

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAVIER RIGHETTI,)
)
 Appellant,)
)
 vs.)
)
 THE STATE OF NEVADA,)
)
 Respondent.)

NO. 73015

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APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

- A. Statute which grants jurisdiction to review the judgment: **NRS 177.015, NRS 177.055** (automatic appeal of first degree murder conviction where the death penalty was imposed). In this case, the Appellant was convicted of First Degree Murder with Use of a Deadly Weapon and nine other felonies. The Appellant was sentenced to death for the murder conviction. (21 Record on Appeal 4690-92).¹
- B. Judgment of Conviction filed May 8, 2017 (21: 4686-92); Notice of Appeal filed by the District Court May 8, 2017, (21: 4701-02).
- C. This appeal is from a final judgment entered May 8, 2017. (21: 4686-92).

¹The Record on Appeal, prepared by the Clerk of the District Court, consists of 11199 pages organized into 51 volumes. After the first citation, all references to the Record will be in parentheses and will identify the volume number followed by the page number of the citation.

ROUTING STATEMENT

- D. Pursuant to NRAP 17, this matter is assigned to the Nevada Supreme Court because Rule 17(a)(2) of the Nevada Rules of Appellate Procedure provides that an appeal of a criminal conviction where a death penalty is imposed shall be heard and decided by the Nevada Supreme Court

ISSUES

- I. THE DISTRICT COURT VIOLATED DUE PROCESS AND FAIR TRIAL GUARANTEES BY SETTING ASIDE A VALID GUILTY PLEA TO THE FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON CHARGE ALLEGED IN AN INDICTMENT BASED ON ALTERNATIVE THEORIES OF GUILT; BY SETTING ASIDE THAT VALID PLEA WITHOUT ANY LEGAL JUSTIFICATION, THE COURT DENIED RIGHETTI THE BENEFIT OF ELIMINATING AGGRAVATING CIRCUMSTANCES PURSUANT TO MCCONNELL V. STATE.

When the State charges a crime and alleges alternative theories by which a jury can find liability for the alleged crime, it is axiomatic that a jury can make a finding of guilt based on any one of the alternative theories; therefore, logically, a finding of guilt based on a plea of guilty by a defendant can be based on any one of the alternative theories.

The District Court accepted the pleas entered by Righetti to all the crimes alleged in the Indictment, and the Court was aware that Righetti was pleading guilty to a certain theory of liability for murder, an option available to a defendant just as it is available to a jury.

The State, present when the entry of pleas occurred, aware of what was happening, insisted that the District Court go beyond the mere acceptance of the pleas and adjudicate the Defendant guilty of all the crimes. When the District Court adjudicated the Defendant guilty of all the crimes, the Court heightened the burden for any motion to withdraw or set aside the guilty pleas.

The State's Motion to Set Aside the Guilty Pleas failed to argue any cognizable legal theories to set aside the guilty pleas.

The state of mind of the State when a defendant pleads guilty without negotiations is irrelevant to the proceedings and may not be relied upon in setting aside the guilty pleas.

When the District Court set aside a validly entered plea of guilty to Count 10 alleging murder based upon nothing except the State's unhappiness with the state of the case, the District Court's decision effectively denied Righetti the benefit of *McConnell v. State*. *McConnell* should have eliminated six of the State's fourteen alleged aggravating circumstances.

II. THE DISTRICT COURT VIOLATED DUE PROCESS AND FAIR TRIAL GUARANTEES BY SETTING ASIDE THE FELONY MURDER GUILTY PLEA TO MURDER WITHOUT ALSO SETTING ASIDE THE FELONY PLEAS WHICH CONSTITUTED THE BASIS FOR THE FELONY MURDER LIABILITY.

III. THE EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THE TWO ALLEGED AGGRAVATING CIRCUMSTANCES OF TORTURE AND MUTILATION; AND THE TORTURE AND MUTILATION AGGRAVATORS MUST BE DISMISSED PURSUANT TO *MCCONNELL* BECAUSE THE FIRST DEGREE MURDER CONVICTION WAS BASED ON TORTURE.

The Failure to Prove the Torture or Mutilation Aggravating Circumstances

The Torture or Mutilation Aggravator Failed to Narrow Death Penalty Eligibility Because Torture Also Served as an Element of First Degree Murder; The Torture or Mutilation Aggravator Should Be Stricken.

IV. RIGHETTI'S DEATH SENTENCE WAS ARBITRARILY IMPOSED BECAUSE IT WAS BASED ON THE DOUBLE COUNTING OF AGGRAVATING FACTORS; AN ARBITRARY DEATH SENTENCE BASED ON DOUBLE-COUNTING AGGRAVATORS VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS' PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

STATEMENT OF THE CASE

A grand jury charged Javier Righetti, in an Indictment filed October 7, 2011, with ten crimes.

Five allegations were based on acts perpetrated against alleged victim Mikaela Kitchen on March 8, 2011: Attempted Robbery, Battery With Intent to Commit Sexual Assault by Strangulation, First Degree Kidnapping, Attempted Sexual Assault With a Child Under Sixteen Years of Age, and Sexual Assault With a Child Under Sixteen Years of Age. (1: 1-3).

Five allegations were based on acts perpetrated, on September 2, 2011, against alleged victim Alyssa Otremba: Robbery With Use of a

Deadly Weapon, First Degree Kidnapping With Use of a Deadly Weapon, two counts of Sexual Assault With A Child Under Sixteen Years of Age With Use of a Deadly Weapon, and Murder With Use of a Deadly Weapon. (1:3-6).

Righetti plead not guilty to the charges on October 20, 2011. (1: 90-92).

