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

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

It shall be your duty to determine:

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

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

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

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

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

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

The jury was then told that:

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

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

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

eligibility.

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

> "After a conviction of murder, a capital sentencing hearing may be held. The jury hears evidence and argument and is then instructed about statutory aggravating circumstances. The Court explained this instruction as follows:
>
> > The purpose of the statutory aggravating circumstance is to limit to a large degree, but not completely, the fact finder's discretion. Unless at least one of the ten statutory aggravating circumstances exist, the death penalty may not be imposed in any event. If there exists at least one statutory aggravating circumstance, the death penalty may be imposed but the fact finder has a discretion to decline to do so without giving any reason ...[citation omitted]. In making the decision as to the penalty, the fact finder takes into consideration all circumstances before it from both the guilt-innocence and the sentence phase of the trial. The circumstances relate to both the offense and the defendant.
>
> [citation omitted]. The United States Supreme Court upheld the constitutionality of structuring the sentencing jury's discretion in such a manner. Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)."

Brooks, 762 F.2d at 1405.

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

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

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

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

Witter, 112 Nev. at 916.

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

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

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

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

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

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

CLAIM EIGHT

CHAPPELL was denied his rights under the Fifth and Sixth,

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

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

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

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

> "6. Keeves [another defendant] is white and killed a white man. Sengsuwan [another defendant] is Thai and killed a Thai women. In the Chappell case, however, the defendant, who is black, kills a white women.
>
> It is very interesting that the State did not file a death penalty notice in the other two cases, but they

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

did file one in this case"

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

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

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

The Clark County District Attorney's office chose to seek the death penalty against CHAPPELL while not seeking it in similar cases where the only significant difference in the

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

cases is the relative races of the defendant and the victim.

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

CLAIM NINE

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

The Nevada capital sentencing process permits the imposition of the death penalty for any first degree murder that is accompanied by an aggravating circumstance. Nev. Rev. Stat. §. 200.030(4)(a). The statutory aggravating circumstances are so numerous and so vague that they arguably exist in every first degree murder case. See Nev. Rev. Stat. §. 200.033. Nevada permits the imposition of the death penalty for all first degree murders that are "at random and without

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

apparent motive." Nev. Rev. Stat. §. 200.033(9). Nevada statutes also appear to permit the death penalty for murders involving virtually every conceivable kind of motive: robbery, sexual assault, arson, burglary, kidnaping, torture, escape, to receive money, and to prevent lawful arrest, and escape. See Nev. Rev. Stat. §. 200.033. The scope of the Nevada death penalty statute makes the death penalty an option for all first degree murders that involve a motive, and death is also an option if the first degree murder involves no motive at all.

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

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

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

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

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

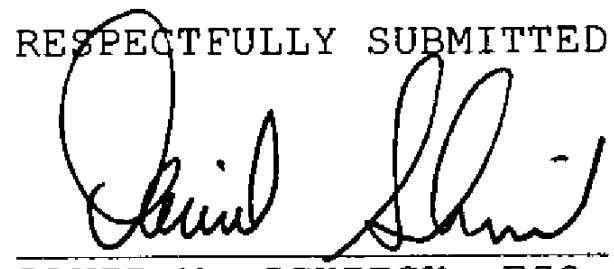
David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

CONCLUSION

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

DATED this 10 day of April, 2002.

RESPECTFULLY SUBMITTED:



DAVID M. SCHIECK, ESQ.

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

AFFIDAVIT OF JAMES CHAPPELL

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

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

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

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

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

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

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

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

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

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

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

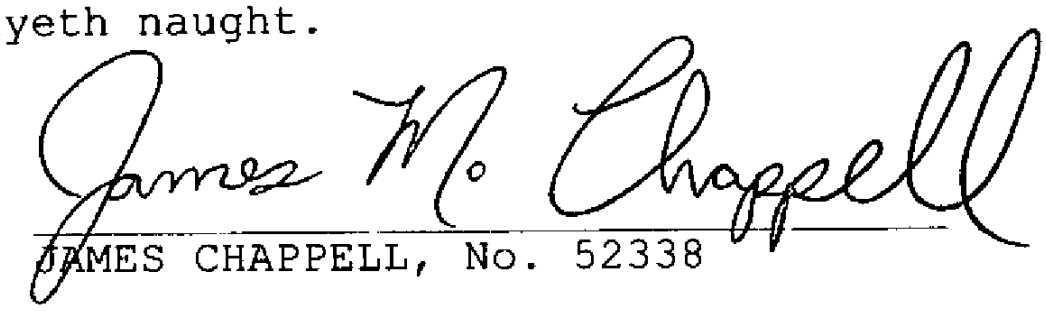
David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

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

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

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

FURTHER, Affiant sayeth naught.



JAMES CHAPPELL, No. 52338

SIGNED AT ELY STATE PRISON
ELY, NEVADA

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

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

RECEIPT OF COPY

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

DISTRICT ATTORNEYS OFFICE

200 S. THIRD STREET
LAS VEGAS, NV 89155

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

MORGAN D. HARRIS, PUBLIC DEFENDER
309 South Third Street
Las Vegas NV 89155
702-455-4685

MEMORANDUM

TO: File

FROM: HOWARD S. BROOKS #3374

RE: James Chappell

DATE: April 12, 1996

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

1. In all three cases, we have defendants who have no felony records.

2. In the Sengsuwan case, the defendant stabs the woman around 20 times. Sengsuwan tries to take the vehicle.

3. In the Keeves case, the defendant stabs the guy around 20 times. Keeves takes the vehicle.

4. In this case, Chappell stabbed the woman about 13 times. He does take the vehicle.

5. In all three cases, the defendants are alone with the victims and their account of the crime will be virtually uncontradicted.

6. Keeves is white and killed a white man. Sengsuwan is Thai and killed a Thai woman. In the Chappell case, however, the defendant, who is black, kills a white woman.

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

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

He said he would think about it.

HSB:sm

EXHIBIT 47

82

INST

FILED IN OPEN COURT
OCT 1 6 1996 19 3:35 pm
LORETTA BOWMAN, CLERK
BY [signature]
Deputy

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JAMES MONTELL CHAPPELL,

Defendant(s).

Case No. ~~C131240~~ C131341
Dept. No. VII
Docket P

INSTRUCTIONS TO THE JURY (INSTRUCTION NO. I)

MEMBERS OF THE JURY:

It is now my duty as judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.

You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the Court.

INSTRUCTION NO. 2

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

INSTRUCTION NO. 3

An Information is but a formal method of accusing a person of a crime and is not of itself any evidence of his guilt.

