IN THE SUPREME COURT OF THE STATE OF NEVADA

JAVIER RIGHETTI,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 73015

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

HOWARD S. BROOKS
Deputy Public Defender
Nevada Bar #003374
309 South Third Street, #226
Las Vegas, Nevada 89155
(702) 455-4685

Counsel for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

ADAM PAUL LAXALT
Nevada Attorney General
Nevada Bar #012426
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

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ROUTING STATEMENT

This appeal is presumptively assigned to the Nevada Supreme Court pursuant to NRAP 17(a)(2) as it is a direct appeal from a judgment of conviction resulting in a sentence of death.

STATEMENT OF THE ISSUES

1. Whether Appellant was entitled to select the theories of First Degree Murder to which he intended to plead guilty.
2. Whether the district court erred in not sua sponte setting aside Appellant's guilty pleas as to the remaining counts pertaining to Alyssa Otremba.
3. Whether the torture or mutilation aggravator was properly charged.
4. Whether there was "double-counting" of the sexual assault aggravators.

STATEMENT OF THE CASE

On October 7, 2011, Javier Righetti ("Appellant") was charged by way of Indictment with Count 1 – Attempted Robbery (Felony – NRS 193.330, 200.380);

Count 2 – Battery With Intent to Commit Sexual Assault By Strangulation (Felony – NRS 200.400(4)); Count 3 – First Degree Kidnapping (Felony – NRS 200.310, 200.320); Count 4 – Attempted Sexual Assault With a Child Under Sixteen Years of Age (Felony – NRS 193.330, 200.364, 200.366); Count 5 – Sexual Assault With a Child Under Sixteen Years of Age (Felony – NRS 200.364, 200.366); Count 6 – Robbery With Use of a Deadly Weapon (Felony – NRS 200.380, 193.165); Count 7 – First Degree Kidnapping With Use of a Deadly Weapon (Felony – NRS 200.310, 200.320, 193.165); Counts 8 and 9 – Sexual Assault With a Child Under Sixteen Years of Age With Use of a Deadly Weapon (Felony – NRS 200.364, 200.366, 193.165); Count 10 – Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165). [1] Appellant's Appendix, Vol. 1 ("1 AA") at 1-9; 50 AA 11188-89.

On October 14, 2011, the State filed a Notice of Intent to Seek Death Penalty, listing fourteen aggravating circumstances. 1 AA 12-21.

On March 13, 2015, Appellant filed a Motion to Exclude Juvenile Records. 2 AA 235-38. The State filed an Opposition on March 20, 2015. 2 AA 255-57. On

[1] The count of Murder with Use of a Deadly Weapon was charged under three alternative theories: that "said killing [was] (1) willful, deliberate and premeditated; and/or (2) perpetrated by means of torture; and/or (3) committed during the perpetration or attempted perpetration of robbery and/or kidnapping and/or sexual assault." 1 AA 5.

June 25, 2015, the court denied Appellant's motion. 2 AA 271-74; 50 AA 11208. The Order denying the motion was filed on July 8, 2015. 2 AA 269-70.

On March 16, 2015, the State filed a Notice of Evidence in Aggravation, adding evidence of Appellant's juvenile records as Evidence of Other Relevant Circumstances in the Penalty Phase. 2 AA 139-54.

On March 24, 2015 the court granted a fourth defense-requested continuance, and reset trial for March 8, 2016. 2 AA 267; 50 AA 11204.

On January 22, 2016, Appellant filed a Motion to Change Plea. 2 AA 288-94.

On January 22, 2016, Appellant filed a Motion to Sever Counts, requesting that his charges pertaining to victim Mikaela Kitchen be severed from the counts pertaining to Alyssa Otremba. 2 AA 295-304. The State filed its opposition on February 4, 2016. 3 AA 611-22. On February 9, 2016, the court denied the motion. 5 AA 1110-14; 50 AA 11209-10. The Order denying Appellant's motion was filed on February 18, 2016. 4 AA 774-75.

On January 22, 2016, Appellant also filed a Motion to Suppress Defendant's Statement to Police. 2 AA 305-447. The State filed an opposition on February 4, 2016. 3 AA 587-610. On February 9, 2016, the court denied the motion. 5 AA 1114-18; 50 AA 11209-10. The Order denying Appellant's motion was filed on February 18, 2016. 4 AA 774-75.

On January 28, 2016, Appellant filed a Motion to Strike Notice of Intent to Seek Death Based on the Unconstitutionality of Nevada's Death Penalty Sentencing Scheme. 3 AA 476-559. The State opposed the motion on February 23, 2016. 4 AA 818-19.

On February 4, 2016, Appellant filed a Motion to Bifurcate Penalty Phase. 3 AA 623-29. The State filed its opposition on February 8, 2016. 3 AA 634-38.

On February 8, 2016, Appellant filed several bench briefs pertaining to voir dire. 3 AA 631-33, 639-59.

On February 11, 2016, Appellant agreed to plead guilty to all the charges in the Indictment, but strategically and surreptitiously – by communicating non-verbally with the district court – avoided an allocution at the plea canvass as to the theory of willful, deliberate, and premeditated first degree murder. 4 AA 743-73; 50 AA 11211-13.

On February 16, 2016, Appellant filed a Motion to Limit State's Evidence Presented in Support of Aggravation. 3 AA 660—4 AA 700. That same day, Appellant also filed a Motion to Strike Aggravating Circumstances and Evidence in Aggravation, attempting to strike six aggravators pursuant to McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004), with Appellant claiming that Appellant only pleaded guilty to First Degree Murder under a felony murder theory, and not a willful, deliberate and premeditated theory. 4 AA 701-42. On February 23, 2016,

the State filed its oppositions to both motions. 4 AA 814-17, 820-33. The court heard and denied the motions on February 25, 2016. 4 AA 875—5 AA 905; 5 AA 905-18; 5- AA 11216-19.

On February 19, 2016, Appellant filed a Motion to Strike Torture and Mutilation Aggravators, claiming that the facts of the case did not constitute 'torture.' 4 AA 776-813. The State filed its opposition on March 14, 2016. 5 AA 1096-1107. On March 17, 2016, the court denied Appellant's motion to strike the torture and mutilation aggravators. 6 AA 1141-45.

On March 2, 2016, the State filed a "Motion to Reject the Defendant's Guilty Plea to the Murder Count Entirely or In the Alternative to Set the Murder Count for Trial on the Theory of Willful, Deliberate, and Premeditated Murder." 4 AA 859-72. Appellant filed his opposition on March 11, 2016. 5 AA 950-1095.

On March 17, 2016, the court granted the State's motion, and rejected Appellant's plea as to Count 10. 6 AA 1139-69, 1164. Appellant filed a Motion to Stay Trial on August 23, 2018, until the Nevada Supreme Court ruled on Appellant's Writ of Prohibition/Mandamus. 6 AA 1347-50. The district court granted the stay on September 6, 2016. 6 AA 1164-68; 8 AA 1721-22.

On August 23, 2016, Appellant filed a Motion for Atkins Hearing, arguing Appellant was "mentally retarded" for purposes of imposing the death penalty under the Eighth Amendment. 6 AA 1340-46; 7 AA 1352—8 AA 1696. The State filed

its opposition to the motion on September 2, 2016. 8 AA 1697-1715. On September 6, 2016, the district court granted the motion in part, and filed its Order Granting in Part and Denying in Part Defendant's Motion for an Atkins hearing on September 16, 2016. 8 AA 1718-23; 1724-25.

On February 8, 2017, Appellant filed a Motion in Limine in order to allow the defense to tell the jury about the facts and circumstances of the guilty plea and its rejection by the court. 8 AA 1739—9 AA 1873.

On February 8, 2017, Appellant also filed a Motion for Review of Jury Questionnaire, requesting that a new jury questionnaire be provided to a new jury pool. 9 AA 1874-77. The State filed its opposition on February 14, 2017. 9 AA 1904-07. On February 22, 2017, the district court denied the motion. 11 AA 2297-

On February 9, 2017, Appellant filed a "Motion in Limine for a Fair Trial," claiming that his guilty pleas as to Counts 6 through 9 foreclosed the possibility of a fair trial. 9 AA 1878-93. The State filed its opposition on February 14, 2017. 9 AA 1908-11. The State indicated that it would be willing to go forward with trial on the First Degree Murder without admitting any evidence of Appellant's pleas as to Counts 6 through 9. 11 AA 2299-03, 2307. On February 22, 2017, the district court denied the motion. 11 AA 2299-2308; 50 AA 11233-35.

On February 9, 2017, Appellant filed a Motion to Continue Atkins Hearing. 9 AA 1894-98. The State filed its opposition on February 14, 2017. 9 AA 1900-

03. On February 22, 2017, the district court denied the motion. 11 AA 2299-2308; 50 AA 11233-35.

On February 16, 2017, the Nevada Supreme Court issued its order denying Appellant's Petition, ruling that Appellant did not have the right to choose the theories of liability to which he could plead. Righetti v. Eighth Judicial Dist. Court, 134 Nev. __, 388 P.3d 643 (2017).

On February 21, 2017, Appellant filed a Bench Memorandum on Atkins. 9 AA 1919-25. On February 21 and February 22, 2017, Appellant filed two Addendums to Atkins Motion. 9 AA 1926-38. The Atkins hearing took place on February 22 and 23, 2017. 9 AA 1970—10 AA 2033; 11 AA 2309—12 AA 2529. The district court found that, based on the evidence presented, Appellant was not intellectually disabled under NRS 174.098(7). 10 AA 2033-34. The court's Order re: Atkins Hearing was filed on March 6, 2017. 10 AA 2093-94.