The State filed, on October 14, 2011, a Notice of Intent to Seek the Death Penalty alleging fourteen (14) Aggravating Circumstances (1:12-20):

- (1) The murder was committed by a person who had been convicted, prior to the penalty hearing of this case, of a felony involving the use or threat of violence to another person. **NRS 200.033(2)(b)**. (1:12). (The prior conviction was for Attempt Robbery against Mikaela Kitchen, which is alleged in Count 1 of the Indictment in this case (1: 2)).
- (2) The murder was committed by a person who had been convicted, prior to the penalty hearing of this case, of a felony involving the use or threat of violence to another person. **NRS 200.033(2)(b)**. (1: 13). (The prior conviction was for Battery With Intent To Commit Sexual Assault, which is alleged in Count Two of the Indictment in this case (1: 2)).

- (3) The murder was committed by a person who had been convicted, prior to the penalty hearing of this case, of a felony involving the use or threat of violence to another person. **NRS 200.033(2)(b).** (1:13-14). (The prior conviction was for First Degree Kidnapping Mikaela Kitchen, which is alleged in Count 3 of the Indictment in this case (1:2)).
- (4) The murder was committed by a person who had been convicted, prior to the penalty hearing of this case, of a felony involving the use or threat of violence to another person. **NRS 200.033(2)(b).** (1:14). (The prior conviction was for Attempted Sexual Assault With a Child Under Sixteen Years of Age, against Mikaela Kitchen, which is alleged in Count Four of the Indictment in this case (1:3)).
- (5) The murder was committed by a person who had been convicted, prior to the penalty hearing of this case, of a felony involving the use or threat of violence to another person. **NRS 200.033(2)(b).** (1:14-15). (The prior conviction was for Sexual Assault With a Child Under Sixteen Years of Age, against Mikaela Kitchen, which is alleged in Count Five of the Indictment in this case. (1:3)).

- (6) The murder was committed while the person was engaged in the commission of, or flight after, committing any robbery and the person charged killed the person murdered. (1:15-16). (This alleged aggravator concerned the circumstances relevant to the death of Alyssa Otremba).
- (7) The murder was committed while the person was engaged in the commission of, or flight after, committing any kidnapping in the first degree and the person charged killed the person murdered. (1:16-17). (This alleged aggravator concerned the circumstances relevant to the death of Alyssa Otremba).
- (8) The person subjected or attempted to subject the victim of the murder to nonconsensual sexual penetration immediately before, during or immediately after the commission of the murder pursuant to **NRS 200.033(13)**. (1: 17). (This alleged aggravator concerned the circumstances relevant to the death of Alyssa Otremba).
- (9) The murder was committed by a person who had been convicted, prior to the penalty hearing of this case, of a felony involving the use or threat of violence to another person. **NRS 200.033(2)(b)**. (1: 17-18). (This aggravator is based on the charge of Sexual

Assault of Alyssa Otremba, which is alleged in Count 8 of the Indictment in this case. (1: 4)).

(10) The person subjected or attempted to subject the victim of the murder to nonconsensual sexual penetration immediately before, during or immediately after the commission of the murder pursuant to **NRS 200.033(13)**. (1:18). (This alleged aggravator concerned the sexual assault of Alyssa Otremba alleged in Count 8 of the Indictment in this case. (1: 4)).

(11) The murder was committed by a person who had been convicted, prior to the penalty hearing of this case, of a felony involving the use or threat of violence to another person. **NRS 200.033(2)(b)**. (1:18). (This alleged aggravator concerned the sexual assault of Alyssa Otremba alleged in Count 9 of the Indictment (1:4)).

(12) The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody. **NRS 200.033(5)**. (1:19). (This allegation arises from the circumstances of Alyssa Otremba's death).

(13) The murder involved torture or mutilation of the victim. **NRS 200.033(8)**. (1: 19). (This allegation arises from the circumstances of Alyssa Otremba's death).

(14) The murder involved torture or mutilation of the victim. **NRS 200.033(8)**. (1: 20). (This allegation arises from the circumstances of Alyssa Otremba's death).

On February 11, 2016, the Appellant plead guilty to all ten charges alleged in the Indictment. (4: 747-68). The District Court accepted the guilty plea and adjudged the Appellant guilty of the crimes.

On February 16, 2016, the Appellant filed a Motion to Strike Aggravating Circumstances and Evidence in Aggravation, (4:701), which argued that Righetti's guilty plea to Murder, on February 11, 2016, was based on a felony murder theory of liability. (4: 707). Pursuant to **McConnell v. State**, 120 Nev. 1043, 102 P.3d 606 (2004), the State's alleged aggravating circumstances may not be based on the same felonies which were the basis for the felony murder liability resulting in the first degree murder conviction. Therefore, aggravating circumstances identified above as Numbers 6, 7, 8, 9, 10, and 11, should be stricken and no evidence of those aggravating circumstances should be allowed in a penalty proceeding. (4: 708).

The State opposed the Motion to Strike (4: 814) and moved to set aside the guilty plea to the murder (4: 859).

On March 17, 2016, the District Court set aside the guilty plea to the murder charge. (6: 1164).

On June 17, 2016, the Appellant filed a Petition for A Writ of Prohibition/Mandamus, which sought a Supreme Court Order reinstating the February 11 guilty plea to the murder charge based on the felony murder theory. The Supreme Court denied the Petition. **Righetti v. Eighth Jud. Dist. Ct.**, 133 Nev., Adv. Op. 7, 388 P.3d 643 (2-16-17).

The case proceeded to trial on March 6, 2017 (50: 11242) on the sole charge of Murder With Use of a Deadly Weapon. The jury returned a guilty verdict on that charge on March 16, 2017 (51: 11263).

A penalty proceeding commenced March 17, 2017 (51: 11265) and the jury returned a verdict, on March 21, 2017, that the State had proved beyond a reasonable doubt certain aggravating circumstances, that certain mitigating circumstances existed, and that the mitigating circumstances did not outweigh the aggravating circumstances. (51: 11271). The jury imposed the sentence of death for the murder charge. (51: 11271).

On May 8, 2017, the District Court sentenced Righetti to death for the murder charge and imposed prison sentences for the other nine felony

convictions. (51: 11273-75). A Judgment of Conviction and Notice of Appeal were filed that same day. (21: 4686-92, 4701-01).

