation was "particularly
14 objectionable" and ordering new penalty hearing), vacated on
15 other grounds, 504 U.S. 930 (1992).
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17 2. Without objection from trial counsel the prosecutor
18 improperly referred to facts not in evidence at the penalty
19 hearing:

20 "The death penalty deters. We know that all we need
21 to do is look in the newspapers or turn on the
22 television set and we all recognize that a very large
23 percentage of the murders that are committed out
24 there today are murders by individuals who have
25 abused their victims in the past just like in this
26 case" (11 ROA 2018).

24 "We know the death penalty deters. It sends out a
25 message and what message has the defendant sent out
26 in this case besides domestic violence ends in
murder?" (11 ROA 2020).

27 No evidence was presented at the penalty hearing concerning
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1 deterrence or the percentage of murders that came from abusive
2 relationships.

3 In Donnelly v. DeChrisoforo, 416 U.S. 637, 645, the
4 Supreme Court explained "[i]t is totally improper for a
5 prosecutor to argue facts not in evidence..." Such arguments
6 also violate the right to confrontation and cross-examination,
7 in the same way that a prosecutor's expression of personal
8 opinion puts unsworn "testimony" before the jury. In Agard v.
9 Portuondo, 117 F.3d 696, 711 (2d Cir. 1997) the Court held that
10 alluding to facts that are not in evidence is "prejudicial and
11 not at all probative.", cert. granted on other grounds, 119
12 S.Ct. 1248 (1999). See also People v. Adcox, 47 Cal.3d 207,
13 236, 763 P.2d 906, 919 (Cal. 1988) wherein the California
14 Supreme Court reaffirmed that "'statements of fact not in
15 evidence by the prosecuting attorney in his argument to the
16 jury constitute misconduct.'" (quoting People v. Kirkes, 39
17 Cal.2d 719, 724, 249 P.2d 1 (Cal. 1952)), cert. denied, 494
18 U.S. 1038 (1990).

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20 The Nevada Court has also condemned arguments that refer
21 to facts not in evidence. In Leonard v. State, 108 Nev. 79,
22 82, 824 P.2d 287, 290 (1992) the Court held that it is improper
23 for a prosecutor to state that defendant committed crime
24 because he "liked it" with no supporting evidence, cert.
25 denied, 505 U.S. 1224 (1992). Similarly in Williams v. State,
26 103 Nev. 106, 110, 734 P.2d 700, 703 (1987) the Court found
27 that was improper to argue that defendant purchased alibi
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1 testimony based on facts outside record.

2 3. Trial counsel failed to object to improper,
3 inflammatory and prejudicial closing argument at the penalty
4 hearing. The specific argument by the prosecutrix was as
5 follows:

6 "The defendant has stated many times, during the
7 trial in the guilt phase, that he feels lower than
8 dirt, yet, ironically, ladies and gentlemen, the only
9 thing lower than dirt is Deborah Panos' decomposed
10 and lifeless body" (11 ROA 2021).

11 "A lot of people have paid for the chances that this
12 system has given this defendant and we can thank our
13 system who gave these chances to this defendant for
14 the last memories to little Chantell and little JP
15 and Anthony of their mom and dad, that perhaps of
16 daddy being taken away from jail crying, as they cry,
17 and mommy getting taken away in an ambulance. Or
18 perhaps we can thank this defendant for his last
19 memory of the day of being with their mother, of
20 being placed into Child Haven into protective custody
21 yet another time. And we can thank the defendant for
22 the fact that this four year old child sits there and
23 wants to die. A four year old wants to die so she
24 can be in heaven with her mommy. How pathetic and a
25 little eight year old child, who's afraid to talk
26 about the violence he's witnessed, and wants sleeping
27 pills at the age of eight years old. Eight year olds
28 shouldn't want sleeping pills, ladies and gentlemen.
That is a depressed little eight year old. That is a
guilty little child because he could not protect his
mommy from this man. He could not protect his
brothers and sisters from that man right there" (11
ROA 2048-2049).

22 "...I'm asking you not to forget about Deborah Panos.
23 It may be that it's been a year since her death and
24 that, perhaps, weeds have grown around her tombstone
25 and that only piece of Deborah Panos' body left is
26 this -- her blood and her vaginally swabs and her
27 pieces of skin that we casually pass around this
28 courtroom..." (11 ROA 2050).

26 At a sentencing hearing, it is most important that the
27 jury not be influenced by passion, prejudice, or any other
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1 arbitrary factor. Hance v. Zant, 696 F.2d 940, 951 (11th Cir.
2 1983)

3 4. Trial counsel also failed to object to arguments by
4 the prosecution that the jury by its verdict should send a
5 message to the community.

6 A prosecutor may not pressure jurors by telling them to do
7 their "job," to fulfill their civic duty, to act as the
8 conscience of the community, to cure society's ills, or to send
9 out a message by finding the defendant guilty. Such comments
10 may also constitute an impermissible assertion of a personal
11 opinion and a reference to facts outside the record. In U.S.
12 v. Young, 470 U.S. 1, 5-7 (1985) the court reminded prosecutors
13 to "refrain from improper methods calculated to produce a
14 wrongful conviction" in holding that it was improper for a
15 prosecutor to tell jurors that "[i]f you feel you should acquit
16 him for that it's your pleasure. I don't think you're doing
17 your job as jurors in finding facts as opposed to the law..."
18 Similarly the Court in Viereck v. U.S., 318 U.S. 236, 247
19 (1943) (held that the prosecutor's statement, including telling
20 jurors that "[t]he American people are relying upon you ladies
21 and gentlemen for their protection against this sort of a
22 crime" compromised the defendant's right to a fair trial. See
23 also U.S. v. Leon-Reyes, 1999 WL 314682, at *5 (9th Cir. 1999)
24 ("A prosecutor may not urge jurors to convict a criminal
25 defendant in order to protect community values, preserve civil
26 order, or deter future lawbreaking. The evil lurking in such
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1 prosecutorial appeals is that the defendant will be convicted
2 for reasons wholly irrelevant to his own guilt or innocence.
3 Jurors may be persuaded by such appeals to believe that, by
4 convicting a defendant, they will assist in the solution of
5 some pressing social problem. The amelioration of society's
6 woes is far too heavy a burden for the individual criminal
7 defendant to bear.").

8 Most recently the Nevada Supreme Court in Evans v. State,
9 117 Nev. Ad. Op. 50 (2001) again condemned arguments by
10 prosecutors that urged the jury to impose the death penalty in
11 order to solve a social problem finding that such argument
12 diverted jurors' attention from their correct task, "which is
13 the determination of the proper sentence for the defendant
14 before them based upon his own past conduct". See also Collier
15 v. State, 101 Nev. 473, 478, 705 P.2d 1126, 1129 (1985). The
16 argument of the prosecutrix violated these holdings by arguing
17 that CHAPPELL should get the death penalty because domestic
18 violence is a problem in society:
19

20 "You can certainly deter him and you have it within
21 your power to send a message today out into this
22 community, which is that we do not tolerate those who
23 have a history of domestic violence, who will let it
24 accelerate and become a murderer and you can tell the
25 other would be James Chappells what the consequence
26 is when you engage in that type of action." (11 ROA
27 2012).

28 Trial counsel was ineffective in failing to object to this
argument which was highly prejudicial and improper.

5. During closing argument at the guilt phase of the

1 trial the prosecutor improperly argued victim impact without
2 drawing an objection from the defense.

3 It is well established that victim impact testimony is
4 highly prejudicial and not relevant during the trial portion of
5 a criminal proceedings. Nonetheless trial counsel completely
6 failed to object and prevent argument from the State that was
7 blatantly victim impact and highly prejudicial. An emotional
8 appeal to consider the victim's family is patently improper and
9 prejudicial. Mears v. State, 83 Nev. 3, 422 P.2d 230 (1967).

10 It must be remembered that the above argument was during
11 the trial portion of the case where victim impact is not
12 admissible, even under the decision in Payne v. Tennessee, 501
13 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) which dealt
14 exclusively with the admissibility of such evidence during the
15 penalty or sentencing phase of a criminal proceeding. Likewise
16 the ruling of the Nevada Supreme Court in Homick v. State, 108
17 Nev. 127, 136, 825 P.2d 600 (1992) dealt with error claimed to
18 have occurred during the penalty hearing. The argument in the
19 instant case was as follows:
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21 "All evil required was a cowering victim. Deborah
22 Ann Panos, 26 years of age, the mother of three
23 little children aged seven, five, and three. Where
is the promise of her years once written on her brow?
Where sleeps that promise now?" (9 ROA 1607).

24 Trial counsel was ineffective in failing to object to the
25 victim impact argument during the trial portion of the case.
26 Such argument was prejudicial and a different result would have
27 been likely had the jury not been subjected to the inflammatory
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1 argument.

2 6. There was no objection from trial counsel to the
3 argument by the prosecutor which improperly quantified
4 reasonable doubt and the guilt phase of the trial.

5 The improper argument was the following:

6 "A reasonable doubt is one based on reason.
7 It's a reasonable doubt. It's not mere possible
8 doubt. So it's not possibilities, it's not
9 speculation because it says, 'Doubt to be reasonable
10 must be actual, not mere possibility or speculation,'
11 okay. It's got to be based on reason, okay. It's
12 not an impossible burden, ladies and gentlemen.
13 Prosecutors across the country everyday meet this
14 burden. It's not an impossible burden. It's a doubt
15 based on reason.

16 It's a type of doubt that would control a person
17 in the weighty affairs of life. What is a weighty
18 affair of life? Well, for some people it could be
19 the decision to get married. For some people it
20 could be the decision to have a child or switch
21 occupations or perhaps -- let me put it to you this
22 way. You have all made reasonable doubt or, excuse
23 me, you have all made weighty affair of life
24 decisions. You have all made them. You have all
25 probably, at some time, bought a home. So, what are
26 some of the things you look for in buying a home? . .
27"

18 There was no objection to this improper argument wherein
19 the prosecutor equates decisions in "every day life" that are
20 unanswered to the constitutional standard applicable to
21 criminal cases. Quillen v. State, 112 Nev. 1369, 1382, 929
22 P.2d 893, 902 (1996) the Court found persuasive the reasoning
23 of the Ninth Circuit model instruction, "because decisions like
24 'choosing a spouse, buying a house, borrowing money, and the
25 like...may involve a heavy element of uncertainty and risk-
26 taking and are wholly unlike the decision jurors ought to make
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1 in criminal cases'". See, 9th Cir. Crim. Jury Inst. 3.03 CMT
2 (1995).

3 Reasonable doubt is a subjective state of near certitude.
4 McCullough v. State, 99 Nev. 62, 75, 657 P.2d 1157, 1158
5 (1983). However, when prosecutors attempt to rephrase the
6 reasonable doubt standard, they venture into troubled waters.
7 Howard v. State, 106 Nev. 713, 721, 800 P.2d 175, 180 (1990).
8 See also, Wesley v. State, 112 Nev. 503, 916 P.2d 793 (1996).

9 The above argument is strikingly similar to the argument
10 in Wesley, supra, that was found to be improper, however, was
11 concluded to be harmless. In Wesley, the prosecutor stated,
12 "[I]f you feel it in your stomach and if you feel it in your
13 heart...then you don't have reasonable doubt." Id., 112 Nev.
14 at 514. See also, Evans v. State, 117 Nev. Ad. Op. 50 (2000)
15 wherein the Court recently condemned similar arguments.

16 In McCullough v. State, 99 Nev. 72, 657 P.2d 1157 (1983)
17 the Court discussed at some length the attempts to clarify or
18 quantify reasonable doubt stating in summary that:
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20 "The concept of reasonable doubt is inherently
21 qualitative. Any attempt to quantify it may
22 impermissibly lower the prosecutor's burden of proof,
23 and is likely to confuse rather than clarify."

24 McCullough, 99 Nev. at 75. The Court reversed a murder
25 conviction based, in part, on the argument of the prosecutor
26 that quantified reasonable doubt with the Court stating:

27 "Additionally, we caution the prosecutors of this
28 State that they venture into calamitous waters when
they attempt to quantify, supplement, or clarify the
statutorily prescribed reasonable doubt standard."

1 Holmes v. State, 114 Nev. 1357, 972 P.2d 337, 343 (1998). The
2 improper argument of the prosecutor in Holmes, was similar to
3 that in the case at bar as it also used the concept of buying a
4 house to quantify the weighty affairs of life.

5 F. Trial counsel failed to make contemporaneous
6 objections on valid issues thereby precluding meaningful
7 appellate review of the case in violation of CHAPPELL'S rights
8 under the Sixth Amendment to effective counsel and under the
9 Fifth and Fourteenth Amendments to due process and a
10 fundamentally fair trial.

11 1. During the penalty hearing, the aunt of Panos, Carol
12 Monson testified and told and urged the jury to give CHAPPELL
13 the death penalty, stating: "We only pray now that justice will
14 do what it needs to do and not fail her children again. By
15 that, I mean to give James what he gave Debbie, death" (11 ROA
16 1960). There was no objection by trial counsel and no request
17 that the jury be admonished to disregard the improper comment.
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19 The next witness, Norma Penfield, the mother of Panos,
20 made a similar improper request during her testimony: "My only
21 wish now is that justice will punish to the fullest the person
22 who took her life" (11 ROA 1964). She finished up her
23 testimony telling the jury: "I feel the system has let her down
24 once. I hope to heaven they don't do it again" (11 ROA 1974)

25 While a victim may address the impact the crime has had on
26 the victim and victim's family, a victim can only express and
27 opinion regarding the defendant's sentence in a non capital
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1 case. Witter v. State, 112 Nev.908, 921 P.2d 886 (1996);
2 Randell v. State, 109 Nev. 5, 846 P.2d 278 (1993).

3 2. Trial counsel failed to object to the prosecutor
4 asking a series of questions during cross-examination at the
5 trial phase of CHAPPELL concerning the punishment he would like
6 to receive and whether the wanted the death sentence. (8 ROA
7 1412-1415). Clearly at the trial phase the subject of
8 punishment is not relevant and the jury is explicitly so
9 instructed. The failure to object to the irrelevant and
10 prejudicial questioning constituted ineffective assistance of
11 counsel.

12 3. Trial counsel failed to object to cross-examination of
13 CHAPPELL that implied that he made up his testimony after
14 hearing all the evidence in violation of his Fifth Amendment
15 right to remain silent. During CHAPPELL testimony the
16 following exchange took place, without any objection from trial
17 counsel:

18
19 "Q You've had a substantial period of time to
20 think about today, haven't you?

21 A Yes, sir.

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

25 A Yes, sir.

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

A I didn't make up anything, sir.

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

3 A No.

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

6 A No, sir." (8 ROA 1413).

7 During closing argument the prosecutor argued that
8 CHAPPELL had made up his story after finding out the DNA
9 results, which was the subject of an objection and raised on
10 direct appeal. Counsel however failed to include the improper
11 cross-examination as exacerbating the prejudicial impact of the
12 implication being given to the jury. A prosecuting attorney
13 may not suggest that the accused's presence at trial helped him
14 frame his testimony or fabricate a defense. Such comments
15 infringe the defendant's constitutional right to be present at
16 trial and to confront and cross-examine the witnesses against
17 him. In Shannon v. State, 105 Nev. 782, 788-89, 783 P.2d 942,
18 946 (1989) the Court condemned as "improper," under the
19 constitutional right to appear and defend, the prosecutor's
20 comment that the defendant was putting on a "show" for jurors.

21 4. CHAPPELL was denied effective assistance of counsel
22 when his trial attorneys failed to move to strike the death
23 penalty being sought in violation of his rights under the Fifth
24 and Fourteenth Amendments to the United States Constitution to
25 Due Process and Equal Protection, in that the decision to seek
26 the death penalty was made in racial biased manner, when
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1 compared to other murder cases involving non-African American
2 defendants.

3 5. CHAPPELL was denied effective assistance of counsel
4 when trial counsel failed to object to the prosecutor arguing
5 the absence of statutory mitigating circumstances that were not
6 asserted by CHAPPELL. As discussed below in GROUND FIVE (5)
7 the State argued the absence of statutory mitigators during
8 closing argument at the penalty hearing. No objection was made
9 this improper argument by trial counsel.

10 It is impermissible for a prosecutor to comment on
11 mitigating factors which the defendant does not raise for a
12 number of reasons. First, it suggests that jurors are
13 restricted in the sentencing process to only the mitigating
14 factors the prosecution discusses. Second, it suggests that
15 the defendant is more worthy of receiving the death penalty
16 because his case does not present mitigating factors found in
17 other cases, which is fundamentally inconsistent with the
18 principle of individualized sentencing.

19 In Penry v. Lynaugh, 492 U.S. 302, 326-28 (1989) the
20 United State Supreme Court held that prosecutorial misconduct
21 in argument violates right to individualized sentencing under
22 Eighth and Fourteenth Amendments. Restricting consideration of
23 sentencers to a handful of specified mitigating factors
24 violates the Eighth and Fourteenth Amendments. Lockett v.
25 Ohio, 438 U.S. 586, 604 (1978). See also State v. DePew, 528
26 N.E.2d 542, 557 (Ohio 1988) (explaining that "[i]f the
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1 defendant chooses to refrain from raising some of or all of the
2 factors available to him, those factors not raised may not be
3 referred to or commented upon by the trial court or the
4 prosecution"), and State v. Bey, 709 N.E.2d 484, 497 (Ohio
5 1999) ("As in State v. Mills, ..., here 'the prosecutor did err
6 by referring to statutory mitigating factors not raised by the
7 defense, when he explained why those statutory mitigating
8 factors were not present.'").

9 **CLAIM TWO**

10 **CHAPPELL'S conviction and sentence are invalid under the**
11 **State and Federal Constitutional guarantees of due process,**
12 **equal protection, impartial jury from cross-section of the**
13 **community, and reliable determination due to the trial,**
14 **conviction and sentence being imposed by a jury from which**
15 **African Americans and other minorities were systematically**
16 **excluded and under represented. United States Constitution**
17 **Amendments 5, 6, 8, and 14; Nevada Constitution Article I,**
18 **Sections 3, 6 and 8; Article IV, Section 21.**

20 CHAPPELL is an African American and was tried by a jury
21 that was under represented of African Americans. There were no
22 African Americans on the trial jury. Clark County has
23 systematically excluded from and under represented African
24 Americans on criminal jury pools. According to the 1990
25 census, African Americans -- a distinctive group for purposes
26 of constitutional analysis -- made up approximately 8.3 percent
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1 of the population of Clark County, Nevada. A representative
2 jury would be expected to contain a similar proportion of
3 African Americans. A prima facie case of systematic under-
4 representation is established as an all-white jury was seated
5 in a community with an 8/3 percent African American population.

6 The jury selection process in Clark County is subject to
7 abuse and is not racially neutral in the manner in which the
8 jury pool is selected. Use of a computer database compiled by
9 the Department of Motor Vehicles, and or the election
10 department results in exclusion of those persons that do not
11 drive or vote, often members of the community of lesser income
12 and minority status. The computer list from which the jury
13 pool is drawn therefore excludes lower income individuals and
14 does not represent a fair cross section of the community and
15 systematically discriminates.

16 The selection process for the jury pool is further
17 discriminatory in that no attempt is made to follow up on those
18 jury summons that are returned as undeliverable or are
19 delivered and generate no response. Thus individuals that move
20 fairly frequently or are too busy trying to earn a living and
21 fail to respond to the summons and thus are not included
22 withing the venire. The failure of County to follow up on
23 these individuals results in a jury pool that does not
24 represent a fair cross section of the community and
25 systematically discriminates.

26
27 CHAPPELL was denied his Sixth Amendment right to a jury
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1 drawn from a fair cross-section of the community, his right to
2 an impartial jury as guaranteed by the Sixth Amendment, and his
3 right to equal protection under the 14th Amendment. The
4 arbitrary exclusion of groups of citizens from jury service,
5 moreover, violates equal protection under the state and federal
6 constitution. The reliability of the jurors' fact finding
7 process was compromised. Finally, the process used to select
8 CHAPPELL'S jury violated Nevada's mandatory statutory and
9 decisional laws concerning jury selection and CHAPPELL'S right
10 to a jury drawn from a fair cross-section of the community, and
11 thereby deprived CHAPPELL of a state created liberty interest
12 and due process of law under the 14th Amendment.

13 **CLAIM THREE**

14 CHAPPELL'S conviction and sentence are invalid under the
15 State and Federal Constitutional guarantee of due process,
16 equal protection of the laws, effective assistance of counsel
17 and reliable sentence because CHAPPELL was not afforded
18 effective assistance of counsel on direct appeal. United
19 States Constitution Amendments 5, 6, 8, and 14; Nevada
20 Constitution Article I, Sections 3, 6 and 8; Article IV,
21 Section 21.
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23 Appellate counsel failed to provide reasonably effective
24 assistance to CHAPPELL by failing to raise on appeal, or
25 completely assert all the available arguments supporting
26 constitutional issues raised herein. In addition, specific
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1 errors that occurred during the case and which were not raised
2 on appeal due to the ineffectiveness of appellate counsel
3 include the following:

4 A. Appellate counsel failed to raise on direct appeal
5 that a number of jury instructions given to the jury during the
6 trial and penalty hearing were unconstitutional in improper.
7 The specific instructions are addressed below in CLAIM V, and
8 are incorporated herein by this reference.

9 B. Appellate counsel failed to raise the use of
10 overlapping aggravating circumstances on direct appeal, just as
11 trial counsel failed to object to same at trial. The specific
12 basis for the issue as being meritorious is discussed above in
13 CLAIM ONE (D) and incorporated herein by this reference.

14 C. Appellate counsel failed to raise the issue the
15 improper closing argument on direct appeal and argue that the
16 prosecutorial misconduct was plain error.

17 D. Appellate counsel failed to raise on direct appeal
18 that the death penalty was sought in violation of his rights
19 under the Fifth and Fourteenth Amendments to the United States
20 Constitution to Due Process and Equal Protection in that the
21 decision to seek the death penalty was not made in a race
22 neutral fashion.

23 E. Appellate counsel failed to challenge the improper
24 victim impact testimony wherein the witnesses urged the jury to
25 impose the death penalty.

26 F. Appellate counsel failed to challenge the improper
27
28

1 cross-examination of CHAPPELL at the guilt phase concerning the
2 subject of punishment and the possibility of parole.

3 **CLAIM FOUR**

4 CHAPPELL'S conviction and sentence are invalid under the
5 State and Federal Constitutional guarantee of due process,
6 equal protection of the laws, and reliable sentence due to the
7 failure of the Nevada Supreme Court to conduct fair and
8 adequate appellate review. United States Constitution
9 Amendments 5, 6, 8, and 14; Nevada Constitution Article I,
10 Sections 3, 6 and 8; Article IV, Section 21.

12 The Nevada Supreme Court's review of cases in which the
13 death penalty has been imposed is constitutionally inadequate.
14 The opinions rendered by the Court have been consistently
15 arbitrary, unprincipled and result oriented. Under Nevada law,
16 the Nevada Supreme Court had a duty to review CHAPPELL'S
17 sentence to determine (a) whether the evidence supported the
18 finding of aggravating circumstances; (b) whether the sentence
19 of death was imposed under the influence of passion, prejudice
20 or other arbitrary factor; (c) whether the sentence of death
21 was excessive considering both the crime and the defendant.
22 NRS 177.055(2) Such appellate review was also required as a
23 matter of constitutional law to ensure the fairness and
24 reliability of CHAPPELL'S sentence.

26 The opinion affirming CHAPPELL'S conviction and sentence
27 was only endorsed by three members of the five person court as
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1 Justice Springer and Maupin recused themselves. The absence of
2 a full court to consider a capital direct appeal aptly
3 demonstrates the absence of a full and complete review by the
4 entire court. The opinion references that a mandatory review
5 was conducted pursuant to NRS 177.055(2), however, there is no
6 discussion of the factors just a blanket statement that review
7 as conducted and the conclusion reached that the punishment
8 imposed was not excessive.

9 The completeness of the review of the thirteen issues
10 raised by CHAPPELL in his Opening Brief is also called into
11 question by the failure of the Court to address six of the
12 issues. Rather than address the issues the Court merely issued
13 a form sentence that each of the issues had been reviewed and
14 found without merit, despite such issues containing significant
15 constitutional claims. Amount the issues not addressed were
16 validity of the death penalty and the discriminatory use of
17 peremptory challenges.

18 **CLAIM FIVE**

19
20 CHAPPELL'S conviction and sentence are invalid under the
21 State and Federal Constitutional guarantee of due process,
22 equal protection of the laws, effective assistance of counsel
23 and reliable sentence because the a number of jury instructions
24 given at trial were faulty and were not the subject of
25 contemporaneous objection by trial counsel, and not raised on
26 direct appeal by appellate counsel. United States
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1 Constitution Amendments 5, 6, 8, and 14; Nevada Constitution
2 Article I, Sections 3, 6 and 8; Article IV, Section 21.

3 A. The jury instruction given defining premeditation and
4 deliberation was constitutionally infirm and denied CHAPPELL
5 due process and equal protection under the United States and
6 Nevada Constitutions. The instructions failed to provide the
7 jury with any rational or meaningful guidance as to the concept
8 of premeditation and deliberation and thereby eliminated any
9 rational distinction between first and second degree murder.
10 The instruction given does not require any premeditation at all
11 and thus violates the constitutional guarantee of due process
12 of law because it is so bereft of meaning as to the definition
13 of two elements of the statutory offense of first degree murder
14 as to allow virtually unlimited prosecutorial discretion in
15 charging decisions.
16

17 By eliminating any conceivable, rational distinction
18 between first and second degree murder, the instruction given
19 during CHAPPELL'S trial also failed to narrow the class of
20 defendants eligible for the death penalty, and thereby
21 corrupted a crucial element of the capital punishment scheme.

22 Instruction number 22 as given to the jury was not subject
23 of an objection by CHAPPELL. The instruction informed the jury
24 that:

25 "Premeditation is a design, a determination to kill,
26 distinctly formed in the mind at any moment before or
27 at the time of the killing.

28 Premeditation need not be for a day, an hour or

1 even a minute. It may be as instantaneous as
2 successive thoughts of the mind. For if the jury
3 believes from the evidence that the act constituting
4 the killing was preceded by and is the result of
5 premeditation, no matter how rapidly the
6 premeditation is followed by the act constituting the
7 killing, it is willful, deliberate and premeditated
8 murder."

9 The above instruction must be read in conjunction with Number
10 21 which stated, in relevant part that:

11 "Murder of the First Degree is murder which is (a)
12 perpetrated by any kind of willful, deliberate and
13 premeditated killing...."

14 The instructions do not define, explain or clarify for the jury
15 the phrases "premeditated", "willful" and "deliberate".

16 The instructions correctly inform the jury that there are three
17 (3) necessary and distinct elements to the crime of First
18 Degree Murder. NRS 200.030(1)(a). The use of the conjunctive
19 "and" crystallizes that the elements are separate and each one
20 is required to support a verdict of murder in the first degree.
21 The jury, however, was only given an instruction relating to
22 premeditation for further guidance with no guidance whatsoever
23 at the meaning of deliberate.

24 The challenged instruction was modified by the Court in
25 Byford v. State, 116 Nev. Ad. Op. 23 (2000). In Byford, the
26 Court rejected the argument as a basis for relief for Byford,
27 but recognized that the erroneous instruction raised "a
28 legitimate concern" that the Court should address. The Court
went on to find that the evidence in the case was clearly
sufficient to establish premeditation and deliberation.

1 Subsequent to the decision in Byford, supra, further
2 challenges have been made to the instruction with no success.
3 In Garner v. State, 116 Nev. Ad. Op. 85 (2000), the Court
4 discussed at length the future treatment of challenges to what
5 has been deemed the "Kazalyn" instruction. Garner was raising
6 the issue on direct appeal without it having been preserved at
7 the trial court level. CHAPPELL is now raising the issue
8 without the issue being preserved at trial or raised on direct
9 appeal because of the ineffective assistance of trial and
10 appellate counsel. The Court stated in Garner:

11 "...To the extent that our criticism of the Kazalyn
12 instruction in Byford means that the instruction was
13 in effect to some degree erroneous, the error was not
plain. . . .

14 Therefore, under Byford, no plain or
15 constitutional error occurred here. Independently of
16 Byford, however, Garner argues that the Kazalyn
17 instruction caused constitutional error. We are
unpersuaded by his arguments and conclude that giving
the Kazalyn instruction was not constitutional
error.. . . .

18 . . .Therefore, the required use of the Byford
19 instruction applies only prospectively. Thus, with
20 convictions predating Byford, neither the use of the
Kazalyn instruction nor the failure to give
21 instructions equivalent to those set forth in Byford
provides grounds for relief."

22 Garner, 116 Nev. Ad. Op. 85 at 15.

23 The prejudicial impact of the improper instruction was
24 heightened by closing argument that highlight the successive
25 thoughts of the mind aspect of the erroneous instruction:

26 "...it's premeditation. It's a design, a
27 determination to kill distinctly formed in the mind
at any moment before or at the time of the killing.

1 Any moment before the time of the killing. It didn't
2 have to a day, an hour or a minute. If I walked up
3 to any one of you and I had a gun and I drew down and
4 shot any one of you, there is no doubt that that's
5 first degree murder. That is a simple act of drawing
6 down and shooting someone is premeditation.

7 All premeditation is successive thoughts in the
8 mind. It's not like TV. Successive thoughts in the
9 mind." (9 ROA 1687).

10 Trial counsel was ineffective in failing to object to this
11 instruction and further in not offering an alternative
12 instruction that properly defined the concept. Appellate
13 counsel likewise rendered ineffective assistance in failing to
14 raise the issue on direct appeal, even in the absence of a
15 contemporaneous objection.

16 B. The malice instruction were vague and ambiguous and
17 gave the state an improper presumption of implied malice.

18 At the settling of jury instructions trial counsel failed
19 to object to Instruction Number 20 which defined express and
20 implied malice as follows:

21 "Express malice is that deliberate intention
22 unlawfully to take away the life of a fellow
23 creature, which is manifested by external
24 circumstances capable of proof.

25 Malice may be implied when no considerable
26 provocation appears, or when all the circumstances of
27 the killing show an abandoned and malignant heart."

28 The instruction in no uncertain terms defines what express
malice is without issuing a directive as to when express malice
may be found. The distinction is obvious, express malice is
merely defined whereas the jury is virtually directed to find
implied malice "when no considerable provocation appears".

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1 This interpretation of Instruction No. 20 is consistent with
2 the finding of the Court in Thomas v. State, 88 Nev. 382, 498
3 P.2d 1314 (1972) that "[g]enerally, the word 'may' is construed
4 as permissive and the word 'shall' is construed as mandatory".

5 The State of California having recognized the problem has
6 altered its instruction to read "Malice is express when...; and
7 malice is implied when...." California Jury Instructions,
8 Criminal, Section 8.11.

9 Although the Nevada Supreme Court has upheld the validity
10 of the instruction as correctly informing the jury of the
11 distinction between express and implied malice under NRS
12 200.020, Guy v. State, 108 Nev. 770, 839 P.2d 578 (1992).
13 CHAPPELL still urges that the presumption language is improper.
14 It is therefore urged that the Court reconsider the finding in
15 Guy, supra and reverse the conviction of CHAPPELL.

16 C. Trial counsel failed to object to the instructions
17 given at the penalty hearing that failed to appraise jury of
18 the proper use of character evidence and as such the imposition
19 of the death penalty was arbitrary and not based on valid
20 weighing of aggravating and mitigating circumstances in
21 violation of the Eighth Amendment to the Constitution.

22 The invalidity of the penalty hearing jury instructions
23 are discussed below as an Eighth Amendment violation and said
24 argument is incorporated herein by this reference. Trial
25 counsel should have objected at the penalty hearing and
26 appellate counsel should have challenged the instructions on
27
28

1 direct appeal.

2 D. The jury was improperly instructed that it could not
3 consider sympathy in mitigation of the death penalty, and no
4 objection was raised by trial counsel and the issue was not
5 raised on direct appeal.

6 Instruction 28, stated in relevant portion:

7 "A verdict may never be influenced by
8 sympathy, prejudice or public opinion.
9 Your decision should be the product of
sincere judgement and sound discretion in
accordance with these rules of law."
10 (Emphasis added)

11 Sentencers may not be given unbridled discretion in
12 determining the fate of those charged with capital offenses.
13 Death penalty statutes must be structured to prevent the
14 penalty being imposed in an arbitrary and unpredictable
15 fashion. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49
16 L.Ed.2d 859 (1976); Furman v. Georgia, 408 U.S. 238, 92 S.Ct.
17 2126, 33 L.Ed.2d 346 (1972). A capital defendant must be
18 allowed to introduce any relevant mitigating evidence regarding
19 his character and record and circumstance of the offense.
20 Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49
21 L.Ed.2d 944 (1976); Eddings v. Oklahoma, 455 U.S. 104, 102
22 S.Ct. 869, 71 L.Ed.2d 1 (1982).

23 The anti-sympathy instruction given violated CHAPPELL'S
24 Eighth Amendment rights because it undermined the jury's
25 constitutionally mandated consideration of mitigating evidence.
26 An alleged error in jury instructions in the sentencing phase
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1 of a capital case requires a determination of how a reasonable
2 juror could construe the instruction in such ways to make its
3 sentencing decision improper. If such a way exists the
4 reviewing court should reverse the sentencing decision. Mills
5 v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384
6 (1988).

7 In California v. Brown, 479 U.S. 541, 107 S.Ct. 837, 93
8 L.Ed.2d 934 (1987), the United States Supreme Court reviewed a
9 jury instruction which a Defendant challenged on the ground
10 that the "sympathy" portion of the instruction interfered with
11 the jury's consideration of mitigating evidence. The
12 challenged instruction informed the jurors that they "must not
13 be swayed by mere sentiment, conjecture, sympathy, passion,
14 prejudice, public opinion or public feeling." The court,
15 upheld the instruction, as not being violative of the Eighth
16 and Fourteenth Amendments, in reliance upon the inclusion of
17 the word "mere". According to the court, a reasonable juror
18 would understand the instruction not to rely on "mere sympathy"
19 as a directive to ignore only the sort of sympathy that would
20 be totally divorced from the evidence adduced during the
21 penalty phase.
22

23 In the instant case, the language of the instruction at
24 issue, is not modified by the word "mere" which was crucial in
25 the decision to uphold the instruction in California v. Brown,
26 supra. The instant instruction is comparable to the
27 instruction that was struck down in Parks v. Brown, 860 F.2d
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1 1545 (10th Cir. 1988), which was as follows: "You must avoid
2 any influence of sympathy, sentiment, passion, prejudice or
3 other arbitrary factor when imposing sentence." In reaching
4 this conclusion, the 10th Circuit found the instruction
5 precluded any consideration of sympathy and thus created an
6 impermissible risk that a reasonable juror might disregard
7 mitigating evidence.

8 Although the jury was instructed to consider any
9 mitigating circumstance, it was also instructed that its
10 verdict may never be influenced by sympathy. The mitigating
11 instruction did not cure the constitutionally defective anti-
12 sympathy instruction. At best, the jury received conflicting
13 instructions. In Francis v. Franklin, 471 U.S. 307, 105 S.Ct.
14 1965, 85 L.Ed.2d 344 (1985), the Court stated:

15 "Language that merely contradicts and does not
16 explain a constitutionally infirm instruction will
17 not suffice to absolve the infirmity."

18 CHAPPELL had the constitutional right to have the jury give
19 "individualized" consideration to the mitigating circumstances
20 of his character, record and the circumstances of the crime.
21 Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235
22 (1983).

23 E. It was a violation of the Eighth and Fourteenth
24 Amendments to fail to properly instruct the jury on the
25 existence and use of mitigating circumstances presented by
26 CHAPPELL as opposed to simply listing the statutory mitigators.

27 Instruction number 22 at the penalty hearing set forth the
28

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1 seven (7) statutory mitigating circumstances, but did not
2 include any mitigating factors which were unique to CHAPPELL'S
3 case. The prosecutor in her closing argument went down the
4 list of statutory mitigating circumstances and was able to
5 ridicule most of them as they did not apply to the facts of
6 this case. (11 ROA 2035-2038). Counsel clearly should have
7 tailored the jury instructions to remove mitigators that did
8 not apply and insert the unique mitigators that were being
9 proffered by the defense. In addition to the limited statutory
10 mitigating circumstances, CHAPPELL contends that the evidence
11 also supported the giving of individual theories of mitigation.

12 In every criminal case a defendant is entitled to have the
13 jury instructed on any theory of defense that the evidence
14 discloses, however improbable the evidence supporting it may
15 be. Allen v. State, 97 Nev. 394, 632 P.2d 1153 (1981);
16 Williams v. State, 99 Nev. 530, 665 P.2d 260 (1983).

17 In Lockett v. Ohio, 438 US 586, 98 S.Ct 2954, 57 L.Ed. 2d
18 973 (1978) the Court held that in order to meet constitutional
19 muster a penalty hearing scheme must allow consideration as a
20 mitigating circumstance any aspect of the defendant's character
21 or record or any of the circumstances of the offense that the
22 defendant proffers as a basis for a sentence of less than
23 death. See also Hitchcock v. Dugger, 481 US 393, 107 S.Ct.
24 1821, 95 L.Ed.2d 347 (1987) and Parker v. Dugger, 498 US 308,
25 111 S.Ct 731, 112 L.Ed.2d 812 (1991).
26

27 NRS 175.554(1) provides that in a capital penalty hearing
28

1 before a jury, the court shall instruct the jury on the
2 relevant aggravating circumstances, and shall also instruct the
3 jury as to the mitigating circumstances alleged by the defense
4 upon which evidence has been presented during the trial or
5 during the hearing. The statute thus requires instructions on
6 alleged mitigators and does not restrict such instructions to
7 the enumerated statutory mitigators. Byford v. State, 116 Nev.
8 Ad. Op 23 (2000).

9 It was error for the Court to fail to specifically
10 instruct the jury on the mitigating circumstances that CHAPPELL
11 submitted as his theory of the case at the penalty hearing.

12 **GROUND SIX**

13 CHAPPELL'S sentence is invalid under the State and Federal
14 Constitutional guarantee of due process, equal protection of
15 the laws, effective assistance of counsel and reliable sentence
16 because the jury was allowed to use overlapping aggravating
17 circumstances in imposing the death penalty. United States
18 Constitution Amendments 5, 6, 8, and 14; Nevada Constitution
19 Article I, Sections 3, 6 and 8; Article IV, Section 21.

20 CHAPPELL hereby incorporates the points and authorities
21 set forth in GROUND ONE (D) above and asserts as a separate and
22 distinct basis for relief that the use of the overlapping
23 aggravating circumstances was unconstitutional as well as the
24 result of ineffective assistance of counsel.
25
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1 CLAIM SEVEN

2 The instructions given at the penalty hearing failed to
3 appraise jury of the proper use of character evidence and as
4 such the imposition of the death penalty was arbitrary and not
5 based on valid weighing of aggravating and mitigating
6 circumstances in violation of the Eighth Amendment to the
7 Constitution.

8
9 NRS 200.030 provides the basic scheme for the
10 determination of whether an individual convicted of first
11 degree murder can be sentenced to death and provides in
12 relevant portion:

13 "4. A person convicted of murder of the first degree
14 is guilty of a category A felony and shall be
punished:

15 (a) By death, only if one or more aggravating
16 circumstances are found and any mitigating
17 circumstance or circumstances which are found do
not outweigh the aggravating circumstance or
circumstances; or

18 (b) By imprisonment in the state prison: ..."

19 In the case at bar, in addition to the alleged aggravating
20 circumstances there was a great deal of "character evidence"
21 offered by the State that was used to urge the jury to return a
22 verdict of death. The jury, however, was never instructed that
23 the "character evidence" or evidence of other bad acts that
24 were not statutory aggravating circumstances could not be used
25 in the weighing process.

26 Instruction No. 7 spelled out the process as follows:
27
28

1 "The State has alleged that aggravating
2 circumstances are present in this case.

3 The defendants have alleged that certain
4 mitigating circumstances are present in this case.

5 It shall be your duty to determine:

6 (a) Whether an aggravating circumstance or
7 circumstances are found to exist; and

8 (b) Whether a mitigating circumstance or
9 circumstances are found to exist; and

10 (c) Based upon these findings, whether a
11 defendant should be sentenced to a definite term of
12 50 years imprisonment, life imprisonment or death.