On February 27, 2017, Appellant filed a Motion in Limine to Present Atkins to Jury in Bifurcated Penalty Phase. 9 AA 1939-51. The State filed its opposition on March 3, 2017. 10 AA 2084-92.

On March 1, 2017, Appellant filed a Motion to Reconsider Request to Bifurcate the Penalty Phase. 10 AA 2039-72. The State opposed the motion on March 3, 2017. 10 AA 2079-83.

On March 2, 2017, Appellant filed a Motion to Compel Application of the Rules of Evidence to Penalty Hearing. 10 AA 2073-78.

Trial began on March 6, 2017. 10 AA 2095. On March 9, 2017, the State filed an Amended Indictment, charging Appellant with one count of Murder With Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165). 14 AA 2980-82. The jury was empaneled on March 9, 2017. 14 AA 3078.

On March 8, 2017, Appellant filed an "Objection to the Trial Phase Process and Offer of Proof as to the Defense's Voir Dire," claiming that Appellant could not plead innocence as to Counts 6 through 9 due to his guilty pleas on those counts, and that as a result of these pleas, the State had no obligation to prove the underlying felonies beyond a reasonable doubt; additionally, that it was an unfair burden on Appellant to disallow him from explaining to the jury that he had pleaded guilty on Counts 6 through 9. 13 AA 2741-44. On March 9, 2017, Appellant also filed an "Objection to the Trial Phase Process and Offer of Proof as to the Defense's Opening Statement." 14 AA 2975-78. In this motion, Appellant argued that his inability to explain his guilty pleas as to Counts 6 through 9 "will negatively impact the jury against [Appellant] during penalty," and that it was an unfair burden on Appellant "to allow the state to proceed to trial on count 10 when [Appellant] has already pled guilty to counts 6-9." 14 AA 2977. On March 10, 2017, in response to the defense's

"offers of proof," the court pointed out that it never ruled that the defense could not present a theory of defense. See 15 AA 3223-25; 50 AA 11253-54.

On March 16, 2017, the jury returned a verdict finding Appellant guilty of First Degree Murder with Use of a Deadly Weapon, unanimously finding that the murder was (1) willful, deliberate, and premeditated, (2) committed during the perpetration or attempted perpetration of robbery, (3) committed during the perpetration or attempted perpetration of kidnapping, and (4) committed during the perpetration or attempted perpetration of sexual assault. 16 AA 3453-54.

The penalty phase began on March 17, 2017. 17 AA 3681. On March 21, 2017, the jury returned a verdict imposing a sentence of death. 20 AA 4490-91. The jury returned a Special Verdict, unanimously finding the eleven aggravating circumstances listed in the Special Verdict beyond a reasonable doubt. 20 AA 4290-92, 4490-91.[2] The jury also returned a Special Verdict, finding the existence of twenty mitigating circumstances amongst the thirty-six listed in the Special Verdict form. 20 AA 4293-95.

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[2] As detailed infra, Appellant repeatedly claims that the jury found four aggravating circumstances based upon the two sexual assault incidents to which Alyssa was subjected by Appellant. AOB at 21, 22, 39-42. Appellant's assertions misrepresent the record: as demonstrated by the Special Verdict and penalty phase Jury Instruction No. 6, **eleven** aggravating circumstances – and not fourteen – were presented to the jury – only two of which pertained to Appellant's two sexual assaults on Alyssa. 19 AA 4265-66; 20 AA 4290-92. The Judgment of Conviction and Warrant of Execution also only include the **eleven** aggravating circumstances found by the jury. 21 AA 4676-92, 4693-96.

On May 8, 2017, Appellant was adjudicated guilty of Count 10, and sentenced as follows: as to Count 1 – to 36 to 120 months in the Nevada Department of Corrections; as to Count 2 – to life without the possibility of parole; as to Count 3 – to life with the possibility of parole after 5 years; as to Count 4 – to four (4) to twenty (20) years; as to Count 5 – to twenty-five (25) years to life, consecutive to Count 4; as to Count 6, to 72 to 180 months plus a consecutive 72 to 180 months for the deadly weapon enhancement; as to Count 7, to life with the possibility of parole after five years, plus a consecutive term of 36 to 240 months for the deadly weapon enhancement; as to Count 8 – to twenty-five (25) years to life and a consecutive term of 36 to 240 months for the deadly weapon enhancement; as to Count 9 – to twenty-five (25) years to life and a consecutive term of 36 to 240 months for the deadly weapon enhancement; and as to Count 10, pursuant to the jury verdict, to death, plus a consecutive 36 to 240 months for the deadly weapon enhancement; all counts to run consecutive. 21 AA 4705-14. The Judgment of Conviction was filed on May 8, 2017. 21 AA 4676-92.

Appellant filed a Notice of Appeal on May 8, 2017. Appellant's Opening Brief was filed on April 12, 2018. The State responds herein.

STATEMENT OF THE FACTS

On Friday September 2, 2011, Alyssa Otremba stayed home sick from Arbor View High School. 14 AA 3131. Between 5 p.m. and 6 p.m., Alyssa texted a

classmate, Cory Pinotti, asking him to lend her a textbook for the weekend. 14 AA 3131-32, 3134. She and Cody originally agreed to meet at the City Stop gas station, by the I-95 freeway. 14 AA 3132. Cory was late, and Alyssa texted him that, since her phone's battery was going to die, she would head home if she did not hear from him. 14 AA 3135-37. Cory later noticed several missed phone calls from Alyssa before 6:30 p.m. 14 AA 3135-37. When Cory tried calling Alyssa back, Alyssa's phone went straight to voicemail. 14 AA 3137.

On September 3, 2011, at approximately 6 p.m., Kaylene Konold and her boyfriend, Antonio, were out searching for Alyssa with their search and rescue dogs. 14 AA 3139-40. They started searching in the area around the I-95 freeway, accessing the west side through the tunnels. 14 AA 3141-43. Kaylene testified that Antonio pulled the dogs back and called 911 when they came across something in a desert 'wash' that "looked like an animal," but that was, in reality, Alyssa's bare stomach. 14 AA 3144. Alyssa's shirt was pulled up over the stomach, and she was not wearing pants. 14 AA 3144; 15 AA 3190-91. LVMPD Crime Scene Analyst William Speas testified that Alyssa's face, chest, legs and vaginal area had been burned, with focused burning on the legs and the vaginal area. 15 AA 3199-3200. A blood trail led from the street to Alyssa's body, and several rocks covered in Alyssa's blood surrounded the body. 15 AA 3199, 3343.

Clark County coroner Lary Simms, performed the autopsy of Alyssa on Monday, September 5, 2011. 16 AA 3479. Alyssa's right leg and vaginal area had been severely burned, as were her face and upper chest. 16 AA 3481, 3484, 3487, 3491. Alyssa had been stabbed at least eighty (80) times with a single-edged weapon, with alternating lethal and non-lethal, and alternating deep and shallow stab wounds. 16 AA 3482-83, 3484-86. Alyssa had suffered a large number of shallow or superficial stab wounds all over her body. 16 AA 3492. Seventy-five percent of the stab wounds were in Alyssa's right cheek, right head and right neck, as well as in her left chest and left thigh. 16 AA 3482. Alyssa had over four stab wounds to her face, at least fifteen in the upper left chest area, multiple stab wounds on her left thigh, and multiple stab wounds to Alyssa's abdomen. 16 AA 3483-91. The stab wounds were both antemortem and postmortem, although the majority of the stab wounds to Alyssa's left leg were postmortem. Id. Dr. Simms testified that two of the wounds were fatal: one stab wound penetrated her brain through her ear, and one stab wound damaged Alyssa's jugular vein, which would have led her to bleed out within a few minutes. 16 AA 3485-87. Appellant had also attempted to carve a geometric pattern into Alyssa's right hip post-mortem. 16 AA 3500. Due to aortic blood resulting from the stabbing to her chest, one of Alyssa's lungs had started collapsing before she died. 16 AA 3500-01. The cause of death was multiple stab wounds, and the manner of death was homicide. 16 AA 3500.

Dr. Simms also recovered the tip of a knife from Alyssa's left skull, which was later found to match the knife recovered at Appellant's house that was covered in Alyssa's blood. 15 AA 3288-89, 3294-96, 3335-36; 16 AA 3487, 3510-11.

Elizabeth Morales' boyfriend, Daniel Ortiz, was Appellant's friend and classmate at Arbor View High School. 14 AA 3147; 15 AA 3157. On Friday, September 2, 2011, Elizabeth and Daniel were out on a date from 10 p.m. to 1:30 a.m. 14 AA 3148-49, 3159. Throughout the evening, Appellant repeatedly called Daniel, approximately every five to ten minutes. 15 AA 3151-52, 3160-61. While driving home from their date, Daniel answered the phone, and Appellant told Daniel to come over to Appellant's house, without Elizabeth. 15 AA 3152, 3163. Elizabeth testified that Daniel dropped her off at her house, telling her that Appellant may have killed someone. 15 AA 3152. Daniel drove over to Appellant's house, at 7964 Willow Pines Drive, and was greeted at the door by Appellant. 15 AA 3167, 3240. Daniel testified that Appellant was acting a little strange, but "more mellow" than normal. 15 AA 3167. Appellant led Daniel to the backyard, and told him that "he had done a lick," meaning he had robbed someone. 15 AA 3168. Appellant explained that he was walking the streets, saw a girl with a cell phone, and tried to rob her. Id. When the girl refused to give him her cell phone, Appellant told Daniel he "merked" – or murdered – her. 15 AA 3169-70. Daniel originally did not believe Appellant. 15 AA 3170.