In this case, it is charged in an Information that on or about the 31st day of August, 1996, the Defendant committed the following offenses:

COUNT I - BURGLARY

did then and there wilfully, unlawfully, and feloniously enter, with intent to commit larceny and/or assault and/or battery and/or robbery and/or murder, that certain building located at 839 North Lamb Boulevard, Las Vegas, Clark County, Nevada, Space No. 125 thereof, occupied by DEBORAH PANOS.

COUNT II - ROBBERY WITH USE OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously take personal property, to-wit: social security cards and/or keys and/or a motor vehicle, from the person of DEBORAH PANOS, or in her presence, by means of force or violence, or fear of injury to, and without the consent and against the will of the said DEBORAH PANOS, said Defendant using a deadly weapon, to-wit: a knife, during the commission of said crime.

COUNT III - MURDER (OPEN) WITH USE OF A DEADLY WEAPON

did then and there, without authority of law and with malice aforethought wilfully and feloniously kill DEBORAH PANOS, a human being, by stabbing at and into the body of the said DEBORAH PANOS with a deadly weapon, to-wit: a knife, during the commission of said crime; defendant committing said act with premeditation and deliberation and/or committing said act during the perpetration of a burglary and/or robbery.

It is the duty of the jury to apply the rules of law contained in these instructions to the facts of the case and determine whether or not the Defendant is guilty of one or more of the offenses charged.

Each charge and the evidence pertaining to it should be considered separately. The fact that you may find a defendant guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged.

INSTRUCTION NO. 4

Any person who by day or night, enters any residence or mobile home or building with intent to commit larceny and/or assault and/or battery and/or robbery and/or murder or any felony, is guilty of Burglary.

INSTRUCTION NO. 5

Larceny is the theft of personal goods or property of another person.

INSTRUCTION NO. 6

An Assault is an unlawful attempt, coupled with present ability, to do a violent injury to another person.

To constitute an assault, it is not necessary that any actual injury be inflicted.

INSTRUCTION NO. 7

Battery means any willful and unlawful use of force or violence upon the person of another.

INSTRUCTION NO. 8

You are instructed that the offense of Burglary is complete if you find that entry was made into a residence or mobile home or building with the intent to commit larceny and/or assault and/or battery and/or robbery and/or murder therein.

An entry is deemed to be complete when any portion of an intruder's body, however slight, penetrates the space within the building.

Any person who, in the commission of a burglary, commits any other crime, may be prosecuted for each crime separately.

INSTRUCTION NO. 9

You are further instructed that an unlawful entry is one ordinarily done without the authority, permission or consent of the owner or one in lawful possession of the building. However, consent to enter is not a defense to the crime of burglary nor need there be a breaking into or a forced entry so long as it is shown that entry was made with the specific intent to commit larceny and/or assault and/or battery and/or robbery and/or murder or any felony therein.

The authority to enter a building extends only to those who enter with a purpose consistent with the reason the residence or mobile home or building is open to them. An entry with intent to commit larceny and/or assault and/or battery and/or robbery and/or murder or any felony cannot be said to be within the authority granted someone who has permission to enter.

INSTRUCTION NO. 10

You are further instructed that in order to constitute the crime of burglary, it is not necessary to prove that the defendant actually stole any of the articles, goods or money contained in the residence or mobile home or building. The gist of the crime of burglary is the unlawful entering of a residence or mobile home or building with the intent to commit larceny and/or assault and/or battery and/or robbery and/or murder or any felony therein

INSTRUCTION NO. 11

Robbery is the unlawful taking of personal property from the person of another, or in her presence, against her will, by means of force or violence or fear of injury, immediate or future, to her person or property, or the person or property of a member of her family, or of anyone in her company at the time of the robbery. A taking is by means of force or fear if force or fear is used to:

(a) Obtain or retain possession of the property;

(b) Prevent or overcome resistance to the taking; or

(c) Facilitate escape.

The degree of force used is immaterial if it is used to compel acquiescence to the taking of or escaping with the property. A taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

INSTRUCTION NO. 12

The value of property or money taken is not an element of the crime of Robbery, and it is only necessary that the State prove the taking of some property or money.

INSTRUCTION NO. 13

You are instructed that if you find a defendant guilty of Robbery you must also determine whether or not a deadly weapon was used in the commission of this crime.

INSTRUCTION NO. 14

A deadly weapon is any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death.

INSTRUCTION NO. 15

If you find beyond a reasonable doubt that a defendant committed Robbery with the Use of a Deadly Weapon, then you are instructed that the verdict of Robbery with the Use of a Deadly Weapon is the appropriate verdict.

If, however, you find that a deadly weapon was not used in the commission of the Robbery, but you do find that a Robbery was committed, then you are instructed that the verdict of Robbery without the Use of a Deadly Weapon is the appropriate verdict.

You are instructed that you cannot return a verdict of both Robbery with the Use of a Deadly Weapon and Robbery without the Use of a Deadly Weapon.

INSTRUCTION NO. 16

If a jury is not satisfied beyond a reasonable doubt that a defendant is guilty of an offense charged, a defendant may, however, be found guilty of a lesser related offense which was not charged, the commission of which is necessarily included in the offense charged, if the evidence is sufficient to establish the defendant's guilt of such lesser related offense beyond a reasonable doubt.

You may find the defendant guilty of the lesser crime only if you are not convinced beyond a reasonable doubt the defendant is guilty of the offense charged, and all twelve of you are convinced beyond a reasonable doubt the defendant is guilty of the lesser crime.

The offense of Robbery with which the defendant is charged includes the lesser related offense of Grand Larceny Auto.

INSTRUCTION NO. 17

Any person who steals, takes and carries away, or drives away the motor vehicle of another, regardless of its value, is guilty of Grand Larceny.

INSTRUCTION NO. 18

Murder is the unlawful killing of a human being, with malice aforethought, whether express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned.

INSTRUCTION NO. 19

Malice aforethought means the intentional doing of a wrongful act without legal cause or excuse or what the law considers adequate provocation. The condition of mind described as malice aforethought may arise, not alone from anger, hatred, revenge or from particular ill will, spite or grudge toward the person killed, but may result from any unjustifiable or unlawful motive or purpose to injure another, which proceeds from a heart fatally bent on mischief or with reckless disregard of consequences and social duty. Malice aforethought does not imply deliberation or the lapse of any considerable time between the malicious intention to injure another and the actual execution of the intent but denotes rather an unlawful purpose and design in contradistinction to accident and mischance.

INSTRUCTION NO. 20

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

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

INSTRUCTION NO. 21

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

A killing which is committed in the perpetration or attempted perpetration of burglary and/or robbery is deemed to be murder of the first degree, whether the killing was intentional, unintentional or accidental. This is called the Felony-Murder rule.