13 The jury may impose a sentence of death only if
14 (1) the jurors unanimously find at least one
15 aggravating circumstance has been established beyond
16 a reasonable doubt and (2) the jurors unanimously
17 find that there are no mitigating circumstances
18 sufficient to outweigh the aggravating circumstance
19 or circumstances found.

20 A mitigating circumstance itself need not be
21 agreed to unanimously; that is, any one juror can
22 find a mitigating circumstance without the agreement
23 of any other juror or jurors. The entire jury must
24 agree unanimously, however, as to whether the
25 aggravating circumstances outweigh the mitigating
26 circumstances or whether the mitigating circumstances
27 outweigh the aggravating circumstances.

28 Otherwise, the punishment shall be imprisonment in
the State Prison for a definite term of 50 years
imprisonment, with eligibility for parole beginning
when a minimum of 20 years has been served or life
with or without the possibility of parole."

The jury was then told that:

"Evidence of any uncharged crimes, bad acts or
character evidence cannot be used or considered in
determining the existence of the alleged aggravating
circumstance or circumstances." (6 ROA 1324)

The jury was never instructed that such evidence was not
to be part of the weighing process to determine death

1 eligibility.

2 In Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985) the
3 Court described the procedure that must be followed by a
4 sentencing jury under a statutory scheme similar to Nevada:

5 "After a conviction of murder, a capital sentencing
6 hearing may be held. The jury hears evidence and
7 argument and is then instructed about statutory
8 aggravating circumstances. The Court explained this
9 instruction as follows:

10 The purpose of the statutory aggravating
11 circumstance is to limit to a large degree,
12 but not completely, the fact finder's
13 discretion. Unless at least one of the ten
14 statutory aggravating circumstances exist,
15 the death penalty may not be imposed in any
16 event. If there exists at least one
17 statutory aggravating circumstance, the
18 death penalty may be imposed but the fact
19 finder has a discretion to decline to do so
20 without giving any reason ...[citation
21 omitted]. In making the decision as to the
22 penalty, the fact finder takes into
23 consideration all circumstances before it
24 from both the guilt-innocence and the
25 sentence phase of the trial. The
26 circumstances relate to both the offense
27 and the defendant.

28 [citation omitted]. The United States Supreme Court
upheld the constitutionality of structuring the
sentencing jury's discretion in such a manner. Zant
v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d
235 (1983)."

Brooks, 762 F.2d at 1405.

In Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996) the
Court stated:

"Under NRS 175.552, the trial court is given broad
discretion on questions concerning the admissibility
of evidence at a penalty hearing. Guy, 108 Nev. 770,
839 P.2d 578. In Robins v. State, 106 Nev. 611, 798
P.2d 558 (1990), *cert. denied*, 499 U.S. 970 (1991),
this court held that evidence of uncharged crimes is

admissible at a penalty hearing once any aggravating circumstance has been proven beyond a reasonable doubt."

Witter, 112 Nev. at 916.

Additionally in Gallego v. State, 101 Nev. 782, 711 P.2d 856 (1995) the court in discussing the procedure in death penalty cases stated:

"If the death penalty option survives the balancing of aggravating and mitigating circumstances, Nevada law permits consideration by the sentencing panel of other evidence relevant to sentence NRS 175.552. Whether such additional evidence will be admitted is a determination repositied in the sound discretion of the trial judge."

Gallego, at 791. More recently the Court made crystal clear the manner to properly instruct the jury on use of character evidence:

"To determine that a death sentence is warranted, a jury considers three types of evidence: 'evidence relating to aggravating circumstances, mitigating circumstances and 'any other matter which the court deems relevant to sentence'. The evidence at issue here was the third type, 'other matter' evidence. In deciding whether to return a death sentence, the jury can consider such evidence only after finding the defendant death-eligible, i.e., after is has found unanimously at least one enumerated aggravator and each juror has found that any mitigators do not outweigh the aggravators. Of course, if the jury decides that death is not appropriate, it can still consider 'other matter' evidence in deciding on another sentence."

Evans v. State, 117 Nev. Ad. Op. 50 (2001).

As the court failed to properly instruct the jury at the penalty hearing the sentence imposed must be set aside.

CLAIM EIGHT

CHAPPELL was denied his rights under the Fifth and Sixth,

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1 Eighth and Fourteenth Amendments to the United States
2 Constitution to Due Process, Equal Protection, and reliable
3 sentence, and therefore his death sentence is invalid as it is
4 the product of purposeful racial discrimination by state
5 officials.

6 CHAPPELL is an African-American man. In Nevada, capital
7 punishment is imposed disproportionately on racial minorities:
8 Nevada's death row population is approximately 50% minority
9 even though Nevada's general minority population is
10 approximately 17%. This disparity is especially great when it
11 comes to African-American defendants such as CHAPPELL. One
12 1993 study found that African-Americans are over-represented on
13 death row by a comparative disparity of 439.4% in Nevada in
14 general and 351.6% in Clark County. It is virtually impossible
15 that this disparity would have occurred by chance alone: One
16 recent study estimated that odds against this result occurring
17 at random are less than 1 in 100,000.

18
19 Trial counsel during the course of representation of
20 CHAPPELL prepared an internal memorandum dated April 12, 1996
21 detailing other murder case he was handling that were similar
22 fact patterns. The memorandum, attached hereto as Exhibit One
23 contains the following notation:

24 "6. Keeves [another defendant] is white and killed a
25 white man. Sengsuwan [another defendant] is Thai and
26 killed a Thai women. In the Chappell case, however,
the defendant, who is black, kills a white women.

27 It is very interesting that the State did not file a
28 death penalty notice in the other two cases, but they

1 did file one in this case"

2 To demonstrate a case of selective prosecution in
3 violation of the Equal Protection Clause, a defendant must show
4 (1) he was singled out for prosecution while others similarly
5 situated were not generally prosecuted; and (2) the prosecution
6 was invidiously based on racial, religious, or other
7 impermissible considerations. United States v. Bohrer, 807
8 F.2d 159 (10th Cir. 1986); United States v. Amon, 669 F.2d
9 1351, 1356-57, (10th Cir.1981). Principles of selective
10 prosecution also encompass disparity in sentencing decisions.

11 Race discrimination was a factor in CHAPPELL case in that
12 the victim, Deborah Panos was Caucasian, and the prosecution
13 struck every African-American from the jury. Thus, CHAPPELL,
14 a black man, was tried and sentenced by an all white jury for
15 the death of a white woman.

16 National studies have demonstrated beyond any reasonable
17 dispute that race plays a prominent role in determining which
18 defendants will be sentenced to death. Although the race of
19 the defendant is important in this calculus, the race of the
20 victim is often more important. One national study
21 demonstrated that, among defendants with comparable aggravating
22 and mitigating circumstances, 5 of every 7 defendants would not
23 have been sentenced to die if their victims had been black.

24 The Clark County District Attorney's office chose to seek
25 the death penalty against CHAPPELL while not seeking it in
26 similar cases where the only significant difference in the
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1 cases is the relative races of the defendant and the victim.

2 Trial counsel felt there was enough of a question of an
3 Equal Protection violation to prepare the attached memo. It is
4 respectfully urged that CHAPPELL must be allowed to conduct
5 discovery and utilize the subpoena power of the Court to
6 establish that the death penalty is being sought in a
7 discriminatory manner in Clark County and the State of Nevada
8 and that it is not being imposed in a racial neutral fashion by
9 sentencing bodies.

10 **CLAIM NINE**

11 CHAPPELL'S death sentence is invalid under the federal
12 constitutional guarantees of due process, equal protection, and
13 a reliable sentence because the Nevada capital punishment
14 system operates in an arbitrary and capricious manner and does
15 not narrow the class eligible to receive the death penalty.
16 United States Constitution Amendments Five, Six, Eight and
17 Fourteen; International Covenant on Civil and Political Rights.

18 The Nevada capital sentencing process permits the
19 imposition of the death penalty for any first degree murder
20 that is accompanied by an aggravating circumstance. Nev. Rev.
21 Stat. §. 200.030(4)(a). The statutory aggravating
22 circumstances are so numerous and so vague that they arguably
23 exist in every first degree murder case. See Nev. Rev. Stat.
24 §. 200.033. Nevada permits the imposition of the death penalty
25 for all first degree murders that are "at random and without
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1 apparent motive." Nev. Rev. Stat. §. 200.033(9). Nevada
2 statutes also appear to permit the death penalty for murders
3 involving virtually every conceivable kind of motive: robbery,
4 sexual assault, arson, burglary, kidnaping, torture, escape, to
5 receive money, and to prevent lawful arrest, and escape. See
6 Nev. Rev. Stat. §. 200.033. The scope of the Nevada death
7 penalty statute makes the death penalty an option for all first
8 degree murders that involve a motive, and death is also an
9 option if the first degree murder involves no motive at all.

10 The death penalty is accordingly permitted in Nevada for
11 all first degree murders, and first degree murders, in turn,
12 are not restricted in Nevada within traditional bounds. As the
13 result of unconstitutional definitions of reasonable doubt,
14 express malice and premeditation and deliberation, first degree
15 murder convictions occur in the absence of proof beyond a
16 reasonable doubt, in the absence of any rational showing of
17 premeditation and deliberation, and as a result of the
18 presumption of malice aforethought. Consequently, a death
19 sentence is permissible under Nevada law in every case where
20 the prosecution can present evidence, not even beyond a
21 reasonable doubt, that an accused committed an intentional
22 killing.
23

24 As a result of plea bargaining practices, and imposition
25 of sentences by juries and three-judge panels, sentences less
26 than death have been imposed for offenses that are more
27 aggravated than the one for which CHAPPELL stands convicted,
28

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1 and in situations where the amount of mitigating evidence was
2 less than the mitigation evidence that existed here. The
3 untrammelled power of the sentencer under Nevada law to decline
4 to impose the death penalty, even when no mitigating evidence
5 exists at all, or when the aggravating factors far outweigh the
6 mitigating evidence, means that the imposition of the death
7 penalty is necessarily arbitrary and capricious.

8 Nevada law fails to provide sentencing bodies with any
9 rational method for separating those few cases that warrant
10 the imposition of the ultimate punishment from the many that do
11 not. The narrowing function required by the Eighth Amendment
12 is accordingly non-existent under Nevada's sentencing scheme,
13 and the process is contaminated even further by Nevada Supreme
14 Court decisions permitting the prosecution to present
15 unreliable and prejudicial evidence during sentencing,
16 regarding uncharged criminal activities of the accused.
17 Consideration of such evidence necessarily diverts the
18 sentencer's attention from the statutory aggravating
19 circumstances, whose appropriate application is already
20 virtually impossible to discern.
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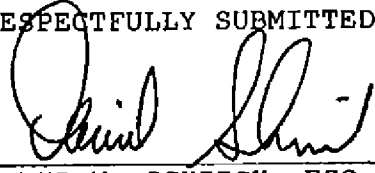
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CONCLUSION

Based on the Points and Authorities herein contained, it is respectfully requested that the conviction and sentence of CHAPPELL be set aside and a new trial date set.

DATED this 10 day of April, 2002.

RESPECTFULLY SUBMITTED:



DAVID M. SCHIECK, ESQ.

AFFIDAVIT OF JAMES CHAPPELL

STATE OF NEVADA)
) ss:
COUNTY OF WHITE PINE)

JAMES CHAPPELL, being first duly sworn, deposes and says:

That I am Petitioner in this matter. I am currently incarcerated at Ely State Prison, Ely, Nevada and state the following to my own personal knowledge, except as to those items indicated to be upon information and belief.

After I was arrested and charged in this case the Clark County Public Defender's Office was assigned to represent me. At trial I was represented by Howard Brooks and Kedric Bassett. I do not recall meeting with Mr. Bassett prior to the trial and believe that he was assigned to the case at the last minute.

I gave Mr. Brooks the names of a number of witnesses that I wanted to be called at trial and he did not call them to testify. One of the witnesses was Ernestine (Sue) Harvey. Sue was a friend of myself and Ms. Panos and could have testified as the relationship between myself and Debra. Her testimony would have greatly rebutted the testimony from the State's witnesses that portrayed me as being abusive. Debra and I had a loving relationship and Sue could have clarified from personal knowledge what our relationship was like. I asked Mr. Brooks why he wasn't calling her as a witness and he said that he had sent his investigator out twice and couldn't find her. I even talked to her during the trial and had given Mr. Brooks

1 her address and phone number so I couldn't understand why he
2 couldn't find her to testify.

3 Another witness that I wanted called at trial was a friend
4 of ours from Michigan, Shirley Sorrell. Shirley knew Debra and
5 myself for many years and talked with us on the phone even
6 after we moved to Arizona and then Nevada. She knew that Debra
7 had followed me to Arizona and the details of our relationship.

8 I gave Mr. Brooks the name and address of my best friend
9 in Michigan, James C. Ford, but he was not called as a witness.
10 I grew up with Mr. Ford and he was around Debra and myself
11 during the first five years of our relationship. He also knew
12 about my employment history and could have testified at both
13 the trial and the penalty hearing. Mr. Ivri Marrell was also a
14 friend of mine and Debra in Michigan and stayed in contact with
15 us in Arizona. He could have testified to Debra's behavior and
16 our relationship.

17 Both of my sisters, Mrya Chappell and Carla Chappell were
18 on the list of witnesses that I gave to Mr. Brooks. They both
19 had been around Debra a lot and knew about the type of
20 relationship that we had together. We lived with Carla for a
21 period of time after the baby was born and she would babysit
22 for us on occasions.

23 There were two witnesses in Tucson, Arizona that knew
24 about our relationship and everything that happened in Arizona.
25 I told Mr. Brooks about Chris Bardow and David Green, but to my
26 knowledge no effort was made to contact and interview them.
27
28

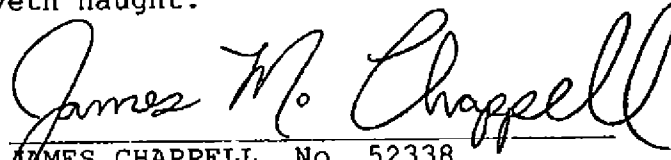
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1 The could have rebutted most of the testimony that was
2 introduced concerning the events that allegedly took place in
3 Arizona.

4 It seemed to me that the whole trial was about destroying
5 my character and I thought that Mr. Brooks should have called
6 more witnesses from Michigan and Arizona to testify at both
7 phases of the trial. Most of the character witnesses called by
8 the State did not really know either myself or Debra.

9 I was very concerned with the fact that there were no
10 minorities on the jury and expressed these concerns to Mr.
11 Brooks. I did not think that it was his fault but rather the
12 fault of the way the jury was selected.

13 FURTHER, Affiant sayeth naught.

14 
15 JAMES CHAPPELL, No. 52338

16
17 SIGNED AT ELY STATE PRISON
18 ELY, NEVADA

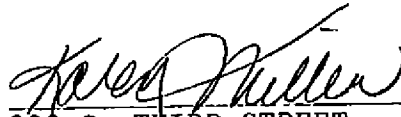
19 UNDER PENALTY OF PERJURY
20 ON THIS 23 DAY OF APRIL, 2002.

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25
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27
28

RECEIPT OF COPY

RECEIPT OF A COPY of the foregoing document is hereby
acknowledged this 30 day of April, 2002.

DISTRICT ATTORNEYS OFFICE


200 S. THIRD STREET
LAS VEGAS, NV 89155

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
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MORGAN D. HARRIS, PUBLIC DEFENDER
309 South Third Street
Las Vegas NV 89155
702-455-4685
MEMORANDUM

TO: File

FROM: HOWARD S. BROOKS #3374

RE: James Chappell

DATE: April 12, 1996

I met with James Chappell in the jail on April 11, 1996. I explained to him that I had been working on the motions in his case, and I also explained to him my discovery of the interesting similarity between this case and the Sonthrat Sengsuwan case and Michael Keeves' case.

1. In all three cases, we have defendants who have no felony records.
2. In the Sengsuwan case, the defendant stabs the woman around 20 times. Sengsuwan tries to take the vehicle.
3. In the Keeves case, the defendant stabs the guy around 20 times. Keeves takes the vehicle.
4. In this case, Chappell stabbed the woman about 13 times. He does take the vehicle.
5. In all three cases, the defendants are alone with the victims and their account of the crime will be virtually uncontradicted.
6. Keeves is white and killed a white man. Sengsuwan is Thai and killed a Thai woman. In the Chappell case, however, the defendant, who is black, kills a white woman.

It is very interesting that the State did not file a death penalty notice in the other two cases, but they did file on in this case.

I explained to Chappell that we have a potential here for trying to get this evidence of the other two cases before the jury. But it would only work if we continue our case until after the other two cases because I can't bring this up and give the State a chance to possibly file a notice of intent in these other two cases.

He said he would think about it.

HSB:sm

1 **RSPN**
2 **STEWART L. BELL**
3 **DISTRICT ATTORNEY**
4 **Nevada Bar #000477**
5 **200 S. Third Street**
6 **Las Vegas, Nevada 89155**
7 **(702) 455-4711**
8 **Attorney for Plaintiff**

10
FILED

JUN 19 4 42 PM '02

Shirley B. Kneegisser
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

8 **THE STATE OF NEVADA,**

9 **Plaintiff,**

10 **-vs-**

11 **JAMES MONTELL CHAPPELL,**
12 **#1212860**

13 **Defendant.**

Case No. C131341
Dept. No. XI

15
16 **STATE'S RESPONSE TO DEFENDANT'S SUPPLEMENTAL PETITION**
17 **FOR WRIT OF HABEAS CORPUS**
18 **(POST CONVICTION)**

19 **DATE OF HEARING: 7-22-02**
TIME OF HEARING: 9:00 A.M.

20 **COMES NOW**, the State of Nevada, by STEWART L. BELL, District Attorney, through
21 **H. LEON SIMON**, Deputy District Attorney, and hereby submits the attached Points and
22 **Authorities in Response to Defendant's Supplemental Petition for Writ of Habeas Corpus (Post**
23 **Conviction).**

24 **This Response is made and based upon all the papers and pleadings on file herein, the**
25 **attached points and authorities in support hereof, and oral argument at the time of hearing, if**
26 **deemed necessary by this Honorable Court.**

27 **///**

28 **///**

\$18

1 answer and all supporting documents which are filed, shall determine whether an evidentiary
2 hearing is required. A defendant is entitled to an evidentiary hearing if his petition is supported
3 by specific factual allegations that, if true, would entitle him to relief unless the factual
4 allegations are repelled by the record. Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603, 605
5 (1994). However, "[a] defendant seeking post-conviction relief is not entitled to an evidentiary
6 hearing on factual allegations belied or repelled by the record." Hargrove v. State, 100 Nev. 498,
7 503, 686 P.2d 222, 225 (1984); citing Grondin v. State, 97 Nev. 454, 634 P.2d 456 (1981). As
8 evidenced by the arguments below, the State alleges that Defendant's claims for relief are
9 without merit and belied by the record. As such, he is not entitled to an evidentiary hearing.

10 II.

11 DEFENDANT WAS PROVIDED WITH EFFECTIVE ASSISTANCE 12 OF COUNSEL

13 Defendant's arguments that his Sixth and Fourteenth Amendment rights to effective
14 assistance of counsel were violated are without merit. The Supreme Court has clearly established
15 the appropriate test for determining whether a defendant received constitutionally defective
16 assistance of counsel. To demonstrate ineffective assistance of counsel, a convicted defendant
17 must show both that his counsel's performance was deficient, and that the deficient performance
18 prejudiced his defense. Strickland v. Washington, 566 U.S. 668, 687, 104 S.Ct. 2052, 2064
19 (1984). The Nevada Supreme Court has adopted this test articulated by the Supreme Court.
20 Bennett v. State, 111 Nev. 1099, 1108, 901 P.2d 676, 682 (1995).

21 Counsel's performance is deficient where counsel made errors so serious that the
22 adversarial process cannot be relied on as having produced a just result. Strickland, at 686. The
23 proper standard for evaluating an attorney's performance is that of "reasonable effective
24 assistance." Strickland, at 687. This evaluation is to be done in light of all the circumstances
25 surrounding the trial. Id. The Supreme Court has created a strong presumption that defense
26 counsel's actions are reasonably effective:

27 Every effort [must be made] to eliminate the distorting effects of
28 hindsight to reconstruct the circumstances of counsel's challenged
conduct, and to evaluate the conduct from counsel's perspective at

1 the time. . . A court must indulge a strong presumption that
2 counsel's conduct falls within the wide range of reasonable
professional assistance.

3 Id at 689-690. "[S]trategic choices made by counsel after thoroughly investigating the plausible
4 options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596
5 (1992). The Nevada Supreme Court has held that it is presumed counsel fully discharged his
6 duties, and said presumption can only be overcome by strong and convincing proof to the
7 contrary. Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978)

8 It is not enough for a defendant to show deficient performance on the part of counsel, a
9 defendant must also demonstrate that the deficient performance prejudiced the outcome of his
10 case. Strickland v. Washington, 566 U.S. 668, 686, 104 S.Ct. 2052, 2065 (1984). In meeting
11 the prejudice requirement of an ineffective assistance of counsel claim, a defendant must show
12 a reasonable probability that, but for counsel's errors, the result of the trial would have been
13 different. McNelson v. State, 115 Nev. 396, 401, 990 P.2d 1263, 1268 (1999) *citing* Strickland,
14 566 U.S. 668, 687, 104 S.Ct. 2052, 2066 (1984). "A reasonable probability is a probability
15 sufficient to undermine confidence in the outcome." Id. *citing* Strickland, 466 U.S. at 687-89,
16 694.

17 Defendant claims that he received ineffective assistance of counsel when his attorney: 1)
18 failed to call witnesses during trial, 2) failed to object to the exclusion of African Americans
19 from the jury system, 3) failed to object to improper jury instructions, 4) failed to object to
20 overlapping aggravating factors used to apply the death penalty to Defendant, 5) failed to object
21 to prosecutorial misconduct during closing argument and during the penalty phase, and 6) failed
22 to object thereby precluding important issues on appeal. Applying this standard of review, the
23 State will address each of the Defendant's claims of ineffective assistance of counsel
24 individually.

25 **A. Failure to Call Witnesses**

26 Defendant asserts that his counsel was ineffective for failing to call witnesses at trial.
27 Specifically, Defendant claims that the witnesses listed in his petition would have demonstrated
28 that Defendant and the victim had a loving, rather than abusive, relationship. Pursuant to

1 Bejarano v. State, 106 Nev. 840, 842, 801 P.2d 1388, 1390 (1990), the Court need not determine
2 whether counsel's actions were ineffective prior to evaluating whether Defendant has been
3 prejudiced. In this case, Defendant has failed to demonstrate how his counsel's failure to call the
4 enumerated witnesses prejudiced him. In demonstrating that prejudice exists, the defendant must
5 show that the decision in the case would have been different absent the errors. McNilton v.
6 State, 115 Nev. 396, 401, 990 P.2d 1263, 1268 (1999). Here, the defendant cannot demonstrate
7 this.

8 Defendant claims that if the witnesses listed in his petition had testified, they would have
9 demonstrated that defendant did not commit first degree murder because their testimony would
10 have demonstrated that he had permission to be in the house and use the victim's belongings.
11 The evidence indicating to the contrary is overwhelming. Further the Nevada Supreme Court
12 found that there was ample evidence to prove the aggravating factors (robbery, burglary and
13 sexual assault) existed. See Exhibit One p. 5-8. As such, character witnesses would not have
14 changed the outcome of the case. Thus, Defendant's attorney was not ineffective for not calling
15 the witnesses.

16 **B. Failure to Object to Jury Selection**

17 Defendant claims that he received ineffective assistance of counsel because his attorney
18 failed to object to the Clark County jury selection system which systematically excludes African
19 Americans. Defendant's claim is without merit.

20 Both the Sixth and the Fourteenth Amendments to the United States Constitution
21 guarantee a defendant the right to a jury selected from a representative cross-section of the
22 community. This right requires that the pools from which juries are drawn do not systematically
23 exclude distinctive groups in the community. Taylor v. Louisiana, 419 U.S. 522, 538, 95 S.Ct.
24 692, 702 (1975). However, there is no requirement that the jury that is selected actually mirror
25 the population at large. Holland v. Illinois, 493 U.S. 474, 110 S.Ct. 803 (1990).

26 The defendant bears the burden of establishing a prima facie violation of the fair cross-
27 section requirement. In order to demonstrate a prima facie violation, the defendant must show
28 1) that the group alleged to be excluded is a distinctive group in the community, 2) that the

1 representation of this group in venires from which juries are selected is not fair and reasonable
2 in relation to the number of such persons in the community and 3) that this under representation
3 is due to systematic exclusion of the group in the jury selection process. Duren v. Missouri, 439
4 U.S. 357, 364, 99 S.Ct. 664, 668 (1979). This test has been adopted by the Nevada Supreme
5 Court. See Evans v. State, 112 Nev. 1172, 1186, 926 P.2d 265, 274 (1996).

6 Defendant has failed to meet this test. Defendant claims that African Americans have
7 been excluded from jury selection in Clark County Nevada. Although African Americans are a
8 distinctive group, Defendant has failed to prove the other two prongs required for a prima facie
9 showing that African Americans have been systematically excluded. Defendant's claim that the
10 number of African Americans on the jury was not reasonable and that they were systematically
11 excluded from the jury is belied by the record. Hargrove v. State, 100 Nev. 498, 503, 686 P.2d
12 222, 225 (1984). The record indicates that initially there were a substantial number of African
13 Americans on the entire panel from which the jury in Defendant's case was selected. (ROA Vol.
14 4 p.832). Further, several of the African American prospective jurors indicated an unwillingness
15 to serve on the jury due to their beliefs regarding the death penalty. (ROA Vol. 4 p. 832).
16 Additionally, the Nevada Supreme Court found that the two African Americans that were
17 excused from the jury based on the State's preemptory challenges were not removed based on
18 race. See Exhibit One p. 10-11. Thus, the record indicates that the representation of African
19 Americans in the jury pool was fair and that African Americans have not been excluded unfairly.

20 As Defendant has failed to show that the jury selection process was unconstitutional, he
21 cannot demonstrate that his counsel was ineffective in not objecting to it.

22 C. Failure to Object to Jury Instructions

23 Defendant alleges that he received ineffective assistance of counsel when his attorney
24 failed to object to improper jury instructions. In supporting this claim, Defendant incorporates
25 his argument in claim V. The State addresses claim V below at issue III (B). The State
26 incorporates the arguments from issue III(B) below in demonstrating that Defendant's attorney
27 was not ineffective in not objecting to the jury instructions.

28 ///

1 **D. Failure to Object to or Strike Overlapping Aggravating Circumstances**

2 Defendant asserts that his counsel was ineffective for failing to object to and move to
3 strike overlapping aggravating circumstances utilized by the State to impose the death penalty.
4 Specifically, Defendant claims that it was improper for the State to use robbery, burglary and
5 sexual assault as aggravating factors because they were all based on the same set of operative
6 facts. Additionally, Defendant claims that using all three charges as aggravating factors violated
7 the Double Jeopardy clause. The Nevada Supreme Court has dismissed this argument. See
8 Bennett v. State, 106 Nev. 135, 142, 787 P.2d 797, 801 (1990). In Bennett, the defendant argued
9 that the State had improperly used burglary and robbery as two separate aggravating factors even
10 though the charges arose out of the same indistinguishable course of conduct. Id. In disagreeing
11 with the defendant, the Nevada Supreme Court reasoned that because the defendant could be
12 prosecuted for both crimes separately and because convictions of both burglary and robbery do
13 not violate the double jeopardy clause as they are separate and distinct offenses they could both
14 be used separately as aggravating factors. Id. See also Wilson v. State, 99 Nev. 362, 376, 664
15 P.2d 328, 336 (1983) (where the court found that any enumerated felonies that are committed
16 during the course of a murder can be aggravating factors).

17 Because it was not improper for the State to use robbery, burglary and sexual assault as
18 aggravating factors, Defendant's counsel was not ineffective in not objecting to the aggravating
19 factors.

20 **E. Failure to Object to Alleged Prosecutorial Misconduct During Voir Dire and**
21 **Closing Argument**

22 Defendant argues that he received ineffective assistance of counsel when his trial counsel
23 failed to object to numerous episodes of prosecutorial misconduct during the guilt and penalty
24 phases of the trial. Defendant has failed to demonstrate that his counsel was ineffective.

25 In addressing the issue of prosecutorial misconduct, the Supreme Court has stated,

26 [A] criminal conviction is not to be lightly overturned on the basis
27 of a prosecutor's comments standing alone, for the statements or
28 conduct must be viewed in context; only by so doing can it be
 determined whether the prosecutor's conduct affected the fairness
 of the trial.

1 United States v. Young, 470 U.S. 1, 11, 105 S.Ct. 1038, 1044 (1985). Inappropriate prosecutorial
2 comments, standing alone do not warrant reversal of a criminal conviction if the proceedings
3 were otherwise fair. United States v. Young, 470 U.S. 1, 11, 105 S.Ct. 1038, 1044 (1985). In
4 order to reverse a conviction, the errors must be "of constitutional dimension and so egregious
5 that they denied [the defendant] his fundamental right to a fair jury trial." Williams v. State, 113
6 Nev. 1008, 1018, 945 P.2d 438, 444 (1997), overruled on other grounds in Byford v. State, 116
7 Nev. Adv. Op. 23, 994 P.2d 700 (2000).

8 In order for a defendant to prove prosecutorial misconduct, he must show "that the
9 remarks made by the prosecutor were 'patently prejudicial'." This standard of review is based
10 on a defendant's right to have a fair trial, not necessarily a perfect one. Ross v. State, 106 Nev.
11 924, 927, 803 P.2d 1104, 1105 (1990). The relevant inquiry is whether the prosecutor's
12 statements so contaminated the proceedings with unfairness as to make the result a denial of due
13 process. Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986). The defendant
14 must show that the statements violated a clear and unequivocal rule of law, he was denied a
15 substantial right, and as a result, he was materially prejudiced. Libby, 109 Nev. at 911, 859 P.2d
16 at 1054.

17 Defendant points to six alleged instances of prosecutorial misconduct which his attorney
18 failed to object to. Each of these statements will be reviewed individually below.

19 **1. Statement Regarding Rehabilitation**

20 Defendant claims that the following statement was inappropriate.

21 And this is a penalty hearing. It's a penalty hearing because a
22 violent murder occurred on August 31st of 1995. So it's not
23 appropriate for you to be considering rehabilitation. This isn't a
rehabilitation hearing.

24 (ROA Vol. 11 p.2017). The State submits that this comment was not improper. In Evans v.
25 State, 117 Nev. Adv. Op. No. 50, p.15, 28 P.3d 498, 514 (2001), the defendant argued
26 misconduct occurred when the prosecutor offered his view that the penalty hearing was not a
27 rehabilitation hearing but was for the purpose of retribution and deterrence. Specifically, the
28 prosecutor said, "in my view, based upon this evidence, such a person has forfeited the right to

1 continue to live." Id. The Nevada Supreme Court determined that there was no error in the
2 prosecutor's remarks and explained:

3 A prosecutor in a penalty phase hearing may discuss general
4 theories of penology, such as the merits of punishment, deterrence,
5 and the death penalty. And statements indicative of opinion, belief,
6 or knowledge are unobjectionable when made as a conclusion from
7 the evidence introduced at trial.

8 Id. Thus, Defendant is incorrect in asserting that the prosecutor committed misconduct when
9 he made the statement above. During closing argument in the penalty phase of the trial, the
10 prosecutor expressed her view that the hearing was not a rehabilitation hearing. The prosecutor
11 was merely commenting on theories of penology with regard to rehabilitation. As such,
12 Defendant's counsel was not ineffective in failing to object.

13 **2. Reference to Facts Not in Evidence**

14 Next Defendant claims that the prosecutor improperly introduced facts that were not in
15 evidence at the penalty hearing. The guilt phase and the penalty phase in a capital case are
16 separate proceedings and what is inadmissible in one may be admissible in the other. Evans v.
17 State, 112 Nev. 1172, 926 P.2d 265 (1996). The evidentiary rules are less stringent in a penalty
18 phase of the trial. Id. Evidence which may not ordinarily be admissible at trial may be admitted
19 in the penalty phase as long as the evidence does not draw its support from impalpable or highly
20 suspect evidence. Id. In this case, the prosecutor's statements were made as a commentary on
21 the merits of the death penalty. As such, they were proper. See Evans v. State, 117 Nev. Adv.
22 Op. 50, 28 P.3d 498, 514 (2001). Defendant has failed to demonstrate that his counsel was
23 ineffective in not objecting.

24 **3. Inflammatory Statement During Closing at Penalty Hearing**

25 Defendant claims that his attorney was ineffective for failing to object to the prosecutor's
26 inflammatory statement during closing argument. See Defendant's Supp. Petition p. 24. The
27 Nevada Supreme Court has expressly held that a prosecutor may comment on the loss
28 experienced by the family of a murder victim. Lay v. State, 110 Nev. 1189, 1194, 886 P.2d 448,
451 (1994). In the instant case, the prosecutor's statement was a comment on the effect Deborah
Panos' murder had on her family and was, therefore, proper. Additionally, in Evans v. State, 117

1 Nev. Adv. Op. 50, 28 P.2d 498, 514 (2001), the Nevada Supreme Court found that the statement
2 by the prosecutor that Defendant was "an evil magnet" was not improperly inflammatory.
3 Likewise, the statements made by the prosecutor during closing argument at the penalty hearing
4 were not improperly inflammatory. Reference to the fact that the victim died, that her death
5 impacted her children did not unduly prejudice Defendant. Thus, Defendant's attorney was not
6 ineffective in not objecting to the statements.

7 **4. Statement Regarding Sending a Message to the Community**

8 Defendant also claims that his attorney was ineffective for not objecting when the
9 prosecutor encouraged the jury to send a message to the community. In his rebuttal closing
10 argument during the penalty phase, the prosecutor made the following statement.

11 My partner also mentioned deterrence. There's nothing illegitimate
12 about deterrence as a factor to be considered. You have it in this
13 case, as the ladies and gentlemen of this jury, within your power to
14 guarantee by the punishment you impose that Mr. Chappell never
15 makes another woman a corpse. You can certainly deter him and
16 you have it within your power to send a message today out into this
community, which is we do not tolerate those who have a history of
domestic violence, who will let it accelerate and become a murderer
and you can tell the other would be James Chappells what the
consequence is when you engage in that type of action.

17 (ROA Vol. 11 p. 2102). A prosecutor may ask a jury to make a statement to the community.
18 Williams v. State, 113 Nev. 1008, 1019, 945 P.2d 438, 444 (1997). In Williams, the prosecutor
19 remarked, "Do not let the system fail them again. When we failed them in the first instance it
20 cost their lives. Should we fail in this instance it will take away the meaning and dignity of their
21 lives." The Nevada Supreme Court found that this statement was not misconduct and explained
22 that the prosecutor, "may ask the jury, through its verdict, to set a standard or make a statement
23 to the community." Id. at 1020. Similar to the prosecutor in Williams, the prosecutor in this case
24 was asking the jury to make a statement to the community and specifically to the defendant. This
25 comment does not amount to prosecutorial misconduct and Defendant's attorney was not
26 ineffective in not objecting.

27 ///

28 ///

1 **5. Victim Impact Testimony During Penalty Phase.**

2 Defendant claims that his attorney was ineffective for failing to object to misconduct
3 when the State introduced victim impact testimony during the trial phase. Defendant's claim is
4 without merit. Defendant argues that the prosecutor improperly admitted victim impact
5 testimony during the penalty phase when he referenced the loss of Deborah Ann Panos and her
6 children during his closing argument.

7 All evil required was a kitchen knife, Exhibit 68-A-1. Not a large
8 knife, but deadly in its consequences for Deborah Panos. All evil
9 required was a cowering victim. Deborah Ann Panos, 26 years of
10 age, the mother of three little children aged seven, five, and three.
11 Where the promise of her years once written on her brow? Where
12 sleeps that promise now?

13 (ROA Vol. 9 p.1607). The Nevada Supreme Court has expressly held that a prosecutor may
14 comment on the loss experienced by the family of a murder victim. Lay v. State, 110 Nev. 1189,
15 1194, 886 P.2d 448, 451 (1994). In Lay v. State, 110 Nev. 1189, 1194, 886 P.2d 448, 451
16 (1994), the Nevada Supreme Court found that the following statement during the prosecutor's
17 closing argument was not reversible error:

18 On the night of June 4th, 1990, society received a great loss and a
19 life was taken from us. Richard Carter's family and friends can no
20 longer have the opportunity to see him.

21 The statement made by the prosecutor in the instant case is similar to that above. A passing
22 reference to the fact that the victim had three children hardly constitutes victim impact
23 testimony. The State did not commit prosecutorial misconduct in making the statement above.
24 As such, Defendant's attorney was not ineffective in not objecting.

25 **6. Improper Quantification of Reasonable Doubt**

26 Defendant asserts that his attorney was ineffective when he failed to object to a statement
27 regarding reasonable doubt. Defendant has failed to show this statement prejudiced him. It is
28 improper for the State to compare reasonable doubt with decisions to buy a house, choose a
spouse, etc. Evans v. State, 28 P.498 (2001). However, the Nevada Supreme Court has found
that this comparison is not prejudicial where a proper written instruction is given. Id. In Lord v.
State, 107 Nev. 28, 35, 806 P.2d 548, 552 (1991), the prosecutor for the State suggested that

1 reasonable doubt was fulfilled where 90-95% of the pieces of the puzzle were there. The Nevada
2 Supreme Court found that the improper quantification of reasonable doubt was not prejudicial
3 to the defendant because the jury received the correct written instruction and because after
4 making improper comments the prosecutor stated the correct statutory definition. Id. See also
5 Randolph v. State, 36 P.3d 424 (2001) (The Nevada Supreme Court found that the statement
6 "if you have a gut feeling he's guilty, he's guilty" was not prejudicial).

7 Defendant has failed to show that the statement regarding reasonable doubt was so
8 egregious that Defendant was denied his fundamental rights. In this case, the jury was given
9 instruction number thirty-six (36) which read:

10 The Defendant is presumed innocent until the contrary is proved.
11 This presumption places upon the State the burden of proving
12 beyond a reasonable doubt every material element of the crime
charged and that the Defendant is the person who committed the
offense.

13 A reasonable doubt is one based on reason. It is not mere possible
14 doubt but is such a doubt as would govern or control a person in the
15 more weighty affairs of life. If the minds of the jurors, after the
entire comparison and consideration of all the evidence, are in such
16 a condition that they can say they feel an abiding conviction of the
truth of the charge, there is not a reasonable doubt. Doubt to be
reasonable must be actual, not mere possibility or speculation.

17 If you have a reasonable doubt as to the guilt of the Defendant, he
18 is entitled to a verdict of not guilty.

19 (ROA Vol. 9 p.1734). Instruction thirty-five did not contain any improper quantification of
20 reasonable doubt; thus, Defendant was not prejudiced by the prosecutor's statement. As such,
21 it was not improper for his attorney to fail to object.

22 **F. Failure to Preserve Valid Issues for Appeal**

23 Defendant also argues that he received ineffective assistance of counsel because his trial
24 counsel failed to make contemporaneous objections during trial, thereby precluding appellate
25 review of important issues. Defendant cites to five instances where his attorney did not object.
26 Defendant fails to demonstrate that his attorney was ineffective.

1 **1. Witnesses' Testimony During Penalty Hearing**

2 Defendant claims that he received ineffective assistance of counsel when his attorney
3 failed to object to the testimony of the victim's mother, Norma Penfield, and aunt, Carol
4 Monson, during the penalty hearing. Defendant claims that the witnesses improperly requested
5 the jury to give Defendant the death penalty.

6 The victim's mother made the following statements at the penalty phase of the hearing.

7 My only wish now is that justice will punish to the fullest the
8 person who took her life.

9 I feel the system has let her down once. I hope to heaven they don't
do it again.

10 (ROA Vol. 11 p.1964, 1974). The statements of the victim's mother were not inappropriate. A
11 State may legitimately conclude that evidence about the victim and about the impact of the
12 murder on the victim's family is relevant to the jury's decision as to whether or not the death
13 penalty should be imposed. Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597 (1991). The
14 statements in the instant case are similar to those made by the victims in the case of Witter v.
15 State, 112 Nev. 908, 922, 921 P.2d 886, 896 (1996). The family in Witter asked the jury to show
16 no mercy to the defendant. Id. The family also said that they wanted to do everything in their
17 power to make sure the defendant would not receive mercy. Id. In Witter, the Nevada Supreme
18 Court ruled that the statements of the victim's family were intended to ask the jury to return the
19 most severe verdict it deemed appropriate not to request a specific sentence. Similarly, the
20 statements made by the victim's mother in this case were asking the jury to return the harshest
21 punishment they could. They were not improper. Id.