After fifteen minutes or so, Daniel left Appellant's house to go to the 7-Eleven. 15 AA 3171-72. Appellant asked Daniel to give him a ride to an unknown location, after stopping by the gas station. Id. Appellant took a black duffel bag and a flashlight with him. 15 AA 3173. Daniel stopped at the 7-Eleven to buy a drink. Id. Appellant asked Daniel to purchase matches, but there were none at the 7-Eleven. 15 AA 3174. Meanwhile, Appellant ran across the street to the Albertsons Express gas station. Id. Daniel did not know what Appellant got from the gas station, but he drove from the 7-Eleven to the Albertsons Express to get the matches. 15 AA 3175-76. Video surveillance from the 7-Eleven and Albertsons Express corroborated Daniel's testimony. 15 AA 3268-74, 3277-80; 16 AA 3515-17. Daniel then drove Appellant to an undeveloped, desert area, and Appellant got out with his bag and a silver medium-sized can that smelled of gasoline. 15 AA 3178-79. Appellant told Daniel, "Yeah, dude, there's a little girl in the desert like this." 15 AA 3180. Daniel realized that this was the dead girl Appellant had told him about at his house, and refused Appellant's offer to see the little girl's body. 15 AA 3180-81. Daniel left Appellant at the scene and drove off, still not believing Appellant. 15 AA 3181.

When Elizabeth heard that police had found a burned body near the tunnels, she contacted police and gave them information about the night of September 2, 2011. 15 AA 3153-54. Homicide Detective Dan Long then interviewed Elizabeth and Daniel on September 5, 2011. 15 AA 3154, 3182; 16 AA 3511, 3513. Daniel

told Detective Long about Appellant and the details of what had occurred in the early morning hours of September 3, 2011. 15 AA 3183.

Detective Long then obtained a search warrant to search Appellant's home. 16 AA 3517-18. When SWAT arrived at Appellant's house, he immediately walked out and surrendered. 16 AA 3518. Appellant agreed to go to the homicide office and talk with the police. 16 AA 3519. Appellant then confessed to the robbery, kidnapping, sexual assaults, and murder of Alyssa. 16 AA 3522—17 AA 3582.

In his statement to police, Appellant told Detective Long that he was bored at home, so he took a serrated kitchen knife and left his house in an attempt to get "easy money." 16 AA 3528-30. Appellant saw Alyssa walking toward the tunnels, and rushed across the street diagonally to catch up with her. 16 AA 3577-80. Alyssa had her phone in her hand, and when she glanced behind and saw him, sped up in an attempt to avoid him. 16 AA 3533-34, 3577-80. Appellant was worried she was going to get away, as she kept looking back at him. 16 AA 3580. Appellant then ran up to Alyssa, and "got her." Id. Appellant admitted that as soon as he realized he was going to catch up to Alyssa, he was planning on raping and robbing her at knifepoint. 16 AA 3582. Appellant grabbed Alyssa, and dragged her away. 16 AA 3534. Appellant ordered Alyssa to get undressed, and she removed her pants and underwear. 16 AA 3536-37, 3552. Appellant raped Alyssa vaginally and ejaculated inside of her. 16 AA 3538. Appellant's semen was recovered from inside Alyssa's

vagina, with a DNA match of one in 700 billion individuals. 15 AA 3285, 3330-31. Both Appellant's and Alyssa's DNA were recovered on Alyssa's red tank top. 15 AA 3337-38. Appellant also forced Alyssa to perform oral sex on him after ejaculating inside her. 16 AA 3558. No semen was recovered from Alyssa's buccal swab. 15 AA 3346-47.

Appellant told police that Alyssa begged Appellant not to kill her. 16 AA 3560. After raping Alyssa, Appellant grabbed the knife he had put down "and started [stabbing her] like in like in the face" and neck, while Alyssa was "struggling for her life." 16 AA 3538-39. Appellant was on top of Alyssa, and told Detective Long that "she was struggling. She was like struggling, and like I just stabbed her, and then she like stopped, and then she still, she was still struggling. I stabbed her so I thought she was still alive." 16 AA 3555. Appellant stabbed her thighs because he "was trying to be cool and stuff." 16 AA 3556. Stabbing Alyssa made him feel "good, powerful, gangster." 16 AA 3573. In response to Detective Long asking him whether he was getting turned on by the shallow stabbing in the thighs and face, Appellant responded that it made him feel like a "thug," and "like I'm somebody. And that's why I did that." 16 AA 3573. Appellant also stabbed Alyssa in the chest, stating that, "oh yes, I tried to like, yeah, I tried to execute her, like the fucking video games and stuff." 16 AA 3540. Appellant added that he tried to carve LV into her right hip. 16 AA 3538.

Appellant told Detective Long that he killed Alyssa because he did not want her to report that he had raped and robbed her, since she could have identified him. 16 AA 3556-57. Appellant was covered in blood, so he jumped in a stranger's backyard pool to wash off, got home, hid his clothes, the knife, and the gasoline canister in his attic. Appellant hid Alyssa's phone in his sister's room and called Daniel after taking a shower. 16 AA 3541-45. Appellant went to purchase gasoline, because "I'm like hey, maybe getting rid of the body, you know, like burning it up, maybe I won't get caught." 16 AA 3546. Appellant told Daniel what happened, and once Daniel dropped Appellant off, Appellant threw gas over Alyssa and lit her on fire. 16 AA 3449-50. Appellant told Detective Long where he hid his bloody clothes, the knife, the gas canister, and Alyssa's iPhone. 16 AA 3530-31. Alyssa's blood was found on Appellant's clothes, on the knife – which had a broken tip, and on Appellant's shoes. 15 AA 3246-48, 3334-37, 3339-41. A latent print found on the gas canister matched Appellant's right middle finger. 15 AA 3321.

At the penalty phase, the State presented evidence of Appellant's prior sexual attacks on three other teenage girls, which occurred in May 2009, March 2011, and June 2011 – the last two being within six months of his rape and murder of Alyssa Otremba. See 17 AA 3703-12.

Summer Horton was a student at Centennial High School who, on May 19, 2009, was attacked by Appellant in the girls' bathroom at school. 17 AA 3724-31.

Summer was leaving the bathroom stall when Appellant – with whom she had crossed paths while heading to the bathroom – pushed her into the stall and grabbed her by the throat. 17 AA 3727-28. Summer testified that she could not breathe or scream for help due to the pressure of Appellant's hands on her throat. Id. Appellant pushed Summer back against the bathroom stall's wall, with Summer's legs straddling the toilet. Id. Appellant kept repeating, "shut up and I won't hurt you." 17 AA 3729. Another girl walked into the bathroom, interrupting Appellant's attack. Id. When the girl screamed for help, Appellant ran out of the bathroom, and Summer and the girl reported the incident to the nurse's office and called the police. 17 AA 3729-30. Appellant eventually entered into an Alford plea in juvenile court to Second Degree Kidnapping. 17 AA 3703-10, 3729-30. Appellant admitted to Detective Long that his attack on Summer was indeed sexually motivated. 17 AA 3767-68.

Perla Cervantes-Righetti, Appellant's younger cousin, also testified at the penalty phase that, two months before Appellant's rape and murder of Alyssa, on June 24, 2011, Appellant orally, vaginally, and anally raped her at a family reunion in Mazatlán, Mexico, when Perla was sixteen years old. 18 AA 4047—19 AA 4067. Perla and Javier had gone out to a club, and then, around 2:00 a.m., walked down to the beach. 19 AA 4051. Perla eventually wanted to leave, and as she walked towards the taxi area, Appellant grabbed her neck from behind with both hands, forced her

to her knees, and ordered her to remove her clothes and perform oral sex on him, telling her to "suck on it, bitch." 19 AA 4051-53. While he orally raped Perla, he told her that he was going to take out a knife if she ran. 19 AA 4058. Appellant laid down on his back, and ordered Perla to get on top of him. 19 AA 4053-54. Perla told him she was a virgin, but Appellant did not care and told her to insert his penis into her vagina, which hurt her. 19 AA 4054-55. Perla got up and started running away, but Appellant ran after her, grabbed her by the neck and choked her, and threw her on the sand. Id. Due to Appellant choking her, Perla lost consciousness. 19 AA 4056. She regained consciousness to Appellant raping her vaginally, with sand penetrating her vagina due to her lying on the beach. 19 AA 4057. Perla pretended to still be unconscious, and Appellant then anally raped her before again vaginally raping her and ejaculating into her vagina. 19 AA 4059. Perla testified that Appellant also put a cigarette butt into Perla's vagina while she still pretended to be unconscious, then attempted to 'wake' Perla up. 19 AA 4059-60. Appellant then told Perla that a group of men had attacked both of them, striking Appellant and raping Perla. Id. Perla knew this was a lie, but went along with it until she got back to her mother's hotel room, where she told her mother what had happened. 19 AA 4060-62. Despite Appellant's parents attempting to dissuade her from reporting the attack, Perla and her mother reported the rape to the police, and Perla's physical examination showed the presence of semen and injuries to her vagina and anus. 19

AA 4064-66. Police attempted to locate Appellant, but Perla learned that in August, Appellant returned to Las Vegas. Id.

The State also presented Appellant's guilty pleas to Counts 1 through 9, including the counts relating to his March 8, 2011, attack on Mikaela Kitchen, who testified at the penalty phase. 17 AA 3695-98.