STATEMENT OF THE FACTS

The Appellant plead guilty to nine of the ten charged felonies in this case. The Appellant plead guilty to the murder charge and the plea was set aside over the Appellant's objection; The substantive facts of the crimes are not at issue in this appeal.

When deciding how to frame the allegations in the pleadings in this case, the State decided to charge multiple theories, as alternatives, to support the Murder With Use of a Deadly Weapon charge in Count 10 of the Indictment. (1: 5).

The Indictment alleged the killing was an act of "willful, deliberate and premeditated" murder. **NRS 200.030(1)(a)**.

As an alternative to the premeditation and deliberation theory, the State alleged the killing was "perpetrated by means of torture." **NRS 200.030(1)(a)**.

As an additional alternative to the other theories, the State alleged the killing was "committed during the perpetration or attempted perpetration of robbery and/or kidnapping and/or sexual assault. **NRS 200.030(1)(b)**. This was a felony murder allegation.

Logically, when a crime is charged using multiple alternative theories, guilt can be found for the charge based on guilt of any one of the alternatively charged theories. See generally **Bolden v. State**, 121 Nev. 908, 124 P.3d 191 (2005)(questioned by other cases on other grounds)(When alternative theories of liability are presented to a jury, guilt can be found based on any one of the alternatives).

Naturally, such logic should also apply when a defendant decides to plead guilty to a charged crime. Absent a statutory prohibition against a defendant having the same right as a jury in responding to a charging document, the same rules should apply to the jury and defendant.

Therefore, having originally plead, on October 20, 2011, not guilty to all the charges in the Indictment (1:91-92), Righetti filed a motion, on January 22, 2016, to change his pleas, plead guilty to all the charges, and proceed to a penalty phase proceeding in this death penalty murder case. (2: 288-94).

At a hearing on February 11, 2016, Righetti told the Court he wanted to plead guilty to all the charges in the Indictment without the benefit of negotiations. (4: 747).

After canvassing Righetti about his age, education, understanding of the charges in the Indictment, and the consequences of pleading guilty, the Court questioned Righetti about his guilt of the ten charges. (4: 748-750).

The Court asked the representatives of the State, who were present, to describe the potential sentences for each of the charged crimes. The State complied with the request and stated the potential consequences for each of the ten pleas. (4: 751-56).

Before accepting the pleas, the Court told Righetti he had to tell the Court what he did that made him guilty of each count. (4: 757). In other words, the Court wanted the record to reflect a factual basis for each plea.

Righetti provided a factual statement supporting liability for each of the first nine crimes alleged in the Indictment. (4: 758-63).

Regarding Count 10, Murder With Use of a Deadly Weapon, where the State alleged felony murder and murder during torture as theories supporting liability, Righetti said, “[D]uring the course of the kidnapping, sexual assault, and robbery, I stabbed Alyssa Otremba causing her death.” (4: 764).

The Court replied, “And you did that—that act was fillful, deliberate, and premeditated—it’s the other theory—okay, it was perpetrated by means of torture, and/or committed during eh perpetration or attempt to

perpetration [sic] of robbery and/or kidnapping, and/or sexual assault?" (4:764).

"Yes," Righetti replied. (Id.).

So the District Court accepted Righetti's guilty plea to Murder With Use of a Deadly Weapon knowing the plea was based on two of the three possible prongs outlined by the State in the charging documents. The District Court knew the plea was NOT based on a deliberate and premeditated killing theory.

Before accepting the plea, the Court addressed the State directly:

THE COURT: Is the State satisfied with that?

MR. PESCI: Yes, Judge.

THE COURT: Okay. (4:764).

After discussing more aspects of a guilty plea to the Murder With Use of a Deadly Weapon charge, the Judge again addressed the State:

THE COURT: Is the State satisfied?

MR. PESCI: Yes. (4:766).

The State, knowing the Defendant had plead guilty pursuant to two of the three murder theories alleged by the State in the Indictment, aware that they had waived any objection to the circumstances of the plea, asked the Court to not only accept the plea but to adjudicate the Defendant guilty of the crimes. (4: 766).

The Court accepted the pleas of guilty and adjudicated Righetti guilty of the ten crimes in the Indictment to which had plead guilty. (4: 767-68).

On February 16, 2016, the Defense filed a Motion To Strike Aggravating Circumstances and Evidence in Aggravation (4:701) which sought to strike, from the State's Notice of Intent to Seek the Death Penalty, the following six aggravating circumstances alleged in the Notice of Intent to Seek the Death Penalty:

(6) The murder was committed while the person was engaged in the commission of, or flight after, committing any robbery and the person charged killed the person murdered. (1:15-16). (This alleged aggravator concerned the circumstances relevant to the death of Alyssa Otremba).

(7) The murder was committed while the person was engaged in the commission of, or flight after, committing any kidnapping in the first degree and the person charged killed the person murdered. (1:16-17). (This alleged aggravator concerned the circumstances relevant to the death of Alyssa Otremba).

(8) The person subjected or attempted to subject the victim of the murder to nonconsensual sexual penetration immediately before, during or immediately after the commission of the murder pursuant to NRS

200.033(13). (1: 17). (This alleged aggravator concerned the circumstances relevant to the death of Alyssa Otremba).

(9) The murder was committed by a person who had been convicted, prior to the penalty hearing of this case, of a felony involving the use or threat of violence to another person. **NRS 200.033(2)(b).** (1: 17-18). (This aggravator is based on the charge of Sexual Assault of Alyssa Otremba, which is alleged in Count 8 of the Indictment in this case. (1: 4)).

(10) The person subjected or attempted to subject the victim of the murder to nonconsensual sexual penetration immediately before, during or immediately after the commission of the murder pursuant to **NRS 200.033(13).** (1:18). (This alleged aggravator concerned the sexual assault of Alyssa Otremba alleged in Count 8 of the Indictment in this case. (1: 4)).

(11) The murder was committed by a person who had been convicted, prior to the penalty hearing of this case, of a felony involving the use or threat of violence to another person. **NRS 200.033(2)(b).** (1:18). (This alleged aggravator concerned the sexual assault of Alyssa Otremba alleged in Count 9 of the Indictment (1:4)).