22 During the penalty phase, the aunt of the victim made the following statement. "We only
23 pray now that justice will do what it needs to do and not fail her children again. By that, I mean
24 to give James what he gave Debbie, death." (ROA Vol. 11 p. 1960). Although Ms. Monson
25 indicated that the jury should give Defendant the death penalty, this was no more than harmless
26 error. In this case, the jury found four aggravating factors. (ROA Vol. 11 p. 2125-2127). Where
27 aggravating factors have been proven, this error could amount to nothing more than harmless
28 error. See Chapman v. California, 386 U.S. 18, 22, 87 S.Ct. 824, 827 (1967). Defendant's

1 attorney was not ineffective in not objecting to these statements.

2 **2. Questions Regarding Defendant's Sentence**

3 Next, Defendant suggests that his counsel was ineffective for failing to object when the
4 State questioned him about punishment. The following exchange took place between Defendant
5 and the State during cross-examination at the guilt phase of the trial.

6 MR. HARMON: As you sit here this afternoon are you
7 concerned about punishment?

8 DEFENDANT: No, sir. Whatever I get I'll accept it.

9 MR. HARMON: It doesn't matter to you whether you're
10 convicted of voluntary manslaughter or
murder of the second degree or murder of
the first degree?

11 DEFENDANT: Does it matter? Is that what you said?

12 MR. HARMON: I'm asking you if it matters which you were
13 convicted

14 DEFENDANT: No, it doesn't matter, sir. Whatever I'm
convicted of I'll accept it.

15 MR. HARMON: And you're not concerned if it's murder of
16 the first degree that the punishments be
minimized to some extent?

17 DEFENDANT: Could you please repeat that, sir.

18 MR. HARMON: You said it really doesn't matter to you what
19 you're convicted of, if it's first degree
murder you will accept that. Is that what
20 you said basically?

21 DEFENDANT: Yes, whatever I'm convicted of I will accept
it, sir.

22 MR. HARMON: My question therefore was so there isn't
23 some effort here on the witness stand to
present yourself in such a way that you will
24 minimize your punishments?

25 DEFENDANT: No, sir.

26 MR. HARMON: You don't care if you get a death sentence?

27 DEFENDANT: Yes, I do care if I get the death sentence.

28 MR. HARMON: So you don't want to get a death sentence?

1 DEFENDANT: I have three children, sir, and I want to see
2 them and be able to do something with them
3 sometime in my life.

4 MR. HARMON: So we have established that is a punishment
5 that you want to avoid; is that true?

6 DEFENDANT: Yes, sir, I am pretty sure any man or woman
7 would want to avoid the death penalty?

8 MR. HARMON: Are you telling us it doesn't matter beyond
9 that if it's life with the possibility of parole
10 or life without parole? You don't care?

11 DEFENDANT: I do care, but --

12 MR. HARMON: What do you mean you do care?

13 DEFENDANT: Of course I'm going to care, you know.

14 MR. HARMON: The bottom line is you don't want to get life
15 without parole either, do you, Mr. Chappell?

16 DEFENDANT: If I get it, I will accept it sir.

17 MR. HARMON: Is that what you want?

18 DEFENDANT: No. I have three children and I want to see
19 my three children and be able to do
20 something with em in their life. I never had
21 no father, sir.

22 MR. HARMON: So you'd certainly prefer a life with parole
23 sentence.

24 DEFENDANT: I would be honored to have life with.

25 MR. HARMON: Honored, is that your answer?

26 DEFENDANT: I would be honored to be able to get out
27 sometime in my life and be able to reconcile
28 with my children.

MR. HARMON: So you do have an interest in how this case
turns out?

DEFENDANT: Of course. Yes.

(ROA Vol. 8 p.1413-1415). The record indicates that the prosecutor was attempting to discredit
Defendant's testimony by demonstrating that he had a strong personal interest in the ultimate
verdict reached by the jury. The prosecutor was not addressing sentencing in order to dissuade
or persuade the jury to come to a verdict, rather he was demonstrating the Defendant's own bias.

1 As such, this line of questioning was not improper. Defendant's attorney was not ineffective in
2 failing to object.

3 **3. Implication Defendant Made Up His Testimony**

4 Defendant claims that his attorney was ineffective for not objecting to the State's cross-
5 examination which allegedly implied Defendant made up his testimony in violation of
6 Defendant's Fifth Amendment rights. Specifically, Defendant claims that the State's cross-
7 examination suggested that he fabricated his testimony after hearing the DNA evidence.
8 Defendant cites to the following testimony:

9 MR. HARMON: You've had a substantial period of time to think about today,
10 haven't you?

11 DEFENDANT: Yes, sir.

12 MR. HARMON: You've known for quite a while, haven't
13 you, that at some point you would take the
witness stand and give the jury your version
of what occurred?

14 DEFENDANT: Yes, sir.

15 MR. HARMON: And once you had made that decision,
16 whenever it was, you've given a lot of
attention to what you would tell the jury?

17 DEFENDANT: I didn't make up anything, sir.

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

20 DEFENDANT: No.

21 MR. HARMON: Have you thought a lot about how you
22 would act on the witness stand?

23 DEFENDANT: No, sir.

24 (ROA Vol. 8 p. 1413). The statements by the prosecutor were not a comment on Defendant's
25 Fifth Amendment right to be present at trial. The prosecutor only asked Defendant if he had
26 thought a great deal about his testimony. Defendant was the one who brought up the fact that his
27 testimony was not fabricated. The exchange indicates that the prosecutor was only trying to
28 demonstrate Defendant's bias and was not making a statement on Defendant's right to testify.

1 As such, Defendant's attorney was not ineffective in not objecting to this line of questioning.

2 **4. Failure to Strike Motion for Death Penalty Based on Race**

3 Defendant claims that his attorney was ineffective for failing to strike the motion for
4 death penalty based on the racially biased manner in which the death penalty is applied to
5 African Americans. Defendant's claim is naked allegation. Hargrove v. State, 100 Nev. 498,
6 502, 686 P.2d 222, 225 (1984). Defendant has failed to provide any evidence that the death
7 penalty notice was filed against him based on his race alone. Although Defendant provides
8 Exhibit One indicating several other cases in which the death penalty was not sought, there has
9 been no evidence that the death penalty was sought in Defendant's case based on his race. As
10 such, Defendant's attorney was not ineffective in not moving to strike the death penalty based
11 on race.

12 **5. Failure to Include Mitigating Circumstances Raised by Defendant**

13 Defendant claims that his eighth and fourteenth amendment rights were violated when
14 the District Court did not give a jury instruction delineating the mitigating factors he claimed
15 were present in addition to the statutory mitigating factors. This claim is without merit. In Byford
16 v. State, 994 P.2d 700, 715 (2000), the defendant claimed that the district court had erred in
17 refusing to give the jury an instruction regarding specific mitigating factors. The Court found
18 that the defendant had not properly preserved the issue for appeal. Id. Further, the Court
19 explained that even if the District Court erred in not giving the instruction, it did not violate the
20 eighth and fourteenth amendments pursuant to a Supreme Court decision in Buchanan v.
21 Angelone, 522 U.S. 269, 275, 118 S.Ct. 757, 761 (1998). The Nevada Supreme Court further
22 explained that the defendant had been given the opportunity to argue the additional mitigating
23 factors during the penalty hearing. Id. As in Byford, Defendant's constitutional rights were not
24 violated when the special jury instruction was not given. Further, instruction number twenty-two
25 indicated that the jury could consider any other mitigating factor. (ROA Vol. 11 p. 2153).

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III.

DEFENDANT IS BARRED FROM RAISING CLAIMS TWO, FIVE, SIX, SEVEN, EIGHT, AND NINE IN HIS PETITION AS THEY SHOULD HAVE BEEN RAISED ON APPEAL

NRS 34.810(1)(b)(2) states that the Court shall dismiss a petition for habeas corpus if the defendant's conviction was based on a trial and the grounds could have been raised in a direct appeal or a prior petition for writ of habeas corpus unless the court finds both good cause for failure to bring such issues previously and actual prejudice to the defendant. See NRS 34.810(1)(b). Good cause is "an impediment external to the defense which prevented [the petitioner] from complying with the state procedural rules." Crump v. Warden, 113 Nev. 293, 298, 934 P.2d 247, 252 (1997).

In the instant case, Defendant was convicted by a jury and subsequently raised thirteen issues in his direct appeal to the Supreme Court of Nevada. The Court disposed of each of Defendant's arguments. See Exhibit One. Because NRS 34.810 is a rule of procedural default, Defendant has the burden of demonstrating good cause for failing to raise the present grounds for post-conviction relief in his earlier petition and the burden of establishing that he will suffer actual prejudice if the grounds are not considered. Crump, 113 Nev. at 302, 934 P.2d at 252. Defendant provides no explanation for not filing these issues on direct appeal. As such, he is barred from bringing them in the instant petition. In claim five, Defendant attempts to elude this procedural bar by couching his claims that the jury instructions were constitutionally infirm in an ineffectiveness of counsel claim. Defendant should not be allowed to side step the procedural bar at NRS 34.810(1)(b)(2) in such a way. Thus, the State argues that claims two, five, six, seven, eight and nine are barred.

However, even if this Court were to address the claims which are procedurally barred, it would find no merit to their claims. The merits of these claims will be addressed below.

A. African Americans Were Not Systematically Excluded from the Jury

In claim two, Defendant asserts that his constitutional rights were violated because the Clark County jury selection system systematically excludes African Americans. Defendant's claim is without merit. As discussed above in issue II (B), Defendant has failed to establish a

1 prima facie showing that the jury selection violates the fair cross-section requirement. The record
2 indicates that a number of African Americans were originally in the jury pool and were
3 dismissed based on their beliefs regarding the death penalty.(ROA Vol. 4 p.832). As such,
4 Defendant's rights have not been violated.

5 **B. The Jury Instructions Were Not Faulty**

6 Defendant is barred from raising claims that the instructions to the jury were improper.
7 Failure to object to jury instructions or request special instructions precludes appellate review
8 of the jury instructions. Etcheverry v. State, 107 Nev. 782, 784, 821 P.2d 350 (1991). In the
9 instant case, Defendant failed to object to the jury instructions which he now claims were
10 improper. As such, he is precluded from raising these issues on appeal. Defendant attempts to
11 get around this bar by couching his objections to the jury instructions in an ineffective assistance
12 of counsel claim. Even addressed on their merits, Defendant's attorney was not improper in not
13 objecting to the jury instructions discussed below.

14 **1. Instructions Regarding Premeditation and Deliberation**

15 Defendant claims that the jury instruction on premeditation denied his due process rights
16 because it does not distinguish between first and second degree murder. Defendant also claims
17 that he received ineffective assistance of trial counsel and appellate counsel when his attorneys
18 did raise this issue before the District Court and Nevada Supreme Court. Defendant asserts that
19 the instructions are improper because they do not clarify the terms deliberation and willful only
20 premeditation. Instructions twenty-one and twenty-two were given to the jury.

21 **Instruction No. 21**

22 Murder of the First Degree is murder which is (a) perpetrated by
23 any kind of willful, deliberate and premeditated killing and/or (b)
24 committed in the perpetration of burglary or attempted burglary
and/or (c) committed in the perpetration of robbery or attempted
robbery.

25 **Instruction No. 22**

26 Premeditation is a design, a determination to kill, distinctly formed
27 in the mind at any moment before or after the time of the killing.
28 Premeditation need not be for a day, an hour or even a minute. It
may be as instantaneous as successive thoughts of the mind. For if
the jury believed from the evidence that the act constituting the

1 killing has been preceded by and has been the result of
2 premeditation, no matter how rapidly the premeditation is followed
3 by the act constituting the killing, it is willful, deliberate and
premeditated murder.

4 (ROA Vol. 9 p. 1719-1720). The Nevada Supreme Court has indicated that the instruction above,
5 the Kazalyn instruction, does not fully define "willful, deliberate, and premeditated", elements
6 of first degree murder. Byford v. State, 116 Nev. Adv. Op. 23, 994 P.2d 700, 716 (2000).
7 However, this case was tried in October of 1996 prior to the ruling in Byford and the Nevada
8 Supreme Court has indicated that the ruling in Byford is not retroactive. Garner v. State, 116
9 Nev. Adv. Op. 85, 6 P.3d 1013, 1025 (2000).

10 Further, in Garner v. State, 116 Nev. Adv. Op. 85, 9 P.3d 1013, 1024 (2000), the Nevada
11 Supreme Court clarified that its holding in Byford did not indicate that giving the Kazalyn
12 instruction constituted error. The Nevada Supreme Court stated that it did not articulate any
13 constitutional grounds for its decision in Byford. Id. There is sufficient evidence that Defendant
14 committed first degree murder. As such, Defendant's constitutional rights were not violated
15 when the Kazalyn instruction was given. Further Defendant's attorneys were not ineffective in
16 not objecting or raising the issue on appeal.

17 2. Instruction on Malice

18 Defendant claims that jury instruction number twenty was improper and that his counsel
19 was ineffective in failing to object to it. Specifically, Defendant contends that the jury instruction
20 gives the improper presumption of implied malice. Jury instruction twenty reads:

21 Express malice is that deliberate intention unlawfully to take away
22 the life of a fellow creature, which is manifested by external
circumstances capable of proof.

23 Malice may be implied when no considerable provocation appears,
24 or when all the circumstances of the killing show an abandoned and
malignant heart.

25 (ROA Vol. 9 p.1718). As Defendant admits, the Nevada Supreme Court has held that this exact
26 instruction accurately informs the jury of the distinction between express and implied malice.
27 Guy v. State, 108 Nev. 770, 777, 839 P.2d 578, 583 (1992). As such, Defendant has not
28 demonstrated that his rights have been violated. Further, Defendant's counsel was not ineffective

1 in not objecting to this instruction.

2 **3. Instruction on Character Evidence**

3 In claim seven, Defendant argues that the failure to properly appraise the jury of the use
4 of character evidence in a penalty hearing violated his constitutional rights. As argued above,
5 this issue is not properly before the court as it was not raised on direct appeal. However, even
6 based on its merits this Defendant deserves no relief. The jury was given instructions seven and
7 eight. They read as follows:

8 The jury may impose a sentence of death only if (1) the jurors
9 unanimously find at least one aggravating circumstance has been
10 established beyond a reasonable doubt and (2) the jurors
11 unanimously find that there are no mitigating circumstances
12 sufficient to outweigh the aggravating circumstances or
13 circumstances found.

14 The law never requires that a sentence of death be imposed; the jury
15 however, may only consider the option of sentencing the Defendant
16 to death where the State has established beyond a reasonable doubt
17 that an aggravating circumstance or circumstances exist and the
18 mitigating evidence is not sufficient to outweigh the aggravating
19 circumstance.

20 (ROA Vol. 11 p.2138-2139). These two jury instructions made it clear that the jury could not
21 sentence Defendant to death based on character evidence presented during the penalty hearing.
22 Further, the jury found four aggravating factors and found that these factors outweighed the
23 mitigating circumstances. (ROA Vol. 11 p.2125-2127). Thus, it is clear that the jury followed
24 the instructions above. As such, the failure to instruct the jury that they could not consider
25 character evidence prior to finding aggravating circumstances could be nothing more than
26 harmless error. Chapman v. California, 386 U.S. 18, 22, 87 S.Ct. 824, 826 (1967).

27 **4. Instruction Regarding Sympathy**

28 Defendant claims that the jury was improperly instructed that it could not consider
sympathy in mitigation of the death penalty. Specifically, Defendant claims that this instruction
undermined the jury's ability to consider mitigating evidence. Further Defendant claims that both
his trial and appellate counsel were ineffective in not raising this issue.

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1 In this case, the jury was given instruction number twenty-eight which reads:

2 Although you are to consider only the evidence in the case in
3 reaching a verdict, you must bring to the consideration of the
4 evidence your everyday common sense and judgment as reasonable
5 men and women. Thus, you are not limited solely to what you see
6 and hear as the witnesses testify. You may draw reasonable
7 inferences from the evidence which you feel are justified in the light
8 of common experience, keeping in mind that such inferences should
9 not be based on speculation or guess.

10 A verdict may never be influenced by sympathy, prejudice or public
11 opinion. Your decision should be the product of sincere judgment
12 and sound discretion in accordance with these rules of law.

13 (ROA Vol. 11 p. 2159). Defendant's claim that this instruction restricted the jury's consideration
14 of mitigating factors has previously been rejected by the Nevada Supreme Court. Lay v. State,
15 110 Nev. 1189, 1194, 886 P.2d 448, 451 (1994). The Nevada Supreme Court has approved the
16 instruction above so long as the jury is instructed to consider the mitigating circumstances placed
17 before it. Id. In the instant case, jury instruction twenty-two listed the mitigating factors for first
18 degree murder. (ROA Vol. 11 p.2153). In addition, instruction number thirty advised the jury:

19 The Court has submitted two sets of verdicts to you. One set of
20 verdicts reflects the four possible punishments which may be
21 imposed. The other verdicts are special verdicts. They are to reflect
22 your findings with respect to the presence or absence and weight to
23 be given any aggravating circumstance and any mitigating
24 circumstance.

25 (ROA Vol. 11 p.2161). It is evident from the record that the jury was instructed to consider
26 mitigating circumstances. As such, the antisympathy jury instruction was not improper. See Lay
27 v. State, 110 Nev. 1189, 1194, 886 P.2d 448, 451 (1994).

28 **5. Instruction on Specific Mitigating Circumstances**

Defendant claims that his Eighth and Fourteenth amendment rights were violated when
the District Court did not give a jury instruction delineating the mitigating factors he claimed
were present in addition to the statutory mitigating factors. As discussed above in issue II (F)(5),
this claim is without merit. In Byford v. State, 994 P.2d 700, 715 (2000), the Nevada Supreme
Court explained that even if the District Court erred in not giving the instruction, it did not
violate the eighth and fourteenth amendments pursuant to a Supreme Court decision in Buchanan

1 v. Angelone, 522 U.S. 269, 275, 118 S.Ct. 757, 761 (1998). As in Byford, Defendant's
2 constitutional rights were not violated when the special jury instruction was not given. Further,
3 instruction number twenty-two indicated that the jury could consider any other mitigating factor.
4 (ROA Vol. 11 p. 2153).

5 **C. The Aggravating Circumstances Are Not Unconstitutional**

6 In claim six, Defendant asserts that the State's use of overlapping aggravating
7 circumstances to impose the death penalty was unconstitutional. As discussed above in issue II
8 (D), the use of burglary, robbery and sexual assault as aggravating factors was not improper. In
9 Bennett v. State, 106 Nev. 135, 142, 787 P.2d 797, 801 (1990), the defendant argued that the
10 State had improperly used burglary and robbery as two separate aggravating factors even though
11 the charges arose out of the same indistinguishable course of conduct. Id. In disagreeing with
12 the defendant, the Nevada Supreme Court reasoned that because defendant could be prosecuted
13 for both crimes separately and because convictions of both burglary and robbery do not violate
14 the double jeopardy clause as they are separate and distinct offenses they could be used
15 separately as aggravating factors. Id. See also Wilson v. State, 99 Nev. 362, 376, 664 P.2d 328,
16 336 (1983) (where the court found that any enumerated felonies that are committed during the
17 course of a murder can be aggravating factors). Thus, it was not improper for the State to use
18 robbery, burglary and sexual assault as aggravating factors.

19 **D. The Lack of a Jury Instruction Prohibiting the Jury from Considering**
20 **Character Evidence Did Not Violate Defendant's Constitutional Rights**

21 Defendant claims that the failure to properly appraise the jury of the use of character
22 evidence in a penalty hearing violated his constitutional rights. As discussed above in issue III
23 (B)(3), Defendant deserves no relief. Two jury instructions, numbers seven and eight, made it
24 clear that the jury could not sentence Defendant to death without finding aggravating factors
25 which outweighed the mitigating factors. (ROA Vol. 11 p. 2138-2139). As such, the jury was
26 aware that they could not sentence Defendant to death based on character evidence presented
27 during the penalty hearing. Further, the jury found four aggravating factors. (ROA Vol. 11 p.
28 2125-2127). As such, the failure to instruct the jury that they could not consider character

evidence prior to finding aggravating circumstances could be nothing more than harmless error.
Chapman v. California, 386 U.S. 18, 22, 87 S.Ct. 824, 826 (1967).

E. The Application of Death Penalty was not Racially Motivated

In claim eight, Defendant asserts that the death penalty was inappropriately applied to him based on his race in violation of his constitutional rights. A defendant who seeks to assert an Equal Protection clause violation must prove that prosecuting authorities acted with discriminatory purpose in his particular case. McClesky v. Kemp, 481 U.S. 279, 292, 107 S.Ct. 1756, 1767 (1986). Defendant has provided no evidence that would support his inference that Defendant's race played a part in the prosecution's decision to seek the death penalty in his case. Instead, Defendant presents three completely unrelated cases in which the death penalty was not sought. As Defendant has provided no evidence that the State acted with discriminatory purpose in prosecuting his case, he has failed to demonstrate a violation of the equal protection clause has occurred.

F. The Administration of Capital Punishment in Nevada is Not Arbitrary

In claim nine, Defendant argues that the imposition of the death penalty in Nevada is arbitrary and therefore, unconstitutional. Both the United States Supreme Court and the Nevada Supreme Court have repeatedly upheld the constitutionality of the death penalty. Colwell v. State, 112 Nev. 807, 814, 919 P.2d 403, 408 (1996). Defendant's claim that the State of Nevada arbitrarily applies the death penalty is a naked allegation unsubstantiated by fact. See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

IV.

DEFENDANT'S APPELLATE COUNSEL WAS EFFECTIVE

The United States Supreme Court has held that there is a constitutional right to effective assistance of counsel in a direct appeal from a judgment of conviction. Evitts v. Lucey, 469 U.S. 395, 397, 105 S.Ct. 830, 836-837 (1985); see also, Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). The federal courts have held that in order to claim ineffective assistance of appellate counsel the defendant must satisfy the two-prong test of Strickland v. Washington by demonstrating that: (1) counsel's representation fell below an objective standard of

1 reasonableness; and (2) but for counsel's errors, there was a reasonable probability that the result
2 of the proceedings would have been different. See Strickland, 466 U.S. at 687-688 & 694, 104
3 S.Ct. at 2065 & 2068; Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v.
4 United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th
5 Cir. 1991).

6 Further, there is a strong presumption that counsel's performance was reasonable and fell
7 within "the wide range of reasonable professional assistance." See, United States v. Aguirre, 912
8 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. The
9 Nevada Supreme Court, although not yet affirming the decision of the federal courts, has held
10 that all appeals must be "pursued in a manner meeting high standards of diligence,
11 professionalism and competence." Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268
12 (1994). Finally, in order to prove that appellate counsel's alleged error was prejudicial, the
13 defendant must show that the omitted issue would have had a reasonable probability of success
14 on appeal. See Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132.

15 Counsel is not required to assert frivolous claims on appeal. The Defendant has the
16 ultimate authority to make fundamental decisions regarding his case. Jones v. Barnes, 463 U.S.
17 745, 751, 103 S.Ct. 3308, 3312 (1983). However, the Defendant does not have the constitutional
18 right to "compel appointed counsel to press nonfrivolous points requested by the client, if
19 counsel, as a matter of professional judgment, decides not to present those points." Id. In
20 reaching this conclusion, the Supreme Court has recognized the "importance of winnowing out
21 weaker arguments on appeal and focusing on one central issue if possible, or at most, on a few
22 key issues." Jones, 463 U.S. at 751-752, 103 S.Ct. at 3313. In particular, a "brief that raises
23 every colorable issue runs the risk of burying the good arguments ... in a verbal mound made up
24 of strong and weak contentions." Id. at 753, 3313. The Court has, therefore, held that for
25 "judges to second guess reasonable professional judgments and impose on appointed counsel
26 a duty to raise every 'colorable' claim suggested by a client would deserve the very goal of
27 vigorous and effective advocacy." Id. at 754, 3314.

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1 Similar to the standards of ineffective assistance regarding trial counsel, appellate counsel
2 has the right and discretion to employ his professional knowledge and tactics in construing a
3 defendant's appeal. Unless the Defendant can demonstrate that counsel did not provide
4 "reasonably effective assistance," appellate counsel's professional conduct will be upheld as
5 effective. See Strickland, 466 U.S. at 687, 104 S.Ct. at 2064; Love, 109 Nev. at 1138, 865 P.2d
6 at 323. The Defendant has not shown that appellate counsel acted unreasonably. Furthermore,
7 appellate counsel did raise key issues on direct appeal. Obviously, appellate counsel focused on
8 those issues that had the greatest chance of success on appeal and thus any argument of
9 ineffectiveness is without merit.

10 **1. Instructions were Proper**

11 Defendant claims that his appellate counsel was ineffective for not raising claims on
12 direct appeal regarding improper jury instructions. These claims have been addressed above in
13 issue III (B). As the jury instructions were proper, Defendant cannot show his appellate counsel
14 was ineffective.

15 **2. Overlapping Aggravators**

16 Defendant asserts that his appellate counsel was ineffective for failing to object to and
17 move to strike overlapping aggravating circumstances utilized by the State to impose the death
18 penalty. As discussed above, in issue II (D) the aggravating factors presented by the State were
19 not overlapping. As such, Defendant's appellate counsel was not ineffective.

20 **3. Prosecutorial Misconduct**

21 Defendant claims that his appellate counsel was ineffective for failing to raise issues
22 regarding instances of prosecutorial misconduct. As discussed above in issue II (E), the
23 prosecutor was did not commit misconduct. Thus, Defendant's claim is without merit.

24 **4. Application of Death Penalty Based on Race.**

25 This issue was addressed above in issue III (E). As it is without merit, Defendant cannot
26 demonstrate that his appellate counsel was ineffective.

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1 with the requirement to address issues presented on appeal. This is belied by the record. See
2 Hargrove v. State. In its order, the Nevada Supreme Court listed the six issues and stated, "We
3 have reviewed each of these issues and conclude they lack merit." See Exhibit One p. 10-11.

4 Further, the Supreme Court's order indicates that it completed the review as required by
5 NRS 177.055 (2) (b-d). In its order under the heading "Mandatory review of propriety of death
6 penalty", the Nevada Supreme Court stated:

7 NRS 177.055(2) requires this court to review every death penalty
8 sentence. Pursuant to the statutory requirement, and in addition to
9 the contentions raised by Chappell and addressed above, we have
10 determined that the aggravating circumstances of robbery, burglary
11 and sexual assault, found by the jury, are supported by sufficient
12 evidence. Moreover, there is no evidence in the record indicating
13 that Chappell's death sentence was imposed under the influence of
14 passion prejudice or any arbitrary factor. Lastly, we have concluded
15 that the death sentence Chappell received was not excessive
16 considering the seriousness of his crimes and Chappell as a person.

17 See Exhibit One p. 10. The record indicates that the Supreme Court fully complied with the
18 mandatory review of Defendant's death sentence. As such, Defendant's claim that his rights
19 were violated is without merit. Furthermore, in so much as Defendant is asking the District Court
20 to find that the Supreme Court of Nevada erred, the District Court does not have jurisdiction to
21 do so. Nev. Const. Article 6 Section 6.

22 CONCLUSION

23 Based on the foregoing arguments, the Court should deny Defendant's Supplemental
24 Petition for Writ of Habeas Corpus.

25 DATED this 19 day of June, 2002.

26 Respectfully submitted,

27 STEWART L. BELL
28 DISTRICT ATTORNEY
Nevada Bar #000477

BY H. Leon Simon
H. LEON SIMON
Deputy District Attorney
Nevada Bar #000411

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DAVID M. SCHIECK, ESQ.

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IN THE SUPREME COURT OF THE STATE OF NEVADA

RECEIVED

No. 29884 JAN 34 1998

APPELLATE DIVISION

JAMES MONTELL CHAPPELL,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

DEC 30 1998

JANET H. RICHARDS
CLERK OF SUPREME COURT
BY *J. Richards*
DEPUTY CLERK

Appeal from a judgment of conviction pursuant to a jury verdict of one count each of burglary, robbery with the use of a deadly weapon, and first-degree murder with the use of a deadly weapon, and from a sentence of death. Eighth Judicial District Court, Clark County; A. William Maupin, Judge.

Affirmed.

Morgan D. Harris, Public Defender, Michael L. Miller, Deputy Public Defender, Howard S. Brooks, Deputy Public Defender, Clark County, for Appellant.

Frankie Sue Del Papa, Attorney General, Carson City; Stewart L. Bell, District Attorney, James Tufteland, Chief Deputy District Attorney, Abbi Silver, Deputy District Attorney, Clark County, for Respondent.

O P I N I O N

PER CURIAM:

On the morning of August 31, 1995, James Montell Chappell was mistakenly released from prison in Las Vegas where he had been serving time since June 1995 for domestic battery. Upon his release, Chappell went to the Ballerina Mobile Home Park in Las Vegas where his ex-girlfriend, Deborah Panos, lived with their three children. Chappell entered Panos' trailer by climbing through the window. Panos was home alone, and she and Chappell engaged in sexual intercourse. Sometime later that morning, Chappell repeatedly stabbed Panos with a kitchen knife, killing her. Chappell then left the

EXHIBIT" 1 "

trailer park in Panos' car and drove to a nearby housing complex.

The State filed an information on October 11, 1995, charging Chappell with one count of burglary, one count of robbery with the use of a deadly weapon, and one count of murder with the use of a deadly weapon. On November 8, 1995, the State filed a notice of intent to seek the death penalty. The notice listed four aggravating circumstances: (1) the murder was committed during the commission of or an attempt to commit any robbery; (2) the murder was committed during the commission of or an attempt to commit any burglary and/or home invasion; (3) the murder was committed during the commission of or an attempt to commit any sexual assault; and (4) the murder involved torture or depravity of mind.

Prior to trial, Chappell offered to stipulate that he (1) entered Panos' trailer home through a window, (2) engaged in sexual intercourse with Panos, (3) caused Panos' death by stabbing her with a kitchen knife, and (4) was jealous of Panos giving and receiving attention from other men. The State accepted the stipulations, and the case proceeded to trial on October 7, 1996.

Chappell took the witness stand on his own behalf and testified that he considered the trailer to be his home and that he had entered through the trailer's window because he had lost his key and did not know that Panos was at home. He testified that Panos greeted him as he entered the trailer and that they had consensual sexual intercourse. Chappell testified that he left with Panos to pick up their children from day care and discovered in the car a love letter addressed to Panos. Chappell, enraged, dragged Panos back into the trailer where he stabbed her to death. Chappell argued that his actions were the result of a jealous rage.

The jury convicted Chappell of all charges. Following a penalty hearing, the jury returned a sentence of death on the murder charge, finding two mitigating circumstances -- murder committed while Chappell was under the influence of extreme mental or emotional disturbance and "any other mitigating circumstances" -- and all four alleged aggravating circumstances. The district court sentenced Chappell to a minimum of forty-eight months and a maximum of 120 months for the burglary; a minimum of seventy-two months and a maximum of 180 months for robbery, plus an equal and consecutive sentence for the use of a deadly weapon; and death for the count of murder in the first degree with the use of a deadly weapon. The district court ordered all counts to run consecutively. Chappell timely appealed his conviction and sentence of death.

DISCUSSION

Admission of evidence of prior bad acts

Chappell contends that the district court abused its discretion by admitting evidence of prior acts of theft without holding a Petrocelli¹ hearing. During the State's case-in-chief, LaDonna Jackson testified that Chappell was known as a "regulator"² and that, on one occasion, he sold his children's diapers for drug money.

Ordinarily, in order for this court to review a district court's decision to admit evidence of prior bad acts, a Petrocelli hearing must have been conducted on the record. Armstrong v. State, 110 Nev. 1322, 1324, 885 P.2d 600, 600-01

¹See Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

²Jackson testified that a "regulator" is a person who steals items from a store and then resells those items for money or drugs.

(1994). However, where the district court fails to hold a proper hearing on the record, automatic reversal is not mandated where "(1) the record is sufficient for this court to determine that the evidence is admissible under the test for admissibility of bad acts evidence . . . ; or (2) where the results would have been the same if the trial court had not admitted the evidence." *Qualls v. State*, 114 Nev. ___, ___, 961 P.2d 765, 767 (1998).

The district court in the instant case did not hold a Petrocelli hearing either on or off the record. Under the circumstances, we conclude that the record is not sufficient for this court to determine whether the evidence was admissible under the test for admissibility of prior bad acts evidence. In light of the overwhelming evidence of guilt in this case, however, we conclude that had the district court not admitted the evidence, the results would have been the same. See *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985) (when deciding whether an error is harmless or prejudicial, the following considerations are relevant: "whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged"); see also *Bradley v. State*, 109 Nev. 1090, 1093, 864 P.2d 1272, 1274 (1993). Accordingly, we hold that the district court's failure to conduct a Petrocelli hearing before admitting this evidence amounted to harmless error, and does not, therefore, require reversal.

Issues arising out of alleged aggravating circumstances

Chappell argues that insufficient evidence exists to support the jury's finding of the four alleged aggravating circumstances. The first three aggravating circumstances depend on whether Chappell killed Panos during the commission

of or an attempt to commit robbery, burglary and/or home invasion, and sexual assault. Chappell's challenge to each of these aggravators comes down to a challenge of the sufficiency of the evidence supporting each of the "aggravating" offenses.

On appeal, the standard of review for sufficiency of the evidence is "whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt." *Kazalyn v. State*, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992). Where there is sufficient evidence in the record to support the verdict, it will not be overturned on appeal. *Id.* We conclude that there is sufficient evidence to support the aggravating circumstances for robbery, burglary and sexual assault. We further conclude that the evidence does not support the aggravating circumstance of torture or depravity of mind.

Robbery

Chappell contends that the evidence shows that he took Panos' car as an afterthought and, therefore, cannot be guilty of robbery. The State argues that a rational trier of fact could find that Chappell took Panos' social security card and car through the use of actual violence or the threat of violence. Under Nevada's criminal law, robbery is defined as

the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property A taking is by means of force or fear if force or fear is used to:

- (a) Obtain or retain possession of the property;
- (b) Prevent or overcome resistance to the taking; or
- (c) Facilitate escape.

The degree of force used is immaterial if it is used to compel acquiescence to the taking of or escaping with the property. A taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of

the person from whom taken, such knowledge was prevented by the use of force or fear.

The statute does not require that the force or violence be committed with the specific intent to commit robbery.

This court has held that in robbery cases it is irrelevant when the intent to steal the property is formed. In *Norman v. Sheriff*, 92 Nev. 695, 697, 558 P.2d 541, 542 (1976), this court stated:

[A]lthough the acts of violence and intimidation preceded the actual taking of the property and may have been primarily intended for another purpose, it is enough, to support the charges in the indictment, that appellants, taking advantage of the terrifying situation they created, fled with [the victim's] property.

This position was affirmed in *Sheriff v. Jefferson*, 98 Nev. 392, 394, 649 P.2d 1365, 1366-67 (1982), and *Patterson v. Sheriff*, 93 Nev. 238, 239, 562 P.2d 1134, 1135 (1977). See also *State v. Myers*, 640 P.2d 1245 (Kan. 1982) (holding that where aggravated robbery requires taking by force or threat of force while armed, it is sufficient that defendant shot victim and then returned three hours later to take victim's wallet, as there was a continuous chain of events and the prior force made it possible to take the property without resistance); *State v. Mason*, 403 So. 2d 701 (La. 1981) (holding that acts of violence need not be for the purpose of taking property and that it is sufficient that the taking of a purse was accomplished as a result of earlier acts of pushing victim onto bed and pulling her clothes).

Accordingly, we hold that there is sufficient evidence to support the conviction of robbery and the finding of robbery as an aggravating circumstance.

Burglary

Chappell argues that the State adduced insufficient evidence to prove that he committed a burglary. We disagree. NRS 205.060(1) provides that a person is guilty of burglary when he "by day or night, enters any . . . semitrailer or house trailer . . . with the intent to commit grand or petit larceny, assault or battery on any person or any felony." At trial, the State introduced evidence that Panos wanted to end her relationship with Chappell, that Chappell had threatened and abused Panos in the past, and that Panos did not communicate with Chappell while he was in jail. Moreover, there was testimony that the trailer appeared ransacked, and that Panos' social security card and car keys were found in Chappell's possession. Accordingly, we conclude that there is sufficient evidence to support the conviction of burglary and the finding by the jury of burglary as an aggravator.

Sexual assault

Chappell argues that the State failed to prove beyond a reasonable doubt that the sexual encounter between Chappell and Panos was nonconsensual. We do not agree. The jury was instructed to find sexual assault if Chappell engaged in sexual intercourse with Panos "against [her] will" or under conditions in which Chappell knew or should have known that Panos was "mentally and emotionally incapable of resisting." The evidence at trial and during the penalty hearing showed that Panos and Chappell had an abusive relationship, that Panos had ended her relationship with Chappell, that Chappell was extremely jealous of Panos' relationships with other men, and that Panos was involved with another man at the time of the killing. We conclude that a rational trier of fact could have concluded that either Panos would not have consented to

sexual intercourse under these circumstances or was mentally or emotionally incapable of resisting Chappell's advances, and that Chappell therefore committed sexual assault. Consequently, the evidence supports the jury's finding of sexual assault as an aggravating circumstance.

Torture or depravity of mind

Chappell argues that the circumstances of Panos' death do not rise to the level necessary to establish torture or depravity of mind. We agree. The depravity of mind aggravator applies in capital cases if "torture, mutilation or other serious and depraved physical abuse beyond the act of killing itself" is shown. *Robins v. State*, 106 Nev. 611, 629, 798 P.2d 558, 570 (1990); NRS 200.033(8).³ In the present case, the jury was instructed that the elements of murder by torture are that "(1) the act or acts which caused the death must involve a high degree of probability of death, and (2) the defendant must commit such act or acts with the intent to cause cruel pain and suffering for the purpose of revenge, persuasion or for any other sadistic purpose."⁴ Panos died as a result of multiple stab wounds; thus, the first element is satisfied. The second element is not as easily met under the facts of this case.

The State argues that evidence of torture may be found in the following: Panos was severely beaten by

³NRS 200.033(8) was amended in 1995 deleting the language of "depravity of mind." 1995 Nev. Stat., ch. 467, §§ 1-3, at 1490-91. In the present case, the murder was committed before October 1, 1995, thus, the previous version of NRS 200.033(8) applies. Id.

⁴These instructions were approved by this court in *Deutscher v. State*, 95 Nev. 669, 677 n.5, 601 P.2d 407, 413 n.5 (1979); see NRS 200.030(1)(a) (defining first-degree murder by torture as murder "[p]erpetrated by means of . . . torture").

Chappell, there were numerous bruises and abrasions on Panos' face, Panos was stabbed in the groin area and chest, Panos was stabbed thirteen times, and four of the stabs were of such force as to have penetrated the spinal cord in Panos' neck. We conclude that there is no evidence that Chappell stabbed Panos with any intention other than to deprive her of life. No evidence exists that Chappell intended to cause Panos cruel suffering for the purposes of revenge, persuasion, or other sadistic pleasure. Nor does Chappell's act of stabbing Panos thirteen times rise to the level of torture. Accordingly, we hold that the record does not contain sufficient evidence to support the aggravating circumstance of depravity of mind and torture.

Invalidating an aggravating circumstance

Invalidating an aggravating circumstance does not automatically require this court to vacate a death sentence and remand for new proceedings before a jury. See Witter v. State, 112 Nev. 908, 929, 921 P.2d 886, 900 (1996); see also Canape v. State, 109 Nev. 864, 881-83, 859 P.2d 1023, 1034-35 (1993). Where at least one other aggravating circumstance exists, this court may either reweigh the aggravating circumstances against the mitigating evidence or conduct a harmless error analysis. Witter, 112 Nev. at 929-30, 921 P.2d at 900. In the present case, the jury designated as mitigating circumstances (1) that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, and (2) any other mitigating circumstances. We conclude that the remaining three aggravators, robbery, burglary and sexual assault, clearly outweigh the mitigating evidence presented by Chappell. We therefore conclude that Chappell's death sentence was proper.