In March of 2011, Mikaela, then fifteen, was a student at Arbor View High School. 17 AA 3733. On Tuesday, March 8, 2011, Mikaela was meeting friends on the other side of the same tunnels in which Appellant attacked Alyssa. 17 AA 3733-34. Mikaela had her phone as she was going through the tunnel, and crossed paths with Appellant, who was coming from the opposite direction. 17 AA 3735-36. Appellant asked if he could use her cell phone, and when Mikaela refused and walked past him, Appellant grabbed her neck from behind and strangled her until she could not talk or scream. 17 AA 3735-37. Appellant dragged her into a side tunnel, which branched off perpendicular to the main tunnel. 17 AA 3737. Appellant strangled Mikaela until she lost consciousness. When she regained consciousness, Mikaela was lying on her back, with her shorts and shoes having been removed. 17 AA 3738. Appellant tried to rape her, but Mikaela blocked her vagina with her hands and begged him not to rape her, crying that she was a virgin. 17 AA 3740, 3771-73. Appellant claimed he was unable to achieve an erection and "stick it in," so he stood over her, dragged her to her knees, and ordered her to

perform oral sex on him. Id. Appellant told Mikaela he had a knife, although she did not see it. Id. Appellant confessed to this incident to Detective Long, and claimed that at some point, he could hear Mikaela's friends yelling "Kayla" or "Kylie." 17 AA 3773-72. Appellant then let Mikaela go and fled. 17 AA 3741-42. The back of Mikaela's head was covered in blood, her knees were severely scraped, and Mikaela had bruises on her neck, back, and shoulders, and had severe petechial hemorrhages in her eyes after the attack. 17 AA 3742-45.

Detective Long testified again at the penalty phase, explaining that Appellant had confessed to the attacks on Summer, Mikaela, and Perla, and that, pursuant to the search warrant obtained after Alyssa's murder, police had seized the computers from Appellant's house. 17 AA 3746-86. Video surveillance from the 7-Eleven store on September 3, 2011, at 7:00 p.m. – approximately twenty-four hours after Appellant murdered Alyssa, showed Appellant laughing and smiling with an individual inside the store. 17 AA 3749-50.

The computers seized at Appellant's house were tested at the LVMPD forensic lab. 17 AA 3773-74. On May 25, 2009, six days after Appellant's attack on Summer, several Internet searches were done as to the definitions of battery and kidnapping, various types of rape, Miranda warnings, the definition of probation, as well as searches pertaining to Fourth Amendment rights and rights of juveniles during interrogation. 17 AA 3775.

Appellant told Detective Long that, after his attack on Mikaela, he saw flyers of the sketch resulting from Mikaela's description everywhere. 17 AA 3778. On April 21, 2011, about five weeks after Appellant attacked Mikaela, one of the computers showed a search for "Neighbors feel fearful as rapist eludes capture" on KVVU Las Vegas. 17 AA 3777. Another Internet search that same day, via Google Search, was done for "Durango US 95 bridge kidnap." 17 AA 3778.

The day of Alyssa's murder, on September 2, 2011, between 3:18 p.m. and 5:55 p.m., Appellant spent time on several rape fetish and pornography sites, which included photos and videos with titles such as, "Kidnapped and d[egraded]," "Two young girls attacked and D[egraded]," "18-year old attacked and d[egraded]," "Kidnapped and D[egraded]," "Kidnapped from Street and d[egraded]" 17 AA 3781. Further searches, in the same time frame, resulted videos and photographs entitled "Toy slave," "Young and abused and d[egraded]," "Young school girl d[egraded]," "Young girl attacked and D[egraded]," "Young girl degraded by soldiers outdoors," "Two girl gang d[egraded], "Teenager is d[egraded]," "18-year old attacked and d[egraded]," "Teenager stripped naked in public." 17 AA 3781-82.

Jennifer Otremba testified that the only way Alyssa could be identified was through dental records, and that she was unable to view her daughter's body until the day after the funeral, before Alyssa's body was cremated. 17 AA 3823-24.

Jennifer had to identify her daughter by Alyssa's left foot. Id. Jennifer explained that the mortuary "did what they could. They wrapped her. They -- they said they looked for a hand and they couldn't find anything. So they -- they said they had a foot we could see but we needed to bring a sock. And so on her left foot from about the mid calf down, we got to -- that's how I made that confirmation." Id.

Ultimately, the jury found that the mitigating circumstances did not outweigh the aggravating circumstances, and imposed a sentence of death.

SUMMARY OF THE ARGUMENT

First, Appellant's claim that the court erred in not allowing him to choose the theories of First Degree Murder to which he wished to plead is without merit, as this Court already issued an order denying this very argument, and as Appellant may not circumvent the State's charging authority by pleading guilty à*a la carte* to the Indictment.

Second, Appellant never, despite multiple opportunities, asked the district court to withdraw his pleas to Counts 1 through 9, and he may not raise this issue for the first time on appeal.

Third, there was sufficient evidence to support the single 'torture *or* mutilation' aggravator charged by the State, where the evidence demonstrated that Appellant stabbed Alyssa over eighty times to feel like a "thug" and "gangster" before setting her body on fire, partially destroying her face and right leg. Moreover,

since the jury did *not* return a verdict finding that the murder had been committed by means of torture, Appellant's claim that the court should have stricken the torture or mutilation aggravator pursuant to McConnell is without merit.

Fourth and finally, Appellant's claim that the State 'double-counted' aggravating circumstances is without merit, since the State only introduced one aggravator for each of Appellant's sexual assaults on Alyssa Otremba, as demonstrated by the penalty phase jury instructions and the penalty phase special verdict, which included eleven aggravating circumstances for the jury to consider.

ARGUMENT

I. APPELLANT WAS NOT ENTITLED TO SELECT THE THEORIES OF FIRST DEGREE MURDER TO WHICH HE INTENDED TO PLEAD GUILTY

Appellant first claims that the district court, "without any legal justification," abused its discretion and violated due process and fair trial guarantees by setting aside Appellant's guilty plea as to Count 10 because Appellant was entitled to select the theories of first degree murder to which he pleaded guilty. AOB at 23-32. These theories – felony murder and first degree murder by torture – would have entitled Appellant, under McConnell, 120 Nev. 1043, 102 P.3d 606, to strike six aggravating circumstances. AOB at 23-32. Appellant adds that the district court "set aside the plea based on no cognizable legal reason" after the State filed "a nonsense motion alleging no cognizable legal theory to set aside the plea." AOB at 32. This claim is

without merit and is barred by the doctrine of res judicata and the doctrine of law of the case.

The doctrine of res judicata precludes a party from re-litigating an issue which has been finally determined by a court of competent jurisdiction. Exec. Mgmt. v. Ticor Titles Ins. Co., 114 Nev. 823, 834, 963 P.2d 465, 473 (1998) (citing Univ. of Nev. v. Tarkanian, 110 Nev. 581, 598, 879 P.2d 1180, 1191 (1994). "The doctrine is intended to prevent multiple litigation causing vexation and expense to the parties and wasted judicial resources…" Id.; see also Sealfon v. United States, 332 U.S. 575, 578, 68 S. Ct. 237, 239 (1948) (recognizing the doctrine's availability in criminal proceedings).

Moreover, "[t]he law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same," and the doctrine of the law of the case "cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798 (1975). This Court's holding on an issue in a decision granting or denying a writ of mandamus precludes a party from re-litigating that issue subsequently in a direct appeal. Price v. State, 409 P.3d 889 (Nev. Unpub., September 29, 2017). In Price, this Court found that its holding on an issue on a writ of mandamus precluded the defendant from re-litigating the issue on direct appeal under the doctrine of law of the case.

Here, Appellant claims that, because a jury can find a defendant guilty on any of the charged alternative theories of liability, "a defendant can certainly plead guilty to one theory of an array of theories constituting alternative paths to criminal liability." AOB at 25-26, 26. In an artful feat of contrived ignorance, Appellant manages to omit *any* mention of this Court's February 16, 2017, Order, which denied Appellant's Petition for Writ of Mandamus *on this very issue*.[3]

Despite Appellant's lengthy attempt to circumvent this Court's prior order denying his Writ of Mandamus, Appellant is still bound by this Court's ruling on the same claim he now brings on appeal. In denying mandamus, this Court ruled as follows:

> A.
>
> Some background is helpful to place the legal issues presented by this petition in context. In McConnell, we held that if a defendant is found guilty of first-degree murder under a felony-murder theory, the prosecution may not use the same felony underlying the felony-murder as an aggravating circumstance to make him eligible for the death penalty. 120 Nev. at 1069, 102 P.3d at 624. In Wilson, we clarified that the rule announced in McConnell did not apply where a defendant pleaded guilty to a murder count alleging both felony-murder and premeditated murder. 127 Nev. at 744, 267 P.3d at 60. Righetti interpreted these holdings to create a loophole: If he pleaded guilty to felony-murder but specifically did not plead guilty to premeditated murder, his case would fall outside of Wilson and he could take advantage of the rule

[3] While Appellant does note that this opinion exists, his *only* mention of this Court's fifteen-page order is one sentence in his Statement of the Case: "The Supreme Court denied the Petition." AOB at 19.

in McConnell. But to advance his reading of McConnell and Wilson, Righetti first had to enter a guilty plea to only two theories of first-degree murder when three were charged. Righetti concluded that so long as he pleaded guilty to the murder count he was free to select the theories of murder upon which to base his guilty plea, regardless of whether the State consented—the position he advances before this court.

B.