The Felony-Murder rule is applicable to this case only if you find that the Defendant possessed a specific intent to commit burglary and/or robbery.

INSTRUCTION NO. 22

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

Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

INSTRUCTION NO. 23

The intention to kill may be ascertained or deduced from the facts and circumstances of the killing, such as the use of a weapon calculated to produce death, the manner of its use, and the attendant circumstances characterizing the act.

INSTRUCTION NO. 24

An act done with intent to commit a crime, and tending but failing to accomplish it, is an attempt to commit that crime.

INSTRUCTION NO. 25

You are instructed that if you find a defendant guilty of murder of the first degree, you must also determine whether or not a deadly weapon was used in the commission of this crime.

INSTRUCTION NO. 26

If you find beyond a reasonable doubt that a defendant committed Murder of the First Degree with the Use of a Deadly Weapon, then you are instructed that the verdict of Murder of the First Degree with the Use of a Deadly Weapon is the appropriate verdict.

If, however, you find that a deadly weapon was not used in the commission of the Murder, but you do find that a Murder was committed, then you are instructed that the verdict of Murder of the First Degree without the Use of a Deadly Weapon is the appropriate verdict.

You are instructed that you cannot return a verdict of both Murder of the First Degree with the Use of a Deadly Weapon and Murder of the First Degree without the Use of a Deadly Weapon.

INSTRUCTION NO. 27

The offense of First Degree Murder necessarily includes the lesser offense of Second Degree Murder.

If you are convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but you have a reasonable doubt whether such murder was of the first or of the second degree, you must give the defendant the benefit of that doubt and return a verdict of murder of the second degree.

INSTRUCTION NO. 28

Murder of the Second Degree is murder with malice aforethought, but without the admixture of premeditation.

All murder which is not Murder of the First Degree is Murder of the Second Degree.

INSTRUCTION NO. 29

You are instructed that if you find a defendant guilty of murder of the second degree you must also determine whether or not a deadly weapon was used in the commission of this crime.

INSTRUCTION NO. 30

If you find beyond a reasonable doubt that a defendant committed Murder of the Second Degree with the Use of a Deadly Weapon, then you are instructed that the verdict of Murder of the Second Degree with the Use of a Deadly Weapon is the appropriate verdict.

If, however, you find that a deadly weapon was not used in the commission of the Murder, but you do find that a Murder was committed, then you are instructed that the verdict of Murder of the Second Degree without the Use of a Deadly Weapon is the appropriate verdict.

You are instructed that you cannot return a verdict of both Murder of the Second Degree with the Use of a Deadly Weapon and Murder of the Second Degree without the Use of a Deadly Weapon

INSTRUCTION NO. 31

The offenses of first degree murder and second degree murder necessarily includes the lesser offense of voluntary manslaughter.

If you have a reasonable doubt that the defendant is guilty of murder of the first degree and if you have a reasonable doubt that a defendant is guilty of murder of the second degree, but you do believe from the evidence beyond a reasonable doubt that the defendant is guilty of manslaughter, you will acquit him of murder and find him guilty of Voluntary Manslaughter.

INSTRUCTION NO. 32

Voluntary Manslaughter is the unlawful killing of a human being without malice express or implied, and without any admixture of deliberation. It must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible. In cases of voluntary manslaughter there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing.

The killing must be the result of that sudden, violent impulse of passion supposed to be irresistible; for, if there should appear to have been an interval between the assault or provocation given and the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge and punished as murder.

A serious and highly provoking injury need not be a direct physical assault on the accused.

INSTRUCTION NO. 33

You are instructed that if you find a defendant guilty of Voluntary Manslaughter you must also determine whether or not a deadly weapon was used in the commission of this crime.

INSTRUCTION NO. 34

If you find beyond a reasonable doubt that a defendant committed Voluntary Manslaughter with the Use of a Deadly Weapon, then you are instructed that the verdict of Voluntary Manslaughter with the Use of a Deadly Weapon is the appropriate verdict.

If, however, you find that a deadly weapon was not used in the commission of the Voluntary Manslaughter, but you do find that Voluntary Manslaughter was committed, then you are instructed that the verdict of Voluntary Manslaughter without the Use of a Deadly Weapon is the appropriate verdict.

You are instructed that you cannot return a verdict of both Voluntary Manslaughter with the Use of a Deadly Weapon and Voluntary Manslaughter without the Use of a Deadly Weapon.

INSTRUCTION NO. 35

To constitute the crime charged, there must exist a union or joint operation of an act forbidden by law and an intent to do the act.

The intent with which an act is done is shown by the facts and circumstances surrounding the case.

Do not confuse intent with motive. Motive is what prompts a person to act. Intent refers only to the state of mind with which the act is done.

Motive is not an element of the crime charged and the State is not required to prove a motive on the part of the Defendant in order to convict. However, you may consider evidence of motive or lack of motive as a circumstance in the case.

INSTRUCTION NO. 36

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

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

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

INSTRUCTION NO. 37

The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel.

There are two types of evidence; direct and circumstantial. Direct evidence is the testimony of a person who claims to have personal knowledge of the commission of the crime which has been charged, such as an eyewitness. Circumstantial evidence is the proof of a chain of facts and circumstances which tend to show whether the Defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. Therefore, all of the evidence in the case, including the circumstantial evidence, should be considered by you in arriving at your verdict.

Statements, arguments and opinions of counsel are not evidence in the case. However, if the attorneys stipulate to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

You must not speculate to be true any insinuations suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

You must disregard any evidence to which an objection was sustained by the court and any evidence ordered stricken by the court.

Anything you may have seen or heard outside the courtroom is not evidence and must also be disregarded.

INSTRUCTION NO. 38

Evidence of a person's character or a trait of his character or evidence of other crimes, wrongs or acts, is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion.

However, such evidence is admissible for other purposes, such as proof of motive, intent, plan, knowledge, identity, or absence of mistake or accident.

INSTRUCTION NO. 39

A statement of a declarant's then-existing state of mind, emotion, sensation or physical condition, such as intent, plan, motive, design, mental feeling, pain and bodily health, is not inadmissible under the hearsay rule. However, such evidence is admitted only for the purpose of establishing the declarant's state of mind and not for the purpose of proving the truth of what the declarant said.

INSTRUCTION NO. 40

The credibility or believability of a witness should be determined by his manner upon the stand, his relationship to the parties, his fears, motives, interests or feelings, his opportunity to have observed the matter to which he testified, the reasonableness of his statements and the strength or weakness of his recollections.

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his testimony which is not proved by other evidence.