Mandatory review of propriety of death penalty

NRS 177.055(2)⁵ requires this court to review every death penalty sentence. Pursuant to the statutory requirement, and in addition to the contentions raised by Chappell and addressed above, we have determined that the aggravating circumstances of robbery, burglary and sexual assault, found by the jury, are supported by sufficient evidence. Moreover, there is no evidence in the record indicating that Chappell's death sentence was imposed under the influence of passion, prejudice or any arbitrary factor. Lastly, we have concluded that the death sentence Chappell received was not excessive considering the seriousness of his crimes and Chappell as a person.

Additional issues raised on appeal

Chappell further contends that: (1) the State's use of peremptory challenges to excuse two African-American jurors from the jury pool was discriminatory; (2) the district court erred in admitting hearsay statements; (3) the district court erred by denying Chappell's motion to strike the notice of intent to seek the death penalty; (4) the State improperly

⁵ NRS 177.055(2) provides:

2. Whether or not the defendant or his counsel affirmatively waives the appeal, the sentence must be reviewed on the record by the supreme court, which shall consider, in a single proceeding if an appeal is taken:

(a) Any error enumerated by way of appeal;

(b) Whether the evidence supports the finding of an aggravating circumstance or circumstances;

(c) Whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor; and


(d) Whether the sentence of death is excessive, considering both the crime and the defendant.


appealed to the jury for vengeance during the penalty phase; (5) cumulative error denied Chappell a fair hearing; and (6) victim impact testimony denied Chappell a fair penalty hearing. We have reviewed each of these issues and conclude that they lack merit.

CONCLUSION

For the foregoing reasons, we affirm the judgment of conviction for robbery, burglary and first-degree murder and the sentence of death.^{6 7}


Shearing J.


Rose J.


Young J.

⁶The Honorable Charles E. Springer, Chief Justice, voluntarily recused himself from participation in the decision of this appeal.

⁷The Honorable A. William Maupin, Justice, voluntarily recused himself from participation in the decision of this appeal.

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FILED

JUL 8 3 24 PM '02

CLERK

EXPT
DAVID M. SCHIECK, ESQ.
Nevada Bar No. 0824
302 E. Carson Ste. 600
Las Vegas, NV 89101
702-382-1844
Attorney for CHAPPELL

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

THE STATE OF NEVADA,	)	CASE NO. C 131341
	)	DEPT. NO. XI
Plaintiff,)	
)	
vs.)	
)	
JAMES M. CHAPPELL,)	
)	
Defendant.	)	DATE: N/A
	)	TIME: N/A

EX PARTE MOTION FOR INTERIM PAYMENT
OF EXCESS ATTORNEY'S FEES
IN POST CONVICTION PROCEEDINGS

COMES NOW, DAVID M. SCHIECK, ESQ., attorney for JAMES M. CHAPPELL, and moves this Court for an Order authorizing interim payment of attorney fees in excess of the statutory allowance.

This Motion is made and based on the provisions of NRS 7.125, the request of the State Public Defender, and the Affidavit of Counsel attached hereto.

Dated this 5 day of July, 2002.

RESPECTFULLY SUBMITTED:

BY 
DAVID M. SCHIECK, ESQ.

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

RESOLVED

JUL 08 2002

STATEMENT OF FACTS

DAVID M. SCHIECK, ESQ. was appointed on November 15, 1999 to represent JAMES CHAPPELL (hereinafter referred to as CHAPPELL) for his post conviction proceedings.

Due to difficulty paying large sums at the completion of the case, the State Public Defender's Office has requested court appointed attorneys in post conviction proceedings submit bills on an interim basis every quarter. This is the fourth request for payment and is for the quarter ending June 30, 2002. (The first request in the amount of \$2,872.50 was granted in July, 2000; the second request was granted in May, 2001 for \$3,023.44; and the third request was granted April 11, 2002 for \$2,621.86.)

The compensation for attorney's fees allowed in post conviction proceedings is not to exceed \$750.00 pursuant to statute. Counsel's billing statement is attached hereto and the amount requested is \$1,728.90 (fees \$1,627.50 and costs \$101.40).

POINTS AND AUTHORITIES

NRS 7.125 provides, in pertinent part, as follows:

"1. ...an attorney other than a public defender appointed by a magistrate or a district court to represent or defend a defendant at any stage of the criminal proceedings from the defendant's initial appearance...through the appeal, if any, is entitled to receive a fee for court appearances and other time reasonably spent on the matter to which the appointment is made, \$75 per hour....

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

1 3. An attorney appointed by a district court to
2 represent an indigent petitioner for a writ of habeas
3 corpus or other post-conviction relief...is entitled
4 to be paid a fee not to exceed \$750.

5 4. If the appointing court because of:

6 (a) The complexity of a case or the number of
7 its factual or legal issues;

8 (b) The severity of the offense;

9 (c) The time necessary to provide an adequate
10 defense; or

11 (d) Other special circumstances,

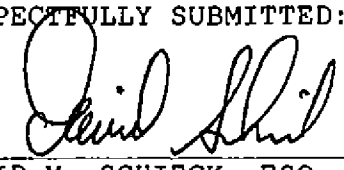
12 deems it appropriate to grant a fee in excess of the
13 applicable maximum, the payment must be made, but
14 only if the court in which the representation was
15 rendered certifies that the amount of the excess
16 payment is both reasonable and necessary and the
17 payment is approved by the presiding judge of the
18 judicial district in which the attorney was
19 appointed...."

20 CONCLUSION

21 It is respectfully requested that this Court certify that
22 the fees in excess of the statutory limit are reasonable, and
23 grant interim payment in the amount of \$1,728.90

24 Dated this 5 day of July, 2002.

25 RESPECTFULLY SUBMITTED:

26 BY 
27 DAVID M. SCHIECK, ESQ.

28 AFFIDAVIT OF DAVID M. SCHIECK

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

DAVID M. SCHIECK, being first duly sworn, deposes and

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844


1 says:

2 That Affiant is an attorney duly licensed to practice law
3 in the State of Nevada and court appointed attorney for
4 CHAPPELL.

5 That statutory guidelines proscribe a cap of \$750.00 in
6 fees for post conviction proceedings. That the State Public
7 Defender's Office has requested that payment be made on a
8 quarterly basis instead of when the case is final. That
9 Affiant has submitted herewith a billing statement through the
10 quarter ending June 30, 2002 in the amount of \$1,728.90.

11 Therefore Affiant requests that this Court grant the
12 instant Motion for interim payment of excess fees.

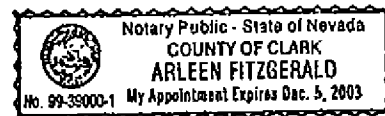
13 Further Affiant sayeth naught.

14 

15 DAVID M. SCHIECK

16 SUBSCRIBED and SWORN to before me
17 this 5th day of June, 2002.

18 
19
20 NOTARY PUBLIC



1 ORDR
2 DAVID M. SCHIECK, ESQ.
3 Nevada Bar No. 0824
4 302 E. Carson, #600
5 Las Vegas, NV 89101
6 702-382-1844

FILED

Nov 29 4 02 PM '99

DISTRICT COURT
CLARK COUNTY, NEVADA

Shirley B. Pangione
CLERK

* * *

8 THE STATE OF NEVADA,

9 Plaintiff,

10 vs.

11 JAMES M. CHAPPELL,

12 Defendant.

CASE NO. C131341
DEPT. NO. VII

AMENDED ORDER
APPOINTING COUNSEL

DATE: 11-15-99
TIME: 9:00 a.m.

14 The above entitled matter having come before the Court on
15 the 15th day of November, 1999, DAVID M. SCHIECK, ESQ.
16 appearing, and a representative of the District Attorney's
17 Office appearing on behalf of The State of Nevada, the Court
18 being fully advised in the premises, and good cause appearing
19 therefor,

20 IT IS HEREBY ORDERED that DAVID M. SCHIECK, ESQ. be
21 appointed to represent CHAPPELL for post conviction relief.

22 IT IS FURTHER ORDERED that the Public Defender turn over
23 all files including attorney work product to David Schieck.

24 DATED AND DONE: 11-29-99

25
26 MARK GIBBONS

DISTRICT COURT JUDGE

27 SUBMITTED BY:

28 By:

David M. Schieck
DAVID M. SCHIECK, ESQ.

1 EXPR
2 DAVID M. SCHIECK, ESQ.
3 Nevada Bar No. 0824
4 302 E. Carson Ste. 600
5 Las Vegas, NV 89101
6 702-382-1844

7 Attorney for CHAPPELL

8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

10 * * *

11 THE STATE OF NEVADA,	)	CASE NO. C 131341
12 Plaintiff,	)	DEPT. NO. VII
13 vs.	)	ORDER GRANTING INTERIM
14 JAMES M. CHAPPELL,	)	PAYMENT OF EXCESS
15 Defendant.	)	ATTORNEY'S FEES
	)	DATE: N/A
	)	TIME: N/A

16 Based upon the Ex Parte Motion for Interim Payment of
17 Excess Attorney's Fees in Post Conviction Proceedings (a copy
18 of which is submitted herewith), the Court being fully advised
19 in the premises, and good cause shown, it is hereby

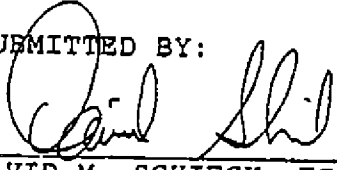
20 ORDERED, ADJUDGED AND DECREED that interim payment of
21 excess attorneys fees is granted in the amount of \$2,872.50.

22 DATED and DONE: 7-19-00

23 **MARK GIBBONS**

24 DISTRICT COURT JUDGE

25 SUBMITTED BY:

26 
27 DAVID M. SCHIECK, ESQ.
28

FILED
JUL 24 1 58 PM '00
Shirley E. Longine
CLERK

1 EXPR
2 DAVID M. SCHIECK, ESQ.
3 Nevada Bar No. 0824
4 302 E. Carson Ste. 600
5 Las Vegas, NV 89101
6 702-382-1844

7 Attorney for CHAPPELL

FILED

JUN 7 10 25 AM '01

Shirley A. Thompson
CLERK

8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

10 * * *

11 THE STATE OF NEVADA,
12 Plaintiff,
13 vs.
14 JAMES M. CHAPPELL,
15 Defendant.

16 CASE NO. C 131341
17 DEPT. NO. VII
18 ORDER GRANTING INTERIM
19 PAYMENT OF EXCESS
20 ATTORNEY'S FEES
21 DATE: N/A
22 TIME: N/A

23 Based upon the Ex Parte Motion for Interim Payment of
24 Excess Attorney's Fees in Post Conviction Proceedings (a copy
25 of which is submitted herewith), the Court being fully advised
26 in the premises, and good cause shown, it is hereby

27 ORDERED, ADJUDGED AND DECREED that interim payment of
28 excess attorneys fees is granted in the amount of \$3,023.44.

DATED and DONE: 5-17-01

MICHAEL P. GIBBONS

DISTRICT COURT JUDGE

SUBMITTED BY:

David M. Schieck
DAVID M. SCHIECK, ESQ.

EXPR
DAVID M. SCHIECK, ESQ.
Nevada Bar No. 0824
302 E. Carson Ste. 600
Las Vegas, NV 89101
702-382-1844

Attorney for CHAPPELL

FILED

APR 12 10 34 AM '02

Shirley L. Longoria
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

* * *

THE STATE OF NEVADA,	)	CASE NO. C 131341
	)	DEPT. NO. IX 1
Plaintiff,)	
vs.	)	ORDER GRANTING INTERIM
	)	PAYMENT OF EXCESS
JAMES M. CHAPPELL,	)	ATTORNEY'S FEES
)	
Defendant.	)	DATE: N/A
	)	TIME: N/A

Based upon the Ex Parte Motion for Interim Payment of Excess Attorney's Fees in Post Conviction Proceedings (a copy of which is submitted herewith), the Court being fully advised in the premises, and good cause shown, it is hereby

ORDERED, ADJUDGED AND DECREED that interim payment of excess attorneys fees is granted in the amount of \$2,621.86.

DATED and DONE: APR 11 2002

MICHAEL L. DOUGLAS

DISTRICT COURT JUDGE

SUBMITTED BY:

David M. Schieck
DAVID M. SCHIECK, ESQ.

Date 7/3/02
Time 8:36 am

DAVID M. SCHIECK
Client Billing Worksheet

Page 1

Selection Criteria

Date range : Earliest through 6/30/02
Slip numbers : All
Timekeeper : All
Client : CHAPPELL.PCR : DIXON.PCR : KOERCHNER.PCR
: RIPPO.PCR : TURNER.PCR : WESLEY.PCR
Activity : All
Custom Fields : All
Reference : All
Slip status : Billed slips and transactions excluded
Other options :
Print Bills that are "paid in full" : Yes
Include transactions outside date range : Yes
Print Bills with no activity : Yes

Nickname 1 : CHAPPELL.PCR Nickname 2: 35
Address : JAMES CHAPPELL, #52338
ESP
In reference to: CHAPPELL V. WARDEN
PCR
COURT APPOINTED
Rounding : None
Full Precision : No

Last bill :
Last charge : 6/25/02
Last payment : 5/20/02 Amount : \$619.36
Arrangement : Time Charges: From slips.
Expenses: From slips.

Date/Slip#	Description	HOURS/RATE	AMOUNT	TOTAL
11/15/99 #55	DMS / CACA COURT APPEARANCE - COURT APPOINTMENT	1.00 75.00	75.00	
11/15/99 #56	DMS / P PREPARE ORDER	0.20 75.00	15.00	
11/17/99 #57	DMS / RVW REVIEW SUPREME COURT DECISION	0.50 75.00	37.50	
11/18/99 #58	DMS / LC LETTER TO CLIENT	0.20 75.00	15.00	
12/9/99 #59	DMS / TCF TELEPHONE CALL FROM BROOKS	0.20 75.00	15.00	
12/9/99 #60	DMS / C CONFERENCE WITH BROOKS	0.30 75.00	22.50	

Date 7/3/02
Time 8:36 am

DAVID M. SCHIECK
Client Billing Worksheet

Page 2

CHAPPELL.PCR :JAMES CHAPPELL, #52338 (continued)

Date/Slip#	Description	HOURS/RATE	AMOUNT	TOTAL
12/9/99 #61	DMS / RVW REVIEW ROA	1.00 75.00	75.00	
12/11/99 #62	DMS / RVW REVIEW ROA	1.00 75.00	75.00	
12/13/99 #63	DMS / TCF TELEPHONE CALL FROM BROOKS	0.20 75.00	15.00	
12/13/99 #64	DMS / RVW REVIEW ROA	1.00 75.00	75.00	
12/13/99 #65	DMS / C CONFERENCE WITH BROOKS	0.50 75.00	37.50	
12/14/99 #66	DMS / RVW REVIEW ROA	1.00 75.00	75.00	
12/15/99 #67	DMS / CC CONFERENCE WITH CLIENT	1.50 75.00	112.50	
12/17/99 #68	DMS / RVW REVIEW ROA	1.50 75.00	112.50	
12/18/99 #69	DMS / RVW REVIEW TRANSCRIPTS	1.50 75.00	112.50	
12/18/99 #70	DMS / PM PREPARE MOTION FOR INVESTIGATOR	1.50 75.00	112.50	
12/22/99 #71	DMS / RVW REVIEW PHOTOS	0.50 75.00	37.50	
12/22/99 #72	DMS / C CONFERENCE WITH BROOKS	0.20 75.00	15.00	
1/8/00 #73	DMS / RVW REVIEW RECORDS	1.00 75.00	75.00	
1/19/00 #74	DMS / CASH COURT APPEARANCE - STATUS HEARING	1.00 75.00	75.00	
1/23/00 #75	DMS / RVW REVIEW TRIAL DOCUMENTS	1.00 75.00	75.00	
1/29/00 #76	DMS / RVW REVIEW TRANSCRIPTS	2.00 75.00	150.00	

Date 7/3/02
Time 8:36 am

DAVID M. SCHIECK
Client Billing Worksheet

Page 3

CHAPPELL.PCR :JAMES CHAPPELL, #52338 (continued).

Date/Slip#	Description	HOURS/RATE	AMOUNT	TOTAL
1/31/00 #77	DMS / TCT TELEPHONE CALL TO BROOKS	0.20 75.00	15.00	
2/1/00 #78	DMS / RC REVIEW CORRESPONDENCE	0.20 75.00	15.00	
2/1/00 #79	DMS / RVW REVIEW TRANSCRIPTS	2.00 75.00	150.00	
2/10/00 #80	DMS / CC CONFERENCE WITH CLIENT	2.00 75.00	150.00	
3/10/00 #159	DMS / RC REVIEW CORRESPONDENCE	0.20 75.00	15.00	
3/10/00 #160	DMS / LC LETTER TO CLIENT	0.20 75.00	15.00	
3/16/00 #176	DMS / RVW REVIEW TRANSCRIPTS	1.00 75.00	75.00	
3/17/00 #171	DMS / RVW REVIEW TRANSCRIPTS	1.00 75.00	75.00	
3/29/00 #195	DMS / RC REVIEW CORRESPONDENCE	0.20 75.00	15.00	
5/27/00 #275	DMS / RVW REVIEW TRANSCRIPTS/RECORD	3.00 75.00	225.00	
5/28/00 #276	DMS / P PREPARE SUPP P&A'S	2.50 75.00	187.50	
6/4/00 #297	DMS / P PREPARE SUPP P/A'S	2.00 75.00	150.00	
6/7/00 #294	DMS / P PREPARE SUPP P/A'S	2.00 75.00	150.00	
6/16/00 #292	DMS / P PREPARE SUPP P/A'S	2.00 75.00	150.00	
6/27/00 #378	DMS / CA COURT APPEARANCE - RESET BRIEFING SCHEDULE	1.00 75.00	75.00	
9/1/00 #519	DMS / RVW REVIEW TRIAL TRANSCRIPTS	2.00 75.00	150.00	

Date 7/3/02
Time 8:36 am.

DAVID M. SCHIECK
Client Billing Worksheet

Page 4

CHAPPELL.PCR :JAMES CHAPPELL, #52338 (continued)

Date/Slip#	Description	HOURS/RATE	AMOUNT	TOTAL
9/3/00 #579	DMS / RVW REVIEW/SUMMARIZE TRANSCRIPTS	2.00 75.00	150.00	
9/7/00 #573	DMS / RVW REVIEW TRANSCRIPTS	1.50 75.00	112.50	
9/8/00 #567	DMS / P PREPARE SUPP P/A'S	2.00 75.00	150.00	
9/16/00 #639	DMS / RVW REVIEW FILE RE: STATUS	1.00 75.00	75.00	
11/1/00 #777	DMS / RVW REVIEW TRANSCRIPTS	2.50 75.00	187.50	
11/2/00 #780	DMS / RVW REVIEW TRANSCRIPTS	1.50 75.00	112.50	
11/3/00 #781	DMS / RVW REVIEW TRANSCRIPTS	2.00 75.00	150.00	
11/4/00 #839	DMS / RVW REVIEW TRANSCRIPTS	1.00 75.00	75.00	
11/6/00 #842	DMS / CASH COURT APPEARANCE - STATUS HEARING	1.00 75.00	75.00	
11/6/00 #843	DMS / R RESEARCH IMPROPER CLOSING ARGUMENT	1.00 75.00	75.00	
11/8/00 #855	DMS / RC REVIEW CORRESPONDENCE	0.20 75.00	15.00	
11/8/00 #856	DMS / LC LETTER TO CLIENT	0.20 75.00	15.00	
11/9/00 #805	DMS / RVW REVIEW TRANSCRIPTS	1.00 75.00	75.00	
11/12/00 #866	DMS / P PREPARE SUPP P/A'S	2.00 75.00	150.00	
11/14/00 #876	DMS / RVW REVIEW CLOSING ARGUMENT TRANSCRIPT	1.50 75.00	112.50	

Date 7/3/02
Time 8:36 am.

DAVID M. SCHIECK
Client Billing Worksheet

Page 5

CHAPPELL.PCR :JAMES CHAPPELL, #52338 (continued)

Date/Slip#	Description	HOURS/RATE	AMOUNT	TOTAL
11/20/00 #891	DMS / R RESEARCH OBJECTION	1.00 75.00	75.00	
11/25/00 #899	DMS / RVW REVIEW TRANSCRIPTS	2.00 75.00	150.00	
12/1/00 #929	DMS / LC LETTER TO CLIENT	0.20 75.00	15.00	
12/7/00 #1001	DMS / CC CONFERENCE WITH CLIENT	2.00 75.00	150.00	
12/13/00 #969	DMS / RC REVIEW CORRESPONDENCE	0.20 75.00	15.00	
12/13/00 #970	DMS / LC LETTER TO CLIENT	0.20 75.00	15.00	
12/20/00 #1019	DMS / RC REVIEW CORRESPONDENCE	0.20 75.00	15.00	
12/20/00 #1020	DMS / LC LETTER TO CLIENT	0.20 75.00	15.00	
1/27/01 #1219	DMS / RVW REVIEW BROOKS DOCUMENTS	2.00 75.00	150.00	
1/27/01 #1220	DMS / LC LETTER TO CLIENT	0.20 75.00	15.00	
1/27/01 #1221	DMS / P PREPARE CLIENT'S BOX	0.50 75.00	37.50	
2/6/01 #1290	DMS / TCFC TELEPHONE CALL FROM CLIENT	0.20 75.00	15.00	
2/12/01 #1306	DMS / CASH COURT APPEARANCE - STATUS HEARING	1.00 75.00	75.00	
3/8/01 #1432	DMS / P PREPARE REVISED SUPP P/A'S	2.00 75.00	150.00	
3/19/01 #1493	DMS / RC REVIEW CORRESPONDENCE	0.20 75.00	15.00	
3/20/01 #1509	DMS / P PREPARE SUPP P/A'S	2.00 75.00	150.00	

Date 7/3/02
Time 8:36 am.

DAVID M. SCHIECK
Client Billing Worksheet

Page 6

CHAPPELL.PCR :JAMES CHAPPELL, #52338 (continued)

Date/Slip#	Description	HOURS/RATE	AMOUNT	TOTAL
3/26/01 #1604	DMS / RC REVIEW CORRESPONDENCE	0.20 75.00	15.00	
5/1/01 #1816	DMS / CASH COURT APPEARANCE - STATUS HEARING	1.00 75.00	75.00	
5/8/01 #1921	DMS / R RESEARCH SUPP R/A'S	1.50 75.00	112.50	
6/7/01 #2283	DMS / CC CONFERENCE WITH CLIENT	2.00 75.00	150.00	
6/7/01 #2284	DMS / RVW REVIEW TRANSCRIPTS	1.00 75.00	75.00	
6/12/01 #2319	DMS / CASH COURT APPEARANCE - STATUS HEARING	1.00 75.00	75.00	
6/26/01 #2447	DMS / RC REVIEW CORRESPONDENCE	0.20 75.00	15.00	
7/5/01 #2544	DMS / R RESEARCH SUPP PETITION	2.00 75.00	150.00	
7/25/01 #2768	DMS / R RESEARCH CLOSING ARGUMENT	0.50 75.00	37.50	
7/26/01 #2776	DMS / CASH COURT APPEARANCE - STATUS HEARING	1.00 75.00	75.00	
8/23/01 #2954	DMS / CA COURT APPEARANCE - STATUS HEARING	1.00 75.00	75.00	
9/13/01 #3297	DMS / CASH COURT APPEARANCE - STATUS HEARING	1.00 75.00	75.00	
11/1/01 #3818	DMS / CASH COURT APPEARANCE - STATUS HEARING	1.00 75.00	75.00	
12/13/01 #4215	DMS / CASH COURT APPEARANCE - STATUS	1.00 75.00	75.00	

Date 7/3/02
Time 8:36 am

DAVID M. SCHIECK
Client Billing Worksheet

Page 7

CHAPPELL.PCR :JAMES CHAPPELL, #52338 (continued)

Date/Slip#	Description	HOURS/RATE	AMOUNT	TOTAL
#4215..	HEARING			
1/17/02	DMS / RVW	2.00	150.00	
#4358	REVIEW FILES	75.00		
1/17/02	DMS / R	1.00	75.00	
#4359	RESEARCH ISSUES	75.00		
1/17/02	DMS / P	2.00	150.00	
#4360	PREPARE SUPP P/A'S	75.00		
1/17/02	DMS / R	1.00	75.00	
#4362	RESEARCH ISSUES	75.00		
1/17/02	DMS / P	2.00	150.00	
#4363	PREPARE SUPP P/A'S	75.00		
2/5/02	DMS / CASH	1.00	75.00	
#4682	COURT APPEARANCE - STATUS HEARING	75.00		
3/5/02	DMS / CASH	1.00	75.00	
#4944	COURT APPEARANCE - STATUS HEARING	75.00		
3/5/02	DMS / P	1.50	112.50	
#4945	PREPARE SUPP P/A'S	75.00		
3/6/02	DMS / C	0.20	15.00	
#4960	CONFERENCE WITH BROOKS	75.00		
3/6/02	DMS / P	2.00	150.00	
#4961	PREPARE SUPP P/A'S	75.00		
3/6/02	DMS / R	2.00	150.00	
#4962	RESEARCH SUPP P/A'S	75.00		
3/6/02	DMS / P	2.50	187.50	
#4966	PREPARE SUPP P/A'S	75.00		
3/26/02	DMS / CASH	1.00	75.00	
#5154	COURT APPEARANCE - STATUS HEARING	75.00		
4/8/02	DMS / P	2.00	150.00	
#5397	PREPARE SUPP P/A'S	75.00		

PD

Date 7/3/02
Time 8:36 am.

DAVID M. SCHIECK
Client Billing Worksheet

Page 8

CHAPPELL.PCR :JAMES CHAPPELL, #52338 (continued)

Date/Slip#	Description	HOURS/RATE	AMOUNT	TOTAL
4/9/02 #5398	DMS / CASH COURT APPEARANCE - STATUS HEARING	1.00 75.00	75.00	
4/11/02 #5378	DMS / P PREPARE SUPP P/A'S	2.00 75.00	150.00	
4/11/02 #5382	DMS / P PREPARE SUPP P/A'S	2.00 75.00	150.00	
4/13/02 #5346	DMS / P PREPARE AMD REVISE SUPP P/A'S	2.00 75.00	150.00	
4/15/02 #5355	DMS / R RESEARCH RACIAL ISSUES	2.00 75.00	150.00	
4/15/02 #5356	DMS / TCT TELEPHONE CALL TO FED. PUBLIC DEFENDER	0.20 75.00	15.00	
4/15/02 #5357	DMS / P PREPARE SUPP P/A'S	4.00 75.00	300.00	
4/17/02 #5361	DMS / RVW REVIEW FILES	1.00 75.00	75.00	
4/17/02 #5362	DMS / C CONFERENCE ELY STATE PRISON (REFUSED)	1.00 75.00	75.00	
4/18/02 #5332	DMS / CASH COURT APPEARANCE - STATUS HEARING	1.00 75.00	75.00	
4/18/02 #5333	DMS / P PREPARE AND REVISE SUPP P/A'S	2.00 75.00	150.00	
4/18/02 #5334	DMS / LC LETTER TO CLIENT	0.20 75.00	15.00	
4/30/02 #5489	DMS / RC REVIEW CORRESPONDENCE	0.20 75.00	15.00	
4/30/02 #5490	DMS / LC LETTER TO CLIENT	0.20 75.00	15.00	
6/20/02 #5983	DMS / RVW REVIEW STATE'S OPPOSITION	0.50 75.00	37.50	

Date 7/3/02
Time 8:36 am

DAVID M. SCHIECK
Client Billing Worksheet

Page 9

CHAPPELL.PCR :JAMES CHAPPELL, #52338 (continued)

Date/Slip#	Description	HOURS/RATE	AMOUNT	TOTAL
6/20/02	DMS / C	0.20	15.00	
#5999	CONFERENCE WITH BROOKS	75.00		
6/24/02	DMS / LC	0.20	15.00	
#6022	LETTER TO CLIENT	75.00		
TOTAL BILLABLE TIME CHARGES		130.10		\$9,757.50

Date/Slip#	Description	QTY/PRICE
7/13/00	DMS / \$X	18
#441	PHOTOCOPIES	0.10
12/20/00	DMS / \$X	1
#1055	PHOTOCOPIES (DIAL REPROGRAPHICS)	257.29
1/29/01	DMS / \$PO	1
#1257	POSTAGE (UPS)	9.16
2/6/01	DMS / \$LDTC	1
#1547	LONG DISTANCE TELEPHONE CALL	2.69
5/17/01	DMS / \$X	28
#2225	PHOTOCOPIES	0.10
6/6/01	DMS / \$C	1
#2235	COST FOR TRAVEL EXPENSES (ROOM, CAR, GAS)	112.76
6/11/01	DMS / \$X	13
#2512	PHOTOCOPIES	0.10
4/11/02	DMS / \$X	36
#5210	PHOTOCOPIES	0.10
4/17/02	DMS / \$C	1
#5669	COST FOR TRAVEL EXPENSES (CAR, ROOM, GAS)	79.00
4/30/02	DMS / \$X	148
#5213	PHOTOCOPIES	0.10
6/25/02	DMS / \$X	40
#6056	PHOTOCOPIES	0.10

fees

\$1,627.50

PD

Costs \$101.40

Date 7/3/02
Time 8:36 am.

DAVID M. SCHIECK
Client Billing Worksheet

Page 10

CHAPPELL.PCR :JAMES CHAPPELL, #52338 (continued)

TOTAL BILLABLE COSTS	\$489.20
----------------------	----------

TOTAL NEW CHARGES	\$10,246.70
-------------------	-------------

PAYMENTS/REFUNDS/CREDITS

10/26/00 Payment - thank you	(2,872.50)
------------------------------	------------

7/23/01 Payment - thank you	(3,023.44)
-----------------------------	------------

5/8/02 Payment - thank you	(2,002.50)
----------------------------	------------

5/20/02 Payment - thank you	(619.36)
-----------------------------	----------

TOTAL PAYMENTS/REFUNDS/CREDITS	(\$8,517.80)
--------------------------------	--------------

NEW BALANCE

New Current period	1,728.90
--------------------	----------

TOTAL NEW BALANCE	\$1,728.90
-------------------	------------

2 hrs in ct \$150.00-

19.7 hrs out ct 1477.50

Costs 1627.50

 101.40

 \$1728.90

*** Holiday Inn ***

150 E. ALTMAN STREET
ELY, NV 89301
PHONE: 775/289-8900
FAX: 775/289-4507

DAVID SCHIECK
LAW OFFICE OF DAVID SCHIECK
302 CARSON AVE
LAS VEGAS, NV 89101-

VE NV 89101-

Room	11
Active Date	04/11/02
Exp. Date	04/17/02
Folio #	0011
Room Rate	67.50
Account	4-CHANK
MidStay	1.00

Independently owned by High Country Development and operated by Holiday Inn.
I authorize you to debit the balance of my account to my credit card (which may preclude other payment methods).
Signature
Rapid Check-Out™

DATE CODE REFERENCE	ID	DESCRIPTION	CHANGE	PAYMENT	DAILY RATE
0416	114	04 6000 LND DISCOUNT ROOM		67.50	
0416	812	04 6001 LND OCCUPANCY TAX		5.40	
0417	914	04 7200 LIZ VISA/MASTERCARD		.00	
TOTAL					.00

110.00

237.01 / 3

Koerschner 79-
Ripps 79.01
Chappell 79-

LAS VEGAS A/P
RENTAL RECORD: 269159424
DAVID SCHIECK
COMPLETED BY: 1836
RENTED: LAS VEGAS A/P
RENTAL: 04/15/02 19:29
RETURN: 04/17/02 20:28
MILES IN: 19084 OUT: 19084
MILES RETURN: 588
PLAN IN/OUT: MOR /MOR
CLSI 0
2 DAYS
SUBTOTAL 63.00
TAXES 18.57
EX 18.57 ON 110.58
TOTAL 129.45
CREDIT CARD #: XXXXXXXXXX0923
Thank you for renting from
Holiday Inn

EXPERIENCE THE
DIFFERENCE (R)
THANK YOU

TURTLE STOP 15
300 E. UARM/SPRINGS
LAS VEGAS NV
DLR #57425830500
DAVID M. SCHIECK
VISA ACCT# 5841
REF# 181511
REF# 31050 35 051
AUTH# 00 APR# 517827
ID-PC#10 PUP#2
REG Blend G 8.673
SELF
PRICE/GAL: \$ 1.519
TAX: \$ 0.00
SALE TOTAL: \$ 13.17
04/17/02 18:45:11

VISA RECEIPT
SCHIECK/DAVID M
*****5841
017714 REF# 14606021
DATE 04/17/02 12:15
PUMP # 04
PRODUCT SILVER
SELF SERVICE LEVEL
GALLONS 12.148
PRICE/GAL: \$ 1.769
FUEL SALE \$ 21.49
DLR# 8285245 TID 01
R PLACE #17
1301 AVENUE F NV
ELY

154

ORIGINAL

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JUL 10 1 52 PM '02

Shirley B. Rungius
CLERK

1 EXPR
2 DAVID M. SCHIECK, ESQ.
3 Nevada Bar No. 0824
4 302 E. Carson Ste. 600
5 Las Vegas, NV 89101
6 702-382-1844
7 Attorney for CHAPPELL

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

9 THE STATE OF NEVADA,
10 Plaintiff,
11 vs.
12 JAMES M. CHAPPELL,
13 Defendant.

CASE NO. C 131341
DEPT. NO. XI
ORDER GRANTING INTERIM
PAYMENT OF EXCESS
ATTORNEY'S FEES
DATE: N/A
TIME: N/A

14 Based upon the Ex Parte Motion for Interim Payment of
15 Excess Attorney's Fees in Post Conviction Proceedings (a copy
16 of which is submitted herewith), the Court being fully advised
17 in the premises, and good cause shown, it is hereby

18 ORDERED, ADJUDGED AND DECREED that interim payment of
19 excess attorneys fees is granted in the amount of \$2,621.86.
20

21 DATED and DONE: 9 July 2002

[Signature]
DISTRICT COURT JUDGE

22 SUBMITTED BY:
23 *[Signature]*
24 DAVID M. SCHIECK, ESQ.
25
26

27 RECEIVED

28 JUL 10 2002

COUNTY CLERK

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

[Stamp]
JUL 08 2002

ITS

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JUL 30 1 21 PM '02

CLERK

1 EXPT
2 DAVID M. SCHIECK, ESQ.
3 Nevada Bar No. 0824
4 302 E. Carson #600
5 Las Vegas, NV 891010
6 702-382-1844

7 ATTORNEY FOR CHAPPELL

8 DISTRICT COURT

9 CLARK COUNTY, NEVADA

10 * * *

11 JAMES MONTELL CHAPPELL,) CASE NO. C 131341
12) DEPT. NO. XI

13 Petitioner,)

14 vs.) EX PARTE MOTION FOR
15) ORDER TO TRANSPORT
16 THE STATE OF NEVADA,) PETITIONER

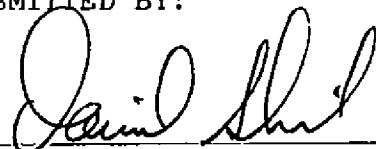
17 Respondent.)

18 DATE: 9-13-02
19 TIME: 8:45 A.M.

20 COMES NOW, Petitioner JAMES CHAPPELL, by and through his
21 attorney DAVID M. SCHIECK, ESQ., and moves this Court for an
22 Order directing that he be transported from Ely State Prison,
23 Ely, Nevada to be present at his evidentiary hearing on
24 September 13, 2002 at 8:45 a.m.

25 DATED this 30 day of July, 2002.

26 SUBMITTED BY:

27 
28 DAVID M. SCHIECK, ESQ.

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

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JUL 30 2002

CLERK

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

AFFIDAVIT OF DAVID M. SCHIECK

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

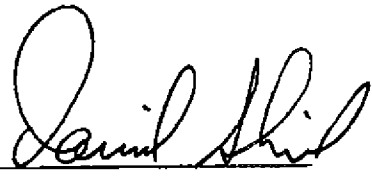
DAVID M. SCHIECK, being duly sworn, deposes and says:

That Affiant is an attorney duly licensed to practice law
in the State of Nevada and court appointed counsel for
CHAPPELL.

That CHAPPELL'S Evidentiary Hearing is set for September
13, 2002 at 8:45 a.m.

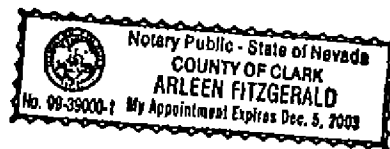
That CHAPPELL is entitled to be present at the hearing and
Affiant requests that an Order be granted transporting CHAPPELL
from Ely State Prison to be present at the hearing.

FURTHER, Affiant sayeth naught.


DAVID M. SCHIECK

SUBSCRIBED AND SWORN to before
me this 30 day of JULY, 2002.


NOTARY PUBLIC



FILED

JUL 31 1 45 PM '02

CLERK

1 EXPR
 2 DAVID M. SCHIECK, ESQ.
 3 Nevada Bar No. 0824
 4 302 E. Carson #600
 5 Las Vegas, NV 891010
 6 702-382-1844

ATTORNEY FOR CHAPPELL

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

9 JAMES MONTELL CHAPPELL,
 10
 11 Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

CASE NO. C 131341
 DEPT. NO. XI

EX PARTE ORDER TO
 TRANSPORT PETITIONER

DATE: 9-13-02
 TIME: 8:45 A.M.

15 Based on the Ex Parte Motion for Order to Transport
 16 Petitioner, a copy of which is submitted herewith, the Court
 17 being fully advised in the premises, and good cause appearing

18 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that JAMES
 19 CHAPPELL, No. 52338, is to be transported from Ely State
 20 Prison, Ely, Nevada to be present at his evidentiary hearing
 21 set for September 13, 2002 at 8:45 a.m.

DATED AND DONE:

31 July 2002

DISTRICT COURT JUDGE

SUBMITTED BY:

DAVID M. SCHIECK, ESQ.

RECEIVED

JUL 31 2002

COUNTY CLERK

Page: 2543

David M. Schieck
 Attorney At Law
 302 E. Carson Ave., Ste. 600
 Las Vegas, NV 89101
 (702) 382-1844

RECEIVED
 JUL 30 2002

COUNTY CLERK

918

98

FILED

AUG 19 3 30 PM '02

Shirley B. Laogaine
CLERK

ORIGINAL

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

PLAINTIFF,

VS.

JAMES MONTELL CHAPPELL,

DEFENDANT.

CASE NO. C-131341

DEPT. NO. XI

BEFORE THE HONORABLE MICHAEL L. DOUGLAS, DISTRICT JUDGE

THURSDAY, JULY 25, 2002; 9:00 A.M.

RECORDER'S TRANSCRIPT RE:
HEARING: WRIT

APPEARANCES:

FOR THE STATE:

LYNN M. ROBINSON, ESQ.
Chief Deputy District Attorney

FOR THE DEFENSE:

DAVID M. SCHIECK, ESQ.

RECORDED BY: CAT NELSON, COURT RECORDER

RECEIVED

AUG 19 2002

COUNTY CLERK

1 THURSDAY, JULY 25, 2002; 9:00 A.M.

2
3 THE COURT: State of Nevada versus James Chappell, page four,
4 C131341.

5 MR. SCHIECK: Good morning, Your Honor.

6 THE COURT: Good morning. This is on reference a writ. This was a
7 time set for at least the initial hearing as to this particular matter. The Court
8 has reviewed the documents that have been submitted by Mr. Schieck as well
9 as the State as to this matter. Mr. Schieck, this is your petition.

10 MR. SCHIECK: Your Honor, the petition is quite lengthy, and as Your
11 Honor has indicated, he has read and reviewed all of the issues that we've
12 claimed. And, I would assume that includes the affidavit of Mr. Chappell
13 that's attached, setting forth the names of witnesses and information that we
14 feel justify at least initially this Court granting an evidentiary hearing in order
15 for us to establish on the record these witnesses and what they would have
16 testified to, and then have trial counsel available to testify as to numerous
17 issues including why these witnesses weren't contacted and called to testify
18 at the trial and at the penalty hearing, why there was no objections to the
19 numerous items that we've included in here as legal basis that should have
20 been the subject of contemporaneous objection then raised on direct appeal
21 by appellate counsel.