Although the facts of this case are unusual, the legal issues are straightforward. In our adversarial system, the State has an almost exclusive right to decide how to charge a criminal defendant, Parsons v. Fifth Judicial Dist. Court, 110 Nev. 1239, 1244, 885 P.2d 1316, 1320 (1994), overruled on other grounds by Parsons v. State, 116 Nev. 928, 936, 10 P.3d 836, 841 (2000), see also Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978), which includes the authority to allege that a defendant committed an offense by one or more alternative means, NRS 173.075(2). While a criminal defendant has a statutory right to tender a guilty plea, NRS 174 .035(1), ***he does not have a right to plead guilty à la carte in order avoid the State's charging decisions.*** Indeed, we have rejected attempts to do just that, holding that a defendant's statutory right to plead guilty does not entitle him to plead guilty to a lesser-included offense without the State's consent. Jefferson v. State, 108 Nev. 953, 954, 840 P.2d 1234, 1235 (1992). To hold otherwise and allow such a plea would be to 'undermine[] prosecutorial discretion in charging and the state's interest in obtaining a conviction on the other charges, which may be the more 'serious' charges.' State v. Eighth Judicial Dist. Court (Hedland), 116 Nev. 127, 138 n.10, 994 P.2d 692, 699 n.10 (2000).

The same logic applies when a defendant seeks to enter a guilty plea to only some of multiple theories supporting a charge. State v. Bowerman, 115 Wn.2d 794, 802 P.2d 116, 120 (Wash. 1990) (holding that a defendant does not have a right to plead guilty to only one theory of guilt when alternative theories are charged), disapproved of on other grounds by State v. Condon, 182 Wn.2d 307,

343 P.3d 357, 365 (Wash. 2015). ***In either instance, permitting a defendant to enter a guilty plea that does not conform to the charges as alleged in the charging document circumvents the State's charging authority and forces the State to amend the charging document and accept a deal it never offered. Id. And permitting a district court to accept such a guilty plea would allow the judiciary to invade a realm where the executive branch maintains almost exclusive control, in violation of separation-of-powers principles***. See Nev. Const. art. 3, § 1 ("The powers of the Government of the State of Nevada shall be divided into three separate departments,—the Legislative,—the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others."); Sandy v. Fifth Judicial Dist. Court, 113 Nev. 435, 440, 935 P.2d 1148, 1150-51 (1997) (observing that a district court runs afoul of the separation-of-powers doctrine when it invades the prosecutor's legitimate charging authority).

C.

Rejecting, as we do, Righetti's argument that he could plead guilty to two of the three theories alleged without the State's consent, we turn next to his assertion that the State explicitly or implicitly consented to his nonconforming guilty plea, which stands on similarly shaky ground. He first claims that the prosecutors in this case agreed to let him enter his plea fully understanding that he had not admitted guilt to each theory of murder alleged in the indictment. This contention is belied by the record. As the district court found, the transcript does not capture the miscommunication that occurred due to the nonverbal interaction initiated by Righetti's attorney—an interaction the prosecutor did not see. Substantial evidence supports this finding.

. . . .

Regardless, we agree with the State that there was no reason to object because Righetti necessarily admitted that he committed a willful, deliberate, and premeditated murder when he pleaded guilty. Righetti places undue

emphasis on the statements he made (or did not make) when asked to give a factual basis for his plea. *Soliciting a factual basis is simply one of several ways for a district court to ensure that a defendant is pleading guilty voluntarily and intelligently; it does not operate to limit the charges or theories to which a defendant is admitting his guilt*. State v. Gomes, 112 Nev. 1473, 1480-81, 930 P.2d 701, 706 (1996) (explaining that although it is "preferable" for the district court to elicit from a defendant an admission that he committed the charged offense, the defendant need only have an understanding of the nature of the charges alleged). ***Rather, a defendant who pleads guilty without the benefit of a negotiated agreement necessarily admits all of the factual and legal elements included in the charging document***. United States v. Broce, 488 U.S. 563, 570, 109 S. Ct. 757, 102 L. Ed. 2d 927 (1989) ("A guilty plea is more than a confession which admits that the accused did various acts. It is an admission that he committed the crime charged against him." []); accord United States v. Allen, 24 F.3d 1180,1183 (10th Cir. 1994) ("[A] defendant who makes a counseled and voluntary guilty plea admits both the acts described in the indictment and the legal consequences of those acts." (footnote omitted)).

. . . .

Here, the indictment alleged that Righetti committed murder under three theories—torture murder, felony-murder, and willful, deliberate, and premeditated murder—and Righetti pleaded guilty to the murder charge alleged in the indictment. ***Despite his carefully choreographed statements during the plea canvass, Righetti necessarily admitted that he committed the charge as alleged in the indictment by pleading guilty***. [United States v. Brown, 164 F.3d 518, 521 (10th Cir. 1998)]; see also Broce, 488 U.S. at 570.

D.

Because Righetti purported to enter a nonconforming guilty plea without the State's consent, express or implicit, the district court lacked the authority to accept it. See generally Sandy, 113 Nev. at 440, 935

> P.2d at 1150-51; Cox v. State, 412 So. 2d 354, 356 (Fla. 1982) (holding that a guilty plea was invalid where state statute precluded a trial court from accepting a plea to a lesser-included offense without the consent of the prosecuting attorney). And, *as Righetti disavows having had any intention of pleading guilty to premeditated murder when he offered his plea, the district court should have rejected it on that basis as well*. See generally Gomes, 112 Nev. at 1480, 930 P.2d at 706 ("In order to be constitutionally valid, a plea of guilty or nolo contendere must have been knowingly and voluntarily entered." (internal quotation marks omitted)). Thus, the district court acted appropriately when it revoked its acceptance of Righetti's guilty plea before his penalty hearing. See People v. Bartley, 47 N.Y.2d 965, 393 N.E.2d 1029, 1029, 419 N.Y.S.2d 956 (N.Y. 1979) (recognizing a court's power to revoke its improper acceptance of a plea before sentencing); People v. Clark, 264 Cal. App. 2d 44, 70 Cal. Rptr. 324, 326 (Ct. App. 1968) (same); see also United States v. Britt, 917 F.2d 353, 358 (8th Cir. 1990) (recognizing that manifest necessity may permit a court to set aside a guilty plea over a defendant's objection).

Righetti, 134 Nev. at __, 388 P.3d at 647-49 (emphasis added).

Appellant is thus merely regurgitating the claim that was already litigated and denied by this Court in February 2017. Despite his lengthy argument to the contrary, as determined by this Court, Appellant is not entitled, when pleading guilty to the Indictment without negotiations, to choose the theory of first degree murder under which to plead. As this issue is barred by res judicata and by the doctrine of the law of the case, Appellant's claim should be denied.

/ / /

II. THE DISTRICT COURT DID NOT COMMIT ERROR IN NOT SUA SPONTE SETTING ASIDE APPELLANT'S GUILTY PLEAS AS TO THE REMAINING COUNTS PERTAINING TO ALYSSA OTREMBA

Appellant next claims that the district court erred in not setting aside "all the pleas because the pleas were not made in isolation of each other [and] were intertwined," as Appellant attempted to plead guilty to first degree murder based on a felony murder theory, pursuant to Counts 6 through 9 of the Indictment. AOB at 33.

It is Appellant's responsibility to provide relevant authority and cogent argument, and when Appellant fails to adequately brief the issue, it will not be addressed by this court. Maresca v. State, 103 Nev. 669, 672-73, 748 P.2d 3, 6 (1987). The appellate court cannot consider matters not properly appearing in the record on appeal. Tabish v. State, 119 Nev. 293, 296, 72 P.3d 584, 586 (2003). Given the lack of factual support as well as the lack of any legal authority whatsoever (see AOB at 33), this Court should not even consider this claim.

However, to the extent this Court deems it fit to nonetheless consider Appellant's one-page claim, the State would note that Appellant *never* moved to withdraw the pleas as to Counts 1 through 9 after this Court affirmed the district court's order reversing the guilty plea as to Count 10. Nor does Appellant even

claim that he *did* move to withdraw his pleas.[4] See AOB at 33. As Appellant never moved to withdraw his pleas, the district court did not consider the motion, and this Court should likewise not consider Appellant's argument that he should have been entitled to withdraw his pleas for the first time on appeal. Guy v. State, 108 Nev. 770, 780, 839 P .2d 578, 584 (1992), cert. denied, 507, U.S. 1009, 113 S. Ct. 1656 (1993) ("Because appellant failed to present these hearsay exceptions at trial, the trial court had no opportunity to consider their merit. Consequently, we will not consider them for the first time on appeal"); Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) ("This ground for relief was not part of appellant's original petition for post-conviction relief and was not considered in the district court's order denying that petition. Hence, it need not be considered by this court"). Appellant's claim is thus waived.

However, should this Court nonetheless wish to review Appellant's unclear and unsupported claim that the district court should have sua sponte rejected all his guilty pleas, it should only do so for plain error. A defendant's failure to object to an issue at trial generally precludes appellate review of that issue unless there is plain

[4] It is Appellant's responsibility to provide relevant authority and cogent argument, and when Appellant fails to adequately brief the issue, it will not be addressed by this court. Maresca v. State, 103 Nev. 669, 672-73, 748 P.2d 3, 6 (1987). The appellate court cannot consider matters not properly appearing in the record on appeal. Tabish v. State, 119 Nev. 293, 296, 72 P.3d 584, 586 (2003).

error. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). Under plain error review, the asserted error must affect the petitioner's substantial rights, and "the burden is on the defendant to show actual prejudice or a miscarriage of justice." Id. Even under this standard, Appellant would fail to make this showing. Appellant cannot show actual prejudice, given the overwhelming evidence against him,[5] and he moreover fails to demonstrate that a miscarriage of justice occurred. Indeed, Appellant had the opportunity to move to withdraw all of his pleas, and opted not to do so.