INSTRUCTION NO. 41

A witness who has special knowledge, skill, experience, training or education in a particular science, profession or occupation is an expert witness. An expert witness may give his opinion as to any matter in which he is skilled.

You should consider such expert opinion and weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if, in your judgment, the reasons given for it are unsound.

INSTRUCTION NO. 42

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

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

INSTRUCTION NO. 43

In arriving at a verdict in this case as to whether the defendant is guilty or not guilty, the subject of penalty or punishment is not to be discussed or considered by you and should in no way influence your verdict.

If the Jury's verdict is Murder in the First Degree, you will, at a later hearing, consider the subject of penalty or punishment.

INSTRUCTION NO. 44

When you retire to consider your verdict, you must select one of your number to act as foreperson who will preside over your deliberation and will be your spokesman here in court.

During your deliberation, you will have all the exhibits which were admitted into evidence, these written instructions and forms of verdict which have been prepared for your convenience.

Your verdict must be unanimous. As soon as you have agreed upon a verdict, have it signed and dated by your foreperson and then return with it to this room.

INSTRUCTION NO. 45

If, during your deliberation, you should desire to be further informed on any point of law or hear again portions of the testimony, you must reduce your request to writing signed by the foreperson. The officer will then return you to court where the information sought will be given you in the presence of, and after notice to, the district attorney and the Defendant and his counsel.

Readbacks of testimony are time-consuming and are not encouraged unless you deem it a necessity. Should you require a readback, you must carefully describe the testimony to be read back so that the court reporter can arrange his notes. Remember, the court is not at liberty to supplement the evidence.

INSTRUCTION NO. 46

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be and by the law as given to you in these instructions, with the sole, fixed and steadfast purpose of doing equal and exact justice between the Defendant and the State of Nevada.

GIVEN: _____
DISTRICT JUDGE

IN OPEN COURT 10-15-96

EXHIBIT 48

VER

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- RICHARD EDWARD POWELL Defendant.	Case No. C148936 Dept. No. XI

SPECIAL
VERDICT
(COUNT I - SAMANTHA LATRELLE SCOTTI)

We, the Jury in the above entitled case, having found the Defendant, RICHARD EDWARD POWELL, Guilty of MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON, designate that the mitigating circumstance or circumstances which have been checked below have been established.

____ The Defendant has no significant history of prior criminal activity.

____ The victim was a participant in the Defendant's criminal conduct or consented to the act.

____ The Defendant was an accomplice in a murder committed by another person and his participation in the murder was relatively minor.

____ Any other mitigating circumstances.

_____

_____

DATED at Las Vegas, Nevada, this 15 day of November, 2000.

FOREPERSON

VER

11-15-00 5:30 PM

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

RICHARD EDWARD POWELL

Defendant.

Case No. C148936
Dept. No. XI

SPECIAL
VERDICT
(COUNT I - SAMANTHA LATRELLE SCOTTI)

We, the Jury in the above entitled case, having found the Defendant, RICHARD EDWARD POWELL, Guilty of MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON, designate that the aggravating circumstance or circumstances which have been checked below have been established beyond a reasonable doubt.

✓ 1. The murder was committed while the person was engaged in the commission of or an attempt to commit any Burglary.

✓ 2. The murder was committed by a person who knowingly created a great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person.

///

✓ 3. The murder was committed to avoid or prevent a lawful arrest.

____ 4. The murder involved torture or the mutilation of the victim.

DATED at Las Vegas, Nevada, this 15 day of November, 2000.

FOREPERSON

VER

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

RICHARD EDWARD POWELL

Defendant.

Case No. C148936
Dept. No. XI

SPECIAL
VERDICT
(COUNT II - LISA RENEE BOYER)

We, the Jury in the above entitled case, having found the Defendant, RICHARD EDWARD POWELL, Guilty of MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON, designate that the mitigating circumstance or circumstances which have been checked below have been established.

____ The Defendant has no significant history of prior criminal activity.

____ The victim was a participant in the Defendant's criminal conduct or consented to the act.

____ The Defendant was an accomplice in a murder committed by another person and his participation in the murder was relatively minor.

____ Any other mitigating circumstances.

_____

_____

DATED at Las Vegas, Nevada, this 15 day of November, 2000.

FOREPERSON

VER

11-15-00 5:30 PM

Joyce Brown

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

RICHARD EDWARD POWELL

Defendant.

Case No. C148936
Dept. No. XI

SPECIAL
VERDICT
(COUNT II - LISA RENEE BOYER)

We, the Jury in the above entitled case, having found the Defendant, RICHARD EDWARD POWELL, Guilty of MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON, designate that the aggravating circumstance or circumstances which have been checked below have been established beyond a reasonable doubt.

✓ 1. The murder was committed while the person was engaged in the commission of or an attempt to commit any Burglary.

✓ 2. The murder was committed by a person who knowingly created a great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person.

///

3. The murder was committed to avoid or prevent a lawful arrest.

DATED at Las Vegas, Nevada, this 1 day of November, 2000.

FOREPERSON

VER

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

RICHARD EDWARD POWELL

Defendant.

Case No. C148936
Dept. No. XI

SPECIAL
VERDICT
(COUNT III - STEVEN LAWRENCE WALKER)

We, the Jury in the above entitled case, having found the Defendant, RICHARD EDWARD POWELL, Guilty of MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON, designate that the mitigating circumstance or circumstances which have been checked below have been established.

_____ The Defendant has no significant history of prior criminal activity.

_____ The victim was a participant in the Defendant's criminal conduct or consented to the act.

_____ The Defendant was an accomplice in a murder committed by another person and his participation in the murder was relatively minor.

_____ Any other mitigating circumstances.

_____

_____

DATED at Las Vegas, Nevada, this _____ day of November, 2000.

FOREPERSON

VER

11-15-00 5:35 PM

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

RICHARD EDWARD POWELL

Defendant.

Case No. C148936
Dept. No. XI

SPECIAL
VERDICT
(COUNT III - STEVEN LAWRENCE WALKER)

We, the Jury in the above entitled case, having found the Defendant, RICHARD EDWARD POWELL, Guilty of MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON, designate that the aggravating circumstance or circumstances which have been checked below have been established beyond a reasonable doubt.

✓ 1. The murder was committed while the person was engaged in the commission of or an attempt to commit any Burglary.

✓ 2. The murder was committed by a person who knowingly created a great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person.

///

3. The murder was committed to avoid or prevent a lawful arrest.

DATED at Las Vegas, Nevada, this ____ day of November, 2000.

FOREPERSON

VER

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

RICHARD EDWARD POWELL

Defendant.