The logic supporting Righetti's Motion to Strike derived from **McConnell v. State**, 121 Nev. 25, 107 P.3d 1287 (2005), which held that the State cannot base an aggravating circumstance in a death penalty

prosecution on the same facts which are the basis of a felony murder prosecution in the same case. For example, if the Defendant was convicted of felony murder based on a robbery, then the State cannot allege as an aggravating circumstance the fact the Defendant was committing that same robbery when the killing occurred.

Righetti's motion, if successful, would have eliminated six of the fourteen alleged aggravators. (As noted below, this motion was rendered moot when the State responded to this motion by moving to have the guilty plea to the murder set aside; the District Court granted the State's motion and set aside the guilty plea).

On February 19, 2016, the Defense filed a Motion to Strike the Torture and Mutilation Aggravators, two additional aggravators. (4: 776). If this motion was granted, along with the motion to strike the other aggravators, then a total of eight of the fourteen alleged aggravators would have been eliminated. The District Court denied the motion on March 17, 2016. (6: 1145).

On February 23, 2016, the State filed an Opposition to the Motion to Limit the State's Evidence of Aggravation. (4: 820).

On March 2, 2016, the State filed a Motion to Reject [sic] the Defendant's Guilty Plea to Murder Count. (4: 859). Since the Court had

already accepted the guilty plea to murder, and the Court, at the State's insistence, had adjudicated Righetti guilty of Murder With Use of a Deadly Weapon, the State should have filed a Motion to Set Aside the Court's Adjudication of Guilt. A hearing was held March 17, 2016 (6: 1139, 1145-69), and the District Court granted the State's motion. (6: 1164).

The Court made no sua sponte effort to deal with the obvious problem created by this procedure and ruling: The Defendant had plead guilty to, and the Court had accepted, a felony murder scenario based on four related guilty pleas. The felony murder scenario, as alleged by the State, was based on the following: the Robbery With Use of a Deadly Weapon charge in Count 6 (which also formed the basis for the Sixth Aggravating Circumstance alleged in the Notice of Intent); the First Degree Kidnapping with Use of a Deadly Weapon alleged in Count 7 (which also formed the basis for the Seventh Aggravating Circumstance alleged in the Notice of Intent); the Sexual Assault of a Child alleged in Count 8 (which also formed the basis for the Eighth and Tenth Aggravating Circumstances alleged in the Notice of Intent); and the Sexual Assault of a Child alleged in Count 9 (which also formed the basis for the Ninth and Eleventh Aggravating Circumstances alleged in the Notice of Intent).

When the Court accepted the guilty plea to Murder with Use based on the Felony Murder scenario, the Murder plea was inextricably bound up with the related guilty pleas for Counts 6 (Robbery With Use of a Deadly Weapon), 7 (First Degree Kidnapping With Use of a Deadly Weapon), 8 (Sexual Assault of a Child) and 9 (Sexual Assault of a Child).

When different counts and distinct guilty pleas are based on crimes which depend on each other, the setting aside of one guilty plea requires the setting aside of all other inextricably linked guilty pleas. In other words, if the District Court intended to set aside a felony murder guilty plea based on other felonies to which guilty pleas were also made, then the District Court had a duty to set them all aside.

In this case, the District Court set aside the felony murder guilty plea but never considered the intertwined nature of the other felony guilty pleas (Counts 6, 7, 8, and 9 alleged in the same Indictment). The Court allowed all the pleas to remain intact except the plea to felony murder.

The Defense filed a Petition for a Writ of Mandamus with the Nevada Supreme Court arguing that the District Court abused its discretion in setting aside the guilty plea to the felony murder theory of First Degree Murder. The Supreme Court denied the Petition. **Righetti v. Eighth Jud. Dist. Ct.**, 133 Nev., Adv. Op. 7, 388 P.3d 643 (2-16-17).

Under these circumstances, the case proceeded to trial. The Defense informed the Court that the status of the case where the District Court allowed the pleas to Counts 6, 7, 8, and 9 to stand, placed the Defense in an impossible situation. (11: 2301). How could Righetti defend against the charge of felony murder when he had plead guilty to all the felonies that make the killing a felony murder? In fact, any attempt by the Defense to “defend against” the murder charge could only be counter-productive. In effect, by refusing to set aside all of Righetti’s guilty pleas, the District Court denied Righetti a fair trial because no defendant could attempt to defend against the felony murder charge when the defendant had plead guilty to all the felonies supporting the felony murder charge. The District Court’s refusal to set aside all the guilty pleas placed the Defense in a situation where no effective defense to the murder charge could possibly be made. (11: 2302).

The case proceeded to trial, and as expected, the jury convicted Righetti of First Degree Murder With Use of a Deadly Weapon.

A penalty proceeding commenced March 17, 2017 (51: 11265) and the jury returned a verdict, on March 21, 2017, that the State had proved beyond a reasonable doubt certain aggravating circumstances.

Among the aggravating circumstances were four based, ultimately, upon the factual allegations that Righetti had twice sexually assaulted the murder victim in this case. Righetti had plead guilty to twice sexually assaulting Alyssa Otremba. Putting aside the felony murder multiplicity arguments, the law, generally, allows an aggravating circumstance based upon a prior crime of violence. Since sexual assault is a crime of violence, then Righetti's two admitted acts of sexual assault would constitute two aggravating circumstances in the penalty decision. But the law also allows an aggravating circumstance for a conviction for a crime of violence. Since the State affirmatively asked the District Court to adjudicate Righetti guilty of the two counts of sexual assault to which he plead guilty, the State argued that the two convictions, based upon the same factual circumstances, the two sexual assaults, would constitute additional aggravating circumstances. The jury bought these arguments and Righetti faced four aggravating circumstances based on the two instances of sexual assault to which he admitted.

The jury also found that certain mitigating circumstances existed, and that the mitigating circumstances did not outweigh the aggravating circumstances. (51: 11271). The jury imposed the sentence of death for the murder charge. (51: 11271).