The district court, upon receiving this Court's February 16, 2017, Order denying Appellant's Writ, extensively inquired of Appellant how he wished to proceed. On February 22, 2017, the following exchange took place:

> MS. CRAIG: I think that kind of leads me into my next question which is what are we doing? I mean the Supreme Court – and I had filed a

[5] Appellant fails to make any note of this evidence or even include a Statement of Facts. See AOB at 11-22, 33. This evidence includes, among other things, his semen found in Alyssa's vagina, Appellant's confession to Detectives Long and Wilson that he robbed, kidnapped, and sexually assaulted Alyssa vaginally and orally; his confession to stabbing, killing, carving "LV" into, and burning Alyssa's body; Daniel Ortiz's testimony as to Appellant telling him he just killed a girl and asking Daniel to drive him to the gas station to purchase gasoline and matches; the video surveillance of the 7-Eleven and the gas station before Appellant burned Alyssa's body; as well as evidence of Alyssa's cell phone, Appellant's bloody clothes, the gasoline canister, and the bloody knife with Alyssa's blood on it, which were found in Appellant's house pursuant to a search warrant. See supra, Statement of Facts.

motion in limine sort of about the fairness. – [] about how we go forward. As it stands now, as I understand it, we're going to trial just on Count 10; is that a fair –

THE COURT: I agree.

MS. CRAIG: --understanding?

THE COURT: Uh-huh.

MS. CRAIG: So the Supreme Court in their decision essentially said that he had in effect pled guilty to all three theories. So what are we doing? And if we are going to trial just on one count, then I have some really complicated concerns about how we proceed as defense attorneys and how we are effective. *Given that Counts 6 through 9 stand*, and those are the counts that support felony murder, and as we all know, any one of those theories independently supports a finding of first degree murder, *he has effectively pled guilty more or less to first degree murder by the fact that he's pled guilty to Counts 6 through 9*.

So I don't know what we write in our jury questionnaire. I don't know what those facts should be. I mean, I think we have an obligation to explain to the jury about how that process works because it's very confusing and it's going to be difficult for us because we can't say that he's presumed innocent. *I don't know that we're entitled to do that given the fact that he's pled guilty to Counts 6 through 9 in particular*.

I don't know that he's entitled to have the State prove felony murder beyond a reasonable doubt because he's pled guilty to those. So it's a very odd place to be. What are – what are the jury instructions going to look like? Are we going to parse that out or aren't we going to parse that out? Are we going to explain to the jury ahead of time that for all intents and purposes first degree

> murder is done *because he's pled guilty to felony murder by pleading guilty to counts 6 through 9*? So—

11 AA 2299-2300 (emphasis added). Despite defense counsel's attempt to limit the State's theories of liability to felony murder once more, the Court interrupted, explaining that:

> THE COURT: I still believe the State has to prove their case. And the State's alleged three different theories. They have to prove their case.
>
> MR. PESCI: And, Judge, in our opposition to the defense's motion, we indicated that first and foremost we would have to prove beyond a reasonable doubt that the murder occurred during the course of . . . the sexual assault, the kidnapping and the robbery in order to avail ourselves of felony murder. In addition, we would have to prove beyond a reasonable doubt that it was not an afterthought' that the Nay analysis would have to apply. But we'll go a step further, Your Honor.
>
> The State's prepared to go forward to trial on Count 10 without ever admitting any evidence of the Defendant's pleas through 6 through 9 which completely cures any concerns that by having pled to it, he's put himself in a position where he's already found guilty. So we go forward, the State of the [sic] Nevada that is, and we tell this jury when they don't have those other charges that this happened during the course of these felonies and this is the felony murder rule. They can reject it. They can accept it. They won't be told by anybody, including the State of Nevada, that oh by the way, he's already pled guilty. That puts him at ground zero.

That puts him where he has no negative consequences to his – to his decisions. And in addition, if we get to a penalty phase, he still gets to draft the benefit of saying he took responsibility because he'll be able to tell the jury in penalty phase, guess what, I pled to 6 through 9. Give me a benefit because I took responsibility. So there's no harm, no foul. We can go forward as – state.

MS. CRAIG: Well, that – it still puts me in a really difficult position. I mean, he certainly can't testify that he didn't do these things because he's pled guilty to them, you know. I mean, I can't say that he sits here as an innocent man because he's not. I mean, there are ethical considerations that we are operating under that make it very difficult to give him a fair and impartial trial. And this Court has a duty to ensure that he has a fair and impartial trial.

And the fact that we're going to trial on—and one of the theories is already proven because he pled guilty to Counts 6 through 9 besides the other elements that he has to do, we effectively are prevented from putting on a defense because we cannot say those things didn't happen. There's literally nothing that we can say because saying anything would be the opposite of what he's already done and that's just not one of those things that we can do. We're – *we're hamstrung by the fact that pleas 6 through 9 still stand*. *Not to mention, you know, the other ones, but those are more for aggravators*.

So – I mean, I'm putting the Court on notice that I don't know how we will be able to go forward. I don't know that we'll be effective. . . . . The fact that we are in this position now is *because he pled guilty to Counts 6 through 9* which support felony murder, which is one of the roads to first

> degree murder, and we cannot say that none of that happened...

11 AA 2301-02 (emphasis added). Instead of moving to withdraw his remaining pleas, Appellant thus only repeatedly and consistently complained about the alleged unfairness and harm he would suffer at trial due to his guilty pleas as to counts 6 through 9. E.g., 8 AA 1739—9 AA 1873; 9 AA 1878-93; 13 AA 2741-44; 14 AA 2975-78; see also AOB at 33.[6]

Yet the district court, after Appellant first complained about the harm he would suffer from his pleas on Counts 6 through 9, explicitly asked Appellant: "**I guess I'm wondering what you are seeking from the Court? […] If anything**." 11 AA 2303. Appellant did *not* respond that he wanted to withdraw his pleas: instead, Appellant stated that "Frankly, at this point I don't really have a solution for the Court." Id. The only solution requested by Appellant was to call a public defender, Ms. Luem, to the stand in order "to explain trial tactics and why the plea went down the way that it did, and why the Supreme Court ruled the way that they did so that we have the opportunity to explain to the jury why we're not doing anything." Id. The State indicated that "I don't understand the remedy." 11 AA

[6] Appellant was, unsurprisingly, not as vocal about his guilty pleas as to Counts 1 through 5, which related to Mikaela. E.g., 8 AA 1739—9 AA 1873; 9 AA 1878-93; 13 AA 2741-44; 14 AA 2975-78. Indeed, by strategically electing to plead guilty to the Mikaela counts, the jury could not hear testimony and evidence of his attack and sexual assault of Mikaela in the same tunnel – six months before Alyssa's murder – at the guilt phase of the trial.

2304. Despite that, the defense persisted in requesting a witness to explain to the jury the mandamus proceedings. Id. at 2303-05. The Court then *again* asked the defense, "**So I guess – what's your remedy**? Don't go to trial because my client -- I mean, **I'm just trying to figure out what you're seeking** --" 11 AA 2306. The defense, instead of moving to withdraw Appellant's remaining pleas, again explained that:

> *The only remedy that I can think of is to explain to the jury the tactical decisions* and how we ended up in this very odd place of going to trial on first degree murder having completed a guilty plea on the underlying counts. And the only way I can think to do that would be to put someone -- another lawyer on who's familiar with the jurisdiction who can explain the tactical process that goes on, that the Court ruled against us, that the plea went away to just one count -- and that's why there's literally no defense.

Id. (emphasis added)

In response, the State noted that, if Appellant had asked "to withdraw his plea and he convinced [the district court] to do that, the State of Nevada would not be able to say guess what, ladies and gentlemen, he pled to it in an earlier decision." 11 AA 2306-07. However, Appellant never moved to withdraw his remaining pleas.

As noted supra, although this claim is waived for failing to raise it before the district court, Appellant thus still fails to show – even under a plain error standard – that he suffered manifest injustice when the district court did not sua sponte reject

his voluntary guilty pleas as to Counts 1 through 9, when Appellant himself never moved to withdraw them. Accordingly, Appellant's claim should be denied.

III. THE TORTURE OR MUTILATION AGGRAVATOR WAS PROPERLY CHARGED

Appellant next claims that (1) there was insufficient evidence to prove the aggravating circumstance of torture or mutilation;[7] and (2) under McConnell, this aggravator should be struck because the First Degree Murder conviction was based on torture. AOB at 34. Appellant's claims are without merit, as they are wholly belied by the trial record.

A. There Was Sufficient Evidence to Prove Torture or Mutilation

Appellant claims that the evidence was insufficient for the jury to find the presence of "torture and mutilation" as an aggravating circumstance beyond a reasonable doubt. AOB at 34-37. This claim is without merit.