Case No. C148936
Dept. No. XI

SPECIAL
VERDICT
(COUNT IV - JERMAINE M. WOODS)

We, the Jury in the above entitled case, having found the Defendant, RICHARD EDWARD POWELL, Guilty of MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON, designate that the mitigating circumstance or circumstances which have been checked below have been established.

____ The Defendant has no significant history of prior criminal activity.

____ The victim was a participant in the Defendant's criminal conduct or consented to the act.

____ The Defendant was an accomplice in a murder committed by another person and his participation in the murder was relatively minor.

____ Any other mitigating circumstances.

_____

_____

DATED at Las Vegas, Nevada, this 15 day of November, 2000.

FOREPERSON

VER

11-15-00 5:30 PM

Judge Brown

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

RICHARD EDWARD POWELL

Defendant.

Case No. C148936
Dept. No. XI

SPECIAL
VERDICT
(COUNT IV - JERMAINE M. WOODS)

We, the Jury in the above entitled case, having found the Defendant, RICHARD EDWARD POWELL, Guilty of MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON, designate that the aggravating circumstance or circumstances which have been checked below have been established beyond a reasonable doubt.

___ 1. The murder was committed while the person was engaged in the commission of or an attempt to commit any Burglary.

✓ 2. The murder was committed by a person who knowingly created a great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person.

///

t 3. The murder was committed to avoid or prevent a lawful arrest.

DATED at Las Vegas, Nevada, this 15 day of November, 2000.

FOREPERSON

VER

11-15-00 5:30 PM

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

RICHARD EDWARD POWELL

Defendant.

Case No. C148936
Dept. No. XI

VERDICT
(COUNT I - SAMANTHA LATRELLE SCOTTI)

We, the Jury in the above entitled case, having found the Defendant, RICHARD EDWARD POWELL, Guilty of MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON and having found that the aggravating circumstance or circumstances outweigh any mitigating circumstance or circumstances impose a sentence of,

✓ Life in Nevada State Prison With the Possibility of Parole.

___ Life in Nevada State Prison Without the Possibility of Parole.

___ Death.

DATED at Las Vegas, Nevada, this 15 day of November, 2000

FOREPERSON

VER

11-15-00 5:30 PM

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

RICHARD EDWARD POWELL

Defendant.

Case No. C148936
Dept. No. XI

VERDICT
(COUNT II - LISA RENEE BOYER)

We, the Jury in the above entitled case, having found the Defendant, RICHARD EDWARD POWELL, Guilty of MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON and having found that the aggravating circumstance or circumstances outweigh any mitigating circumstance or circumstances impose a sentence of,

____ Life in Nevada State Prison With the Possibility of Parole.

✓ Life in Nevada State Prison Without the Possibility of Parole.

____ Death.

DATED at Las Vegas, Nevada, this ___ day of November, 2000

FOREPERSON

VER

11-15-00 5:50 PM

Joyce Brown

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

RICHARD EDWARD POWELL

Defendant.

Case No. C148936
Dept. No. XI

VERDICT
(COUNT III - STEVEN LAWRENCE WALKER)

We, the Jury in the above entitled case, having found the Defendant, RICHARD EDWARD POWELL, Guilty of MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON and having found that the aggravating circumstance or circumstances outweigh any mitigating circumstance or circumstances impose a sentence of,

____ Life in Nevada State Prison With the Possibility of Parole.

✓ Life in Nevada State Prison Without the Possibility of Parole.

____ Death.

DATED at Las Vegas, Nevada, this 15 day of November, 2000

FOREPERSON

VER

11-15-00 5:30 PM

Joyce Bloom

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

RICHARD EDWARD POWELL

Defendant.

Case No. C148936
Dept. No. XI

VERDICT
(COUNT IV - JERMAINE M. WOODS)

We, the Jury in the above entitled case, having found the Defendant, RICHARD EDWARD POWELL, Guilty of MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON and having found that the aggravating circumstance or circumstances outweigh any mitigating circumstance or circumstances impose a sentence of,

____ Life in Nevada State Prison With the Possibility of Parole.

✓ Life in Nevada State Prison Without the Possibility of Parole.

____ Death.

DATED at Las Vegas, Nevada, this 15 day of November, 2000

FOREPERSON

EXHIBIT 49

District Case Inquiry - Minutes

Case 97-C-144577-C **Just Ct. Case#** 97-GJ-00041 **Status** CLOSED

Plaintiff State of Nevada **Attorney** Roger, David J.

Defendant Strohmeyer, Jeremy **Attorney** Colucci, Carmine J.

Judge Villani, Michael **Dept.** 17

Event 09/08/1998 at 09:00 AM AT THE REQUEST OF THE COURT

Heard By Leavitt, Myron E.

Officers SUE DEATON, Court Clerk
LAURIE WEBB, Reporter/Recorder

Parties	0000 - S1	State of Nevada	Yes
	000477	Bell, Stewart L.	Yes
	001951	Leen, Peggy	Yes
	0001 - D1	Strohmeyer, Jeremy	Yes
	000886	Wright, Richard A.	Yes
	910154	Abramson, Leslie H.	Yes

Prior to Court convening, Ms. Karen Winckler, Esq., FILED Guilty Plea Agreement IN OPEN COURT.

Also present in courtroom, Mr. William Koot, Chief Deputy District Attorney, representing the State.

OUTSIDE PRESENCE OF THE JURY - Court informed Deft Strohmeyer that Court had been told Deft wished to withdraw his pleas of Not Guilty. Colloquy between Court and Deft; Court WILL ALLOW Deft Strohmeyer to WITHDRAW HIS PLEAS OF NOT GUILTY. Mr. Bell stated negotiations are that the State agrees to withdraw the Notice of Intent to Seek Death; Deft agrees to stipulate to the maximum sentences otherwise provided by law and that all four (4) sentences shall run consecutive to each other, Count I - First Degree Murder, sentence shall be Life Without the Possibility of Parole, Count II - First Degree Kidnaping, sentence shall be Life Without the Possibility of Parole, to run consecutive to the sentence imposed for Count I, Count III - Sexual Assault With a Minor Under Sixteen Years of Age With Substantial Bodily Harm, sentence shall be Life Without the Possiblity of Parole, to run consecutive to the sentences imposed for Counts I and II and Count IV - Sexual Assault With a Minor Under Sixteen Years of Age, sentence shall be Life With the Possibility of Parole after a minimum of twenty (20) years are served, to run consecutive to the sentences imposed for Counts I, II and III. Mr. Bell noted there had been a meeting in Chambers between all counsel and the Court and Court had reviewed and agreed with Deft's Guilty Plea Agreement with the State. Court inquired of Deft Strohmeyer if he had reviewed his decision to enter guilty pleas in this matter with his attorneys and family and that he understood exactly what the sentence is as to each Count and that Deft understood the State was no longer seeking the death penalty; Deft Strohmeyer answered yes to each inquiry. Court inquired if Deft realized that he would have to spend the rest of his natural life in prison, due the sentences imposed for Counts I, II and III, notwithstanding the parole eligibility as to Count IV, Deft will never be eligible for parole; Deft acknowledged that he understood he would never be eligible for parole. Court reviewed rights Deft would be giving up by entering into plea agreement; Deft indicated he understood he was giving up those rights. Deft Strohmeyer indicated he had no questions regarding Guilty Plea Agreement he had signed; that he had reviewed the document with his attorneys and fully