On May 8, 2017, the District Court sentenced Righetti to death for the murder charge and imposed prison sentences for the other nine felony convictions. (51: 11273-75). A Judgment of Conviction and Notice of Appeal were filed that same day. (21: 4686-92, 4701-01).

SUMMARY OF THE ARGUMENT

The District Court violated Due Process and Fair Trial guarantees by vacating a valid plea of guilty to murder without any legal justification for setting aside the plea. By doing so, the District Court denied the Defense the benefit of *McConnell v. State*, which prohibited the State relying on Aggravating Circumstances which duplicated the crimes that rendered the Defendant guilty of First Degree Murder based on a felony murder theory. When the Court set aside the validly entered plea of guilty to murder, the Court should have set aside those pleas which were intertwined with the murder plea because the murder plea was based solely on felony murder relying on certain associated and intertwined crimes. This situation violated Due Process and Fair Trial guarantees. Furthermore, certain aggravating circumstances should be vacated because they were duplicative of each other or were not proved by the evidence.

ARGUMENT

I. THE DISTRICT COURT VIOLATED DUE PROCESS AND FAIR TRIAL GUARANTEES BY SETTING ASIDE A VALID GUILTY PLEA TO THE FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON CHARGE ALLEGED IN AN INDICTMENT BASED ON ALTERNATIVE THEORIES OF GUILT; BY SETTING ASIDE THAT VALID PLEA WITHOUT ANY LEGAL JUSTIFICATION, THE COURT DENIED RIGHETTI THE BENEFIT OF ELIMINATING AGGRAVATING CIRCUMSTANCES PURSUANT TO MCCONNELL V. STATE

The United States and Nevada Constitutions' guarantee Due Process in criminal proceedings. **U.S. Constitution, Fifth Amendment; Nevada Constitution, Article 1, Section 8(5)**. Due Process means procedures are fair and rules that protect or benefit persons accused of crime are enforced. **In Re Murchison**, 349 U.S. 133, 136 (1955) cited in **Mosley v. Comm'n on Judicial Discipline**, 117 Nev. 371, 22 P.3d 655 (2001). Due Process requires that procedures must comport with the deepest notions of what is fair and right and just. **Solesbee v. Balkcom**, 339 U.S. 9 (1950). **Riley v. Supreme Court**, 763 F. Supp. 446 (D. Nev. 1991).

When the State charges a crime and alleges alternative theories by which a jury can find liability for the alleged crime, it is axiomatic that a jury can make a finding of guilt based on any one of the alternative theories; therefore, logically, a finding of guilt based on a plea of guilty by a defendant can be based on any one of the alternative theories.

When the State initiates a criminal proceeding, the State can do so by drafting a Criminal Complaint to be filed in Justice Court, which will be followed by the drafting of an Information to be filed in District Court after the magistrate has found probable cause supporting the allegation. **NRS 171.206, 172.015.** Or the State may draft an Indictment, **NRS 172.005,** which is presented to a grand jury, and the Indictment is filed in District Court after the grand jury has found probable cause supporting the allegation. **Franklin v. State**, 89 Nev. 382, 513 P.2d 1252 (1973).

The State's decision to allege certain crimes, in the Complaint, Information, or Indictment, is the key decision in the commencement of criminal proceedings.

One decision the State makes is whether to allege alternative crimes. For example, the State might allege Attempt Murder With Use of a Deadly Weapon and Battery With Use of a Deadly Weapon, both based on the same act towards the same victim. In this scenario, the State will allege the two alternative counts in two separate counts. **NRS 173.075(2); Williams v. State**, 118 Nev. 536, 50 P.3d 1116 (2002). **Jenkins v. Dist. Ct.**, 109 Nev. 337, 339-40, 849 P.2d 1055, 1057 (1993).

The State may also decide to allege one crime based on multiple theories. This is common in murder cases, particularly with murder

allegations based on a deliberate and premeditated killing, or, alternatively, a felony murder theory.

When the State alleges multiple theories in a single count, they are generally alleged as alternative theories. Liability can be based on a finding of guilt on one theory. See generally **Bolden v. State**, 121 Nev. 908, 124 P.3d 191 (2005)(questioned by other cases on other grounds)(When alternative theories of liability are presented to a jury, guilt can be found based on any one of the alternatives).

Theoretically, an allegation of criminal conduct could charge mandatory non-alternative theories. This type of allegation is rare in criminal justice pleading.

For a defendant or a jury considering the charge, the difference between alternative pleading and mandatory non-alternative pleading is whether the theories are alleged in a conjunctive (“and”) or disjunctive (“or”) manner.

In the present case, it is undisputed that the charge of Murder in Count 10 of the Indictment alleged alternative theories of liability. (1:5).

There is no law in Nevada, or elsewhere, that requires a jury to find guilt on all alleged theories when the State has alleged alternative theories. The jury need only find guilt on one theory to render a guilty verdict.

In this case, the Defendant faced three alternative theories for first degree murder liability: that the killing was a premeditated and deliberate killing based on **NRS 200.030(1)(a)**; that the killing was “perpetrated by means of torture” pursuant to **NRS 200.030(1)(a)**; or that the killing “was committed during the perpetration or attempted perpetration of robbery and/or kidnapping and/or sexual assault” based on **NRS 200.030(1)(b)**. The third theory was the felony murder allegation.

The law is clear that a jury can pick one theory and find guilt based on the one theory. Because of the very nature of the meaning of “alternative theory” and the fact that what is acceptable for a factfinder, the jury, should also be acceptable for the party facing the charges, a defendant can certainly plead guilty to one theory of an array of theories constituting alternative paths to criminal liability.

To do otherwise, to have one standard submitted to the jury (guilt can be based on any of the alleged theories) and another standard (guilt can only be based on acceptance of all the alleged theories) would obviously be grossly unfair. That unfairness would violate the deepest notions of what is fair and right and just. **Solesbee v. Balkcom**, 339 U.S. 9 (1950). **Riley v. Supreme Court**, 763 F. Supp. 446 (D. Nev. 1991).