As an initial matter, Appellant cites to the State's Notice of Intent to Seek the Death Penalty, seemingly not realizing that this Notice was neither the Special Verdict which was presented to the jury at the penalty phase nor the Jury Instruction containing the aggravating circumstances to be considered by the jury. Compare AOB 34-37 with 19 AA 4265-66; 20 AA 4290-92. Where the Notice listed fourteen

[7] Appellant only cites to the Notice of Intent to Seek the Death Penalty – instead of the actual trial record – to support his contention that the aggravators are unsupported by the evidence. AOB at 34-37.

aggravating circumstances,[8] the penalty phase Jury Instruction No. 6 and the Special Verdict form only listed **eleven**, which were as follow:

> 1. The murder was committed by a person who, at any time before a penalty hearing conducted for the murder, is or has been convicted of a felony involving the use or threat of violence to the person of another. The Defendant was adjudicated guilty of Attempt Robbery of Mikeala Kitchen in Case No. C276713.
> 2. The murder was committed by a person who, at any time before a penalty hearing conducted for the murder, is or has been convicted of a felony involving the use or threat of violence to the person of another. The Defendant was adjudicated guilty of Battery with Intent to Commit Sexual Assault by Strangulation of Mikeala Kitchen in Case No. C276713.
> 3. The murder was committed by a person who, at any time before a penalty hearing conducted for the murder, is or has been convicted of a felony involving the use or threat of violence to the person of another. The Defendant was adjudicated guilty of First Degree Kidnapping of Mikeala Kitchen in Case No. C276713.
> 4. The murder was committed by a person who, at any time before a penalty hearing conducted for the murder,

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[8] The Notice's fourteen aggravating circumstances included nine aggravators mirroring Counts 1 through 9, to which Appellant had pleaded guilty, pursuant to 200.033(2)(b); two aggravating circumstances under NRS 200.033(13), where Appellant "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," for each of the sexual assaults on Alyssa; two aggravating circumstances charging torture and mutilation under NRS 200.033(8) (for setting Alyssa's body on fire and for the excessive stabbing and carving into Alyssa's body); and finally, that the murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody under NRS 200.033(5).

By the time the case was presented to the jury, the State had removed the two sexual assaults under NRS 200.033(2)(b), and one of the torture and mutilation aggravators under NRS 200.033(5). 19 AA 4265-66; 20 AA 4290-92

is or has been convicted of a felony involving the use or threat of violence to the person of another. The Defendant was adjudicated guilty of Attempt Sexual Assault of Mikeala Kitchen in Case No. C276713.

5. The murder was committed by a person who, at any time before a penalty hearing conducted for the murder, is or has been convicted of a felony involving the use or threat of violence to the person of another. The Defendant was adjudicated guilty of Sexual Assault of Mikeala Kitchen in Case No. C276713.

6. The murder was committed by a person who, at any time before a penalty hearing conducted for the murder, is or has been convicted of a felony involving the use or threat of violence to the person of another. The Defendant was adjudicated guilty of Robbery of Alyssa Otremba in Case No. C276713.

7. The murder was committed while the person was engaged, alone or with others, in the commission of or flight after committing any kidnapping in the first degree and the person charged killed the person murdered or knew or had reason to know that life would be taken or legal force used. The Defendant was adjudicated guilty of Kidnapping of Alyssa Otremba in Case No. C276713.

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. The Defendant was adjudicated guilty of Sexual Assault, orally, of Alyssa Otremba in Case No. C276713.

9. 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. The Defendant was adjudicated guilty of Sexual Assault, vaginally, of Alyssa Otremba in Case No. C276713.

10. The murder was committed to avoid or prevent lawful arrest.

11. The murder involved torture or the mutilation of the victim.

20 AA 4290-92; see also 19 AA 4265-66. Contrary to Appellant's claim, there was thus only one aggravator charging torture or mutilation.

Under NRS 177.055(2)(c), on direct appeal from a death sentence, this Court considers whether the evidence supports the finding of an aggravating circumstance. The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. Edwards v. State, 90 Nev. 255, 258-259, 524 P.2d 328, 331 (1974); see also, e.g., Nunnery v. State, 127 Nev. 749, 780, 263 P.3d 235, 256 (2011) (finding that the analysis of whether the evidence is sufficient as to an aggravator is whether the evidence is sufficient for a rational juror to find beyond a reasonable doubt the elements of the aggravating circumstance).

In reviewing a claim of insufficient evidence, the relevant inquiry is "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Leonard v. State, 114 Nev. 1196, 1209-10, 969 P.2d 288, 297 (1998); Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998); see also Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). "Where there is substantial evidence to support a jury verdict, it [the verdict] will not be disturbed on appeal." Smith v. State, 112 Nev. 1269, 927 P.2d 14, 20 (1996);

Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992); Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Unsurprisingly, Appellant only argues that there was insufficient evidence to support torture, completely omitting any mention of the *mutilation* that was, in fact, argued at the penalty phase. See AOB at 35-37. Indeed, the aggravating circumstance refers to evidence of "torture *or mutilation*." NRS 200.033(5) (emphasis added). "Establishing *either* torture *or* mutilation is sufficient to support the jury's finding of this aggravating circumstance." Byford v. State, 116 Nev. 215, 240, 994 P.2d 700, 716 (2000) (emphasis added).

Torture requires an intent to inflict pain beyond the killing itself. Domingues v. State, 112 Nev. 683, 702, 917 P.2d 1364, 1377 (1996). Appellant's citation to Byford is misleading (AOB at 36): although "torture" cannot be based on acts that occurred after the victim has died, mutilation certainly can. 116 Nev. 215, 241, 994 P.2d 700, 716-17 ("Although a victim who has died cannot be tortured, mutilation can occur after death."). The Byford Court also noted that mutilation existed where there was gratuitous violence through the infliction of additional wounds on the dead victim, where there were postmortem amputation of the victim's body parts, or where a murderer plunged a knife into a dead victim's chest. Id. In fact, in Byford,

this Court found that "*postmortem mutilation occurred here when Byford set the body on fire*"[9] – just as Appellant did to Alyssa's body. Id. (emphasis added).

In fact, the penalty phase jury was only instructed as to mutilation. Penalty phase Jury Instruction No. 10 reads:

> The term "mutilate" means to cut off or permanently destroy a limb or essential part of the body or to cut off or alter radically so as to make imperfect. In order to find mutilation of a victim, you must find that there was mutilation beyond the act of killing itself.

19 AA 4270; see also 20 AA 4448-90. This mirrored the instruction on mutilation approved in McConnell, in which this Court found that the action of McConnell digging into the victim's body with a knife and plunging the knife into the body "went beyond the act of killing and caused serious abuse that altered radically Pierce's torso or abdomen, which is an essential part of the body. Desecration is also apparent in McConnell's callous, disrespectful treatment of the body." 120 Nev. at 1071; 102 P.3d at 625.

Here, the jury heard that Alyssa had been stabbed at least eighty (80) times with a single-edged weapon, with alternating deep and shallow stab wounds. 16 AA 3482-83, 3484-86, 3492. Dr. Simms could not give an exact number, as the many stab wounds were too close together to tell how many there were. Id. Seventy-five

[9] This quote from Byford somewhat weakens Appellant's reliance on Byford to support his explicit assertion that "[a] post-mortem burning of the body is not torture or mutilation." AOB at 36.

percent of the stab wounds were in Alyssa's right cheek, right head and right neck, as well as in her left chest and left thigh. 16 AA 3482. The stab wounds were both antemortem and postmortem, although the majority of the stab wounds to Alyssa's left leg were postmortem. Id. Only two of the eighty-something stab wounds were fatal. 16 AA 3485-87. Appellant also attempted to carve "LV" into Alyssa's right hip, post-mortem. 16 AA 3500, 3538.

Appellant himself told Detective Long that, while on top of Alyssa, he "started [stabbing her] like in like in the face" and neck, while Alyssa was "struggling for her life." 16 AA 3538-39, 3555. Appellant stabbed her thighs because he "was trying to be cool and stuff." 16 AA 3556. Stabbing Alyssa made him feel "good, powerful, gangster," like he was a thug, "like [he was] somebody. And that's why [he] did that." 16 AA 3573. Appellant also stabbed Alyssa in the chest, stating that, "oh yes, I tried to like, yeah, I tried to execute her, like the fucking video games and stuff." 16 AA 3540. Appellant then burned Alyssa's body, and Dr. Simms testified that there were focalized and severe burns to Alyssa's right leg and vaginal area, and additional burns to Alyssa's face and upper chest. 16 AA 3481, 3484, 3487, 3491.

The photographs introduced by the State through LVMPD Speas and Dr. Simms demonstrate the extent of the stab wounds and fire damage. Respondent's Appendix ("RA") at 1-18; see also 15 AA 3191, 3196; 16 AA 3480. For example, the crime scene photographs show that Alyssa's face, upper chest, and right thigh

were completely charred, her face so blackened by the fire that it was unrecognizable. RA 3-6. Alyssa's right upper leg and genital area were also severely burned, to the point that her right thigh was partially destroyed. RA 1-2, 7-8, 17-18. Alyssa's upper chest and arms were so burned that the skin split open. 11-12, 17-18. The right side of Alyssa's face had been repeatedly stabbed, and Alyssa's lips and left ear were partially burned off. RA 9-16. Further, Jennifer Otremba testified that the only way she could identify her daughter was through dental records, and that, although the mortuary did what they could, the only part of Alyssa's body she was able to touch and see was Alyssa's left foot – *after* Jennifer brought a sock to put over the foot. 17 AA 3823-24.

Here, as in Byford or McConnell, the eighty-plus antemortem and postmortem stab wounds, seventy-five percent of which were focalized on Alyssa's face, chest, and right leg, the fact that Appellant attempted to carve "LV" into Alyssa's dead body with his knife in order to feel like a "gangster" or a "thug," and the fact that Appellant set fire to Alyssa's body – specifically her genital area, right leg, and face – went beyond the act of killing itself. By doing so, Appellant permanently destroyed a limb or essential parts of Alyssa's body, or radically altered her body so as to make imperfect, committing mutilation.

Alternatively, the evidence also supported a finding of torture, given Appellant's statements that stabbing Alyssa while she was struggling made him feel

powerful and like a "thug" or "gangster" – demonstrating an intent to inflict pain beyond the killing itself. Byford, 116 Nev. at 241, 994 P.2d at 717.