under[illegible]d what he was signing. DEFT STROHME[illegible] ARRAIGNED AND PLED GUILTY TO C[illegible]T I - FIRST DEGREE MURDER (F) and [illegible]NT II - FIRST DEGREE KIDNAPING (F). DEFT STROHMEYER ARRAIGNED and PLED GUILTY PURSUANT TO ALFORD TO COUNT

III - SEXUAL ASSAULT WITH A MINOR UNDER SIXTEEN YEARS OF AGE WITH SUBSTANTIAL BODILY HARM (F) and COUNT IV - SEXUAL ASSAULT WITH A MINOR UNDER

SIXTEEN YEARS OF AGE (F). Mr. Bell made an offer of proof as to what facts the State could prove as to Counts III and IV if this matter should go to trial. COURT ACCEPTED DEFT'S PLEAS OF GUILTY AS TO COUNTS I AND II AND DEFT'S PLEAS OF GUILTY PURSUANT TO ALFORD AS TO COUNTS III AND IV and ORDERED matter referred to Division of Parole & Probation for a PSI Report and SET for SENTENCING.

COURT FURTHER ORDERED State's Exhibits marked as "Proposed Exhibits" in this matter TO BE RETURNED to Las Vegas Metropolitan Police Department.

CUSTODY

10-14-98, 9:00 A.M., SENTENCING (DEPT. XII)

Due to time restraints and individual case loads, the above case record may not reflect all information to date.

Top Of Page

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EXHIBIT 50

VER

FILED IN OPEN COURT
MAY 7 1996
LORETTA BOWMAN, CLERK
BY [signature] Deputy

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

FERNANDO PADRON RODRIGUEZ

Defendant.

Case No. C130763
Dept. No. VI
Docket B

VERDICT

We, the Jury in the above entitled case, having found the Defendant, FERNANDO PADRON RODRIGUEZ, Guilty of COUNT I - MURDER OF THE FIRST DEGREE (Brad Palcovic) and having found that the aggravating circumstance or circumstances outweigh any mitigating circumstance or circumstances impose a sentence of,

____ A definite term of 50 years, with eligibility for parole beginning when a minimum of 20 years has passed

____ Life in Nevada State Prison With the Possibility of Parole.

X Life in Nevada State Prison Without the Possibility of Parole.

____ Death.

DATED at Las Vegas, Nevada, this 7 day of May, 1996

Jacques C. Sapne
FOREPERSON

VER

MAY 7 1996
LORETTA BOWMAN, Clerk
BY [signature] Deputy

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

FERNANDO PADRON RODRIGUEZ

Defendant.

Case No. C130763
Dept. No. VI
Docket B

VERDICT

We, the Jury in the above entitled case, having found the Defendant, FERNANDO PADRON RODRIGUEZ, Guilty of COUNT II - MURDER OF THE FIRST DEGREE (Richley Miller) and having found that the aggravating circumstance or circumstances outweigh any mitigating circumstance or circumstances impose a sentence of,

_____ A definite term of 50 years, with eligibility for parole beginning when a minimum of 20 years has passed

_____ Life in Nevada State Prison With the Possibility of Parole.

_X_ Life in Nevada State Prison Without the Possibility of Parole.

_____ Death.

DATED at Las Vegas, Nevada, this 7 day of May, 1996

Jacques C. Jaque
FOREPERSON

CE31

EXHIBIT 51

168

DISTRICT COURT

CLARK COUNTY, NEVADA

C1126201

THE STATE OF NEVADA, Plaintiff, -vs- JONATHAN CORNELIUS DANIELS, #1201050 Defendant.	CASE NO. ~~C1126201~~ DEPT. NO. XV DOCKET NO. L

FILED IN OPEN COURT
NOV 01 1995 19
LORETTA BOWMAN, CLERK
BY Andy Horton Deputy

S P E C I A L

V E R D I C T

We, the Jury in the above entitled case, having found the Defendant, JONATHAN CORNELIUS DANIELS, Guilty of COUNT I - MURDER OF THE FIRST DEGREE (June Mildred Frye), designate that the aggravating circumstance or circumstances which have been checked below have been established beyond a reasonable doubt.

X The murder was committed by a person who knowingly created a great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person.

X The murder was committed while the person was engaged in the commission of or an attempt to commit any Robbery.

X The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody.

643

CE31

X The Defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree.

DATED at Las Vegas, Nevada, this 1st day of ~~October~~ November, 1995

Marland T. Eogan
FOREPERSON

644

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- JONATHAN CORNELIUS DANIELS, #1201050 Defendant.	CASE NO. C1126201 DEPT. NO. XV DOCKET NO. L

S P E C I A L

V E R D I C T

We, the Jury in the above entitled case, having found the Defendant, JONATHAN CORNELIUS DANIELS, Guilty of COUNT I - MURDER OF THE FIRST DEGREE (June Mildred Frye), designate that the mitigating circumstance or circumstances which have been checked below have been established.

_____ The defendant has no significant history of prior criminal activity.

X The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

X The defendant acted under duress or under the domination of another person.

645

____ The youth of the defendant at the time of the crime.

X Any other mitigating circumstances.

DATED at Las Vegas, Nevada, this 1st day of ~~October~~ November, 1995.

Michael T. Eugan
FOREPERSON

646

169

DISTRICT COURT

CLARK COUNTY, NEVADA

C126201

THE STATE OF NEVADA, Plaintiff,	)	CASE NO. ~~C1126201~~
	)	DEPT. NO. XV
-vs-	)	DOCKET NO. L
JONATHAN CORNELIUS DANIELS, #1201050	)	
Defendant.	)	

FILED IN OPEN COURT
NOV 0 1 1995 19
LORETTA BOWMAN, CLERK
BY Cindy Horton Deputy

V E R D I C T

We, the Jury in the above entitled case, having found the Defendant, JONATHAN CORNELIUS DANIELS, Guilty of COUNT II - MURDER OF THE FIRST DEGREE (Nicasio Diaz) and having found that the aggravating circumstance or circumstances outweigh any mitigating circumstance or circumstances impose a sentence of,

____ Life in Nevada State Prison With the Possibility of Parole.

X Life in Nevada State Prison Without the Possibility of Parole.