The District Court accepted the pleas entered by Righetti to all the crimes alleged in the Indictment, and the Court was aware that Righetti was pleading guilty to a certain theory of liability for the murder charge, an option available to a defendant just as it is available to a jury.

A criminal defendant is free to enter a plea of guilty without negotiations. *United States v. Hare*, 269 F.3d 859, 868 (2001). The Nevada Supreme Court has stated that a court must seriously consider any proffered plea. *NRS 174.035, Sandy v. Fifth Jud. Dist. Ct.*, 113 Nev. 435, 935 P.2d 1148 (1997).

A court considering a plea of guilty by a defendant has a constitutional duty to ensure a defendant understands the consequences of the plea and the nature of the charged offenses. With that information, the court can determine that a defendant is freely, voluntarily, and knowingly pleading guilty. *State v. Freese*, 116 Nev. 1097, 13 P.3d 442 (2000).

It is undisputed, in this case, that the Defendant plead guilty to all ten felonies alleged in the Indictment, and the District Court accepted the guilty pleas. It is also undisputed that the Defendant plead guilty to First Degree Murder With Use of a Deadly Weapon, in Count 10, based on the felony murder theory alleged by the State. It

is undisputed that the District Court was aware of what the Defendant was doing, and the District Court accepted the plea.

The State, present when the entry of pleas occurred, aware of what was happening, insisted that the District Court go beyond the mere acceptance of the pleas and adjudicate the Defendant guilty of all the crimes. When the District Court adjudicated the Defendant guilty of all the crimes, the Court heightened the burden for any motion to withdraw or set aside the guilty pleas.

It is undisputed in this case that the Defense filed a motion, on January 22, 2016, informing the Court and the State that Righetti intended to change his plea and plead guilty to all the crimes alleged in the Indictment. (2: 288).

Subsequently, on February 11, 2016, Righetti appeared in Court and plead guilty to the ten felonies alleged by the State in the Indictment. (4: 749-52).

After the entry of the pleas, the State affirmatively requested (4: 766) that the Court move the status of the pleas forward to an adjudicated judgement of guilt. The District Court complied with the State's request and adjudicated the Defendant guilty of all ten crimes to which guilty pleas had been accepted. (4: 767-69).

When the Court adjudicated the Defendant guilty, the status of the case changed. Prior to adjudication, a plea may be withdrawn or

set aside at the discretion of the District Court. **NRS 176.165; State v. Adams**, 94 Nev. 503, 581 P.2d 868 (1978).

After the adjudication, the District Court only has jurisdiction to set aside the judgment based on manifest injustice. **NRS 176.165**. Manifest injustice is only present when the injustice is obvious and evident.

The State's Motion to Set Aside the Guilty Pleas failed to argue any cognizable legal theories to set aside the guilty pleas.

A guilty plea is presumptively valid. When entered with the advice of counsel, a party has a "heavy burden" to show that a plea was not knowingly, intelligently, or voluntarily entered. **Molina v. State**, 120 Nev. 185190, 87 P.3d 533 , 537 (2004).

The State filed a Motion to "Reject" the Defendant's Guilty Plea to Murder on March 2, 2016. (4: 859). (The State should have filed a Motion to Set Aside the Guilty Plea; the District Court had already accepted the Guilty Plea and, at the State's insistence, adjudged Righetti guilty). Here are the points made in the State's pleading:

1. The District Court has the discretion to not accept a guilty plea. (Absolutely true. But moot when the Defendant has

already plead guilty and the State has urged the Court to convert the plea into a judgment).\

2. No negotiation occurred in this case. (True, but irrelevant).
3. Righetti had no right to plead guilty. (True, but irrelevant).
4. Defense counsel tricked the State and the Court. (No evidence supports this bald assertion).

The essence of the State's motion is simple: the State did not like the fact that the Defense plead guilty. The State offered not one cogent reason why the Righetti's guilty plea to murder, reduced to Judgment at the State's insistence, should be set aside.

The state of mind of the State when a defendant pleads guilty without negotiations is irrelevant to the proceedings and may not be relied upon in setting aside the guilty pleas.

The message of the State's motion was simple: the State did not like the fact that Righetti plead guilty without negotiations. But the State does not have the power to control every aspect of a criminal case. When there are no negotiations, it really does not matter whether the State is happy about what the Defense has done. The State's state of mind is irrelevant. Furthermore, because the State affirmatively sought a an adjudication of guilt for Righetti based on the guilty plea, the State is estopped from now going back and saying, oh, we don't like this.

*When the District Court set aside a validly entered plea of guilty to Count 10 alleging murder based upon nothing except the State's unhappiness with the state of the case, the District Court's decision effectively denied Righetti the benefit of *McConnell v. State*. *McConnell* should have eliminated six of the State's fourteen alleged aggravating circumstances.*

When Righetti plead guilty to a felony murder theory of liability in Count 10, he was entitled to the benefit of *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004), where the Nevada Supreme Court considered whether an aggravator sufficiently narrows death penalty eligibility when the facts supporting the aggravator were an element supporting a felony murder first degree murder conviction. The Supreme Court ruled as follows:

We therefore deem it impermissible under the United States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated.

Id at 1069. Applying *McConnell* to the facts of this case, six aggravating circumstances should have been dismissed because they also constituted the crimes upon which the felony murder were predicated. They included Aggravating Circumstance Six (1:15-16) (Murder committed during robbery), Circumstance Seven (1:16-17) (Murder committed during kidnapping), Circumstance Eight (1:17) (Murder committed during sexual assault), Circumstance Nine (1:17-18) (Murder committed during sexual

assault), Circumstance Ten (1: 18)(Sexual Assault), and Circumstance Elevent (1:18) (Sexual Assault).