22 These attorneys need to be put on the stand and given the
23 opportunity to say either yes, I didn't object because I have a strategic reason,
24 I didn't object for -- because I didn't want to upset the jury, I didn't want to

1 highlight the information, or to get up and say, I missed that objection, I
2 should have objected, so the Court can review those issues and determine
3 whether or not it meets the second prong of the Strickland test, which is
4 would it have made a difference in the trial if trial counsel had done all the
5 things that we've alleged in our petition.

6 So, I would ask the Court to set this down for an evidentiary
7 hearing. I'm sure that we could do it in a day's time, certainly not more than
8 that I wouldn't expect, and have -- afford me the opportunity to cross-
9 examine the witnesses and establish a record as to the ineffective assistance
10 trial counsel.

11 THE COURT: On behalf of the State?

12 MS. ROBINSON: Your Honor, we don't believe that the Defendant is
13 entitled to an evidentiary hearing in this case. As we've laid out in our rather
14 lengthy response, a defendant is only entitled to an evidentiary hearing if it's
15 based on facts which are not belied or repelled by the record. This particular
16 record, the fact that the Defendant burglarized the victim's house, robbed the
17 victim, and these were all found by the jury as aggravators and whatnot, we
18 feel that any character evidence would not have made a difference and
19 several quibbling objections wouldn't have made a difference, and they're
20 belied by the record, and we don't think an evidentiary hearing is required in
21 this case.

22 MR. SCHIECK: Your Honor, if I could just respond briefly. The record in
23 this case does establish a failure of counsel to object to numerous items that
24 we've included, and at the very least we need to be able to examine those

1 attorneys to ask them why they didn't object to these things that -- and our
2 Supreme Court, bless their heart, you never know what they're going to
3 reverse a death penalty on. They change their mind on a regular basis. There
4 have been cases where arguments were made by prosecutors for years and
5 years that were accepted by the Nevada Supreme Court as proper argument,
6 and within the last six months, they said, no, you can't say that anymore,
7 we're going to give Mr. Evans a new penalty hearing based on that argument
8 that wasn't objected to at trial and trial counsel should have objected, even
9 though years and years of jurisprudence from the courts said you don't need
10 to object, it's not objectionable. So, I would urge the Court to grant us an
11 evidentiary hearing.

12 THE COURT: Mr. Schieck, you're being very kind this morning
13 indicating that our Supreme Court has a heart. I know quite often defense
14 counsel don't think that our Supreme Court has a heart, but be that as it may.
15 There are issues within this petition that the Court can summarily rule on. I
16 will hold that because those were matters that could have been appealed on
17 direct appeal originally, but as to the ineffective assistance of counsel issues
18 that you have raised, in light of probably the last three or four decisions that
19 have come down from the Nevada Supreme Court which we in the District
20 Court have kind of a running battle with, the standard being belied by the
21 record seems to be changing. They are now compelling us and they have
22 sent back a number recently and demanded that we have an evidentiary
23 hearing as to the issue of ineffective assistance of counsel.

24 Within what you're asking for, I'm not sure it's appropriate initially
25

to have a hearing as to what those witnesses would have testified to and bringing them in and having them make a record because we're putting the cart before the horse. We must establish that there was ineffective assistance of counsel in failing to call them before it would or would not be appropriate to proffer what their testimony would have been so the Court can make the ultimate determination whether or not that would have possibly affected the outcome.

So, I think at the minimum, we need to get the appropriate counsel that are -- come into play and have them before the Court so that counsel can ask questions of them in terms of whether they, in effect as you indicated, missed it or was it trial strategy in terms of calling or not calling individuals or not objecting to issues. And, there are one or two other specific things that you raised as to failure of counsel to do. But, I think that's at a minimum our first issue that we must do is make that determination and then see if we go further in terms of having those people in and at least making a record of what they would have testified to had they been called.

So, I will grant that portion of the petition at this time to have an evidentiary hearing, to have appropriate counsel call to find out whether or not what the information is going to indicate in terms of what they did at the time of trial. Are all counsel at issue still local?

MR. SCHIECK: Yes, Your Honor.

THE COURT: Knowing counsels' schedule and everything else in terms of the counsel that would have to be called, probably have to at a minimum set this over for three weeks to be able to do an evidentiary.

1 MR. SCHIECK: We also have to transport Mr. Chappell down from Ely,
2 Your Honor. If we could get a date the first part of September, that would
3 allow me to get him transported down there. They're very picky on their
4 orders. Thank you.

5 THE COURT: Let's do it on a Friday morning, 8:45, first part --

6 MS. ROBINSON: Can we do it after the 11th, when I'll get back from
7 my vacation, please?

8 THE COURT: That would work.

9 THE CLERK: September 13th --

10 MS. ROBINSON: Thanks.

11 THE CLERK: Eight forty-five.

12 MR. SCHIECK: I'll submit a transport order for Your Honor to sign.

13 THE COURT: Thank you.

14 (Proceedings concluded)

15 * * * * *

16
17
18
19
20 ATTEST: I do hereby certify that I have truly and correctly transcribed
the sound recording in the above-entitled matter.

21 *Carrie A. Hansen*
22 CARRIE A. HANSEN
23 Court Transcriber
24
25

ORIGINAL

8
FILED

SEP 18 2 19 PM '02

Shirley J. McGuire
CLERK

1 EXPT
2 DAVID M. SCHIECK, ESQ.
3 NEVADA BAR NO. 0824
4 302 E. CARSON, STE. 600
5 LAS VEGAS, NV 89101
6 702-382-1844
7 ATTORNEY FOR CHAPPELL

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

9 JAMES MONTELL CHAPPELL,) CASE NO. C 131341
10) DEPT. NO. XI
11 Petitioner,)
12 vs.) EX PARTE MOTION FOR
13) APPOINTMENT OF
14 THE STATE OF NEVADA,) INVESTIGATOR AND FOR
15) EXCESS FEES
16 Respondent.) DATE: N/A
17) TIME: N/A

18 COMES NOW, JAMES CHAPPELL, by and through his attorney
19 DAVID M. SCHIECK, ESQ., and moves this Court for an Order
20 appointing DYMENT INVESTIGATIONS, as investigator, to
21 represent, investigate and prepare the above styled case for
22 the Court Appointed attorney; and for an Order authorizing
23 payment to the investigator in excess of the statutory limit
24 pursuant to N.R.S. 7.135(1).

25 This Motion is made and based upon the Points and
26 Authorities and Affidavit of Counsel attached hereto.

STATEMENT OF FACTS

27 DAVID M. SCHIECK, ESQ. is appointed to represent JAMES
28 CHAPPELL (hereinafter referred to as CHAPPELL) through post

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

COUNTY CLERK

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David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

1 conviction proceedings. At the evidentiary hearing on
2 September 13, 2002 the Court allowed counsel for CHAPPELL to
3 file witness affidavits. It is necessary for an investigator
4 to be appointed in order to locate the witnesses for
5 affidavits.

6 POINTS AND AUTHORITIES

7 N.R.S. 7.135 states:

8 "The attorney or attorneys appointed by a
9 magistrate or District Court to represent a Defendant
10 are entitled, in addition to the fee provided by law
11 for their services, to be reimbursed for expenses
12 reasonably incurred by him or them in representing
13 the Defendant any may employ, subject to the prior
14 approval of the magistrate or the District Court in
15 an ex parte application, such investigative, expert
16 or other services as may be necessary for an adequate
17 defense. Compensation to any person furnishing such
18 investigative, expert or other services shall not
19 exceed \$300.00 exclusive or reimbursements for
20 expense reasonably incurred, unless payment in excess
21 of that limit is:

22 1. Certified by the trial judge of the
23 Court ... as necessary to provide fair
24 compensation for services of an unusual
25 character or duration."

26 Based on the facts set forth in Counsel's affidavit, it is
27 respectfully requested that DYMENT INVESTIGATIONS be appointed
28 as investigator and fees in excess of the statutory limit be
granted in the amount of \$5,000.00.

DATED this 17 day of September, 2002.

SUBMITTED BY:


DAVID M. SCHIECK, ESQ.

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

AFFIDAVIT

STATE OF NEVADA)
COUNTY OF CLARK) ss:


DAVID SCHIECK, being first duly sworn, deposes and says:

That Affiant is an attorney duly licensed to practice law in the State of Nevada and is the court appointed counsel for CHAPPELL.

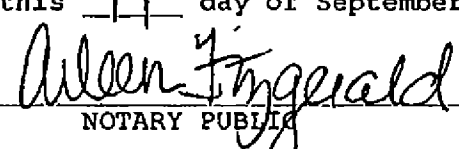
That the time to locate witnesses and interview for the affidavits as allowed at the Evidentiary Hearing on September 13, 2002 can be done at a lesser rate by an investigator than by court appointed counsel.

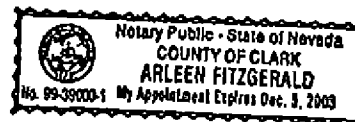
Therefore, it is requested that this Court grant the motion to appoint Dymment Investigations and that the sum of \$2,000.00 be granted for investigative work.

Further, Affiant sayeth naught.


DAVID SCHIECK

SUBSCRIBED AND SWORN to before me
this 17 day of September, 2002.


NOTARY PUBLIC



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EXPR
DAVID M. SCHIECK, ESQ.
NEVADA BAR NO. 0824
302 E. CARSON, STE. 600
LAS VEGAS, NV 89101
702-382-1844
ATTORNEY FOR CHAPPELL

FILED

SEP 24 3 24 PM '02

Shirley S. Kingma
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

* * *

JAMES MONTELL CHAPPELL,	)	CASE NO. C 131341
	)	DEPT. NO. XI
Petitioner,)	
	)	ORDER APPOINTING
vs.	)	INVESTIGATOR AND GRANTING
	)	EXCESS FEES
THE STATE OF NEVADA,)	
)	
Respondent.	)	DATE: N/A
	)	TIME: N/A

Based on the Ex Parte Motion to Appoint Investigator and for Excess Fees, a copy submitted herewith, the Court being fully advised in the premises, and good cause appearing

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that DYMENT INVESTIGATIONS be, and hereby is, appointed as investigator for CHAPPELL.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that compensation for said services shall not exceed \$5,000.00, exclusive of reimbursement for expenses reasonably incurred pursuant to NRS 7.135, unless further ordered by the Court.

DATED and DONE: *September 23, 2002*

SUBMITTED BY: *[Signature]*
DAVID M. SCHIECK, ESQ.

[Signature]
DISTRICT COURT JUDGE

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

COUNTY CLERK

SEP 24 2002

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S17

Case No. C-131341

Dept. No. 011

FILED

OCT 19 4 40 PM '99

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

JAMES M. CHAPPELL,

PETITIONER,

V.

E. K. McDANIEL, WARDEN,

RESPONDENT,

PETITION FOR WRIT OF HABEAS CORPUS
(POST-CONVICTION)

MOTION FOR APPOINTMENT
OF COUNSEL

COMES NOW the petitioner, JAMES M. CHAPPELL, in
propria persona, hereby moves this court for appointment of
effective counsel in state post-conviction proceedings.

This motion is made and based upon N.R.S. §34.820 (1)(a),
the attached Memorandum of Points and Authorities, the Fifth,
Sixth, Eighth and Fourteenth Amendments to the United States
Constitution.

DATED this 17 day of OCTOBER, 1999.

JAMES M. CHAPPELL
PETITIONER

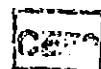
By: James M. Chappell

JAMES M. CHAPPELL
In Propria Persona
Inmate No. 52338
ELY STATE PRISON
P. O. BOX 1989
ELY, NEVADA 89301

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OCT 19 1999

COUNTY CLERK



Memorandum of Points and Authorities

1 1. I am an inmate on Nevada's death row at Ely State
2 Prison, Ely, Nevada.

3 2. I was assigned the Clark County Public Defender as
4 counsel for the Nevada Supreme Court proceedings on direct
5 appeal. Counsel was terminated by statute and procedure.

6 3. I am presently without counsel to litigate my
7 constitutional claims in state petition for writ of habeas
8 corpus post-conviction proceedings.

9 4. I understand that I am entitled under N.R.S. §34.820
10 (1)(a) to effective assistance of counsel in state habeas
11 proceedings.

12
13
14 N.R.S. §34.820 (1)(a) provides:

- 15 1. If a petitioner has been sentenced to death
16 and the petition is the first one challenging
17 the validity of the petitioner's conviction
 or sentence, the court shall:
 (a) Appoint counsel to represent the petitioner;

18
19 I am therefore requesting that this court appoint me counsel
20 who will ensure that all available claims are discovered and
21 litigated effectively on my behalf in the Nevada court system.
22 I do not consent to waiving any of the specific claims in this
23 motion. The omission of any of the above claims, or any other
24 available claims, in any state petition for writ of habeas
25 corpus filed by effective counsel should be expressly deemed
26 to be without my consent and against my will. See, e.g.,
27 Racquepaw v. State, 108 Nev. 1020 (1992); Stewart v. Warden

92 Nev. 588 (1976). My authority allowing appointed counsel to represent me, and to bind me by his or her actions as my agent, is conditional upon counsel performing effectively as my counsel; discovery, investigating and litigating all available claims on my behalf; and maintaining undivided loyalty to my interests, regardless of counsel's personal, social or political interests that may be affected by the vigorous discovery and litigation of my claims and regardless of the impact of such litigation on counsel's prospects of compensation, appointment in other cases, or treatment in other cases by the presiding judge in this matter, or by any other judicial officials. Any action by counsel which is inconsistent with effective performance of these duties is outside the scope of my authorization to counsel to act as my agent, and the state can not rely upon counsel's authorization to act as my agent if counsel performs any act inconsistent with these duties without my express consent. See, Deutscher v. Angelone, 16 F.2d 981 (9th Cir. 1994).

5. The constitutional claims identified in my original PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) I direct appointed counsel to raise on my behalf.

6. I further direct counsel to seek an evidentiary hearing (s) on each of the issues to provide the requisite factual basis for the development and review of the claims. I further direct counsel to seek court authorization to expand any and all funds necessary to fully and fairly develop and present my claims, including whatever funds necessary for expert

or investigation and other ancillary services.

1 7. In particular, I direct counsel to investigate fully
2 and litigate effectively the following issues which is not
3 presented in the current record:
4

5 a. The appellate review of this case by the Nevada Supreme
6 Court was inadequate and arbitrary under the equal protection
7 and due process guarantees of the state and federal constitution
8 and under the Eighth Amendment to the United States Constitution.

9 (i) Under state law, the Nevada Supreme Court is required
10 to conduct a review of the sentence to determine if the
11 aggravating factors are supported, if the sentence "was imposed
12 under the influence of passion, prejudice or any arbitrary
13 factors," and if the sentence is "excessive considering both
14 the crime and the defendant." N.R.S. §177.055 (2)(b,c,d).

15 (ii) In addition to the Nevada Supreme Court's failure
16 to conduct adequate and impartial review of the issues raised
17 in the direct appeal, the Nevada Supreme Court did not in fact
18 conduct any review of the sentence for excessiveness or the
19 influence of passion, prejudice or any arbitrary factor.

20 (iii) Members of the Nevada Supreme Court have admitted
21 that the do not even read the briefs in cases the decide
22 and have publicly admitted that it is a "myth" that they read
23 the briefs, and that they do not review the records in cases.
24 State Bar of Nevada, "Advocacy Before the Supreme Court," Tape
25 1, Session 5, 1, 2; Tape 2, Session 6 (Continuing Legal
26 Education Program, Reno, February 1, 1996).
27
28


1 (iv) I am informed and believe and therefore allege that
2 in cases affirmed by the Nevada Supreme Court no review under
3 N.R.S. §177.055 (2) is actually conducted. The staff of the
4 Nevada Supreme Court is instructed as a matter of practice
5 to employ a "macro" -- a standard computer-generated sentence
6 -- reciting the language of N.R.S. §177.055 (2)(c,d) and to
7 insert it in all opinions affirming capital convictions and
8 sentences. The mandatory "review" under N.R.S. §177.055 (2)
9 conducted in this case consisted of a clerk pressing a button
10 on a computer.

11 (v) Information to substantiate this claim is available
12 by deposing current and former justices of the Nevada Supreme
13 Court and their staffs.

14 8. I, JAMES M. CHAPPELL, declare under penalty of
15 perjury that the foregoing is true and correct to the best
16 of my knowledge, except for those matters stated upon
17 information and belief, and as to those matters, I believe
18 them to be true and correct.

19 DATED this 17 day of OCTOBER, 1999.

20 
21 JAMES M. CHAPPELL
22 PETITIONER

23 By: 
24 JAMES M. CHAPPELL
25 In Propria Persona
26 Inmate No. 52338
27 ELY STATE PRISON
28 P. O. BOX 1989
ELY, NEVADA 89301

CERTIFICATE OF SERVICE

I, JAMES M. CHAPPELL, hereby certify that on the
date of October 17, 1999, I served a true and correct
copy of the foregoing MOTION FOR APPOINTMENT OF COUNSEL; and
Memorandum of Points and Authorities by mailing a copy thereof
to:

E. K. McDANIEL, WARDEN
ELY STATE PRISON
P. O. BOX 1989
ELY, NEVADA 89301

STEWART L. BELL
CLARK COUNTY DISTRICT ATTORNEY
200 SOUTH THIRD STREET, SUITE 701
LAS VEGAS, NEVADA 89155

FRANKIE SUE DEL PAPA
NEVADA ATTORNEY GENERAL
100 NORTH CARSON STREET
CARSON CITY, NEVADA 89701


JAMES M. CHAPPELL
PETITIONER

Case No. C-131341

Dept. No. D11

FILED

OCT 19 4 40 PM '99

IN THE EIGHTH JUDICIAL DISTRICT ~~COURT~~ OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

JAMES M. CHAPPELL,

PETITIONER,

V.

E. K. McDANIEL, WARDEN,

RESPONDENT,

PETITION FOR WRIT OF HABEAS CORPUS
(POST -CONVICTION)

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

COMES NOW the petitioner, JAMES M. CHAPPELL, in
propria persona, asks leave to file the accompanying PETITION
FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) without repayment
of costs and to proceed in forma pauperis. Petitioner has been
granted leave to proceed before the Nevada Supreme Court; and
in the Supreme Court of the United States.

This motion is made and based upon the attached hereto
declaration; financial certificate; and N.R.S. §12.015.

DATED this 17 day of OCTOBER, 1999.

JAMES M. CHAPPELL
PETITIONER

By: James M. Chappell

JAMES M. CHAPPELL
In Propria Persona
Inmate No. 52338
ELY STATE PRISON
P. O. BOX 1989
ELY, NEVADA 89301

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OCT 19 1999

COUNTY CLERK

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FILED

Case No. C-131341

Dept. No. CU

OCT 19 4 40 PM '99

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
CLERK
IN AND FOR THE COUNTY OF CLARK

JAMES M. CHAPPELL,

PETITIONER,

V.

E. K. MCDANIEL, WARDEN,

RESPONDENT,

DECLARATION IN SUPPORT
OF MOTION TO PERMIT
PETITION TO CONTAIN
LEGAL CITATIONS

I, JAMES M. CHAPPELL, declare that I am the petitioner in the above entitled case; that in support of my motion to permit petition to contain legal citations; I hereby declare and say as follows:

1. I am the petitioner named in the foregoing PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION).

2. This petition is from a judgment of conviction and sentence of death.

3. The petition that I prepared in this matter includes grounds and supporting facts for relief. The supporting facts include a minimal number of legal citations and a full recitation of the facts and a comprehensive discussion of a number of unique legal issues of first impression.

4. Not including a minimal number of legal citations

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COUNTY CLERK

1 would potentially leave the said supporting facts without
2 merit and/or a comprehensive understanding.

3 5. I have made every effort in the editing process to
4 make them as concise as possible. I believe that further
5 editing, however, would either render them incomplete or
6 would result in the elimination of potentially meritorious
7 issues. This would be inconsistent with my responsibilities
8 to raise potentially meritorious issues in this matter.

9 Under the penalty of perjury, pursuant to N.R.S. §208.165;
10 the above declaration is true and correct to the best of my
11 personal knowledge.

12 DATED this 17 day of OCTOBER, 1999.

13 James M. Chappell
14 JAMES M. CHAPPELL
15 PETITIONER

16 By: James M. Chappell
17 JAMES M. CHAPPELL
18 In Propria Persona
19 Inmate No. 52338
20 ELY STATE PRISON
21 P. O. BOX 1989
22 ELY, NEVADA 89301
23
24
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26
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CERTIFICATE OF SERVICE

1 I, JAMES M. CHAPPELL, hereby certify that on the
2 date of October 17, 1999, I served a true and correct
3 copy of the foregoing MOTION TO PERMIT PETITION TO CONTAIN
4 LEGAL CITATIONS; and DECLARATION IN SUPPORT OF MOTION TO
5 PERMIT PETITION TO CONTAIN LEGAL CITATIONS by mailing a
6 copy thereof to:

7
8 E. K. McDANIEL, WARDEN
9 ELY STATE PRISON
10 P. O. BOX 1989
11 ELY, NEVADA 89301

12 STEWART L. BELL
13 CLARK COUNTY DISTRICT ATTORNEY
14 200 SOUTH THIRD STREET, SUITE 701
15 LAS VEGAS, NEVADA 89155

16 FRANKIE SUE DEL PAPA
17 NEVADA ATTORNEY GENERAL
18 100 NORTH CARSON STREET
19 CARSON CITY, NEVADA 89701

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JAMES M. CHAPPELL
PETITIONER

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Case No. C-131341Dept. No. 011

FILED

OCT 19 4 40 PM '99

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
 IN AND FOR THE COUNTY OF CLARK

JAMES M. CHAPPELL,

PETITIONER,

PETITION FOR WRIT OF HABEAS CORPUS
 (POST-CONVICTION)

V.

E. K. McDANIEL, WARDEN,

MOTION TO PERMIT PETITION
 TO CONTAIN LEGAL CITATIONS

RESPONDENT,

COMES NOW the petitioner, JAMES M. CHAPPELL, in

propria persona, hereby moves this court for leave to permit
 the petitioner to file a PETITION FOR WRIT OF HABEAS CORPUS
 (POST-CONVICTION) which contains a minimal number of legal
 citations and points of authorities.

This motion is made and based upon the attached hereto
 declaration of petitioner, and is made in good faith and not
 for any improper purpose.

DATED this 17 day of October, 1999.

JAMES M. CHAPPELL
 PETITIONER

By: James M. Chappell

JAMES M. CHAPPELL
 In Propria Persona
 Inmate No. 52338
 ELY STATE PRISON
 P. O. BOX 1989
 ELY, NEVADA 89301

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OCT 19 1999

COUNTY CLERK

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Case No. C-131341

Dept. No. 011

FILED

OCT 19 4 40 PM '99

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

JAMES M. CHAPPELL,

PETITIONER,

V.

E. K. McDANIEL, WARDEN,

RESPONDENT,

DECLARATION IN SUPPORT
OF MOTION TO PROCEED
IN FORMA PAUPERIS

I, JAMES M. CHAPPELL, declare that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefore, I state that because of my poverty I am unable to pay costs of said case or to give security therefore; and that I believe I am entitled to redress.

I further declare that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of proceedings in this court are true and correct.

///

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OCT 19 1999

COUNTY CLERK

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1. Are you presently employed? Yes _____ No X

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

N/A.

b. If the answer is no, state the date of your last employment and the amount of salary and wages per month which you received.

1994 - \$600.00 Per Month.

2. Have you received within the past twelve months any income from a business, profession, or other form of self employment or in the form of rent payments, interest, dividends, or other source? Yes _____ No X

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

N/A.

3. Do you own any cash or checking or savings account (including any funds in prison account)? Yes X No _____

a. If the answer is yes, describe each source of income, and state the amount for each.

\$ 200.00 None Touchable Inmate Savings

\$ 50.00 Inmate Personal Property Fund

4. Do you own any real estate, stocks, bonds, notes,
automobiles, or other valuable property (excluding
any ordinary household furnishings and clothing)?
Yes _____ No X

a. If the answer is yes, describe the property
and state its approximate value.

N/A.

5. List the persons who are dependent upon you for
support and state your relationship to those persons.

N/A.

Under the penalty of perjury, pursuant to N.R.S. §208.165;
the above declaration is true and correct to the best of my
personal knowledge.

DATED this 17 day or OCTOBER, 1999.

James M. Chappell
JAMES M. CHAPPELL
PETITIONER

By: James M. Chappell
JAMES M. CHAPPELL
In Propria Persona
Inmate No. 52338
ELY STATE PRISON
P. O. BOX 1989
ELY, NEVADA 89301

AUG 9 9 AM '99

FINANCIAL CERTIFICATE

JAMES MONTELL CHAPPELL
Inmate No. 52338
ELY STATE PRISON

1. CURRENT ACCOUNT BALANCE NONE TOUCHABLE SAVINGS \$ 206.67 *gh*
2. CURRENT ACCOUNT BALANCE PERSONAL PROPERTY FUND \$ 474.30
3. AVERAGE MONTHLY BALANCE..... \$ 106.47

I hereby certify that the above financial information is accurate for inmate James Montell Chappell #52338 according to the records of Ely State Prison.

DATED this 30th day of August, 1999.

Sandra L. Human
AUTHORIZED OFFICER
CUSTODIAN OF RECORDS


CERTIFICATE OF SERVICE

I, JAMES M. CHAPPELL, hereby certify that on the
date of October 17, 1999, I served a true and correct
copy of the foregoing MOTION FOR LEAVE TO PROCEED IN FORMA
PAUPERIS; and DECLARATION IN SUPPORT OF MOTION TO PROCEED
IN FORMA PAUPERIS by mailing a copy thereof to:

E. K. McDANIEL, WARDEN
ELY STATE PRISON
P. O. BOX 1989
ELY, NEVADA 89301

STEWART L. BELL
CLARK COUNTY DISTRICT ATTORNEY
200 SOUTH THIRD STREET, SUITE 701
LAS VEGAS, NEVADA 89155

FRANKIE SUE DEL PAPA
NEVADA ATTORNEY GENERAL
100 NORTH CARSON STREET
CARSON CITY, NEVADA 89701


JAMES M. CHAPPELL
PETITIONER

ORIGINAL

ORDR

DISTRICT COURT
CLARK COUNTY, NEVADA

FILED

OCT 20 12 34 PM '99

Shirley
CLERK

James M Chappell

Petitioner,

Vs

THE STATE OF NEVADA,

Respondent.

Case No. 95-C-131341-C

Dept. No. 7

ORDER RE: PETITION FOR
WRIT OF HABEAS CORPUS

Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction Relief) on OCTOBER 19, 1999. The Court has reviewed the Petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefor,

IT IS HEREBY ORDERED that Respondent shall, within 45 days after the date of this Order, answer or otherwise respond to the Petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive.

IT IS HEREBY FURTHER ORDERED that this matter shall be placed on this Court's calendar on the 16 day of December 1999, at the hour of 9 o'clock 9 m. for further proceedings.

DATED this 20 day of October 1999.

[Signature]
DISTRICT JUDGE

Rev4/99



COUNTY CLERK

OCT 20 1999

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FILED

1 0001
2 STEWART L. BELL
3 DISTRICT ATTORNEY
4 Nevada Bar #000477
5 200 S. Third Street
6 Las Vegas, Nevada 89155
7 (702) 455-4711
8 Attorney for Plaintiff

NOV 2 10 39 AM '99

Shirley E. Pangione
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,

9 Plaintiff,

10 -vs-

11 JAMES MONTELL CHAPPELL,
12 #1212860

13 Defendant.
14

Case No. C131341
Dept. No. VII
Docket P

15
16 **NOTICE OF MOTION AND MOTION TO APPOINT**
17 **COUNSEL FOR CAPITAL MURDER DEFENDANT TO HELP**
18 **PREPARE SUPPLEMENTAL POINTS AND AUTHORITIES**
19 **FOR PETITION FOR WRIT OF HABEAS CORPUS**
20 **(POST-CONVICTION)**

21 DATE OF HEARING: 11-8-99
22 TIME OF HEARING: 9:00 A.M.

23 COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through
24 ABBIE SILVER, Chief Deputy District Attorney, and files this Notice of Motion and Motion to
25 Appoint Counsel for Capital Murder Defendant to Help Prepare Supplemental Points and
26 Authorities for Petition for Writ of Habeas Corpus (Post-Conviction).

27 This Motion is made and based upon all the papers and pleadings on file herein, the
28 attached points and authorities in support hereof, and oral argument at the time of hearing, if
deemed necessary by this Honorable Court.

///



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DATED this 29th day of October, 1999.

BY Abbi Silver
ABBI SILVER
Chief Deputy District Attorney
Nevada Bar #003813

On October 16, 1996, James Montell Chappell, hereinafter “Defendant,” was convicted, after jury trial, of Burglary; Robbery With Use Of A Deadly Weapon; and Murder Of The First Degree With Use Of A Deadly Weapon. On October 24, 1996, the jury sentenced Defendant to death. On December 30, 1998, the Nevada Supreme Court affirmed Defendant’s conviction and sentence. On October 20, 1999, Defendant filed the instant proper person Petition for Writ of Habeas Corpus (Post-Conviction).

NRS 34.820 states that where a petitioner who has been sentenced to death files a petition for writ of habeas corpus (post-conviction), the court shall appoint counsel to represent the petitioner. Moreover, counsel and petitioner shall include all claims in a single petition. Therefore, this court should appoint counsel to represent Defendant. After counsel has had reasonable time to file supplemental points and authorities, the State will answer Defendant's petition.

1 CONCLUSION

2 Based on the foregoing, this Court should appoint counsel to represent Defendant and
3 give him reasonable time to file supplemental points and authorities.

4 DATED this 29th day of October, 1999.

5 STEWART L. BELL
6 DISTRICT ATTORNEY
7 Nevada Bar #000477

8 BY [Signature]
9 ABBI SILVER
10 Chief Deputy District Attorney
11 Nevada Bar #003813

12 RECEIPT OF COPY

13
14 RECEIPT OF COPY of the above and foregoing NOTICE OF MOTION AND MOTION
15 TO APPOINT COUNSEL FOR CAPITAL MURDER DEFENDANT TO HELP PREPARE
16 SUPPLEMENTAL POINTS AND AUTHORITIES FOR PETITION FOR WRIT OF HABEAS
17 CORPUS (POST-CONVICTION) is hereby acknowledged this 29th day of October, 1999.

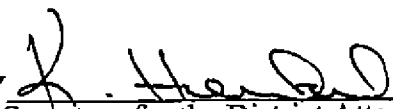
18 PUBLIC DEFENDER'S OFFICE
19 ATTORNEY FOR DEFENDANT

20 BY [Signature]
21 309 S. Third St., #226
22 Las Vegas, Nevada 89155

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing, was made this 2nd day of October, 1999, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

JAMES MONTELL CHAPPELL #52338
Ely State Prison
P. O. Box 1989
Ely, Nevada 89301

BY 
Secretary for the District Attorney's Office

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES MONTELL CHAPPELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Nov 4 2 31 PM '99
No. 29884

Shirley B. Bloom
CLERK

District Court Case No. C131341

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Janette M. Bloom, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed as follows: "Affirmed."

Judgment, as quoted above, entered this 30th day of December, 1998.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed as follows: "... we deny rehearing."

Judgment, as quoted above, entered this 17th day of March, 1999.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada, this 26th day of October, 1999.

RECEIVED

OCT 27 1999

COUNTY CLERK

Janette M. Bloom, Supreme Court Clerk

By:

J. Richards
Chief Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES MONTELL CHAPPELL,

No. 29884

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

OCT 26 1999

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

O R D E R

On April 2, 1999, this court stayed the issuance of the remittitur in this matter pending final disposition of appellant's petition for a writ of certiorari in the Supreme Court of the United States. The Supreme Court denied appellant's petition on October 4, 1999. Accordingly, we direct the clerk of this court to issue the remittitur in this matter, forthwith.

It is so ORDERED.

[Signature], C.J.

cc: Attorney General
Clark County District Attorney
Clark County Public Defender
Federal Public Defender

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OCT 27 1999

COUNTY CLERK

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES MONTELL CHAPPELL,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 29884

FILED**DEC 30 1998**JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

Appeal from a judgment of conviction pursuant to a jury verdict of one count each of burglary, robbery with the use of a deadly weapon, and first-degree murder with the use of a deadly weapon, and from a sentence of death. Eighth Judicial District Court, Clark County; A. William Maupin, Judge.

Affirmed.

Morgan D. Harris, Public Defender, Michael L. Miller, Deputy Public Defender, Howard S. Brooks, Deputy Public Defender, Clark County, for Appellant.

Frankie Sue Del Papa, Attorney General, Carson City; Stewart L. Bell, District Attorney, James Tufteland, Chief Deputy District Attorney, Abbi Silver, Deputy District Attorney, Clark County, for Respondent.

O P I N I O N

PER CURIAM:

On the morning of August 31, 1995, James Montell Chappell was mistakenly released from prison in Las Vegas where he had been serving time since June 1995 for domestic battery. Upon his release, Chappell went to the Ballerina Mobile Home Park in Las Vegas where his ex-girlfriend, Deborah Panos, lived with their three children. Chappell entered Panos' trailer by climbing through the window. Panos was home alone, and she and Chappell engaged in sexual intercourse. Sometime later that morning, Chappell repeatedly stabbed Panos with a kitchen knife, killing her. Chappell then left the

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trailer park in Panos' car and drove to a nearby housing complex.

The State filed an information on October 11, 1995, charging Chappell with one count of burglary, one count of robbery with the use of a deadly weapon, and one count of murder with the use of a deadly weapon. On November 8, 1995, the State filed a notice of intent to seek the death penalty. The notice listed four aggravating circumstances: (1) the murder was committed during the commission of or an attempt to commit any robbery; (2) the murder was committed during the commission of or an attempt to commit any burglary and/or home invasion; (3) the murder was committed during the commission of or an attempt to commit any sexual assault; and (4) the murder involved torture or depravity of mind.

Prior to trial, Chappell offered to stipulate that he (1) entered Panos' trailer home through a window, (2) engaged in sexual intercourse with Panos, (3) caused Panos' death by stabbing her with a kitchen knife, and (4) was jealous of Panos giving and receiving attention from other men. The State accepted the stipulations, and the case proceeded to trial on October 7, 1996.

Chappell took the witness stand on his own behalf and testified that he considered the trailer to be his home and that he had entered through the trailer's window because he had lost his key and did not know that Panos was at home. He testified that Panos greeted him as he entered the trailer and that they had consensual sexual intercourse. Chappell testified that he left with Panos to pick up their children from day care and discovered in the car a love letter addressed to Panos. Chappell, enraged, dragged Panos back into the trailer where he stabbed her to death. Chappell argued that his actions were the result of a jealous rage.

The jury convicted Chappell of all charges. Following a penalty hearing, the jury returned a sentence of death on the murder charge, finding two mitigating circumstances -- murder committed while Chappell was under the influence of extreme mental or emotional disturbance and "any other mitigating circumstances" -- and all four alleged aggravating circumstances. The district court sentenced Chappell to a minimum of forty-eight months and a maximum of 120 months for the burglary; a minimum of seventy-two months and a maximum of 180 months for robbery, plus an equal and consecutive sentence for the use of a deadly weapon; and death for the count of murder in the first degree with the use of a deadly weapon. The district court ordered all counts to run consecutively. Chappell timely appealed his conviction and sentence of death.

DISCUSSION

Admission of evidence of prior bad acts

Chappell contends that the district court abused its discretion by admitting evidence of prior acts of theft without holding a Petrocelli¹ hearing. During the State's case-in-chief, LaDonna Jackson testified that Chappell was known as a "regulator"² and that, on one occasion, he sold his children's diapers for drug money.

Ordinarily, in order for this court to review a district court's decision to admit evidence of prior bad acts, a Petrocelli hearing must have been conducted on the record. Armstrong v. State, 110 Nev. 1322, 1324, 885 P.2d 600, 600-01

¹See Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

²Jackson testified that a "regulator" is a person who steals items from a store and then resells those items for money or drugs.

(1994). However, where the district court fails to hold a proper hearing on the record, automatic reversal is not mandated where "(1) the record is sufficient for this court to determine that the evidence is admissible under the test for admissibility of bad acts evidence . . . ; or (2) where the results would have been the same if the trial court had not admitted the evidence." *Qualls v. State*, 114 Nev. ___, ___, 961 P.2d 765, 767 (1998).

The district court in the instant case did not hold a Petrocelli hearing either on or off the record. Under the circumstances, we conclude that the record is not sufficient for this court to determine whether the evidence was admissible under the test for admissibility of prior bad acts evidence. In light of the overwhelming evidence of guilt in this case, however, we conclude that had the district court not admitted the evidence, the results would have been the same. See *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985) (when deciding whether an error is harmless or prejudicial, the following considerations are relevant: "whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged"); see also *Bradley v. State*, 109 Nev. 1090, 1093, 864 P.2d 1272, 1274 (1993). Accordingly, we hold that the district court's failure to conduct a Petrocelli hearing before admitting this evidence amounted to harmless error, and does not, therefore, require reversal.

Issues arising out of alleged aggravating circumstances

Chappell argues that insufficient evidence exists to support the jury's finding of the four alleged aggravating circumstances. The first three aggravating circumstances depend on whether Chappell killed Panos during the commission

of or an attempt to commit robbery, burglary and/or home invasion, and sexual assault. Chappell's challenge to each of these aggravators comes down to a challenge of the sufficiency of the evidence supporting each of the "aggravating" offenses.

On appeal, the standard of review for sufficiency of the evidence is "whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt." *Kazalyn v. State*, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992). Where there is sufficient evidence in the record to support the verdict, it will not be overturned on appeal. *Id.* We conclude that there is sufficient evidence to support the aggravating circumstances for robbery, burglary and sexual assault. We further conclude that the evidence does not support the aggravating circumstance of torture or depravity of mind.

Robbery

Chappell contends that the evidence shows that he took Panos' car as an afterthought and, therefore, cannot be guilty of robbery. The State argues that a rational trier of fact could find that Chappell took Panos' social security card and car through the use of actual violence or the threat of violence. Under Nevada's criminal law, robbery is defined as

the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property A taking is by means of force or fear if force or fear is used to:

- (a) Obtain or retain possession of the property;
- (b) Prevent or overcome resistance to the taking; or
- (c) Facilitate escape.

The degree of force used is immaterial if it is used to compel acquiescence to the taking of or escaping with the property. A taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of

the person from whom taken, such knowledge was prevented by the use of force or fear.

The statute does not require that the force or violence be committed with the specific intent to commit robbery.

This court has held that in robbery cases it is irrelevant when the intent to steal the property is formed. In *Norman v. Sheriff*, 92 Nev. 695, 697, 558 P.2d 541, 542 (1976), this court stated:

[A]lthough the acts of violence and intimidation preceded the actual taking of the property and may have been primarily intended for another purpose, it is enough, to support the charges in the indictment, that appellants, taking advantage of the terrifying situation they created, fled with [the victim's] property.

This position was affirmed in *Sheriff v. Jefferson*, 98 Nev. 392, 394, 649 P.2d 1365, 1366-67 (1982), and *Patterson v. Sheriff*, 93 Nev. 238, 239, 562 P.2d 1134, 1135 (1977). See also *State v. Myers*, 640 P.2d 1245 (Kan. 1982) (holding that where aggravated robbery requires taking by force or threat of force while armed, it is sufficient that defendant shot victim and then returned three hours later to take victim's wallet, as there was a continuous chain of events and the prior force made it possible to take the property without resistance); *State v. Mason*, 403 So. 2d 701 (La. 1981) (holding that acts of violence need not be for the purpose of taking property and that it is sufficient that the taking of a purse was accomplished as a result of earlier acts of pushing victim onto bed and pulling her clothes).

Accordingly, we hold that there is sufficient evidence to support the conviction of robbery and the finding of robbery as an aggravating circumstance.