____ Death.

DATED at Las Vegas, Nevada, this 1st day of ~~October~~ NOVEMBER, 1995

Michael T. Evans
FOREPERSON

647

CE31

170

DISTRICT COURT

CLARK COUNTY, NEVADA

C126201

THE STATE OF NEVADA, Plaintiff, -vs- JONATHAN CORNELIUS DANIELS, #1201050 Defendant.	CASE NO. ~~C1126201~~ DEPT. NO. XV DOCKET NO. L

FILED IN OPEN COURT
NOV 0 1 1995 19
LORETTA BOWMAN, CLERK
BY Cindy Horton
Deputy

S P E C I A L

V E R D I C T

We, the Jury in the above entitled case, having found the Defendant, JONATHAN CORNELIUS DANIELS, Guilty of COUNT II - MURDER OF THE FIRST DEGREE (Nicasio Diaz), designate that the aggravating circumstance or circumstances which have been checked below have been established beyond a reasonable doubt.

X The murder was committed by a person who knowingly created a great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person.

X The murder was committed while the person was engaged in the commission of or an attempt to commit any Robbery.

X The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody.

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X The Defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree.

DATED at Las Vegas, Nevada, this 1ST day of ~~October~~ NOVEMBER, 1995

Michael T. Eagan
FOREPERSON

649

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- JONATHAN CORNELIUS DANIELS, #1201050 Defendant.	CASE NO. C1126201 DEPT. NO. XV DOCKET NO. L

S P E C I A L

V E R D I C T

We, the Jury in the above entitled case, having found the Defendant, JONATHAN CORNELIUS DANIELS, Guilty of COUNT II - MURDER OF THE FIRST DEGREE (Nicasio Diaz), designate that the mitigating circumstance or circumstances which have been checked below have been established.

____ The defendant has no significant history of prior criminal activity.

X The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

X The defendant acted under duress or under the domination of another person.

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____ The youth of the defendant at the time of the crime.

X Any other mitigating circumstances.

DATED at Las Vegas, Nevada, this 1ST day of ~~October~~ NOVEMBER, 1995.

Michael T. Eagan
FOREPERSON

651

171

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- JONATHAN CORNELIUS DANIELS, #1201050 Defendant.	CASE NO. ~~C1126201~~ C126201 DEPT. NO. XV DOCKET NO. L

FILED IN OPEN COURT
NOV 01 1995 19
LORETTA BOWMAN, CLERK
BY Cindy Horton Deputy

V E R D I C T

We, the Jury in the above entitled case, having found the Defendant, JONATHAN CORNELIUS DANIELS, Guilty of COUNT I - MURDER OF THE FIRST DEGREE (June Mildred Frye) and having found that the aggravating circumstance or circumstances outweigh any mitigating circumstance or circumstances impose a sentence of,

____ Life in Nevada State Prison With the Possibility of Parole.

X Life in Nevada State Prison Without the Possibility of Parole.

____ Death.

DATED at Las Vegas, Nevada, this 1st day of ~~October,~~ NOVEMBER 1995

Michael T. Sagem
FOREPERSON

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EXHIBIT 52

Declaration of Benjamin Dean

I, Benjamin Dean, hereby declare as follows:

1. My name is Benjamin Dean. I am forty-nine years old and reside in Lansing, Michigan. The late Barbara Dean was my mother, and I am the brother of Charles and Fred Dean. James Chappell and I grew up in the same neighborhood and were childhood friends. I testified at James's second trial in 2007.

2. My family originally moved to James's neighborhood during the early 1970s from Arkansas. Otho Blocker, the father of James's eldest brother, Lapriest, was a close family friend and also from Arkansas. Otho and his brother Fred helped my family relocate to Lansing, Michigan, and introduced us to James's family who were already living in the neighborhood. My mother and James's grandmother, Clara, became good friends, and our families were close.

3. My earliest memories of James are from the mid-1970s when we were both attending Moores Park Elementary School. My mother, Barbara, worked there as a school lunch aide and interacted with James on a daily basis. James and I were never in the same classes because I am two years older than James. Nevertheless, James and I became close friends and spent a lot of time together from that time period through high school.

4. It was obvious that James was mentally slow from the time that I first met him in the 1970s. James spoke slowly and sometimes seemed like he had trouble getting his words out. James used few words and spoke in simple phases. The words that James used usually had no more than two or three syllables. James could easily get lost in a conversation, especially if a person was speaking too quickly or changing subjects. James was also not a focused person and had a short attention span. The only activities that held James's attention was when he watched music videos or played Atari video games.

5. I had the impression that James's slowness may have been hereditary because it seemed to run in his family. James's Uncle Rodney, Aunt Sharon, Aunt Louise, and some of James's cousins all seemed a bit mentally challenged. Even his Grandmother Clara seemed a bit slow because of the slow way that she often spoke. Clara's brother, Jimmy Underwood, was in a residential mental health facility before his death. James's siblings, Ricky and Myra, did not seem mentally slow, but they had severe behavioral problems, which gave some the impression that something might be wrong with them.

6. James was not a street-wise person and was very gullible. Kids in the neighborhood enjoyed playing tricks on James, and he was often the butt of jokes because you could tell him almost anything and he'd believe it.

7. James was a follower and often went along with the crowd. It did not take much to get James to follow an idea, no matter how silly it was. James often followed friends when they came up with ideas to go into a fast food restaurant and throw toilet paper all over the bathroom. James was once arrested on juvenile charges, during his early teens, after following friends into a neighbor's house on Herbert Street and trashing the place. James followed friends when they played a very immature game called "The Dash." The game entailed the group mixing bleach, ketchup, and various liquids into cups or bottles and then running up and throwing the contents onto random people. James once threw a concoction onto a brand new jacket that I had just purchased. I was pretty mad, but I refrained from beating him up because I knew that James was slow and he was like family. In fact, most of the kids who played this Dash game around the neighborhood seemed slow. James did not put much thought into the things that he did throughout the time that he lived in Lansing. James also had difficulty reading social cues and figuring out when he was going too far with his pranks and silly behaviors. James was very childish and at times did not know when to stop playing around.