Therefore, there was sufficient evidence for any rational jury to find that, by committing these actions, Appellant committed mutilation of Alyssa's body beyond a reasonable doubt. Accordingly, Appellant's claim should be denied.

B. The Jury Did Not Convict Appellant Of First Degree Murder Based On Torture

Appellant next contends that the aggravator for "torture or mutilation" "must be eliminated because the first degree murder conviction was based on torture." AOB at 34; see also AOB at 37-39. According to Appellant, because the State charged him in the Amended Indictment with First Degree Murder under the alternative theories of the "killing having been (1) willful, deliberate, and premeditated, (2) *perpetrated by means of torture*; and/or (3) committed during the perpetration of robbery and/or kidnapping and/or sexual assault," the aggravator for torture or mutilation must be stricken. 14 AA 2981 (emphasis added); AOB at 37-38. This argument is without merit.

When a defendant pleads guilty to first degree murder upon the theories of premeditation and deliberation, *as well as* on a theory of felony murder, it is permissible to use the felony as an aggravating circumstance. Wilson v. State, 99 Nev. 362, 373-74, 664 P.2d 328, 336 (1983). In McConnell, 120 Nev. 1043, 1069, 102 P.3d 606, 624 (2004) this Court held that an aggravating circumstance in a

capital prosecution, in order to narrow death eligibility, could not be based on the felony upon which a felony murder conviction is predicated. Thus, in a conviction for felony murder only, any aggravating circumstances based on those predicate felonies are stricken. This was, indeed, the purpose behind Appellant's attempt to limit his plea on Count 10 to felony murder and first degree murder perpetrated by torture – to obtain the benefit of McConnell. However, the McConnell Court continued,

> This decision has no effect in a case where the State relies solely on a theory of deliberate, premeditated murder to gain a conviction of first-degree murder; it can then use appropriate felonies associated with the murder as aggravators. But in cases where the State bases a first-degree murder conviction in whole or part on felony murder, to seek a death sentence the State will have to prove an aggravator other than one based on the felony murder's predicate felony. (Even absent this consideration, judicious charging of felony murder should be the rule in any case. We advise the State, therefore, that if it charges alternative theories of first-degree murder intending to seek a death sentence, *jurors in the guilt phase should receive a special verdict form that allows them to indicate whether they find first-degree murder based on deliberation and premeditation, felony murder, or both*. Without the return of such a form showing that the jury did not rely on felony murder to find first-degree murder, the State cannot use aggravators based on felonies which could support the felony murder.

Id.

Seven years later, in Wilson v. State (Wilson II), this Court specifically addressed the question, pursuant to McConnell, of "whether the use of a felony

aggravator is precluded if the defendant pleads guilty to first-degree murder based on both a willful, deliberate, and premeditated killing and a killing committed during the perpetration of or attempted perpetration of the same felony." 127 Nev. 740, 744, 267 P.3d 58, 60 (2011). It is not. In Wilson II, the defendant pleaded guilt to the charge of first-degree murder, under the theory that the killing was both willful, deliberate, and premeditated, *and* that it was committed in the perpetration or attempted perpetration of a felony. Id. at 746, 267 P.3d at 61. Wilson then argued that McConnell precluded the use of the felony as an aggravator even if he pleaded to the premeditated murder as well as the felony murder, pursuant to the McConnell Court's above-cited language. Id. The Wilson II Court, in denying Wilson's claim, held that if a jury unanimously finds that a defendant is guilty under willful, deliberate and premeditated murder as well as unanimously finds an alternative theory such as felony murder, the felony aggravators *could* be used. Id. at 747-48, 267 P.3d at 62-63.

While Appellant does not challenge the felony aggravators in his brief, he does challenge the torture or mutilation aggravator, analogizing that, under McConnell, the torture or mutilation aggravator should be stricken because the jury convicted him of murder under the theory that the killing was perpetrated during torture. However, Appellant's argument suffers from one fatal flaw: the jury did

not find that the murder was committed during the perpetration of torture. The Verdict form, in fact, included a Special Verdict filled in by the jury, finding that:

> The jury ***unanimously*** finds the murder willful, deliberate, and premeditated.
>
> The jury ***unanimously*** finds the murder was committed during the perpetration or attempted perpetration of robbery.
>
> The jury ***unanimously*** finds the murder was committed during the perpetration or attempted perpetration of kidnapping.
>
> The jury ***unanimously*** finds the murder was committed during the perpetration or attempted perpetration of sexual assault.

16 AA 3453-54. In fact, the only remaining box, which the jury did *not* check, was the box stating that the jury was *not* unanimous as to the theories of liability. Id. There is no mention whatsoever of the jury convicting Appellant of First Degree Murder under a theory that the killing was perpetrated by torture. See id. The 'torture or mutilation' aggravator was thus appropriately presented to the jury.

Moreover, under McConnell and Wilson II, even had the jury unanimously convicted Appellant of First Degree Murder under a torture theory, it *also* convicted Appellant unanimously under the theory that the killing was willful, premeditated, and deliberate. Finally, even had the *torture* aggravator been stricken pursuant to McConnell, there remained sufficient evidence to find the existence of *mutilation* beyond a reasonable doubt, as detailed supra.

Accordingly, as the torture or mutilation aggravator was properly charged at the penalty phase, Appellant's claim is without merit and should be denied.

IV. THERE WAS NO "DOUBLE-COUNTING" OF THE SEXUAL ASSAULT AGGRAVATORS

Appellant's final contention is that the aggravating circumstances pertaining to his oral and vaginal sexual assaults on Alyssa were overlapping and stacked, resulting in the arbitrary and capricious infliction of the death penalty. Appellant claims that the State charged "two aggravators based on [each] sexual assault by [Appellant] against [Alyssa]: One for the act, and one for being convicted of the act." AOB at 41. Appellant baldly states that, "the jury found all four Aggravating Circumstances valid." AOB at 41. However, this misrepresents the record, as the jury only found a total of two sexual assault aggravators pertaining to Alyssa, both under NRS 200.033(13). See 19 AA 4265-66; 20 AA 4290-92.

Appellant again fails to go beyond the Notice of Intent to Seek the Death Penalty, seemingly convinced of the fact that the State rested the entire penalty phase on this Notice and somehow failing to take note of the Special Verdict, the penalty phase jury instructions, or argument by the parties. See AOB at 39-42. While the State may have indeed initially charged fourteen aggravating circumstances in its Notice of Intent to Seek the Death Penalty (1 AA 12-21), by the time the case went to trial, the jury was presented with Jury Instruction No. 6, the Special Verdict as to the aggravating circumstances, and the State's argument at the penalty phase – all of

which presented one aggravating circumstance per sexual assault of Alyssa to the jury. 19 AA 4265-66; 20 AA 4446-47, 4290-92.

Indeed, only **two** among the **eleven** aggravators presented to the jury for consideration related to Appellant's oral and vaginal rapes of Alyssa, reading:

> 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. The Defendant was adjudicated guilty of Sexual Assault, orally, of Alyssa Otremba in Case No. C276713.
> 9. 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. The Defendant was adjudicated guilty of Sexual Assault, vaginally, of Alyssa Otremba in Case No. C276713.

20 AA 4290-92; see also 19 AA 4265-66, 21 AA 4676-92, 4693-96.

In closing arguments at the penalty phase, the State summarized the aggravators – the list of which had been read to the jury in Jury Instruction No. 6 – and explained them as follows:

> Number 1 through 5 is that the murder was committed by a person who, at anytime before a penalty hearing is conducted is or has been convicted of a felony involving the use or threat of violence to another person. And this, of course, is Mikaela Kitchen.
>
> No, 1 through 5 has already been proven beyond a reasonable doubt because the defendant pled guilty to those. And the defense, when they came up in their opening, conceded these.

> Same with 6 through 9. *Six through 9 are all associated with the robbery, the kidnapping, and the sexual assaults.* ***There was an oral and vaginal of Alyssa Otremba***. These are also proven beyond a reasonable doubt to you by way of either the defendant's guilty plea or your verdict.

20 AA 4446-47 (emphasis added); see also 17 AA 3700-01 (introducing aggravating circumstances 8 and 9). This is the entirety of the State's argument as to the aggravating circumstances pertaining to Appellant's sexual assaults of Alyssa.

The State submits that the aggravating circumstances were properly charged and Appellant's resulting death sentence proper. There was only one aggravator per sexual assault: one for the vaginal rape, and one for the oral rape. Id. The only aggravating circumstance for each sexual assault was a single felony aggravator under NRS 200.033(13), despite Appellant's claims to the contrary. AOB at 39-41. As there were not four aggravators, there is nothing to vacate (AOB at 42), and Appellant's claim should be denied.

CONCLUSION

WHEREFORE, for all the foregoing, the State respectfully requests that Javier Righetti's Judgment of Conviction and Sentence of Death be AFFIRMED.

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Dated this 5th day of September, 2018.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Charles W. Thoman*
CHARLES W. THOMAN
Chief Deputy District Attorney
Nevada Bar #012649
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this capital 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 Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this capital brief complies with the page and type-volume limitations of NRAP 32(a)(7)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 13,990 words and does not exceed 80 pages.
3. **Finally, I hereby certify** that I have read this capital 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 5th day of September, 2018.

Respectfully submitted

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Charles W. Thoman*
CHARLES W. THOMAN
Chief Deputy District Attorney
Nevada Bar #012649
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on September 5, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

HOWARD S. BROOKS
Deputy Public Defender

CHARLES W. THOMAN
Chief Deputy District Attorney

/s/ E. Davis
Employee, Clark County
District Attorney's Office

CWT/Melanie Marland/ed