Burglary

Chappell argues that the State adduced insufficient evidence to prove that he committed a burglary. We disagree. NRS 205.060(1) provides that a person is guilty of burglary when he "by day or night, enters any . . . semitrailer or house trailer . . . with the intent to commit grand or petit larceny, assault or battery on any person or any felony." At trial, the State introduced evidence that Panos wanted to end her relationship with Chappell, that Chappell had threatened and abused Panos in the past, and that Panos did not communicate with Chappell while he was in jail. Moreover, there was testimony that the trailer appeared ransacked, and that Panos' social security card and car keys were found in Chappell's possession. Accordingly, we conclude that there is sufficient evidence to support the conviction of burglary and the finding by the jury of burglary as an aggravator.

Sexual assault

Chappell argues that the State failed to prove beyond a reasonable doubt that the sexual encounter between Chappell and Panos was nonconsensual. We do not agree. The jury was instructed to find sexual assault if Chappell engaged in sexual intercourse with Panos "against [her] will" or under conditions in which Chappell knew or should have known that Panos was "mentally and emotionally incapable of resisting." The evidence at trial and during the penalty hearing showed that Panos and Chappell had an abusive relationship, that Panos had ended her relationship with Chappell, that Chappell was extremely jealous of Panos' relationships with other men, and that Panos was involved with another man at the time of the killing. We conclude that a rational trier of fact could have concluded that either Panos would not have consented to

sexual intercourse under these circumstances or was mentally or emotionally incapable of resisting Chappell's advances, and that Chappell therefore committed sexual assault. Consequently, the evidence supports the jury's finding of sexual assault as an aggravating circumstance.

Torture or depravity of mind

Chappell argues that the circumstances of Panos' death do not rise to the level necessary to establish torture or depravity of mind. We agree. The depravity of mind aggravator applies in capital cases if "torture, mutilation or other serious and depraved physical abuse beyond the act of killing itself" is shown. *Robins v. State*, 106 Nev. 611, 629, 798 P.2d 558, 570 (1990); NRS 200.033(8).³ In the present case, the jury was instructed that the elements of murder by torture are that "(1) the act or acts which caused the death must involve a high degree of probability of death, and (2) the defendant must commit such act or acts with the intent to cause cruel pain and suffering for the purpose of revenge, persuasion or for any other sadistic purpose."⁴ Panos died as a result of multiple stab wounds; thus, the first element is satisfied. The second element is not as easily met under the facts of this case.

The State argues that evidence of torture may be found in the following: Panos was severely beaten by

³NRS 200.033(8) was amended in 1995 deleting the language of "depravity of mind." 1995 Nev. Stat., ch. 467, §§ 1-3, at 1490-91. In the present case, the murder was committed before October 1, 1995, thus, the previous version of NRS 200.033(8) applies. Id.

⁴These instructions were approved by this court in *Deutscher v. State*, 95 Nev. 669, 677 n.5, 601 P.2d 407, 413 n.5 (1979); see NRS 200.030(1)(a) (defining first-degree murder by torture as murder "[p]erpetrated by means of . . . torture").

Chappell, there were numerous bruises and abrasions on Panos' face, Panos was stabbed in the groin area and chest, Panos was stabbed thirteen times, and four of the stabs were of such force as to have penetrated the spinal cord in Panos' neck. We conclude that there is no evidence that Chappell stabbed Panos with any intention other than to deprive her of life. No evidence exists that Chappell intended to cause Panos cruel suffering for the purposes of revenge, persuasion, or other sadistic pleasure. Nor does Chappell's act of stabbing Panos thirteen times rise to the level of torture. Accordingly, we hold that the record does not contain sufficient evidence to support the aggravating circumstance of depravity of mind and torture.

Invalidating an aggravating circumstance

Invalidating an aggravating circumstance does not automatically require this court to vacate a death sentence and remand for new proceedings before a jury. See Witter v. State, 112 Nev. 908, 929, 921 P.2d 886, 900 (1996); see also Canape v. State, 109 Nev. 864, 881-83, 859 P.2d 1023, 1034-35 (1993). Where at least one other aggravating circumstance exists, this court may either reweigh the aggravating circumstances against the mitigating evidence or conduct a harmless error analysis. Witter, 112 Nev. at 929-30, 921 P.2d at 900. In the present case, the jury designated as mitigating circumstances (1) that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, and (2) any other mitigating circumstances. We conclude that the remaining three aggravators, robbery, burglary and sexual assault, clearly outweigh the mitigating evidence presented by Chappell. We therefore conclude that Chappell's death sentence was proper.

Mandatory review of propriety of death penalty

NRS 177.055(2)⁵ requires this court to review every death penalty sentence. Pursuant to the statutory requirement, and in addition to the contentions raised by Chappell and addressed above, we have determined that the aggravating circumstances of robbery, burglary and sexual assault, found by the jury, are supported by sufficient evidence. Moreover, there is no evidence in the record indicating that Chappell's death sentence was imposed under the influence of passion, prejudice or any arbitrary factor. Lastly, we have concluded that the death sentence Chappell received was not excessive considering the seriousness of his crimes and Chappell as a person.

Additional issues raised on appeal

Chappell further contends that: (1) the State's use of peremptory challenges to excuse two African-American jurors from the jury pool was discriminatory; (2) the district court erred in admitting hearsay statements; (3) the district court erred by denying Chappell's motion to strike the notice of intent to seek the death penalty; (4) the State improperly

⁵ NRS 177.055(2) provides:

2. Whether or not the defendant or his counsel affirmatively waives the appeal, the sentence must be reviewed on the record by the supreme court, which shall consider, in a single proceeding if an appeal is taken:

(a) Any error enumerated by way of appeal;

(b) Whether the evidence supports the finding of an aggravating circumstance or circumstances;

(c) Whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor; and


(d) Whether the sentence of death is excessive, considering both the crime and the defendant.

appealed to the jury for vengeance during the penalty phase; (5) cumulative error denied Chappell a fair hearing; and (6) victim impact testimony denied Chappell a fair penalty hearing. We have reviewed each of these issues and conclude that they lack merit.

CONCLUSION

For the foregoing reasons, we affirm the judgment of conviction for robbery, burglary and first-degree murder and the sentence of death.⁶ ⁷


Shearing J.


Rose J.


Young J.

⁶The Honorable Charles E. Springer, Chief Justice, voluntarily recused himself from participation in the decision of this appeal.

⁷The Honorable A. William Maupin, Justice, voluntarily recused himself from participation in the decision of this appeal.

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES MONTELL CHAPPELL,

No. 29884

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

MAR 17 1999

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *S. R. R. R.*
CHIEF DEPUTY CLERK

ORDER DENYING REHEARING

This is a petition for rehearing of Chappell v. State, 114 Nev. __, __ P.2d __ (Adv. Op. No. 148, December 30, 1998). Appellant James Montell Chappell was convicted, pursuant to a jury verdict, of one count each of first degree murder with the use of a deadly weapon, robbery with the use of a deadly weapon, and burglary for the murder of his ex-girlfriend, Deborah Panos, by multiple stab wounds. The jury returned a verdict of death after finding that two mitigating circumstances (the murder was committed while under the influence of extreme mental or emotional disturbance and any other mitigating circumstances) did not outweigh four aggravating factors (the murder was committed during the commission of a robbery, burglary, and sexual assault, and the murder involved torture or depravity of mind). On appeal, this court affirmed Chappell's conviction and sentence of death, but concluded that the torture aggravating factor was not supported by sufficient evidence. After reweighing the remaining aggravating factors against the mitigating circumstances, this court concluded that the death sentence was not improper. Subsequently, Chappell filed the instant petition for rehearing, and the state filed an opposition.

When petitioning for rehearing, a petitioner may not reargue a point already raised, nor raise a point for the first time. NRAP 40(c)(1). This court may consider rehearing when the court has overlooked or misapprehended a material fact or material question of law or when the court has overlooked,


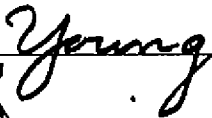
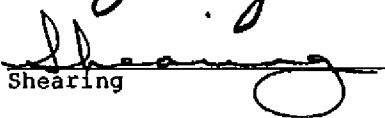
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COUNTY CLERK

misapplied, or failed to consider any legal authority directly controlling a dispositive issue. NRAP 40(c)(2).

Chappell correctly indicates that this court did not address two issues in the opinion: whether the district court erroneously admitted evidence of Chappell's prior acts of domestic violence upon Panos, and whether the district court erroneously admitted evidence that Chappell was unemployed. Although these issues were not specifically discussed in the opinion, prior to filing the opinion we had carefully and fully reviewed these issues and determined that they did not require reversal.

The remaining contentions Chappell raises in this petition are either rearguments in violation of NRAP 40(c)(1) or do not warrant rehearing under the standards enumerated in NRAP 40(c)(2). Accordingly, we deny rehearing.

It is so ORDERED.¹

 C.J.
Rose
 J.
Young
 J.
Shearing

cc: Hon. Mark W. Gibbons, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Stewart L. Bell, District Attorney
Morgan D. Harris, Public Defender
Shirley Parraguirre, Clerk

¹This petition challenges an opinion that was issued prior to the expansion of the court from five to seven justices on January 4, 1999. Only those justices remaining on the court who previously heard this matter participated in this decision. The Honorable A. William Maupin, Justice, voluntarily recused himself from the decision of this matter.

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES MONTELL CHAPPELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 29884

District Court Case No. C131341

REMITTITUR

TO: Honorable Shirley Parraguirre, Clark County Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and copy of Opinion.

Receipt for Remittitur.

Exhibits: State's Exhibits 1 through 60.
(NO EXHIBIT 50)

DATE: October 26, 1999

Janette Bloom, Clerk of Court

By: J. Richards
Chief Deputy Clerk

cc: Hon. Mark W. Gibbons, District Judge
Attorney General
Clark County District Attorney
Clark County Public Defender
Federal Public Defender

RECEIPT FOR REMITTITUR

Received of Janette M. Bloom, Clerk of the Supreme Court of the State of Nevada, the
REMITTITUR issued in the above-entitled cause, on NOV - 4 1999

NORRETA CALDWELL

DEPUTY County Clerk

jw

DISTRICT COURT

CLARK COUNTY, NEVADA

FILED

ORIGINAL

* * * * *

Nov 16 3 53 PM '99

THE STATE OF NEVADA,

Plaintiff,

Vs

JAMES MONTELL CHAPPELL,

Defendant.

CASE NO. C131341

DEPT. NO. VII

DOCKET P

BEFORE THE HONORABLE:

MARK GIBBONS DISTRICT JUDGE

MONDAY, NOVEMBER 15, 1999, 9:00 A.M.

APPEARANCES:

FOR THE STATE:

C. DAN BOWMAN
Chief Deputy District Attorney

FOR THE DEFENDANT:

HOWARD S. BROOKS
Deputy Public Defender
& DAVID M. SCHIECK, ESQ.

REPORTED BY:

PATSY K. SMITH, C.C.R. #190

PATSY K. SMITH, OFFICIAL COURT REPORTER

CE42

1 MONDAY, NOVEMBER 15, 1999, 9:00 A.M.

2 THE COURT: Case number C131341, State of
3 Nevada versus James Montell Chappell.

4 The record will reflect the presence of
5 David Schieck. Also present is Howard Brooks, Deputy
6 Public Defender.

7 This is on for the State's motion to appoint
8 counsel for capital murder defendant to help prepare
9 supplemental Points & Authorities for petition for writ of
10 habeas corpus.

11 Dan Bowman, Deputy District Attorney,
12 representing the State of Nevada.

13 Mr. Bowman, I have contacted Mr. Schieck's
14 office to see if he would be willing to accept the
15 appointment on this.

16 So, Mr. Schieck, can you accept this one?

17 MR. SCHIECK: Yes, I can, your Honor.

18 THE COURT: We will confirm Mr. Schieck as
19 counsel for Mr. Chappell for these proceedings then like
20 that.

21 MR. SCHIECK: Your Honor, can we set this
22 for a status check in 30 days to see if I'm able to
23 assemble all the files and then we can set a briefing
24 schedule at that time?

25 THE COURT: Absolutely. Set a status check

PATSY K. SMITH, OFFICIAL COURT REPORTER

1 in about 30 days.

2 MR. BROOKS: Judge, I'm assuming we give Mr.
3 Schieck all our files including the work product?

4 THE COURT: Yes, we will ask the Public
5 Defender's Office to give Mr. Schieck all the files
6 including the attorney work product.

7 THE CLERK: December 15th at 9 a.m.

8 MR. SCHIECK: Thank you, your Honor.

9

10 * * * * *

11 ATTEST: FULL, TRUE, ACCURATE AND CERTIFIED TRANSCRIPT OF
12 PROCEEDINGS.

13 
PATSY K. SMITH, C.C.R. #190

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PATSY K. SMITH, OFFICIAL COURT REPORTER

1 ORDR
2 DAVID M. SCHIECK, ESQ.
3 Nevada Bar No. 0824
4 302 E. Carson, #600
5 Las Vegas, NV 89101
6 702-382-1844

FILED

Nov 16 4 18 PM '99

Shirley L. ...
CLERK

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

* * *

9 THE STATE OF NEVADA,)
10)
11 Plaintiff,)
12)
13 vs.)
14)
15 JAMES M. CHAPPELL,)
16)
17 Defendant.)
18)
19)
20)

CASE NO. C131341
DEPT. NO. VII
ORDER APPOINTING COUNSEL
DATE: 11-15-99
TIME: 9:00 a.m.

21 The above entitled matter having come before the Court on
22 the 15th day of November, 1999, DAVID M. SCHIECK, ESQ.
23 appearing, and a representative of the District Attorney's
24 Office appearing on behalf of The State of Nevada, the Court
25 being fully advised in the premises, and good cause appearing
26 therefor,

27 IT IS HEREBY ORDERED that DAVID M. SCHIECK, ESQ. be
28 appointed to represent CHAPPELL through trial.

IT IS FURTHER ORDERED that the Public Defender turn over
all files including attorney work product to David Schieck.

DATED AND DONE: 11/16/99

[Signature]
DISTRICT COURT JUDGE

SUBMITTED BY:

By:

[Signature]
DAVID M. SCHIECK, ESQ.

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

RECEIVED
NOV 16 1999
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * Nov 19 1 21 PM '99

THE STATE OF NEVADA,

Plaintiff,

Vs

JAMES MONTELL CHAPPELL,

Defendant.

CASE NO. C131341

DEPT. NO. VII

DOCKET P

ORDER FOR TRANSCRIPT

IT IS HEREBY THE ORDER OF THE COURT, pursuant to Supreme Court Rule 250.4(b), "Priority of Calendaring and Transcribing," that a daily transcript be prepared of the above-entitled case through and including the penalty phase and any post-trial motions. This transcription is to be paid at the daily copy transcription rate of \$6.16 per page for the original and two copies.

IT IS FURTHER THE ORDER OF THE COURT that the County will pay for two court reporters during said trial and including the penalty phase at the rate of \$150.00 per day per court reporter.

DATED and DONE this 19th day of November, 1999.

HONORABLE MARK GIBBONS
DISTRICT COURT JUDGE, DEPT. VII

ORDR
DAVID M. SCHIECK, ESQ.
Nevada Bar No. 0824
302 E. Carson, #600
Las Vegas, NV 89101
702-382-1844

FILED

Nov 29 4 42 PM '99

Shirley S. Rungius
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

* * *

THE STATE OF NEVADA,	)	CASE NO. C131341
	)	DEPT. NO. VII
Plaintiff,)	
	)	AMENDED ORDER
vs.	)	APPOINTING COUNSEL
)	
JAMES M. CHAPPELL,	)	DATE: 11-15-99
	)	TIME: 9:00 a.m.
Defendant.)	

The above entitled matter having come before the Court on the 15th day of November, 1999, DAVID M. SCHIECK, ESQ. appearing, and a representative of the District Attorney's Office appearing on behalf of The State of Nevada, the Court being fully advised in the premises, and good cause appearing therefor,

IT IS HEREBY ORDERED that DAVID M. SCHIECK, ESQ. be appointed to represent CHAPPELL for post conviction relief.

IT IS FURTHER ORDERED that the Public Defender turn over all files including attorney work product to David Schieck.

DATED AND DONE: 11/29/99

[Signature]
DISTRICT COURT JUDGE

SUBMITTED BY:

By: *[Signature]*
DAVID M. SCHIECK, ESQ.

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

COUNTY CLERK

NOV 29 1999

RECEIVED

DISTRICT COURT

FILED

ORIGINAL

CLARK COUNTY, NEVADA

* * * * *

DEC 16 1 28 PM '99

Shirley L. Pinzone
CLERK

THE STATE OF NEVADA,

Plaintiff,

Vs

JAMES MONTELL CHAPPELL,

Defendant.

CASE NO. C131341

DEPT. NO. VII

DOCKET F

BEFORE THE HONORABLE:

MARK GIBBONS DISTRICT JUDGE

WEDNESDAY, DECEMBER 15, 1999, 9:00 A.M.

APPEARANCES:

FOR THE STATE:

MELISA DE LA GARZA
Deputy District Attorney

FOR THE DEFENDANT:

CHRISTOPHER R. ORAM, ESQ.

CE23

REPORTED BY:

PATSY K. SMITH, C.C.R. #190

PATSY K. SMITH, OFFICIAL COURT REPORTER

RECEIVED

DEC 16 1999

COUNTY CLERK

1 WEDNESDAY, DECEMBER 15, 1999, 9:00 A.M.

2 THE COURT: Case number C131341, State of
3 Nevada versus James Montell Chappell.

4 The record will reflect the presence of
5 Christopher Oram appearing for David Schieck on behalf of
6 Mr. Chappell, who is in state prison, so we will waive his
7 appearance. We have got Melisa De La Garza, Deputy
8 District Attorney, representing the State of Nevada.

9 This is on for status check and I think Mr.
10 Schieck was appointed on this recently, Mr. Oram. So I
11 think we wanted to give him some time.

12 MR. ORAM: And what's taken place is he
13 indicated to me yesterday that he received a great deal of
14 the file from, I believe, Mr. Howard Brooks and what he was
15 asking for was another 30 day status check, if that was
16 acceptable to the Court.

17 THE COURT: State have any objection to
18 that?

19 MS. DE LA GARZA: No, Judge.

20 THE COURT: We will pass it 30 days for a
21 status check.

22 MR. ORAM: Thank you, your Honor.

23 THE CLERK: January 19, 9 a.m.

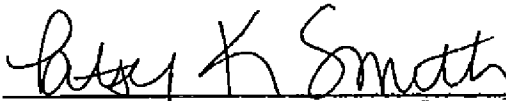
24 MR. ORAM: Thank you.

25

PATSY K. SMITH, OFFICIAL COURT REPORTER

* * * * *

ATTEST: FULL, TRUE, ACCURATE AND CERTIFIED TRANSCRIPT OF
PROCEEDINGS.


PATSY K. SMITH, C.C.R. #190

PATSY K. SMITH, OFFICIAL COURT REPORTER

135

FILED

JAN 13 11 15 AM '00

Shirley L. Robinson
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)
)
Plaintiff,)
)
vs.)
)
JAMES MONTELL CHAPPELL,)
#1212860)
)
Defendant.)

Case No. C131341
Dept. No. VII
Docket No. P

Before the Honorable Mark Gibbons

Monday, November 8, 1999, 9:00 a.m.

Reporter's Transcript of Proceedings

STATE'S MOTIONS

APPEARANCES:

For the Plaintiff:

LYNN ROBINSON, ESQ.
Deputy District Attorney
200 South Third Street
Las Vegas, Nevada 89155

For the Defendant:

(No Appearance)

REPORTED BY: Renee Silvaggio, C.C.R. No. 122

6223

RECEIVED

JAN 13 2000

COUNTY CLERK

1 Las Vegas, Nevada, Monday, November 8, 1999, 9:00 a.m.

2
3 * * * * *

4
5 THE COURT: Okay. Let's just go back to the
6 beginning of the calendar and we've done probably the bulk
7 of it here.

8 Okay. Let's go to Case
9 Number -- page one, Case Number C131341, the State of Nevada
10 versus James Montell Chappell.

11 Let the record reflect Mr.
12 Chappell is not present; he's in state prison; Lynn
13 Robinson, deputy District Attorney, representing the State
14 of Nevada.

15 This is on at the request of
16 the Court regarding appointment of counsel.

17 Okay. There is a conflict with
18 the special Public Defender's Office on this and the regular
19 Public Defender's Office.

20 I attempted to contact JoNell
21 Thomas, to see if she would be willing to accept the case,
22 but I haven't been able to reach her though in the last
23 couple of days.

24 Why don't we do this: We'll

1 pass it for one week, and then we'll see if I can reach Miss
2 Thomas; and then if she's willing to accept the case, the
3 Court will appoint her.

4 If not, we will get somebody
5 else appointed.

6 MS. ROBINSON: Okay.


7 THE COURT: Just pass it until Monday.

8 (Whereupon, a sotto voce at this time.)

9 THE COURT: Yeah, let's -- we'll pass it
10 until November 16th, then like that.

11
12 * * * * *

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14
15 ATTEST: Full, true and accurate transcript of proceedings.
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21 RENE E SILVAGGIO, C.C.R. NO. 122
22 OFFICIAL COURT REPORTER
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FILED

FEB 29 2 42 PM '00

Shirley J. P.
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)
)
Plaintiff,)
)
vs.)
)
JAMES MONTELL CHAPPELL,)
#1212860)
)
Defendant.)

Case No. C131341
Dept. No. VII
Docket No. P

Before the Honorable Mark Gibbons

Wednesday, January 19, 2000, 9:00 a.m.

Reporter's Transcript of Proceedings

STATUS CHECK

APPEARANCES:

For the Plaintiff:

CLARK PETERSON, ESQ.
Deputy District Attorney
200 South Third Street
Las Vegas, Nevada 89155

For the Defendant:

DAVID SCHIECK, ESQ.
Attorney at Law
302 E. Carson, #600
Las Vegas, Nevada 89101

REPORTED BY: Renee Silvaggio, C.C.R. No. 122

CE15

RECEIVED
FEB 29 2000
COUNTY CLERK

1 Las Vegas, Nevada, Wednesday, January 19, 2000, 9:00 a.m.

2
3 * * * * *

4
5 THE COURT: Okay. Let's go to the bottom of
6 page two, Case Number C131341, State of Nevada versus James
7 Montell Chappell.

8 The record will reflect the presence of
9 David Schiek, representing the defendant; Clark Peterson,
10 deputy District Attorney, representing the State of Nevada.

11 This is on for status check.

12 Again, Mr. Schiek, I think, was recently
13 appointed on this one.

14 So, Mr. Schiek, what do we need to do at
15 this stage?

16 MR. SCHICK: Your Honor, I've received the
17 files, several boxes of files, from a Mr. Brooks in the
18 Public Defender's Office. I haven't made it all the way
19 through the files.

20 If we could just have another 30 day status
21 check, at that point, we would be asking to set the briefing
22 schedule and go.

23 THE COURT: Mr. Peterson.

24 MR. PETERSON: Well, I have a note in the

1 file that says we need to set the briefing schedule ASAP
2 because these things shouldn't be remaining in limbo.

3 What I would prefer we do is set a briefing
4 schedule and if we need to set it out a little bit, that's
5 great, but let's get it rolling. And if he needs to
6 subsequently make a request for a continuance, I think --

7 THE COURT: Why don't we do that.

8 MR. SCHIECK: That's fine. If we could do
9 the same three months that you gave Miss Erickson, Your
10 Honor, that's fine.

11 MR. PETERSON: I don't know about that three
12 months. The Court's discretion, Judge.

13 THE COURT: Well, it is a murder case.
14 Let's -- and Mr. Schiek is new to it, so we'll give -- the
15 defense three months.

16 And what is the three month date, Amber?

17 THE CLERK: April 19th.

18 THE COURT: April 19th for the State to
19 file -- or the defense to file its brief.

20 Mr. Peterson, how long would you like to
21 respond to that?

22 MR. PETERSON: If we're doing it all the
23 same, I'll take a month then.

24 THE COURT: Okay. A month for the State,

1 which would be --

2 THE CLERK: May 19th.

3 THE COURT: And then to reply, Mr. Schiek?

4 MR. SCHIECK: If I could have 15 days for
5 reply.

6 THE COURT: Fifteen days for reply.

7 THE CLERK: June 12th.

8 THE COURT: Okay. And then we'll do a
9 hearing date -- I don't know how involved this will be.

10 Why don't we set a hearing date -- why don't
11 we do it that last week in June, Amber.

12 THE CLERK: June -- do you want to put it on
13 a Thursday or a Friday?

14 THE COURT: That will be okay. Let's not do
15 it on a Thursday, because it's calendar call day. Let's do
16 it on a Monday, Tuesday or Wednesday.

17 THE CLERK: Okay, June 27th at nine a.m.

18 THE COURT: Okay. And then it will probably
19 be trailed to the end of the calendar on that.


20 MR. SCHIECK: That's fine, Your Honor.

21 Thank you.

22 THE COURT: Thank you very much.

23
24 * * * * *

1 1
2 ATTEST: Full, true and accurate transcript of proceedings.
3
4

5 
6 RENE SILVAGGIO, C.C.R. NO. 122
7 OFFICIAL COURT REPORTER

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24
(Chappell)

ORIGINAL

DISTRICT COURT
CLARK COUNTY, NEVADA

FILED

* * * * * JUN 28 12 49 PM '00

Shirley J. Kingma
CLERK

THE STATE OF NEVADA,

Plaintiff,

Vs

JAMES MONTELL CHAPPELL,

Defendant.

CASE NO. C131341

DEPT. NO. VII

DOCKET P

BEFORE THE HONORABLE:

MARK GIBBONS DISTRICT JUDGE

TUESDAY, JUNE 27, 2000, 9:00 A.M.

APPEARANCES:

FOR THE STATE:

LIZ McDONALD
Deputy District Attorney

FOR THE DEFENDANT:

DAVID M. SCHIECK, ESQ.

REPORTED BY:

PATSY K. SMITH, C.C.R. #190

PATSY K. SMITH, OFFICIAL COURT REPORTER

1 TUESDAY, JUNE 27, 2000, 9:00 A.M.

2 THE COURT: Case number C131341, State of
3 Nevada versus James Chappell.

4 The record will reflect the presence of
5 David Schieck representing Mr. Chappell, who is in state
6 prison, so we will waive his appearance. Liz McDonald,
7 Deputy District Attorney, representing the State of
8 Nevada?

9 This is on for hearing on the writ. I
10 didn't get any briefs. What is going on?

11 MR. SCHIECK: Your Honor, what's gone on is
12 I have tried two capital cases in the last four months and
13 I just have not had time to get this completed, to go see
14 Mr. Chappell one last time before we file it.

15 If I could ask the Court for 45 more days
16 and the only reason I'm asking for 45 more days is because
17 I start another capital trial July 10th in front of Judge
18 Loehrer.

19 THE COURT: I'd rather give you 60 days to
20 make sure we get it done.

21 MR. SCHIECK: That would help.

22 THE COURT: We will reset the briefing
23 schedule. I will have Amber give you the dates. We will
24 set it the same length as the other one was set. The
25 briefing schedule starting in 60 days --

PATSY K. SMITH, OFFICIAL COURT REPORTER

1 (Off the record discussion not reported.)

2 THE COURT: Let's me do that. The defendant
3 will have 60 days, which is what, Amber?

4 THE CLERK: August 28th.

5 THE COURT: The State will have 30 days
6 after that to file its response.

7 THE CLERK: October 30th -- I'm sorry, that
8 was 60.

9 September 25th.

10 THE COURT: The defense will have 30 days to
11 reply.

12 THE CLERK: That's October 30th.

13 THE COURT: And then we will put it on for
14 hearing one week after that and I will put it on like at
15 10:30 in the morning.

16 THE CLERK: November 6th, 10:30.

17 MR. SCHIECK: Thank you, your Honor.

18 * * * * *

19 ATTEST: FULL, TRUE, ACCURATE AND CERTIFIED TRANSCRIPT OF
20 PROCEEDINGS.

21 
22 PATSY K. SMITH, C.C.R. #190

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PATSY K. SMITH, OFFICIAL COURT REPORTER

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ORIGINAL

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FILED

JUL 13 2 22 PM '00

Shirley L. Thompson
CLERK

EXPT
DAVID M. SCHIECK, ESQ.
Nevada Bar No. 0824
302 E. Carson Ste. 600
Las Vegas, NV 89101
702-382-1844
Attorney for CHAPPELL

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

THE STATE OF NEVADA,	)	CASE NO. C 131341
	)	DEPT. NO. VII
Plaintiff,)	
)	
vs.)	
)	
JAMES M. CHAPPELL,)	
)	
Defendant.	)	DATE: N/A
	)	TIME: N/A

EX PARTE MOTION FOR INTERIM PAYMENT
OF EXCESS ATTORNEY'S FEES
IN POST CONVICTION PROCEEDINGS

COMES NOW, DAVID M. SCHIECK, ESQ., attorney for JAMES M. CHAPPELL, and moves this Court for an Order authorizing interim payment of attorney fees in excess of the statutory allowance.

This Motion is made and based on the provisions of NRS 7.125, the request of the State Public Defender, and the Affidavit of Counsel attached hereto.

Dated this 13 day of July, 2000.

RESPECTFULLY SUBMITTED:

BY *David M. Schieck*
DAVID M. SCHIECK, ESQ.

CE52

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

NOTED
JUL 13 2000

STATEMENT OF FACTS

DAVID M. SCHIECK, ESQ. was appointed on November 15, 1999 to represent JAMES CHAPPELL (hereinafter referred to as CHAPPELL) for his post conviction proceedings.

Due to difficulty paying large sums at the completion of the case, the State Public Defender's Office has requested court appointed attorneys in post conviction proceedings submit bills on an interim basis every quarter. This is the first request for the quarter ending June 30, 2000.

The compensation for attorney's fees allowed in post conviction proceedings is not to exceed \$750.00 pursuant to statute. Counsel's billing statement is attached hereto and the amount requested is \$2,872.50 in fees.

POINTS AND AUTHORITIES

NRS 7.125 provides, in pertinent part, as follows:

"1. ...an attorney other than a public defender appointed by a magistrate or a district court to represent or defend a defendant at any stage of the criminal proceedings from the defendant's initial appearance...through the appeal, if any, is entitled to receive a fee for court appearances and other time reasonably spent on the matter to which the appointment is made, \$75 per hour....

. . . .

3. An attorney appointed by a district court to represent an indigent petitioner for a writ of habeas corpus or other post-conviction relief...is entitled to be paid a fee not to exceed \$750.

4. If the appointing court because of:

(a) The complexity of a case or the number of its factual or legal issues;

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

(b) The severity of the offense;
(c) The time necessary to provide an adequate defense; or

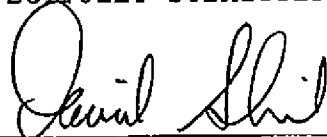
(d) Other special circumstances,
deems it appropriate to grant a fee in excess of the applicable maximum, the payment must be made, but only if the court in which the representation was rendered certifies that the amount of the excess payment is both reasonable and necessary and the payment is approved by the presiding judge of the judicial district in which the attorney was appointed...."

CONCLUSION

It is respectfully requested that this Court certify that the fees in excess of the statutory limit are reasonable, and grant interim payment in the amount of \$2,872.50.

Dated this 13 day of July, 2000.

RESPECTFULLY SUBMITTED:

BY 
DAVID M. SCHIECK, ESQ.

AFFIDAVIT OF DAVID M. SCHIECK

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

DAVID M. SCHIECK, being first duly sworn, deposes and says:

That Affiant is an attorney duly licensed to practice law in the State of Nevada and court appointed attorney for CHAPPELL.

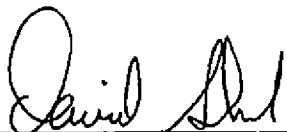
That statutory guidelines proscribe a cap of \$750.00 in

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

1 fees for post conviction proceedings. That the State Public
2 Defender's Office has requested that payment be made on a
3 quarterly basis instead of when the case is final. That
4 Affiant has submitted herewith a billing statement through the
5 quarter ending June 30, 2000 in the amount of \$2,872.50.
6

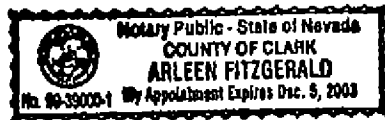
7 Therefore Affiant requests that this Court grant the
8 instant Motion for interim payment of excess fees.

9 Further Affiant sayeth naught.

10 
11 DAVID M. SCHIECK

12 SUBSCRIBED and SWORN to before me
13 this 13 day of July, 2000.

14 
15 NOTARY PUBLIC
16



David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

ORDR
DAVID M. SCHIECK, ESQ.
Nevada Bar No. 0824
302 E. Carson, #600
Las Vegas, NV 89101
702-382-1844

FILED

Nov 29 4 42 PM '99

DISTRICT COURT

Shirley S. Rungius
CLERK

CLARK COUNTY, NEVADA

* * *

THE STATE OF NEVADA,

Plaintiff,

vs.

JAMES M. CHAPPELL,

Defendant.

CASE NO. C131341

DEPT. NO. VII

AMENDED ORDER

APPOINTING COUNSEL

DATE: 11-15-99

TIME: 9:00 a.m.

The above entitled matter having come before the Court on the 15th day of November, 1999, DAVID M. SCHIECK, ESQ. appearing, and a representative of the District Attorney's Office appearing on behalf of The State of Nevada, the Court being fully advised in the premises, and good cause appearing therefor,

IT IS HEREBY ORDERED that DAVID M. SCHIECK, ESQ. be appointed to represent CHAPPELL for post conviction relief.

IT IS FURTHER ORDERED that the Public Defender turn over all files including attorney work product to David Schieck.

DATED AND DONE: 11-29-99

MARK GIBBONS

DISTRICT COURT JUDGE

SUBMITTED BY:

By:

David M. Schieck
DAVID M. SCHIECK, ESQ.

Date 7/12/00
Time 11:14 am

DAVID M. SCHIECK
Client Billing Worksheet

Page 1

Nickname 1 : CHAPPELL.PCR Nickname 2: 35
Address : JAMES CHAPPELL, #52338
ESP
In reference to: CHAPPELL V. WARDEN
PCR
COURT APPOINTED
Rounding : None
Full Precision : No
Last bill :
Last charge : 6/27/00
Last payment : Amount : \$0.00
Arrangement : Time Charges: From slips.
Expenses: From slips.

Date/Slip#	Description	HOURS/RATE	AMOUNT	TOTAL
11/15/99	DMS / CACA	1.00	75.00	
#181	COURT APPEARANCE - COURT APPOINTMENT	75.00		
11/15/99	DMS / P	0.20	15.00	
#182	PREPARE ORDER	75.00		
11/17/99	DMS / RVW	0.50	37.50	
#183	REVIEW SUPREME COURT DECISION	75.00		
11/18/99	DMS / LC	0.20	15.00	
#184	LETTER TO CLIENT	75.00		
12/9/99	DMS / TCF	0.20	15.00	
#185	TELEPHONE CALL FROM BROOKS	75.00		
12/9/99	DMS / C	0.30	22.50	
#186	CONFERENCE WITH BROOKS	75.00		
12/9/99	DMS / RVW	1.00	75.00	
#187	REVIEW ROA	75.00		
12/11/99	DMS / RVW	1.00	75.00	
#188	REVIEW ROA	75.00		
12/13/99	DMS / TCF	0.20	15.00	
#189	TELEPHONE CALL FROM BROOKS	75.00		
12/13/99	DMS / RVW	1.00	75.00	
#190	REVIEW ROA	75.00		
12/13/99	DMS / C	0.50	37.50	
#191	CONFERENCE WITH BROOKS	75.00		

Date 7/12/00
Time 11:14 am

DAVID M. SCHIECK
Client Billing Worksheet

Page 2

CHAPPELL.PCR :JAMES CHAPPELL, #52338 (continued)

Date/Slip#	Description	HOURS/RATE	AMOUNT	TOTAL
12/14/99 #192	DMS / RVW REVIEW ROA	1.00 75.00	75.00	
12/15/99 #193	DMS / CC CONFERENCE WITH CLIENT	1.50 75.00	112.50	
12/17/99 #194	DMS / RVW REVIEW ROA	1.50 75.00	112.50	
12/18/99 #195	DMS / RVW REVIEW TRANSCRIPTS	1.50 75.00	112.50	
12/18/99 #196	DMS / PM PREPARE MOTION FOR INVESTIGATOR	1.50 75.00	112.50	
12/22/99 #197	DMS / RVW REVIEW PHOTOS	0.50 75.00	37.50	
12/22/99 #198	DMS / C CONFERENCE WITH BROOKS	0.20 75.00	15.00	
1/8/00 #199	DMS / RVW REVIEW RECORDS	1.00 75.00	75.00	
1/19/00 #200	DMS / CASH COURT APPEARANCE - STATUS HEARING	1.00 75.00	75.00	
1/23/00 #201	DMS / RVW REVIEW TRIAL DOCUMENTS	1.00 75.00	75.00	
1/29/00 #202	DMS / RVW REVIEW TRANSCRIPTS	2.00 75.00	150.00	
1/31/00 #203	DMS / TCT TELEPHONE CALL TO BROOKS	0.20 75.00	15.00	
2/1/00 #204	DMS / RC REVIEW CORRESPONDENCE	0.20 75.00	15.00	
2/1/00 #205	DMS / RVW REVIEW TRANSCRIPTS	2.00 75.00	150.00	
2/10/00 #206	DMS / CC CONFERENCE WITH CLIENT	2.00 75.00	150.00	
3/10/00 #550	DMS / RC REVIEW CORRESPONDENCE	0.20 75.00	15.00	

Date 7/12/00
Time 11:14 am

DAVID M. SCHIECK
Client Billing Worksheet

Page 3

CHAPPELL.PCR :JAMES CHAPPELL, #52338 (continued)

Date/Slip#	Description	HOURS/RATE	AMOUNT	TOTAL
3/10/00	DMS / LC	0.20	15.00	
#551	LETTER TO CLIENT	75.00		
3/16/00	DMS / RVW	1.00	75.00	
#653	REVIEW TRANSCRIPTS	75.00		
3/17/00	DMS / RVW	1.00	75.00	
#617	REVIEW TRANSCRIPTS	75.00		
3/29/00	DMS / RC	0.20	15.00	
#751	REVIEW CORRESPONDENCE	75.00		
5/27/00	DMS / RVW	3.00	225.00	
#1459	REVIEW TRANSCRIPTS/RECORD	75.00		
5/28/00	DMS / P	2.50	187.50	
#1463	PREPARE SUPP P&A'S	75.00		
6/4/00	DMS / P	2.00	150.00	
#1645	PREPARE SUPP P/A'S	75.00		
6/7/00	DMS / P	2.00	150.00	
#1629	PREPARE SUPP P/A'S	75.00		
6/16/00	DMS / P	2.00	150.00	
#1623	PREPARE SUPP P/A'S	75.00		
6/27/00	DMS / CA	1.00	75.00	
#1904	COURT APPEARANCE - RESET BRIEFING SCHEDULE	75.00		
TOTAL BILLABLE TIME CHARGES		38.30		\$2,872.50
TOTAL BILLABLE COSTS				\$0.00
TOTAL NEW CHARGES				\$2,872.50
NEW BALANCE				
New Current period			2,872.50	
TOTAL NEW BALANCE				\$2,872.50

FILED
JUL 24 1 57 PM '00
Shirley S. Thompson
CLERK

EXPR
DAVID M. SCHIECK, ESQ.
Nevada Bar No. 0824
302 E. Carson Ste. 600
Las Vegas, NV 89101
702-382-1844

Attorney for CHAPPELL

DISTRICT COURT
CLARK COUNTY, NEVADA

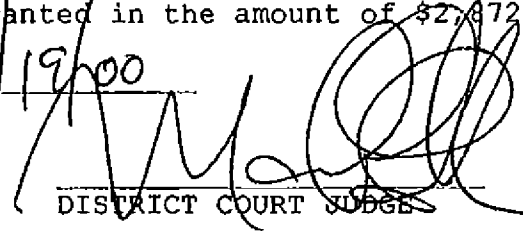
* * *

THE STATE OF NEVADA,	)	CASE NO. C 131341
	)	DEPT. NO. VII
Plaintiff,)	
	)	ORDER GRANTING INTERIM
vs.	)	PAYMENT OF EXCESS
	)	ATTORNEY'S FEES
JAMES M. CHAPPELL,)	
)	
Defendant.	)	DATE: N/A
	)	TIME: N/A

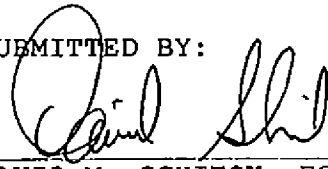
Based upon the Ex Parte Motion for Interim Payment of
Excess Attorney's Fees in Post Conviction Proceedings (a copy
of which is submitted herewith), the Court being fully advised
in the premises, and good cause shown, it is hereby

ORDERED, ADJUDGED AND DECREED that interim payment of
excess attorneys fees is granted in the amount of \$2,472.50.