Righetti entered a valid plea to felony murder based on robbery, kidnapping, and sexual assault. The plea was absolutely valid because a defendant is entitled to plead guilty without negotiations to any theory of liability when the State alleges alternative theories of liability. (Similarly, a jury could find guilt based on any theory of liability). The State was present when the plea was validly entered, the State affirmatively moved to transform the guilty plea into a judgement. The Defense moved to strike the State's six (out of 14) alleged aggravating circumstances based on McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004). Then, the State filed a nonsense motion alleging no cognizable legal theory to set aside the plea (or "reject it" in the State's words), and the District Court set aside the plea based on no cognizable legal reason. By doing so, the District Court thwarted the intention of McConnell. The District Court's ruling violated Due Process and Fair Trial Guarantees. The murder conviction in this case should be reversed and the case remanded for a new trial.

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II. THE DISTRICT COURT VIOLATED DUE PROCESS AND FAIR TRIAL GUARANTEES BY SETTING ASIDE THE FELONY MURDER GUILTY PLEA TO MURDER WITHOUT ALSO SETTING ASIDE THE FELONY PLEAS WHICH CONSTITUTED THE BASIS FOR THE FELONY MURDER LIABILITY.

Righetti plead guilty to ten felonies, and his plea of guilty to murder, based on a felony murder theory that the District Court accepted, was based, in part, on pleas to other felonies beyond the murder. In other words, a number of the pleas made on February 11, 2016 were intertwined with each other. (See generally 4:743-52). Under these circumstances, when the District Court set aside the guilty plea to murder, Federal and State Due Process required the Court to set aside all the pleas because the pleas were not made in isolation of each other. They were intertwined.

When the Court failed to set aside all the pleas, the Court created an untenable situation where the posture of the Defense in this case was impossible. (See generally the record at 11:2301).

Based on Due Process and Fair Trial guarantees, all the pleas in this case should have been set aside if the Court intended to set any of the pleas aside.

III. THE EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THE TWO ALLEGED AGGRAVATING CIRCUMSTANCES OF TORTURE AND MUTILATION; AND THE TORTURE AND MUTILATION AGGRAVATORS MUST BE ELIMINATED PURSUANT TO MCCONNELL BECAUSE THE FIRST DEGREE MURDER CONVICTION WAS BASED ON TORTURE.

When a criminal defendant is convicted of first degree murder, the defendant will be sentenced to one of the following: a term of 50 years with parole eligibility after 20 years; life with the possibility of parole after 20 years; life without the possibility of parole; or, under certain circumstances, death. **NRS 200.030(4)**. If the State has filed a Notice of Intent to Seek the Death Penalty, the convicted defendant is eligible for the death penalty if the State has proven, beyond a reasonable doubt, that at least one aggravating circumstance exists, **Nunnery v. State**, 127 Nev. 749, 263 P.3d 235 (2011), **Gallego v. State**, 117 Nev. 348, 23 P.3d 227 (2001), and any mitigating circumstances found by the jury do not outweigh the aggravating circumstances. **NRS 200.030(4)(a)**. Under no circumstance is a death sentence ever mandatory.

The Failure to Prove the Torture or Mutilation Aggravating Circumstances

In this case, the State alleged, in the Notice of Intent to Seek the Death Penalty, the following two aggravators (in addition to twelve others):

(13)The murder involved torture or mutilation of the victim. NRS
200.033(8). (1: 19).

(14)The murder involved torture or mutilation of the victim. NRS
200.033(8). (1: 20).

The torture or mutilation aggravator exists only when the evidence proves the killer intended to inflict pain for pain's sake or inflict punishment for sadistic pleasure. **Domingues v. State**, 112 Nev. 683, 917 P.2d 1364 (1996); **Rippo v. State**, 113 Nev. 1239, 946 P.2d 1017 (1997). The acts which allegedly constitute "torture or mutilation" cannot be the acts that caused the abuse or injury that caused the death. **Smith v. State**, 110 Nev. 1009, 879 P.2d 60 (1994). In **Chappell v. State**, 114 Nev. 1403, 972 P.2d 838 (1998), the defendant stabbed the victim numerous times, but because those stab wounds caused the death, they did not constitute "torture or mutilation."

Regarding the 13th Aggravator, the State's Notice of Intent claimed the "torture or mutilation" of the victim occurred "by the said Defendant stabbing the head, face and body of the said Alyssa Otremba with a knife over eighty (80) times and/or by the said Defendant carving the letters "LV" or some other symbol into the body of the said Alyssa Otremba. (1: 19). As demonstrated in **Chappell v. State**, the act of stabbing a victim multiple

times, when that stabbing caused the death of the victim, is not torture or mutilation. Instead, the stabbing is the act of killing.

Regarding the 14th Aggravator, the State's Notice of Intent claimed the act which provided the factual foundation for the "torture or mutilation" of the victim was "by the said Defendant pouring gasoline and/or an unknown flammable liquid on the head, face, and body of the said Alyssa Otremba and thereafter setting her head, face and body on fire." (1:20). The evidence in this case is undisputed that Righetti burned the body of Alyssa Otremba hours after Righetti had attacked her in the desert and left her dead. Otremba died after being stabbed, according to the State, approximately 80 times. She was not alive some five to six hours later, when Righetti returned to burn the body. Torture cannot be based on acts that occurred after the victim has died. **Byford v. State**, 116 Nev. 215, 341, 994 P.2d 700 (2000).

The evidence in this case was clear that Righetti killed Otremba by stabbing her multiple times, causing her death. As explained in *Chappell v. State*, that is not torture or mutilation. Similarly, the alleged aggravating circumstance based on Righetti returning to the body many hours after the killing with the intent to burn the body had nothing to do with torture or mutilation. A post-mortem burning of the body is not torture or mutilation. **Byford v. State**, 116 Nev. 215, 341, 994 P.2d 700 (2000).

Under these circumstances, the two Aggravating Circumstances based on Torture or Mutilation found by the jury should be vacated. The penalty phase sentence of death should be overturned and a new penalty phase should occur so a jury can properly weigh aggravating and mitigating circumstances and render a sentence not based on arbitrary unproven factors.