DATED and DONE:

7/19/00

DISTRICT COURT JUDGE

SUBMITTED BY:


DAVID M. SCHIECK, ESQ.

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

RECEIVED
JUL 24 2 47 PM '00
CLERK

ORIGINAL

APR 17 1 37 PM '01

Shirley M. J. J. J.
CLERK

1 0001
 2 STEWART L. BELL
 3 DISTRICT ATTORNEY
 4 Nevada Bar #000477
 5 200 S. Third Street
 6 Las Vegas, Nevada 89155
 7 (702) 455-4711
 8 Attorney for Plaintiff

DISTRICT COURT
 CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,
 9 Plaintiff,
 10 -vs-
 11 JAMES MONTELL CHAPPELL,
 12 #1060797
 13 Defendant.

Case No. C131341
 Dept. No. VII

16 NOTICE OF MOTION AND MOTION
 17 TO PLACE ON CALENDAR

18 DATE OF HEARING: 5-1-01
 19 TIME OF HEARING: 9:00 A.M.

20 COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through
 21 H. LEON SIMON, Deputy District Attorney, and files this Notice of Motion and Motion to
 22 Place on Calendar.

23 This Motion is made pursuant to a request by the State as to the status of the Defendant's
 24 Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) that was due to be filed on
 25 March 13, 2001.

26 ///
 27 ///
 28 ///

COUNTY
 APR 17 2001
 RECEIVED



1 **NOTICE OF HEARING**

2 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will
3 bring the foregoing motion on for setting before the above entitled Court, in Department VII
4 thereof, on Tuesday, the 1st day of May, 2001, at the hour of 9:00 o'clock a.m., or as soon
5 thereafter as counsel may be heard.

6 DATED this 17 day of April, 2001.

7 STEWART L. BELL
8 DISTRICT ATTORNEY
9 Nevada Bar #000477

10 BY H. Leon Simon
11 H. LEON SIMON
12 Deputy District Attorney
13 Nevada Bar #000411

14
15
16 **CERTIFICATE OF FACSIMILE TRANSMISSION**

17 I hereby certify that service of STATE'S MOTION TO PLACE ON CALENDAR, was
18 made this 17th day of April, 2001, by facsimile transmission to:

19 DAVID M. SCHIECK, ESQ.
20 FAX #386-2687

21 [Signature]
22 Secretary for the District Attorney's Office

FILED

2001 MAY 17 AM 11:24


 CLERK

EXPT
 DAVID M. SCHIECK, ESQ.
 Nevada Bar No. 0824
 302 E. Carson Ste. 600
 Las Vegas, NV 89101
 702-382-1844
 Attorney for CHAPPELL

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

THE STATE OF NEVADA,	)	CASE NO. C 131341
	)	DEPT. NO. VII
Plaintiff,)	
)	
vs.)	
)	
JAMES M. CHAPPELL,)	
)	
Defendant.	)	DATE: N/A
	)	TIME: N/A

EX PARTE MOTION FOR INTERIM PAYMENT
 OF EXCESS ATTORNEY'S FEES
IN POST CONVICTION PROCEEDINGS

COMES NOW, DAVID M. SCHIECK, ESQ., attorney for JAMES M. CHAPPELL, and moves this Court for an Order authorizing interim payment of attorney fees in excess of the statutory allowance.

This Motion is made and based on the provisions of NRS 7.125, the request of the State Public Defender, and the Affidavit of Counsel attached hereto.

Dated this 16 day of May, 2001.

RESPECTFULLY SUBMITTED:

BY 
 DAVID M. SCHIECK, ESQ.

David M. Schieck
 Attorney At Law
 302 E. Carson Ave., Ste. 600
 Las Vegas, NV 89101
 (702) 382-1844

RECEIVED

MAY 17 2001

COUNTY CLERK

STATEMENT OF FACTS

DAVID M. SCHIECK, ESQ. was appointed on November 15, 1999 to represent JAMES CHAPPELL (hereinafter referred to as CHAPPELL) for his post conviction proceedings.

Due to difficulty paying large sums at the completion of the case, the State Public Defender's Office has requested court appointed attorneys in post conviction proceedings submit bills on an interim basis every quarter. This is the second request for payment (the first request in the amount of 42,872.50 was granted in July, 2000) and is for the quarter ending March 31, 2001.

The compensation for attorney's fees allowed in post conviction proceedings is not to exceed \$750.00 pursuant to statute. Counsel's billing statement is attached hereto and the amount requested is \$3,023.44 (fees \$2,752.50 and costs \$270.94).

POINTS AND AUTHORITIES

NRS 7.125 provides, in pertinent part, as follows:

"1. ...an attorney other than a public defender appointed by a magistrate or a district court to represent or defend a defendant at any stage of the criminal proceedings from the defendant's initial appearance...through the appeal, if any, is entitled to receive a fee for court appearances and other time reasonably spent on the matter to which the appointment is made, \$75 per hour....

. . .

3. An attorney appointed by a district court to represent an indigent petitioner for a writ of habeas corpus or other post-conviction relief...is entitled to be paid a fee not to exceed \$750.

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

1 4. If the appointing court because of:

2 (a) The complexity of a case or the number of
3 its factual or legal issues;

4 (b) The severity of the offense;

5 (c) The time necessary to provide an adequate
6 defense; or

7 (d) Other special circumstances,

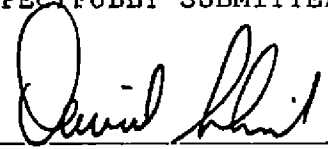
8 deems it appropriate to grant a fee in excess of the
9 applicable maximum, the payment must be made, but
10 only if the court in which the representation was
11 rendered certifies that the amount of the excess
12 payment is both reasonable and necessary and the
13 payment is approved by the presiding judge of the
14 judicial district in which the attorney was
15 appointed...."

12 CONCLUSION

13 It is respectfully requested that this Court certify that
14 the fees in excess of the statutory limit are reasonable, and
15 grant interim payment in the amount of \$3,023.44.

16 Dated this 16 day of May, 2001.

17 RESPECTFULLY SUBMITTED:

18
19
20 BY 
21 DAVID M. SCHIECK, ESQ.

22 AFFIDAVIT OF DAVID M. SCHIECK

23 STATE OF NEVADA)
24) ss:
25 COUNTY OF CLARK)

26 DAVID M. SCHIECK, being first duly sworn, deposes and
27 says:

28 That Affiant is an attorney duly licensed to practice law

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

1 in the State of Nevada and court appointed attorney for
2 CHAPPELL.

3 That statutory guidelines proscribe a cap of \$750.00 in
4 fees for post conviction proceedings. That the State Public
5 Defender's Office has requested that payment be made on a
6 quarterly basis instead of when the case is final. That
7 Affiant has submitted herewith a billing statement through the
8 quarter ending March 31, 2001 in the amount of \$3,023.44.
9

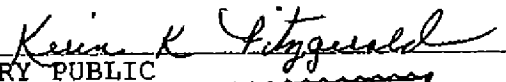
10 Therefore Affiant requests that this Court grant the
11 instant Motion for interim payment of excess fees.

12 Further Affiant sayeth naught.



DAVID M. SCHIECK

15 SUBSCRIBED and SWORN to before me
16 this 16 day of May, 2001.

18 
19 NOTARY PUBLIC



David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

ORDR
DAVID M. SCHIECK, ESQ.
Nevada Bar No. 0824
302 E. Carson, #600
Las Vegas, NV 89101
702-382-1844

FILED

Nov 29 4 42 PM '99

DISTRICT COURT
CLARK COUNTY, NEVADA

Shirley B. Rungione
CLERK

* * *

THE STATE OF NEVADA,)	
	)	CASE NO. C131341
Plaintiff,	)	DEPT. NO. VII
)	
vs.	)	AMENDED ORDER
	)	APPOINTING COUNSEL
JAMES M. CHAPPELL,)	
	)	DATE: 11-15-99
Defendant.	)	TIME: 9:00 a.m.

The above entitled matter having come before the Court on the 15th day of November, 1999, DAVID M. SCHIECK, ESQ. appearing, and a representative of the District Attorney's Office appearing on behalf of The State of Nevada, the Court being fully advised in the premises, and good cause appearing therefor,

IT IS HEREBY ORDERED that DAVID M. SCHIECK, ESQ. be appointed to represent CHAPPELL for post conviction relief.

IT IS FURTHER ORDERED that the Public Defender turn over all files including attorney work product to David Schieck.

DATED AND DONE: 11-29-99

MARK GIBBONS

DISTRICT COURT JUDGE

SUBMITTED BY:

By: *David M. Schieck*
DAVID M. SCHIECK, ESQ.

Date 4/5/01
Time 10:56 am

DAVID M. SCHIECK
Client Billing Worksheet

Page 9

Nickname 1 : CHAPPELL.PCR Nickname 2: 35
Address : JAMES CHAPPELL, #52338
ESP
In reference to: CHAPPELL V. WARDEN
PCR
COURT APPOINTED
Rounding : None
Full Precision : No
Last bill :
Last charge : 3/26/01
Last payment : 10/26/00 Amount : \$2,872.50
Arrangement : Time Charges: From slips.
Expenses: From slips.

Date/Slip#	Description	HOURS/RATE	AMOUNT	TOTAL
11/15/99 #71	DMS / CACA COURT APPEARANCE - COURT APPOINTMENT	1.00 75.00	75.00	
11/15/99 #72	DMS / P PREPARE ORDER	0.20 75.00	15.00	
11/17/99 #73	DMS / RVW REVIEW SUPREME COURT DECISION	0.50 75.00	37.50	
11/18/99 #74	DMS / LC LETTER TO CLIENT	0.20 75.00	15.00	
12/9/99 #75	DMS / TCF TELEPHONE CALL FROM BROOKS	0.20 75.00	15.00	
12/9/99 #76	DMS / C CONFERENCE WITH BROOKS	0.30 75.00	22.50	
12/9/99 #77	DMS / RVW REVIEW ROA	1.00 75.00	75.00	
12/11/99 #78	DMS / RVW REVIEW ROA	1.00 75.00	75.00	
12/13/99 #79	DMS / TCF TELEPHONE CALL FROM BROOKS	0.20 75.00	15.00	
12/13/99 #80	DMS / RVW REVIEW ROA	1.00 75.00	75.00	
12/13/99 #81	DMS / C CONFERENCE WITH BROOKS	0.50 75.00	37.50	

Date 4/5/01
Time 10:56 am

DAVID M. SCHIECK
Client Billing Worksheet

Page 10

CHAPPELL.PCR :JAMES CHAPPELL, #52338 (continued)

Date/Slip#	Description	HOURS/RATE	AMOUNT	TOTAL
12/14/99	DMS / RVW	1.00	75.00	
#82	REVIEW ROA	75.00		
12/15/99	DMS / CC	1.50	112.50	
#83	CONFERENCE WITH CLIENT	75.00		
12/17/99	DMS / RVW	1.50	112.50	
#84	REVIEW ROA	75.00		
12/18/99	DMS / RVW	1.50	112.50	
#85	REVIEW TRANSCRIPTS	75.00		
12/18/99	DMS / PM	1.50	112.50	
#86	PREPARE MOTION FOR INVESTIGATOR	75.00		
12/22/99	DMS / RVW	0.50	37.50	
#87	REVIEW PHOTOS	75.00		
12/22/99	DMS / C	0.20	15.00	
#88	CONFERENCE WITH BROOKS	75.00		
1/8/00	DMS / RVW	1.00	75.00	
#89	REVIEW RECORDS	75.00		
1/19/00	DMS / CASH	1.00	75.00	
#90	COURT APPEARANCE - STATUS HEARING	75.00		
1/23/00	DMS / RVW	1.00	75.00	
#91	REVIEW TRIAL DOCUMENTS	75.00		
1/29/00	DMS / RVW	2.00	150.00	
#92	REVIEW TRANSCRIPTS	75.00		
1/31/00	DMS / TCT	0.20	15.00	
#93	TELEPHONE CALL TO BROOKS	75.00		
2/1/00	DMS / RC	0.20	15.00	
#94	REVIEW CORRESPONDENCE	75.00		
2/1/00	DMS / RVW	2.00	150.00	
#95	REVIEW TRANSCRIPTS	75.00		
2/10/00	DMS / CC	2.00	150.00	
#96	CONFERENCE WITH CLIENT	75.00		
3/10/00	DMS / RC	0.20	15.00	
#199	REVIEW CORRESPONDENCE	75.00		

Date 4/5/01
Time 10:56 am

DAVID M. SCHIECK
Client Billing Worksheet

Page 11

CHAPPELL.PCR :JAMES CHAPPELL, #52338 (continued)

Date/Slip#	Description	HOURS/RATE	AMOUNT	TOTAL
3/10/00	DMS / LC	0.20	15.00	
#200	LETTER TO CLIENT	75.00		
3/16/00	DMS / RVW	1.00	75.00	
#222	REVIEW TRANSCRIPTS	75.00		
3/17/00	DMS / RVW	1.00	75.00	
#217	REVIEW TRANSCRIPTS	75.00		
3/29/00	DMS / RC	0.20	15.00	
#246	REVIEW CORRESPONDENCE	75.00		
5/27/00	DMS / RVW	3.00	225.00	
#429	REVIEW TRANSCRIPTS/RECORD	75.00		
5/28/00	DMS / P	2.50	187.50	
#431	PREPARE SUPP P/A'S	75.00		
6/4/00	DMS / P	2.00	150.00	
#511	PREPARE SUPP P/A'S	75.00		
6/7/00	DMS / P	2.00	150.00	
#508	PREPARE SUPP P/A'S	75.00		
6/16/00	DMS / P	2.00	150.00	
#504	PREPARE SUPP P/A'S	75.00		
6/27/00	DMS / CA	1.00	75.00	
#618	COURT APPEARANCE - RESET BRIEFING SCHEDULE	75.00		
9/1/00	DMS / RVW	2.00	150.00	
#830	REVIEW TRIAL TRANSCRIPTS	75.00		
9/3/00	DMS / RVW	2.00	150.00	
#934	REVIEW/SUMMARIZE TRANSCRIPTS	75.00		
9/7/00	DMS / RVW	1.50	112.50	
#922	REVIEW TRANSCRIPTS	75.00		
9/8/00	DMS / P	2.00	150.00	
#911	PREPARE SUPP P/A'S	75.00		
9/16/00	DMS / RVW	1.00	75.00	
#1019	REVIEW FILE RE: STATUS	75.00		
11/1/00	DMS / RVW	2.50	187.50	
#1274	REVIEW TRANSCRIPTS	75.00		

Date 4/5/01
Time 10:56 am

DAVID M. SCHIECK
Client Billing Worksheet

Page 12

CHAPPELL.PCR :JAMES CHAPPELL, #52338 (continued)

Date/Slip#	Description	HOURS/RATE	AMOUNT	TOTAL
11/2/00	DMS / RVW	1.50	112.50	
#1281	REVIEW TRANSCRIPTS	75.00		
11/3/00	DMS / RVW	2.00	150.00	
#1282	REVIEW TRANSCRIPTS	75.00		
11/4/00	DMS / RVW	1.00	75.00	
#1353	REVIEW TRANSCRIPTS	75.00		
11/6/00	DMS / CASH	1.00	75.00	
#1358	COURT APPEARANCE - STATUS HEARING	75.00		
11/6/00	DMS / R	1.00	75.00	
#1359	RESEARCH IMPROPER CLOSING ARGUMENT	75.00		
11/8/00	DMS / RC	0.20	15.00	
#1379	REVIEW CORRESPONDENCE	75.00		
11/8/00	DMS / LC	0.20	15.00	
#1380	LETTER TO CLIENT	75.00		
11/9/00	DMS / RVW	1.00	75.00	
#1315	REVIEW TRANSCRIPTS	75.00		
11/12/00	DMS / P	2.00	150.00	
#1398	PREPARE SUPP P/A'S	75.00		
11/14/00	DMS / RVW	1.50	112.50	
#1412	REVIEW CLOSING ARGUMENT TRANSCRIPT	75.00		
11/20/00	DMS / R	1.00	75.00	
#1428	RESEARCH OBJECTION	75.00		
11/25/00	DMS / RVW	2.00	150.00	
#1436	REVIEW TRANSCRIPTS	75.00		
12/1/00	DMS / LC	0.20	15.00	
#1467	LETTER TO CLIENT	75.00		
12/7/00	DMS / CC	2.00	150.00	
#1553	CONFERENCE WITH CLIENT	75.00		
12/13/00	DMS / RC	0.20	15.00	
#1519	REVIEW CORRESPONDENCE	75.00		

Date 4/5/01
Time 10:56 am

DAVID M. SCHIECK
Client Billing Worksheet

Page 13

CHAPPELL.PCR :JAMES CHAPPELL, #52338 (continued)

Date/Slip#	Description	HOURS/RATE	AMOUNT	TOTAL
12/13/00	DMS / LC	0.20	15.00	
#1520	LETTER TO CLIENT	75.00		
12/20/00	DMS / RC	0.20	15.00	
#1578	REVIEW CORRESPONDENCE	75.00		
12/20/00	DMS / LC	0.20	15.00	
#1579	LETTER TO CLIENT	75.00		
1/27/01	DMS / RVW	2.00	150.00	
#1846	REVIEW BROOKS DOCUMENTS	75.00		
1/27/01	DMS / LC	0.20	15.00	
#1847	LETTER TO CLIENT	75.00		
1/27/01	DMS / P	0.50	37.50	
#1848	PREPARE CLIENT'S BOX	75.00		
2/6/01	DMS / TCFC	0.20	15.00	
#1982	TELEPHONE CALL FROM CLIENT	75.00		
2/12/01	DMS / CASH	1.00	75.00	
#2023	COURT APPEARANCE - STATUS HEARING	75.00		
3/8/01	DMS / P	2.00	150.00	
#2338	PREPARE REVISED SUPP P/A'S	75.00		
3/19/01	DMS / RC	0.20	15.00	
#2415	REVIEW CORRESPONDENCE	75.00		
3/20/01	DMS / P	2.00	150.00	
#2442	PREPARE SUPP P/A'S	75.00		
3/26/01	DMS / RC	0.20	15.00	
#2576	REVIEW CORRESPONDENCE	75.00		
TOTAL BILLABLE TIME CHARGES		75.00		\$5,625.00

Date/Slip#	Description	QTY/PRICE	
7/13/00	DMS / \$X	18	1.80
#702	PHOTOCOPIES	0.10	
12/20/00	DMS / \$X	1	257.29
#1630	PHOTOCOPIES (DIAL REPROGRAPHICS)	257.29	

Date 4/5/01
Time 10:56 am

DAVID M. SCHIECK
Client Billing Worksheet

Page 14

CHAPPELL.PCR :JAMES CHAPPELL, #52338 (continued)

<u>Date/Slip#</u>	<u>Description</u>	<u>QTY/PRICE</u>	
1/29/01	DMS / \$PO	1	9.16
#1911	POSTAGE (UPS)	9.16	
2/6/01	DMS / \$LDTC	1	2.69
#2500	LONG DISTANCE TELEPHONE CALL	2.69	
<hr/>			
TOTAL BILLABLE COSTS			\$270.94
<hr/>			
TOTAL NEW CHARGES			\$5,895.94
<hr/>			
<u>PAYMENTS/REFUNDS/CREDITS</u>			
10/26/00 Payment - thank you			(2,872.50)
<hr/>			
TOTAL PAYMENTS/REFUNDS/CREDITS			(\$2,872.50)
<hr/>			
<u>NEW BALANCE</u>			
New Current period			3,023.44
<hr/>			
TOTAL NEW BALANCE			\$3,023.44

Invoice

Dial
REPROGRAPHICS, INC.
 330 S. 3RD ST., SUITE 910
 LAS VEGAS, NEVADA 89101
 PHONE: 388-9940 FAX: 388-9943

DATE	INVOICE #
12/15/2000	36387

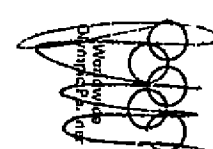
BILL TO
Schieck, David 302 E. Carson # 600 Las Vegas, NV 89101

REFERENCE NO.	TERMS	REP	CONTACT NAME
Kathleen	Net 30	JTB	Kathleen

ITEM	QUANTITY	DESCRIPTION	AMOUNT
Litigatio...	2,399	Copying from stapled, clipped or tagged documents. NEVADA SALES TAX <i>re: Chappell pd# 3896</i>	239.90T 17.39

Happy Holidays!!	Total	\$257.29
------------------	--------------	-----------------

We recognize that some of our clients may be billing these expenses through their customers. In any case, the client remains responsible to pay within our terms regardless of their receivables.
FEDERAL TAX ID#: 86-0859196



RETURN ADDRESS (PLEASE PRINT)

NAME David M. Schieck, Esq. DATE 12/29/01

STREET 302 E. Carson, Suite 600

CITY Las Vegas NV 89101 STATE NV ZIP 89101

TELEPHONE (702) 382-1844

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1

NAME Tom Preston, NO. 42622

STREET WNCC-RMC

CITY Carson City NV, 89702 STATE NV ZIP 89702

PACKAGE CONTENTS: legal mail

INSURED VALUE \$

CO.D. AMOUNT \$

SHIP TO ADDRESS: 12 870 X80 03 1618 225 3

WEIGHT (LBS) 23.00 LB

WEIGHT (KG) 10.43 KG

POSTAGE 12.91

INSURANCE 0.11

TOTAL 35.94

2

NAME Thom Preston #42622

STREET WNCC

CITY Carson City NV, 89702 STATE NV ZIP 89702

PACKAGE CONTENTS: legal mail

INSURED VALUE \$

CO.D. AMOUNT \$

SHIP TO ADDRESS: 12 870 X80 03 1618 219 1

WEIGHT (LBS) 25.58 LB

WEIGHT (KG) 11.60 KG

POSTAGE 12.91

INSURANCE 0.11

TOTAL 38.60

3

NAME Shanes Chappell #52338

STREET ESP

CITY 2000 N. Botwinick STATE NV ZIP 89301

PACKAGE CONTENTS: legal mail

INSURED VALUE \$

CO.D. AMOUNT \$

SHIP TO ADDRESS: 12 870 X80 03 1618 242 2

WEIGHT (LBS) 25.58 LB

WEIGHT (KG) 11.60 KG

POSTAGE 12.91

INSURANCE 0.11

TOTAL 38.60

36 USC 380

0122702 REV 200 W

Thank You For Using
United Parcel Service

MCIWORLD.COM

MCIWorldcom charges**Call 1-800-877-7077 for billing inquiries***Sprint provides billing on behalf of MCIWorldcom.**There is no connection between Sprint and MCIWorldcom.**Please review all charges appearing in this section. Any question regarding these charges should be referred to the number provided for billing inquiries.***Summary of MCIWorldcom charges****Long Distance services**

Direct dial charges 702-382-1844 46.98

Taxes

Federal tax 1.47

Franchise fee 1.98

Total MCIWorldcom charges \$50.43**Direct dial itemized calls**

	Date	Time	Place called	Number called	Period	Minutes	Amount
1	Jan 24	8:56 A	LAS VEGAS, NV	702-382-1844	Day	2.0	1.41
		from	INDIAN SPG, NV	702-879-0611	Operator assist		
2	Jan 26	9:41 A	LAS VEGAS, NV	702-382-1844	Day	2.0	1.41
		from	INDIAN SPG, NV	702-879-0611	Operator assist		
3	Jan 29	9:04 A	LAS VEGAS, NV	702-382-1844	Day	5.0	2.43
		from	ELY, NV	775-289-9270	Operator assist		
4	Jan 29	1:54 P	LAS VEGAS, NV	702-382-1844	Day	1.0	1.39
		from	ELY, NV	775-289-9270	Operator assist		
5	Jan 31	1:26 P	LAS VEGAS, NV	702-382-1844	Day	1.0	1.39
		from	ELY, NV	775-289-9270	Operator assist		
6	Feb 1	12:09 P	LAS VEGAS, NV	702-382-1844	Day	6.0	2.47
		from	MANSFIELD, OH	419-525-0021	Operator assist		
7	Feb 2	11:55 A	LAS VEGAS, NV	702-382-1844	Day	7.0	2.95
		from	LOVELOCK, NV	775-273-0581	Operator assist		
8	Feb 2	1:28 P	LAS VEGAS, NV	702-382-1844	Day	1.0	1.39
		from	LOVELOCK, NV	775-273-0581	Operator assist		
9	Feb 2	2:30 P	LAS VEGAS, NV	702-382-1844	Day	1.0	1.39
		from	ELY, NV	775-289-9270	Operator assist		
10	Feb 2	2:31 P	LAS VEGAS, NV	702-382-1844	Day	1.0	1.39
		from	INDIAN SPG, NV	702-879-3528	Operator assist		
11	Feb 2	3:19 P	LAS VEGAS, NV	702-382-1844	Day	4.0	2.17
		from	LOVELOCK, NV	775-273-0581	Operator assist		
12	Feb 2	4:17 P	LAS VEGAS, NV	702-382-1844	Day	1.0	1.39
		from	LOVELOCK, NV	775-273-0581	Operator assist		
13	Feb 6	1:38 P	LAS VEGAS, NV	702-382-1844	Day	9.0	3.47
		from	ELY, NV	775-289-9270	Operator assist		
14	Feb 6	1:54 P	LAS VEGAS, NV	702-382-1844	Day	6.0	2.47
		from	ELY, NV	775-289-9270	Operator assist		
15	Feb 6	4:32 P	LAS VEGAS, NV	702-382-1844	Day	8.0	3.21
		from	LOVELOCK, NV	775-273-0581	Operator assist		
16	Feb 7	11:45 A	LAS VEGAS, NV	702-382-1844	Day	4.0	1.29
		from	LAS VEGAS, NV	702-651-1062	Operator assist		
17	Feb 7	6:22 P	LAS VEGAS, NV	702-382-1844	Evening	12.0	3.43
		from	LOVELOCK, NV	775-273-0581	Operator assist		
18	Feb 13	2:30 P	LAS VEGAS, NV	702-382-1844	Day	11.0	3.99
		from	CARSONCITY, NV	775-841-3785	Operator assist		
19	Feb 20	11:43 A	LAS VEGAS, NV	702-382-1844	Day	2.0	1.19
		from	LAS VEGAS, NV	702-651-1062	Operator assist		

MCIWorldcom charges continued next page

5 - see page 2 for explanation

ORIGINAL

FILED

EXPR
DAVID M. SCHIECK, ESQ.
Nevada Bar No. 0824
302 E. Carson Ste. 600
Las Vegas, NV 89101
702-382-1844

JUN 7 10 25 AM '01

Shirley B. Panagis
CLERK

Attorney for CHAPPELL

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

THE STATE OF NEVADA,

Plaintiff,

vs.

JAMES M. CHAPPELL,

Defendant.

CASE NO. C 131341
DEPT. NO. VII

ORDER GRANTING INTERIM
PAYMENT OF EXCESS
ATTORNEY'S FEES

DATE: N/A
TIME: N/A

Based upon the Ex Parte Motion for Interim Payment of
Excess Attorney's Fees in Post Conviction Proceedings (a copy
of which is submitted herewith), the Court being fully advised
in the premises, and good cause shown, it is hereby

ORDERED, ADJUDGED AND DECREED that interim payment of
excess attorneys fees is granted in the amount of \$3,023.44.

DATED and DONE: 12/17/2001

Michael P. Z...
DISTRICT COURT JUDGE *k*

SUBMITTED BY:

David M. Schieck
DAVID M. SCHIECK, ESQ.

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

RECEIVED
JUN 07 2001
COUNTY CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * JUN 13 10 50 AM '01

ORIGINAL

THE STATE OF NEVADA,

Plaintiff,

Vs

JAMES MONTELL CHAPPELL,

Defendant.

CASE NO. C131341

DEPT. NO. VII

BEFORE THE HONORABLE:

MARK GIBBONS DISTRICT JUDGE

TUESDAY, JUNE 12, 2001, 9:00 A.M.

APPEARANCES:

FOR THE STATE:

H. LEON SIMON

Deputy District Attorney

FOR THE DEFENDANT:

DAVID M. SCHIECK, ESQ.

REPORTED BY:

PATSY K. SMITH, C.C.R. #190

PATSY K. SMITH, OFFICIAL COURT REPORTER
(702) 455-3416

RECEIVED

JUN 13 2001

COUNTY CLERK

1 TUESDAY, JUNE 12, 2001, 9:00 A.M.

2 THE COURT: Case number C131341, State of
3 Nevada versus James Chappell.

4 The record will reflect the presence of
5 Mr. Chappell -- excuse me -- Mr. Chappell is in state
6 prison, so we will waive his appearance, David Schieck
7 representing the defendant, Leon Simon representing the
8 State.

9 This is on for status check regarding the
10 briefing schedule.

11 Mr. Schieck, did you get that executed?

12 MR. SCHIECK: No, I did not, your Honor.
13 I need another 30 days to get it done. I had problems
14 with another one that was due and the prison refused to
15 let me see that inmate to get that one signed, but within
16 the next 30 days I should be able to file it.

17 THE COURT: Pass it for 30 days on the
18 briefing schedule.

19 THE CLERK: July 17.

20 MR. SIMON: Your Honor, we'd ask that you
21 put it on for status check a day or two later and then the
22 State would like 60 days to respond.

23

24 (Off the record discussion not reported.)

25

PATSY K. SMITH, OFFICIAL COURT REPORTER
(702) 455-3416

1 THE COURT: I just set a status check.
2 MR. SIMON: On the 17th?
3 THE COURT: Yeah. Is that okay with your
4 schedule?
5 MR. SIMON: That's fine, your Honor, and
6 then we would like 60 days from then to respond.
7 THE COURT: I just want to confirm that
8 it was done.
9 MR. SIMON: Okay.
10 THE COURT: And then we will set the
11 briefing schedule at that time.
12 MR. SIMON: Fine.

13 * * * * *

14 ATTEST: FULL, TRUE, ACCURATE AND CERTIFIED TRANSCRIPT OF
15 PROCEEDINGS.

16 
17 PATSY K. SMITH, C.C.R. #190
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PATSY K. SMITH, OFFICIAL COURT REPORTER
(702) 455-3416

1 TRANS

2 ORIGINAL

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FILED
AUG 28 4 25 PM '01

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,)

PLAINTIFF,)

VS.)

JAMES MONTELL CHAPPELL,)

DEFENDANT.)

CASE NO. C131341
DEPT. NO. 11

BEFORE THE HONORABLE MICHAEL L. DOUGLAS
EIGHTH JUDICIAL DISTRICT COURT JUDGE DEPARTMENT 11

THURSDAY, JULY 26, 2001; 9:00 A.M.

STATUS CHECK ON BRIEFING SCHEDULE

APPEARANCES:

FOR THE STATE:

CHERYL KOSEWICZ, ESQ.
DEPUTY DISTRICT ATTORNEY
200 S. THIRD STREET (7TH FLOOR COURTHOUSE)
LAS VEGAS, NEVADA 89155
(702) 455-4711

FOR THE DEFENSE:

DAVID SCHIECK, ESQ.
302 E. CARSON AVE. #600
LAS VEGAS, NEVADA 89101
(702) 382-1844

RECORDED BY: CAT NELSON, COURT RECORDER FOR
THE HONORABLE MICHAEL L. DOUGLAS
DISTRICT COURT JUDGE DEPARTMENT 11
200 S. THIRD STREET
LAS VEGAS, NV 89155
(702) 455-4527

1 THURSDAY, JULY 26, 2001; 9:00 A.M.

2

3 THE COURT: State of Nevada versus Chappell.

4 MR. SCHIECK: Good morning your honor. This is on for a status

5 check on the filing of my supplemental points and authorities. This

6 is a capital - capital case and quite honestly I have four others that

7 I'm working on and its been a very slow process to get this one in.

8 If I could have until about September 15th to get it filed, we could

9 put it on for a status check at that date and then the State could

10 come in and indicate how much time they need to respond. That's the

11 way we've been doing it. Mr. Simon I believe is handling this one.

12 THE COURT: Let's have it on for the 13th for a status check.

13 THE CLERK: September 13th at 9:00 am.

14 MR. SCHIECK: Thank you your honor.

15 (WHEREUPON THE PROCEEDINGS WERE CONCLUDED)

16 * * *

17 ATTEST: I do hereby certify that I have truly and correctly

18 transcribed the sound recording in the above-entitled case.

19 
20 Cat Nelson, Court Recorder
21 District Court Department 11

22

23

24

25

26

27

28

FILED

APR 11 12 52 PM '02

Shirley S. ...
CLERK

21

EXPT
DAVID M. SCHIECK, ESQ.
Nevada Bar No. 0824
302 E. Carson Ste. 600
Las Vegas, NV 89101
702-382-1844
Attorney for CHAPPELL

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

THE STATE OF NEVADA,

Plaintiff,

vs.

JAMES M. CHAPPELL,

Defendant.

CASE NO. C 131341

DEPT. NO. TX X1

DATE: N/A

TIME: N/A

EX PARTE MOTION FOR INTERIM PAYMENT
OF EXCESS ATTORNEY'S FEES
IN POST CONVICTION PROCEEDINGS

COMES NOW, DAVID M. SCHIECK, ESQ., attorney for JAMES M. CHAPPELL, and moves this Court for an Order authorizing interim payment of attorney fees in excess of the statutory allowance.

This Motion is made and based on the provisions of NRS 7.125, the request of the State Public Defender, and the Affidavit of Counsel attached hereto.

Dated this 10 day of April, 2002.

RESPECTFULLY SUBMITTED:

BY 
DAVID M. SCHIECK, ESQ.

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

RECEIVED
APR 11 2002
COUNTY CLERK

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

STATEMENT OF FACTS

DAVID M. SCHIECK, ESQ. was appointed on November 15, 1999 to represent JAMES CHAPPELL (hereinafter referred to as CHAPPELL) for his post conviction proceedings.

Due to difficulty paying large sums at the completion of the case, the State Public Defender's Office has requested court appointed attorneys in post conviction proceedings submit bills on an interim basis every quarter. This is the third request for payment (the first request in the amount of \$2,872.50 was granted in July, 2000; and the second request was granted in May, 2001 for \$3,023.44) and is for the quarter ending March 31, 2002.

The compensation for attorney's fees allowed in post conviction proceedings is not to exceed \$750.00 pursuant to statute. Counsel's billing statement is attached hereto and the amount requested is \$2,621.86 (fees \$2,505.00 and costs \$116.86).

POINTS AND AUTHORITIES

NRS 7.125 provides, in pertinent part, as follows:

"1. ...an attorney other than a public defender appointed by a magistrate or a district court to represent or defend a defendant at any stage of the criminal proceedings from the defendant's initial appearance...through the appeal, if any, is entitled to receive a fee for court appearances and other time reasonably spent on the matter to which the appointment is made, \$75 per hour....

. . .

3. An attorney appointed by a district court to represent an indigent petitioner for a writ of habeas

corpus or other post-conviction relief...is entitled to be paid a fee not to exceed \$750.

4. If the appointing court because of:

(a) The complexity of a case of the number of its factual or legal issues;

(b) The severity of the offense;

(c) The time necessary to provide an adequate defense; or

(d) Other special circumstances,

deems it appropriate to grant a fee in excess of the applicable maximum, the payment must be made, but only if the court in which the representation was rendered certifies that the amount of the excess payment is both reasonable and necessary and the payment is approved by the presiding judge of the judicial district in which the attorney was appointed...."

CONCLUSION

It is respectfully requested that this Court certify that the fees in excess of the statutory limit are reasonable, and grant interim payment in the amount of \$2,621.81.

Dated this 10 day of April, 2002.

RESPECTFULLY SUBMITTED:

BY David M. Schieck
DAVID M. SCHIECK, ESQ.

AFFIDAVIT OF DAVID M. SCHIECK

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

DAVID M. SCHIECK, being first duly sworn, deposes and says:

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

1 That Affiant is an attorney duly licensed to practice law
2 in the State of Nevada and court appointed attorney for
3 CHAPPELL.


4 That statutory guidelines proscribe a cap of \$750.00 in
5 fees for post conviction proceedings. That the State Public
6 Defender's Office has requested that payment be made on a
7 quarterly basis instead of when the case is final. That
8 Affiant has submitted herewith a billing statement through the
9 quarter ending March 31, 2002 in the amount of \$2,621.86.

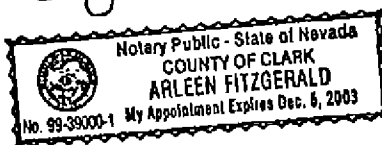
10 Therefore Affiant requests that this Court grant the
11 instant Motion for interim payment of excess fees.

12 Further Affiant sayeth naught.

13 
14
15 DAVID M. SCHIECK

16 SUBSCRIBED and SWORN to before me
17 this 10 day of April, 2002.

18 
19 NOTARY PUBLIC



David M. Schieck
Attorney At Law
302 E. Carson Ave. Ste. 600
Las Vegas, NV 89101
(702) 382-1844

ORDR
DAVID M. SCHIECK, ESQ.
Nevada Bar No. 0824
302 E. Carson, #600
Las Vegas, NV 89101
702-382-1844

FILED

Nov 29 4 02 PM '99

DISTRICT COURT
CLARK COUNTY, NEVADA

Shirley B. Rungius
CLERK

* * *

THE STATE OF NEVADA,

Plaintiff,

vs.

JAMES M. CHAPPELL,

Defendant.

CASE NO. C131341
DEPT. NO. VII

AMENDED ORDER
APPOINTING COUNSEL

DATE: 11-15-99
TIME: 9:00 a.m.

The above entitled matter having come before the Court on the 15th day of November, 1999, DAVID M. SCHIECK, ESQ. appearing, and a representative of the District Attorney's Office appearing on behalf of The State of Nevada, the Court being fully advised in the premises, and good cause appearing therefor,

IT IS HEREBY ORDERED that DAVID M. SCHIECK, ESQ. be appointed to represent CHAPPELL for post conviction relief.

IT IS FURTHER ORDERED that the Public Defender turn over all files including attorney work product to David Schieck.

DATED AND DONE: 11-29-99

MARK GIBSON

DISTRICT COURT JUDGE

SUBMITTED BY:

By:

David M. Schieck
DAVID M. SCHIECK, ESQ.

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

1 EXPR
2 DAVID M. SCHIECK, ESQ.
3 Nevada Bar No. 0824
4 302 E. Carson Ste. 600
5 Las Vegas, NV 89101
6 702-382-1844

7 Attorney for CHAPPELL

8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

10 * * *

11 THE STATE OF NEVADA,	)	CASE NO. C 131341
	)	DEPT. NO. VII
12 Plaintiff,	)	ORDER GRANTING INTERIM
	)	PAYMENT OF EXCESS
13 vs.	)	ATTORNEY'S FEES
)	
14 JAMES M. CHAPPELL,)	
)	
15 Defendant.	)	DATE: N/A
	)	TIME: N/A

16 Based upon the Ex Parte Motion for Interim Payment of
17 Excess Attorney's Fees in Post Conviction Proceedings (a copy
18 of which is submitted herewith), the Court being fully advised
19 in the premises, and good cause shown, it is hereby

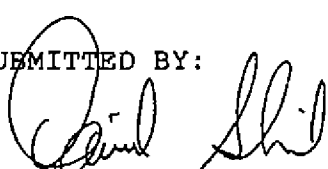
20 ORDERED, ADJUDGED AND DECREED that interim payment of
21 excess attorneys fees is granted in the amount of \$2,872.50.

22 DATED and DONE: 7-19-00

23 **MARK GIBBONS**

24 DISTRICT COURT JUDGE

25 SUBMITTED BY:

26 
27 DAVID M. SCHIECK, ESQ.
28

FILED
JUL 24 1 58 PM '00
Shirley C. Longenecker
CLERK

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

EXPR
DAVID M. SCHIECK, ESQ.
Nevada Bar No. 0824
302 E. Carson Ste. 600
Las Vegas, NV 89101
702-382-1844

Attorney for CHAPPELL

FILED

JUN 7 10 25 AM '91

Cheryl A. Longoria
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

THE STATE OF NEVADA,	)	CASE NO. C 131341
	)	DEPT. NO. VII
Plaintiff,)	
	)	ORDER GRANTING INTERIM
vs.	)	PAYMENT OF EXCESS
	)	ATTORNEY'S FEES
JAMES M. CHAPPELL,)	
)	
Defendant.	)	DATE: N/A
	)	TIME: N/A

Based upon the Ex Parte Motion for Interim Payment of Excess Attorney's Fees in Post Conviction Proceedings (a copy of which is submitted herewith), the Court being fully advised in the premises, and good cause shown, it is hereby

ORDERED, ADJUDGED AND DECREED that interim payment of excess attorneys fees is granted in the amount of \$3,023.44.

DATED and DONE: 5-17-01

MICHAEL P. GIBBONS

DISTRICT COURT JUDGE

SUBMITTED BY:

David M. Schieck
DAVID M. SCHIECK, ESQ.

Date 4/9/02
Time 11:25 am

DAVID M. SCHIECK
Client Billing Worksheet

Page 1

Selection Criteria

Date range : 5/1/01 through 3/31/02
Slip numbers : All
Timekeeper : All
Client : CHAPPELL.PCR
Activity : All
Custom Fields : All
Reference : All
Slip status : Billed slips and transactions excluded
Other options :
Print Bills that are "paid in full" : Yes
Include transactions outside date range : Yes
Print Bills with no activity : Yes

Nickname 1 : CHAPPELL.PCR Nickname 2: 35

Address : JAMES CHAPPELL, #52338
ESP

In reference to: CHAPPELL V. WARDEN
PCR
COURT APPOINTED

Rounding : None

Full Precision : No

Last bill :

Last charge : 3/26/02

Last payment : 7/23/01 Amount : \$3,023.44

Arrangement : Time Charges: From slips.
Expenses: From slips.

Date/Slip#	Description	HOURS/RATE	AMOUNT	TOTAL
5/1/01	DMS / CASH	1.00	75.00	
#1816	COURT APPEARANCE - STATUS HEARING	75.00		
5/8/01	DMS / R	1.50	112.50	
#1921	RESEARCH SUPP P/A'S	75.00		
6/7/01	DMS / CC	2.00	150.00	
#2283	CONFERENCE WITH CLIENT	75.00		
6/7/01	DMS / RVW	1.00	75.00	
#2284	REVIEW TRANSCRIPTS	75.00		
6/12/01	DMS / CASH	1.00	75.00	
#2319	COURT APPEARANCE - STATUS HEARING	75.00		
6/26/01	DMS / RC	0.20	15.00	
#2447	REVIEW CORRESPONDENCE	75.00		

Date 4/9/02
Time 11:25 am

DAVID M. SCHIECK
Client Billing Worksheet

Page 2

CHAPPELL.PCR : JAMES CHAPPELL, #52338 (continued)

Date/Slip#	Description	HOURS/RATE	AMOUNT	TOTAL
7/5/01	DMS / R	2.00	150.00	
#2544	RESEARCH SUPP PETITION	75.00		
7/25/01	DMS / R	0.50	37.50	
#2768	RESEARCH CLOSING ARGUMENT	75.00		
7/26/01	DMS / CASH	1.00	75.00	
#2776	COURT APPEARANCE - STATUS HEARING	75.00		
8/23/01	DMS / CA	1.00	75.00	
#2954	COURT APPEARANCE - STATUS HEARING	75.00		
9/13/01	DMS / CASH	1.00	75.00	
#3297	COURT APPEARANCE - STATUS HEARING	75.00		
11/1/01	DMS / CASH	1.00	75.00	
#3818	COURT APPEARANCE - STATUS HEARING	75.00		
12/13/01	DMS / CASH	1.00	75.00	
#4215	COURT APPEARANCE - STATUS HEARING	75.00		
1/17/02	DMS / RVW	2.00	150.00	
#4358	REVIEW FILES	75.00		
1/17/02	DMS / R	1.00	75.00	
#4359	RESEARCH ISSUES	75.00		
1/17/02	DMS / P	2.00	150.00	
#4360	PREPARE SUPP P/A'S	75.00		
1/17/02	DMS / R	1.00	75.00	
#4362	RESEARCH ISSUES	75.00		
1/17/02	DMS / P	2.00	150.00	
#4363	PREPARE SUPP P/A'S	75.00		
2/5/02	DMS / CASH	1.00	75.00	
#4682	COURT APPEARANCE - STATUS HEARING	75.00		
3/5/02	DMS / CASH	1.00	75.00	
#4944	COURT APPEARANCE - STATUS	75.00		

Date 4/9/02
Time 11:25 am

DAVID M. SCHIECK
Client Billing Worksheet

Page 3

CHAPPELL, PCR :JAMES CHAPPELL, #52338 (continued)

Date/Slip#	Description	HOURS/RATE	AMOUNT	TOTAL
#4944..	HEARING			
3/5/02	DMS / P	1.50	112.50	
#4945	PREPARE SUPP P/A'S	75.00		
3/6/02	DMS / C	0.20	15.00	
#4960	CONFERENCE WITH BROOKS	75.00		
3/6/02	DMS / P	2.00	150.00	
#4961	PREPARE SUPP P/A'S	75.00		
3/6/02	DMS / R	2.00	150.00	
#4962	RESEARCH SUPP P/A'S	75.00		
3/6/02	DMS / P	2.50	187.50	
#4966	PREPARE SUPP P/A'S	75.00		
3/26/02	DMS / CASH	1.00	75.00	
#5154	COURT APPEARANCE - STATUS HEARING	75.00		

TOTAL BILLABLE TIME CHARGES	33.40	\$2,505.00
-----------------------------	-------	------------

Date/Slip#	Description	QTY/PRICE	
5/17/01	DMS / \$X	28	2.80
#2225	PHOTOCOPIES	0.10	
6/6/01	DMS / \$C	1	112.76
#2235	COST FOR TRAVEL EXPENSES (ROOM, CAR, GAS)	112.76	
6/11/01	DMS / \$X	13	1.30
#2512	PHOTOCOPIES	0.10	

TOTAL BILLABLE COSTS	\$116.86
----------------------	----------

TOTAL NEW CHARGES	\$2,621.86
-------------------	------------

PAYMENTS/REFUNDS/CREDITS

10/26/00	Payment - thank you	(2,872.50)
7/23/01	Payment - thank you	(3,023.44)

Date 4/9/02
Time 11:25 am

DAVID M. SCHIECK
Client Billing Worksheet

Page 4

CHAPPELL, PCR : JAMES CHAPPELL, #52338 (continued)

TOTAL PAYMENTS/REFUNDS/CREDITS	(\$5,895.94)
BALANCE FORWARD (INTERIM PAYMENTS MADE)	\$5,895.94
<u>NEW BALANCE</u>	

New Current period

<u>TOTAL NEW BALANCE</u>	<u>\$2,621.86</u>
--------------------------	-------------------

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APR 12 10 34 AM '02

Shirley B. Kingma
CLERK

1 EXPR
 2 DAVID M. SCHIECK, ESQ.
 3 Nevada Bar No. 0824
 4 302 E. Carson Ste. 600
 5 Las Vegas, NV 89101
 6 702-382-1844

7 Attorney for CHAPPELL

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

9 THE STATE OF NEVADA,	)	CASE NO. C 131341
	)	DEPT. NO. IX XI
10 Plaintiff,)	
	)	ORDER GRANTING INTERIM
11 vs.	)	PAYMENT OF EXCESS
	)	ATTORNEY'S FEES
12 JAMES M. CHAPPELL,)	
)	
13 Defendant.	)	DATE: N/A
	)	TIME: N/A

15 Based upon the Ex Parte Motion for Interim Payment of
 16 Excess Attorney's Fees in Post Conviction Proceedings (a copy
 17 of which is submitted herewith), the Court being fully advised
 18 in the premises, and good cause shown, it is hereby

19 ORDERED, ADJUDGED AND DECREED that interim payment of
 20 excess attorneys fees is granted in the amount of \$2,621.86.

21 DATED and DONE: *11th day of April 2002*

22 *Michael A. Day*
 23 DISTRICT COURT JUDGE

24 SUBMITTED BY:

25 *David M. Schieck*
 26 DAVID M. SCHIECK, ESQ.

David M. Schieck
 Attorney At Law
 302 E. Carson Ave., Ste. 600
 Las Vegas, NV 89101
 (702) 382-1844

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 APR 12 2002

COUNTY CLERK

151

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Shirley B. Williams
CLERK

21

PTAT
DAVID M. SCHIECK, ESQ.
NV BAR NO. 0824
302 E. CARSON, STE. 600
LAS VEGAS, NEVADA 89101
702-382-1844
ATTORNEY FOR CHAPPELL

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

JAMES MONTELL CHAPPELL,	)	CASE NO. C 131341
	)	DEPT. NO. XI
Petitioner,)	
)	
vs.)	
)	
THE STATE OF NEVADA,)	
)	
Respondent.	)	DATE: 4-18-02
	)	TIME: 9:00 A.M.

SUPPLEMENTAL PETITION FOR WRIT
OF HABEAS CORPUS (POST CONVICTION)
POINTS AND AUTHORITIES IS SUPPORT THEREOF

COMES NOW, Petitioner JAMES MONTELL CHAPPELL, by and through his attorney DAVID M. SCHIECK, ESQ., and hereby files this Supplemental Petition for Writ of Habeas Corpus and Supplemental Points and Authorities in Support Thereof. Petitioner is being held in custody in violation of the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States of America, and Article I, Sections 3, 6, 8 and 9 and Article IV, Section 21 of the Constitution of the State of Nevada.

STATEMENT OF THE CASE

Petitioner JAMES MONTELL CHAPPELL (hereinafter referred to

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1 as CHAPPELL) is currently in the custody of the State of Nevada
2 at Ely State Prison in Ely, Nevada pursuant to a judgement of
3 conviction and sentence of death. E.K. McDaniel is the Warden
4 of Ely State Prison.

5 CHAPPELL'S was charged by way of an Information filed on
6 October 11, 1995 with burglary, robbery with use of a deadly
7 weapon, and murder with use of a deadly weapon. The State
8 filed a Notice of Intent to seek the death penalty alleging
9 four aggravating circumstances: the murder was committed while
10 the person was engaged in the commission of or an attempt to
11 commit a robbery; the murder was committed while the person was
12 engaged in the commission of or an attempt to commit any
13 burglary or home invasion; the murder was committed while the
14 person was engaged in the commission of or an attempt to commit
15 any sexual assault; and the murder involved torture or
16 depravity of mind.

17 The jury trial commenced on October 7, 1996 and the jury
18 convicted CHAPPELL of all charges and imposed a sentence of
19 death. The District Court imposed consecutive sentences on the
20 burglary and robbery charges.

21 CHAPPELL pursued a direct appeal to the Nevada Supreme
22 Court with the conviction and sentence being affirmed on
23 December 30, 1998. Chappell v. State, 114 Nev. 1404, 972 P.2d
24 838 (1998). CHAPPELL filed for Rehearing and on March 17, 1999
25 an Order was entered Denying Rehearing. A Petition for Writ of
26 Certiorari was filed with the United States Supreme Court and
27
28

1 Certiorari was denied on October 4, 1999. The Nevada Supreme
2 Court issued it's Remittitur on October 26, 1999. CHAPPELL
3 timely filed the instant Petition for Writ of Habeas Corpus on
4 October 19, 1999.

5 STATEMENT OF THE FACTS

6 For purposes of these Supplemental Points and Authorities
7 CHAPPELL will incorporate the Facts from the decision of the
8 Nevada Supreme Court, with the caveat that CHAPPELL contends
9 that no proper investigation was conducted before either the
10 trial or penalty hearing and therefore the testimony presented
11 was virtually unopposed at trial and penalty hearing and does
12 not accurately portray the facts of the case. (See e.g.
13 Buffalo v. State, 111 Nev. 1145, 901 P.2d 647 (1995) wherein
14 the Court found that the overwhelming evidence that appeared
15 after trial was entirely different from the evidence that came
16 to light after post-conviction pleadings).

17
18 "On the morning of August 31, 1995, James Montell
19 Chappell was mistakenly released from prison in Las
20 Vegas where he had been serving time since June 1995
21 for domestic battery. Upon his release, Chappell
22 went to the Ballerina Mobile Home Park in Las Vegas
23 where his ex-girlfriend, Deborah Panos, lived with
24 their three children. Chappell entered Panos'
trailer by climbing through the window. Panos was
home alone, and she and Chappell engaged in sexual
intercourse. Sometime later that morning Chappell
repeatedly stabbed Panos with a kitchen knife,
killing her. Chappell then left the trailer park in
Panos' car and drove to a nearby housing complex.

25 The State filed an information on October 11,
26 1995, charging Chappell with one count of burglary,
27 one count of robbery with the use of a deadly weapon,
28 and one count of murder with the use of a deadly
weapon. On November 8, 1995, the State filed a

1 notice of intent to seek the death penalty. The
2 notice listed four aggravating circumstances: (1)
3 the murder was committed during the commission of or
4 an attempt to commit any robbery; (2) the murder was
5 committed during the commission of or an attempt to
6 commit any burglary and/or home invasion; (3) the
7 murder was committed during the commission of or an
8 attempt to commit any sexual assault; and (4) the
9 murder involved torture or depravity of mind.

10 Prior to trial, Chappell offered to stipulate that
11 he (1) entered Panos' trailer home through a window,
12 (2) engaged in sexual intercourse with Panos, (3)
13 caused Panos' death by stabbing her with a kitchen
14 knife, and (4) was jealous of Panos giving and
15 receiving attention from other men. The State
16 accepted the stipulations, and the case proceeded to
17 trial on October 7, 1996.

18 Chappell took the witness stand on his own behalf
19 and testified that he considered the trailer to be
20 his home and that he had entered through the
21 trailer's window because he had lost his key and did
22 know that Panos was at home. He testified that Panos
23 greeted him as he entered the trailer and that they
24 had consensual sexual intercourse. Chappell
25 testified that he left with Panos to pick up their
26 children from day care and discovered in the car a
27 love letter addressed to Panos. Chappell, enraged,
28 dragged Panos back into the trailer where he stabbed
her to death. CHAPPELL argued that his actions were
the result of a jealous rage.

The jury convicted Chappell of all charges.
Following a penalty hearing, the jury returned a
sentence of death on the murder charge, finding two
mitigating circumstances - murder committed while
Chappell was under the influence of extreme mental or
emotional disturbance and 'any other mitigating
circumstances' - and all four alleged aggravating
circumstances. The district court sentenced Chappell
to a minimum of forty-eight months and a maximum of
120 months for the burglary; a minimum seventy-two
months and a maximum of 180 months for robbery, plus
an equal and consecutive sentence for the use of a
deadly weapon; and death for the count of murder in
the first degree with the use of a deadly weapon.
The district court ordered all counts to run
consecutively. Chappell timely appealed his
conviction and sentence of death.

1 Chappell v. State, 114 Nev. 1404, 972 P.2d 838 (1998)

2 ISSUES RAISED ON DIRECT APPEAL

3 NRS 34.810(b) provides that grounds raised in a Petition
4 for Writ of Habeas Corpus should be dismissed if the grounds
5 could have been presented to the trial court, raised on direct
6 appeal or in any other proceedings taken by the Petitioner.
7 CHAPPELL hereby reasserts each of the issues raised on direct
8 appeal, both substantively as stated, and as having been denied
9 as a result of ineffective assistance of counsel in violation
10 of his State and Federal Constitutional rights.

11 On direct appeal, CHAPPELL was represented by Howard
12 Brooks of the Clark County Public Defender and raised the
13 following issues to the Nevada Supreme Court. The decision of
14 the Court as to each issue is contained in parenthesis
15 following each enumerated issue

16 1. *The trial court abused its discretion by allowing the*
17 *State to introduce evidence of prior domestic batteries by*
18 *CHAPPELL when that evidence was not relevant to matters in*
19 *issue. ("...we conclude that the record is not sufficient for*
20 *the court to consider whether the evidence was admissible under*
21 *the test for admissibility of prior bad acts evidence. In*
22 *light of the overwhelming evidence of guilt in this case,*
23 *however, we conclude that had the district court not admitted*
24 *the evidence, the result would have been the same")*

25 2. *The trial court abused it's discretion by allowing*
26 *state witnesses to testify regarding the state of mind of*
27
28

1 *Panos, thereby improperly impeaching CHAPPELL'S credibility.*

2 *(This issue was addressed only in a cursory fashion as one of a*
3 *number of issues wherein the Court stated "We have reviewed*
4 *each of these issues and conclude that they lack merit")*

5 *3. The trial court abused it's discretion by allowing the*
6 *State to introduce testimony regarding a shoplifting incident*
7 *that occurred the day after the killing. (This issue was not*
8 *addressed by the Court, but presumably falls within the holding*
9 *that other bad act evidence was harmless error despite no*
10 *evidentiary hearing)*

11 *4. The trial court abused it's discretion by allowing the*
12 *State to introduce character evidence that CHAPPELL was*
13 *unemployed and a chronic thief and this evidence was admitted*
14 *without the scrutiny of a pretrial Petrocelli hearing. (This*
15 *issue was not addressed by the Court, but presumably falls*
16 *within the holding that other bac act evidence was harmless*
17 *error despite no evidentiary hearing)*

18 *5. The cumulative effect of the trial court's evidentiary*
19 *rulings was to allow the State to introduce overwhelming*
20 *character evidence at trial, thereby denying CHAPPELL his due*
21 *process rights to a fair trial. (This issue was not addressed*
22 *by the Court, but presumably falls within the holding that*
23 *other bac act evidence was harmless error despite no*
24 *evidentiary hearing)*

25 *6. The State discriminated against the defendant by using*
26
27
28

1 *peremptory challenges to selectively exclude the only two black*
2 *persons qualified for the jury pool. (This issue was addressed*
3 *under the heading of "Additional issues raised on appeal" with*
4 *the Court stating only "We have reviewed each of these issues*
5 *and conclude that they lack merit")*

6 7. *The state failed to prove beyond a reasonable doubt*
7 *the charges of burglary, robbery and first degree murder. ("We*
8 *conclude that there is sufficient evidence to support the*
9 *aggravating circumstances for robbery, burglary and sexual*
10 *assault")*

11 8. *The trial court committed reversible error by denying*
12 *defendant's motion to strike the Notice of Intent to seek death*
13 *penalty. (This issue was addressed under the heading of*
14 *"Additional issues raised on appeal" with the Court stating*
15 *only "We have reviewed each of these issues and conclude that*
16 *they lack merit")*

17 9. *The prosecutor committed misconduct during the closing*
18 *argument by attacking the defendant's post arrest silence.*
19
20 *(This issue was not addressed by the Court)*

21 10. *The state committed prosecutorial misconduct in the*
22 *penalty phase by appealing to the jury for vengeance. (This*
23 *issue was addressed under the heading of "Additional issues*
24 *raised on appeal" with the Court stating only "We have reviewed*
25 *each of these issues and conclude that they lack merit")*

26 11. *Appellant was denied a fair penalty hearing when the*
27
28

1 State's witnesses implored the jury to impose "death" upon the
2 defendant. (This issue was addressed under the heading of
3 "Additional issues raised on appeal" with the Court stating
4 only "We have reviewed each of these issues and conclude that
5 they lack merit")

6 12. The State failed to prove beyond a reasonable doubt
7 the existence of certain aggravating circumstances. ("We
8 conclude that there is sufficient evidence to support the
9 aggravating circumstances for robbery, burglary and sexual
10 assault")

11 13. The sentence of death was excessive considering the
12 crime and the defendant. ("Pursuant to the statutory
13 requirement, and in addition to the contentions raised by
14 Chappell and addressed above, we have determined that the
15 aggravating circumstances of robbery, burglary and sexual
16 assault, found by the jury, are supported by sufficient
17 evidence. Moreover, there is no evidence in the record
18 indicating that Chappell's death sentence was imposed under the
19 influence of passion, prejudice or any arbitrary factor.
20 Lastly, we have concluded that the death sentence Chappell
21 received was not excessive considering the seriousness of this
22 crimes and Chappell as a person")
23
24
25
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1
2
3 ARGUMENT

4 I.

5 CHAPPELL IS ENTITLED TO AN
6 EVIDENTIARY HEARING ON HIS PETITION

7 It has long been the holding of the Nevada Supreme Court
8 that if a Petition for post conviction relief contains
9 allegations, which, if true, would entitle the Petitioner to
10 relief, an evidentiary hearing is required. Bolden v. State,
11 99 Nev. 181, 659 P.2d 886 (1983); Grandin v. State, 97 Nev.
12 454, 634 P.2d 456 (1981); Doggett v. State, 91 Nev. 768, 542
13 P.2d 1066 (1975).

14 It is anticipated that the State, as it usually does, will
15 ask this Court to deny CHAPPELL an evidentiary hearing and deny
16 his Petition based on the perceived strength of the State's
17 case at trial without considering the allegations of the
18 Petition. In Drake v. State, 108 Nev. 523, 836 P.2d 52 (1992)
19 the Court remanded the case for an evidentiary hearing over the
20 State's objection where trial counsel had not adequately
21 opposed a Motion in Limine filed by the State. The purpose of
22 the hearing was to determine whether counsel had sufficient
23 cause for the noted failure. Drake, 108 Nev. at 527-528.

24 The Petition filed by CHAPPELL fits squarely within the
25 parameters of the decision in Hargrove v. State, 100 Nev. 398,
26 686 P.2d 222 (1984), and contrary to the anticipated argument
27 of the State, Hargrove mandates that an evidentiary hearing be
28 granted. In Hargrove, the Nevada Supreme Court stated:

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1 "Appellant's motion consisted primarily of 'bare'
2 or 'naked' claims for relief, unsupported by any
3 specific factual allegations that would, if true,
4 have entitled him to withdrawal of his plea.
5 Specifically, appellant's claim that certain
6 witnesses could establish his innocence of the bomb
7 threat charge was not accompanied by the witness'
8 names or descriptions of their intended testimony.
9 As such, to the extent that it advanced merely
10 'naked' allegations, the motion did not entitle
11 appellant to an evidentiary hearing. See
12 Vaillancourt v. Warden, 90 Nev. 431, 529 P.2d 204
13 (1974); Fine v. Warden, 90 Nev. 166, 521 P.2d 374
14 (1974); see also Wright v. State, 619 P.2d 155, 158
15 (Kan.Ct.App. 1980) (to entitle defendant to an
16 evidentiary hearing, a post-conviction petition must
17 set forth 'a factual background, names of witnesses
18 or other sources of evidence demonstrating . . .
19 entitlement to relief')."

20 During the trial portion of the case, only three
21 witnesses were called by the defense, Bret Robello, Dr. Lewis
22 Etcoff and CHAPPELL. Robello was a neighbor and his testimony
23 was limited to the messy condition of the mobile home. As set
24 forth in the affidavit of CHAPPELL attached hereto, he had
25 requested a number of witnesses be called on his behalf. These
26 Supplemental Points and Authorities contain the names of the
27 witnesses and a description of their expected testimony. As
28 such the allegations are not "naked" and an evidentiary hearing
should be conducted.

It is respectfully urged that this Court grant an
evidentiary hearing to CHAPPELL.

II.

CLAIMS FOR RELIEF

CLAIM ONE

CHAPPELL'S conviction and death sentence are invalid under

1 the State and Federal guarantee of effective assistance of
2 counsel, due process of law, equal protection of the laws,
3 cross-examination and confrontation and a reliable sentence due
4 to the failure of trial counsel to provide reasonably effective
5 assistance of counsel. United States Constitution Amendments
6 5, 6, 8, and 14; Nevada Constitution Article I, Sections 3, 6
7 and 8; Article IV, Section 21.

8
9 The Sixth Amendment guarantees that a person accused of a
10 crime receive effective assistance of counsel for his defense.
11 The right extends from the time the accused is charged up to
12 and through his direct appeal and includes effective assistance
13 for any arguable legal points. Anders v. California, 386 U.S.
14 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The United State
15 Supreme Court has consistently recognized that the right to
16 counsel is necessary to protect the fundamental right to a fair
17 trial, guaranteed under the Fourteenth Amendment's Due Process
18 Clause. Powell v. Alabama, 287 U.S. 45, 53 S.Ct.55, 77 L.Ed.
19 158 (1932); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9
20 L.Ed.2d 799 (1963). Mere presence of counsel does not fulfill
21 the constitutional requirement: The right to counsel is the
22 right to effective counsel, that is, "an attorney who plays the
23 role necessary to ensure that the trial is fair." Strickland,
24 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 657 (1984); McMann v.
25 Richardson, 439 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d. 763
26 (1970).
27
28

1 Pre-trial investigation is a critical area in any criminal
2 case and failure to accomplish same has been held to constitute
3 ineffective assistance of counsel. The Nevada Supreme Court in
4 Jackson v. Warden, 91 Nev. 430, 537 P.2d 473 (1975) stated:

5 "It is still recognized that a primary requirement is
6 that counsel . . . conduct careful factual and legal
7 investigations and inquiries with a view toward
8 developing matters of defense in order that he make
9 informed decisions on his client's behalf both at the
10 pleading stage . . . and at trial."

11 Jackson 91 Nev. at 433, 537 P.2d at 474. The Federal Courts
12 are in accord that pre-trial investigation and preparation for
13 trial are a key to effective representation of counsel. U.S.
14 v. Tucker, 716 F.2d 576 (1983).

15 In U.S. v. Baynes, 687 F.2d 659 (1982) the Court, in
16 language applicable to this case, stated:

17 "Defense counsel, whether appointed or retained is
18 obligated to inquire thoroughly into all potential
19 exculpatory defenses and evidence, mere possibility
20 that investigation might have produced nothing of
21 consequences for the defense could not serve as
22 justification for trial defense counsel's failure to
23 perform such investigations in the first place. Fact
24 that defense counsel may have performed impressively
25 at trial would not have excused failure to
26 investigate defense that might have led to complete
27 exoneration of the Defendant."

28 In Warner v. State, 102 Nev. 635, 729 P.2d 1359 (1986) the
Nevada Supreme Court found that trial counsel was ineffective
where counsel failed to conduct adequate pre-trial
investigation, failed to properly utilize the Public Defender's
full time investigator, neglected to consult with other
attorneys although urged to do so, and failed to prepare for

1 the testimony of defense witnesses. See also, Sanborn v.
2 State, 107 Nev. 399, 812 P.2d 1279 (1991).

3 In support of CLAIM ONE CHAPPELL alleges the following
4 facts, among others to be presented at an evidentiary hearing:

5 A. Trial counsel was ineffective in failing to call
6 witnesses to testify on behalf of CHAPPELL. The only witnesses
7 called at the trial portion of the case were a next door
8 neighbor that said the house was messy, Dr. Etcoff and
9 CHAPPELL. The State's entire case was built around portraying
10 CHAPPELL as a chronic abuser, thief and individual of poor
11 character. A number of witnesses were called by the State to
12 describe the relationship between CHAPPELL and Panos and did so
13 in a fashion that was totally derogatory to CHAPPELL. Numerous
14 witnesses could have been called from Nevada, Michigan and
15 Arizona that intimately knew the relationship between them and
16 would have described it as loving and not abusive. Further
17 contrary to the testimony at trial, witnesses could have shown
18 that Panos followed CHAPPELL to Arizona, but rather she begged
19 him to come out and be with her. All of this testimony would
20 have had an impact on the State's case and corroborated the
21 defense theory that of defense that the killing was not first
22 degree murder. The witnesses, who are described in CHAPPELL'S
23 affidavit attached hereto, are as follows:

24
25 -Ernestine (Sue) Harvey. Sue was a friend of CHAPPELL and
26 Ms. Panos and could have testified as the relationship. Her
27 testimony would have greatly rebutted the testimony from the
28

1 State's witnesses that portrayed CHAPPELL as being abusive, but
2 instead had a loving relationship.

3 -Shirley Sorrell. Shirley knew Debra and CHAPPELL for
4 many years and talked with them on the phone even after they
5 moved to Arizona and then Nevada. She knew that Debra had
6 followed CHAPPELL to Arizona and the details of our
7 relationship.

8 -James C. Ford. CHAPPELL'S best friend in Michigan.
9 CHAPPELL grew up with Mr. Ford and he was around Debra and
10 CHAPPELL during the first five years of our relationship. He
11 also knew about CHAPPELL'S employment history and could have
12 testified at both the trial and the penalty hearing.

13 -Mr. Ivri Marrell was also a friend of CHAPPELL and Debra
14 in Michigan and stayed in contact with them in Arizona. He
15 could have testified to Debra's behavior and the relationship
16 with CHAPPELL.

17 -CHAPPELL'S sisters, Mrya Chappell and Carla Chappell had
18 been around Debra a lot and knew about the type of relationship
19 that they had together. They lived with Carla for a period of
20 time after the baby was born and she would babysit for them on
21 occasions.
22

23 -Chris Bardow and David Green. Both were friends of
24 CHAPPELL in Arizona and could have rebutted most of the
25 testimony that was introduced concerning the events that
26 allegedly took place in Arizona.

27 B. Trial counsel failed to timely object to the system of
28

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1 jury selection that systematically excluded African Americans
2 and wherein African Americans are under represented, as
3 described in CLAIM TWO set forth below, which is incorporated
4 by this reference. If the State asserts that the claim is
5 barred because it should have been raised at trial, CHAPPELL
6 hereby asserts that it was a Sixth Amendment violation for
7 counsel not to have timely raised the issue.

8 C. Trial counsel failed to object to unconstitutional and
9 improper jury instruction as are specifically set forth in
10 CLAIM FIVE below, and failed to offer proper and constitutional
11 instructions that did not violate CHAPPELL'S rights under the
12 Eighth and Fourteenth Amendments. CHAPPELL incorporates hereat
13 the arguments from CLAIM FIVE, below. If the State claims that
14 the failure to object at trial bars consideration of the
15 constitutionality of the discussed instructions, CHAPPELL
16 asserts that his Sixth Amendment right to effective counsel was
17 violated by the failure of trial counsel to do so.

18 D. Trial counsel failed to object and move to strike
19 overlapping aggravating circumstances that were alleged by the
20 State and utilized to unconstitutionally impose the death
21 penalty against CHAPPELL.

22 CHAPPELL herein asserts that overlapping and multiple use
23 of the same facts as separate aggravating circumstances
24 resulted in the arbitrary and capricious imposition of the
25 death penalty. Trial counsel failed to file any pretrial
26 motion challenging the aggravating circumstances, failed to
27
28

1 object at trial, failed to offer any jury instruction on the
2 matter, and the issue was not raised on direct appeal.

3 The original notice of intent to seek the death penalty
4 filed by the State on November 8, 1995, alleged the presence of
5 four (4) aggravating circumstances, i.e., the murder was
6 committed while the person was engaged in the commission of or
7 attempt to commit any robbery; the murder was committed while
8 the person was engaged in the commission of or an attempt to
9 commit any burglary; the murder was committed while the person
10 was engaged in the commission of or an attempt to commit any
11 sexual assault; and the murder involved torture or depravity of
12 mind.

13 After the penalty hearing the jury found that all four (4)
14 of the aggravating circumstances existed and found two
15 mitigating circumstances; the murder was committed while the
16 defendant was under the influence of extreme mental or
17 emotional disturbance and any other mitigating circumstance.
18 On direct appeal the Nevada Supreme Court found that there was
19 insufficient evidence to uphold a finding of torture or
20 depravity and that aggravating circumstance was invalidated.

21 Nonetheless, in essence the State was allowed to double
22 count the same conduct in accumulating three of the aggravating
23 circumstances. The robbery, burglary and sexual assault
24 aggravating circumstances are all based upon the same set of
25 operative facts and unfairly accumulated to compel the jury
26 toward the death penalty. The use of the same set of operative
27
28

1 facts to multiple aggravating circumstances in a State that
2 uses a weighing process, such as Nevada does, violates
3 principles of Double Jeopardy and deprived CHAPPELL of Due
4 Process of Law. United States Constitution, Amendments V, VII,
5 XIV; Nevada Constitution, Article I, Section 8.

6 The Double Jeopardy Clause of the Fifth Amendment
7 guarantees that no person shall "be subject for the same
8 offense to be twice put in jeopardy of life or limb." The
9 traditional test of the "same offense" for double jeopardy
10 purposes is whether one offense requires proof of an element
11 which the other does not. See, Bockburger v. U.S., 284 U.S.
12 299, 304 (1932). This test does not apply, however, when one
13 offense is an incident of another; that is, when one of the
14 offenses is a lesser included of the other. U.S. v. Dixon, 509
15 U.S. 688, 113 S.Ct. 2849, 2857 (1993); Illinois v. Vitale, 447
16 U.S. 410, 420 100 S.Ct. 2260 (1980).

17 Courts of other jurisdictions have found the use of such
18 overlapping aggravating circumstances to be improper. In
19 Randolph v. State, 463 So.2d 186 (Fla. 1984) the court found
20 that the aggravating circumstances of murder while engaged in
21 the crime of robbery and murder for pecuniary gain to be
22 overlapping and constituted only a single aggravating
23 circumstance. See also Provence v. State, 337 So.2d 783 (Fla.
24 1976) cert. denied 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065
25 (1977).

26
27 The California Supreme Court in People v. Harris, 679 P.2d
28

1 433 (Cal. 1984) found that evidence showed that the defendant
2 traveled to Long Beach for the purpose of robbing the victim
3 and committed a burglary and two murders to facilitate the
4 robbery. In determining that the use of both robbery and
5 burglary as special circumstances at the penalty hearing was
6 improper the court stated:

7 "The use in the penalty phase of both of these
8 special circumstances allegation thus artificially
9 inflates the particular circumstances of the crime
10 and strays from the high court's mandate that the
11 state 'tailor and apply its law in a manner that
12 avoids the arbitrary and capricious infliction of the
13 death penalty' (Godfrey v. Georgia, (1980) 446 U.S.
14 420 at P.28, 100 S.Ct 1759 at p. 1764, 64 L.Ed.2d
15 398. The United States Supreme Court requires that
16 the capital - sentencing procedure must be one that
17 'guides and focuses the jury's objective
18 consideration of the particularized circumstances of
19 the individual offense and the individual offender
20 before it can impose a sentence of death.' (Jurek v.
21 Texas (1976) 428 U.S. 262 at pp. 273-74, 96 S.Ct.
22 2950 at pp 2956-2957), 49 L.Ed.2d 929). That
23 requirement is not met in a system where the jury
24 considers the same act or an indivisible course of
25 conduct to be more than one special circumstance."

18 Harris, 679 P.2d at 449.

19 Other States that prohibit a "stacking" or "overlapping"
20 of aggravating circumstances include Alabama (Cook v. State,
21 369 So.2d 1251, 1256 (Ala. 1978) disallowing use of robbery and
22 pecuniary gain) and North Carolina (State v. Goodman, 257
23 S.E.2d 569, 587 (N.C. 1979) disallowing using both avoiding
24 lawful arrest and disrupting of lawful government function as
25 aggravating circumstances).

26 It can be anticipated that the State will argue that any
27 error that occurred as a result of the inappropriate stacking
28

1 of the aggravating circumstances was harmless error in this
2 case because of the existence of other valid aggravating
3 circumstances. The Nevada statutory scheme has two components
4 that would seem to foreclose the existence of harmless error at
5 a penalty hearing. First the jury is required to proceed
6 through a weighing process of aggravation versus mitigation and
7 second, the jury has the discretion, even in the absence of
8 mitigation to return with a life sentence irregardless of the
9 number of aggravating circumstances. Who can say whether the
10 numerical stacking of aggravating circumstances was the
11 proverbial straw that broke the camel's back and tipped the
12 scales of justice tempered by compassion in favor of the death
13 penalty?

14 "When there is a 'reasonable possibility that the
15 erroneous submission of an aggravating circumstance
16 tipped the scales in favor of the jury finding that
17 the aggravating circumstances were 'sufficiently
18 substantial' to justify the imposition of the death
19 penalty,' the test for prejudicial error has been
20 met. (citation omitted) Because the jury arrived at
21 a sentence of death based upon weighing . . . and it
22 is impossible now to determine the amount of weight
23 ascribed to each factor, we cannot hold the error of
24 submitting both redundant aggravating circumstances
25 to be harmless."

26 State v. Ouisenberry, 354 S.E.2d 446 (N.C. 1987). A
27 reweighing is especially inappropriate in this case as the
28 Nevada Supreme court has already thrown out one aggravator that
went into the decision to impose the death penalty.

Justice Gunderson in his concurring opinion in Moses v.
State, 91 Nev. 809, 815, 544 P.2d 424 (1975) stated with

1 respect to harmless error that:

2 "...judicial resort to the harmless error rule, as in
3 this case, erodes confidence in the court system,
4 since calling clear misconduct [or error] 'harmless'
5 will always be viewed by some as 'sweeping it under
6 the rug.' (We can at best, make a debatable judgment
7 call.)"

8 The stacking of aggravating circumstances based on the
9 same conduct results in the arbitrary and capricious imposition
10 of the death penalty, and allows the State to seek the death
11 penalty based on arbitrary legal technicalities and artful
12 pleading. This violates the commands of the United States
13 Supreme Court in Gregg v. Georgia, 428 U.S. 153 (1976) and
14 violates the Eighth Amendment to the United States Constitution
15 and the prohibition in the Nevada Constitution against cruel
16 and unusual punishment and that which guarantees due process of
17 law.

18 Trial counsel was deficient in failing to strike the
19 duplicate and overlapping aggravating circumstances and
20 appellate counsel should have raised the issue on direct appeal
21 and urged plain error, even in the absence of contemporaneous
22 objection at trial.

23 E. Trial counsel failed to object to numerous instances
24 of improper closing argument at the trial and penalty hearing.
25 On direct appeal only two instances of improper argument were
26 raised, that the state was commenting on CHAPPELL'S post arrest
27 silence and that it was improper to argue that CHAPPELL be
28 shown the same mercy he showed to Panos.

1 1. During her closing argument at the penalty hearing the
2 prosecutrix improperly argued that it was not appropriate for
3 the jury to consider rehabilitation stating:

4 "And this is a penalty hearing. It's a penalty
5 hearing because a violent murder occurred on August
6 31st of 1995. So it's not appropriate for you to be
7 considering rehabilitation. This isn't a
8 rehabilitation hearing." (11 ROA 2017)

9 It is improper for the prosecution to make arguments that
10 minimize the existence and utilization of mitigating
11 circumstances in the weighing process. Recently in Hollaway v.
12 State, 116 Nev. Ad. Op. 83 (2000) the Nevada Supreme Court
13 reversed a death penalty based in part on the argument of the
14 prosecution against the existence of mitigation. In Hollaway
15 the Court stated:

16 "The United States Supreme Court has held that
17 to ensure that jurors have reliably determined death
18 to be the appropriate punishment for a defendant,
19 'the jury must be able to consider and give effect to
20 any mitigating evidence relevant to a defendant's
21 background and character or the circumstances of the
22 crime.' *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989).
23 In *Penry*, the absence of instructions informing the
24 jury that it could consider and give effect to
25 certain mitigating evidence caused the Court to
26 conclude that

27 'the jury was not provided with a vehicle
28 for expressing its reasoned moral response
29 to that evidence in rendering its
30 sentencing decision. Our reasoning in
31 [*Lockett v. Ohio*, 438 U.S. 586 (1978) and
32 *Eddings v. Oklahoma*, 455 U.S. 104 (1982),]
33 thus compels a remand for resentencing so
34 that we do not risk that the death penalty
35 will be imposed in spite of factors which
36 may call for a less severe penalty.'"

37 Hollaway, 116 Nev. Ad. Op. 83 at page 10. The Court then went

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IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

JAMES CHAPPELL,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

S.C. CASE NO. 61967

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APPEAL FROM DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS
(POST-CONVICTION) AND SENTENCE OF DEATH
EIGHTH JUDICIAL DISTRICT COURT
THE HONORABLE JUDGE CAROLYN ELLSWORTH, PRESIDING

~~~~~  
APPELLANT'S APPENDIX TO THE OPENING BRIEF  
VOLUME X  
~~~~~

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on this 18th day of November, 2013. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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