The Torture or Mutilation Aggravator Failed to Narrow Death Penalty Eligibility Because Torture Also Served as an Element of First Degree Murder; The Torture or Mutilation Aggravator Should Be Stricken.

The Eighth and Fourteenth Amendments to the United States Constitution prohibit the infliction of cruel and unusual punishments. A death sentence is “Unusual” if it is arbitrarily imposed. Death sentences are arbitrarily imposed where the scheme to identify who is eligible for the ultimate sentence does not guide the sentencer’s discretion and narrow the class of persons eligible for the death penalty. **Zant v. Stephens**, 462 U.S. 862, 877 (1983). These same rules govern Nevada’s death penalty scheme. **Nevada Constitution, Article 1, Section 6. McConnell v. State**, 120 Nev. 1043, 102 P.3d 606 (2004).

In **McConnell v. State**, 120 Nev. 1043, 102 P.3d 606 (2004), the Nevada Supreme Court considered whether an aggravator sufficiently narrows death penalty eligibility when the facts supporting the aggravator

were an element supporting a felony murder first degree murder conviction.

The Supreme Court ruled as follows:

We therefore deem it impermissible under the United States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated.

Id at 1069.

In the present case, the two "Torture or Mutilation" aggravating circumstances were based on the fact that Righetti stabbed the victim multiple times, killing the victim. Righetti also carved letters into the dead woman's body. And Righetti burned the woman's body many hours after he killed her. But the State also used these same circumstances to allege First Degree Murder. The Indictment premises Righetti's first degree murder liability, in part, on the allegation the murder was done "by means of torture" pursuant to **NRS 200.030(1)(a)**. This allegation is not the felony murder allegation, so this argument is not precisely concurrent with the McConnell situation, but the State based two aggravating circumstances on the precise same allegation that resulted in the first degree murder conviction. By doing so, the scheme did not narrow the class of persons eligible for the death penalty and the resulting death sentence was rendered

arbitrary. The "Torture or Mutilation" Aggravating Circumstances should be stricken.

The penalty phase sentence of death should be overturned and a new penalty phase should occur so a jury can properly weigh aggravating and mitigating circumstances.

IV. RIGHETTI'S DEATH SENTENCE WAS ARBITRARILY IMPOSED BECAUSE IT WAS BASED ON THE DOUBLE COUNTING OF AGGRAVATING FACTORS; AN ARBITRARY DEATH SENTENCE BASED ON DOUBLE-COUNTING AGGRAVATORS VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS' PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

The United States Constitution prohibits the imposition of cruel and unusual punishment. United States Constitution, Eighth Amendment. The Eighth Amendment applies to the States through the Fourteenth Amendment's Due Process Clause. Robinson v. California, 370 U.S. 660, 666 (1962). A death sentence constitutes cruel and unusual punishment when arbitrarily imposed. Gregg v. Georgia, 428 U.S. 153 (1976).

In Nevada's death penalty scheme, a jury must weigh aggravating circumstances against mitigating circumstances. If the mitigating circumstances outweigh the aggravating circumstances, a death sentence cannot be imposed. If mitigating circumstances do not outweigh the

aggravating circumstances, then the jury has the discretion to impose the death penalty. **NRS 200.030.**

A legitimate aggravating circumstance must not duplicate another aggravating circumstance. When one factual circumstance is counted twice, then the penalty process becomes arbitrary and unfair.

Such double counting of aggravating factors, especially under a weighing scheme has a tendency to skew the weighing process and creates the risk that the death sentence will be imposed arbitrarily and thus, unconstitutionally. When the same aggravating factor is counted twice, the defendant is essentially condemned twice for the same culpable act, which is inherently unfair.

United States v. McCullah, 76 F.3d 1087, 1111 (10th Cir. 1996) cited in **Allen v. Woodford**, 395 F.3d 979, 1013 (9th Cir. 2005).

The test for whether one aggravating circumstance improperly duplicates another is whether one circumstance is subsumed within another.

United States v. McCullah, 76 F.3d 1087 (10th Cir. 1996).

In the present case, the State alleged two aggravating circumstances (Circumstance 8 (1:17) and 10 (1:18) based on the two sexual assaults that Righetti admitted committing against Alyssa Otremba. Those two Aggravators are, on their face, valid.

But the State also alleged an additional Aggravating Circumstance (Circumstance 9 (1:17-18)) based on the fact that Righetti had not only committed the sexual act describe in Circumstance 8, but he was convicted

for that same conduct. So the State alleged two aggravators based on the first sexual assault by Righetti against Otremba: One for the act, and one for being convicted of the act.

The State did the same thing with the second sexual assault committed by Righetti against Otremba. The State alleged Circumstance 10 based on the second sexual assault by Righetti; and the State then alleged an additional Aggravating Circumstance based on the fact that Righetti was convicted for the second sexual assault. (Aggravating Circumstance 11 (1: 18)).

The result of this charging was that the State alleged four Aggravating Circumstances based on two factual events. If the test for whether an Aggravating Circumstance is duplicative of another is whether the facts of one circumstance are subsumed within another, then it is obvious that the two acts of sexual assault are subsumed within the felony convictions based on those two sexual crimes.

The jury found all four Aggravating Circumstances valid.

Because we have four Aggravating Circumstances based on two factual events, the weighing required by Nevada's death penalty scheme was skewed, biased, and arbitrary. And that was unfair and unconstitutional.

Two of the four Aggravating Circumstances based on the sexual assaults against Otremba should be vacated. Because appellate judges do not know what any single jury would do under different circumstances, the Penalty Phase sentence of death should be reversed and the matter should be remanded for a new Penalty Phase.

CONCLUSION

In view of the above, the Appellant respectfully asks this Court to reverse the convictions in this case and reverse the sentence of death.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 size font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

Proportionately spaced, has a typeface of 14 points or more and contains 42 pages which does not exceed the 80 page limit.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 12 day of April, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 12 day of April, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM LAXALT
STEVEN S. OWENS

HOWARD S. BROOKS

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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BY /s/ Carrie M. Connolly
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