8. James was a very impressionable person and imitated things he saw on television. He tried to learn every dance move that he saw on music videos. He stood next to the television, dancing and mouthing the lyrics. The other kids would watch and laugh at

James. James also tried to dress and wear his hair like his favorite singers, which was another source of teasing. His favorite rapper was LL Cool J, and James often tried to imitate the way that LL licked his lips and wiped his mouth. James would often pose and look at himself in mirrors trying to imitate these behaviors perfectly. It was very bizarre.

9. The old Diamond Reo automobile plant was located right across the street from my and James's homes, and we spent a lot of time playing in and around its vacant structures. We were not aware of the presence of environment toxins at the unsecured site. The building was open and the materials had not been fully removed. We used to play with old equipment and various items that we picked up around the facility. Many of the containment tanks were left open, so we used to play around and climb inside of them. Some of these old tanks had strong chemical smells from the dried residual substances that were left behind. I never thought about it before, but when the city constructed a local park on a portion of the old plant ground, in my mother's honor, they did not use the dirt that was already there. Instead, they brought in fresh soil from elsewhere.

10. James was not a violent person during the time that I was around him in Lansing. I never saw or heard of James fighting anyone. James was a very peaceful and unaggressive guy who avoided problems with others. In fact, James is the only guy in the neighborhood who I never saw engaged in a fist fight.

11. James started smoking marijuana around the time he entered junior high school. Marijuana was cheap and easy to obtain in our neighborhood. The cost of a single joint was about one or two dollars, and there were weed houses on his block. Marijuana seemed to lift James's spirits and make him happy whenever he smoked it. James often laughed, danced, sang songs, and played video games when high on marijuana. James sometimes became so focused when he was smoking weed and playing Atari that he was able to play games all the way to the end where the scores turned over and started again.

12. I heard that James had gotten into smoking a mixture of marijuana and crack cocaine during his late teens. This was not my thing, so James did not do this around me.

13. James had a troubled family history. His mother was killed when he was just three years old. James's Uncle Anthony was murdered when James was about eleven or twelve years old. His cousin Laura, the daughter of James's Aunt Louise, was shot to death in her mother's home, which was located across the street from James's house. James was a teenager during the time of Laura's murder, and they were close to one another. Several members of James's family were substance abusers and had problems with the law.

14. Like myself, and most of the children in our neighborhood, James and his siblings were raised without their fathers or male role models. James's siblings Carla and Ricky had the same father, but I did not meet Mr. Chappell until I was an adult. I did not see him around the family while we were growing up together. I have no idea who fathered James and Myra, and I have never met him. Lapriest is James's only sibling who was raised with his father. Lapriest lived in a healthier environment in his father's home and rarely associated with his grandmother and siblings.

15. My mother used to tell me that James frequently asked for second and third portions of food during lunchroom hours. James also used to eat at our house after school on many occasions. James's appetite gave us the impression that he was not getting enough to eat at home. I have no recollection of ever seeing Clara cooking in their home or preparing meals, like my mother and the other neighborhood moms frequently did around the neighborhood.

16. Clara was a strict, but she was away from their home a lot for work and other activities. James and his siblings were not allowed to leave the block and sometimes even the front yard. Clara was verbally abusive to James and his siblings and ordered them around. The majority of the kids in the neighborhood were not allowed in Clara's home at all. My siblings and I were the exceptions because of Clara's close relationship with our mother. James and his siblings were forbidden from leaving the house when Clara was not home. This is why the kids in the neighborhood visited James and his siblings at the

house when Clara was not around, which led to his home becoming the favorite place for neighborhood kids to hangout.

17. No other home in our community was as unsupervised as James's house. For instance, my mom was always around and never allowed the neighborhood kids to do in our home the things that were done in James's house. When the kids got together at James's place, there was always a lot of alcohol drinking and marijuana smoking. Some of the guys even brought girls over to James's home to have sex. We watched music videos on MTV for hours at a time and moved the furniture in his living room out of the way to make space for break dancing. It was like a free-for-all in James's house and everyone had fun. Whenever Clara made her way home, everyone had to scatter and run out the back door. Clara sometimes caught us as we were running away and punished James and his siblings.

18. James was not into girls and acted awkward whenever he was around them when we were growing up. In fact, James was the last virgin on the block when we were teenagers. James's relationship with Debbie Panos was the only real one he ever had. James briefly dated Nicole Elliot in high school, but that relationship ended before it had a chance to get started. Nicole ended up marrying James's close friend, the late Ivri Marrell.

19. I was not around James and Debbie that much because they met around the time that I graduated from high school. James and I did not spend as much time together after I finished school and enlisted in the Army National Guards from 1986 to 1990. I continued to see James from time to time, but I was doing my own thing for the most part.

20. James told me a little bit about the struggles that he had in his relationship with Debbie. I heard rumors about what was going on, but I did not witness those occurrences for myself. This is why I responded the way that I did during the prosecutor's cross examination of my testimony at James's 2007 trial. It was my understanding that I was

only supposed to testify about the things that I personally witnessed and not comments that had been made to me by James and our common friends. The affidavit that I signed in March 2003 did not seem completely correct because there was not a clear distinction whether my comments about Debbie were from my personal experience or based on what I had been told. I believed that James and the others were telling me the truth over the years, and their comments regarding the way that Debbie treated James were consistent. However, their comments were not my words, and I did not want to perjure myself.

21. I believe that James's attorneys were the source of the confusion that occurred during my testimony. His attorneys spoke with me once in 2002, and I did not hear from them after signing the declaration in 2003 until one month before the beginning of James's second trial in 2007. His attorney did not speak with me individually during the two interviews, but rather in a group of about six of seven other people on both occasions. The attorneys sent my affidavit by postal mail and never called to go over it and check its accuracy. I signed the affidavit because I didn't think the ambiguity was that big of a deal and believed that I'd have a chance to bring it up when we eventually met. Unfortunately, this never happened. After I testified, one of James's attorneys actually apologized to me for not preparing me for my testimony.

22. I was brought out to Las Vegas a week before taking the witness stand. James's attorneys initially informed us that we would be testifying within two or three days of our arrival, but this was a total misestimation. I called my job to let my supervisor know that I needed to stay in Las Vegas longer than anticipated. My job allowed me to stay after the relevant documents were faxed to them, including a notarized letter, along with documents that bore the court's seal. James Ford and Ivri Marrell were not as fortunate. They had to return to their jobs in Lansing before they had a chance to take the stand. Not having Ford's and Marrell's testimonies was a blow to James's case because they were his closest friends and knew the most about his life and relationship with Debbie.

23. James's attorneys met with me a couple of times prior to the day that I took the stand, but these exchanges were meaningless because we didn't go over much. I recall sitting

around their office with some of the other witnesses on a few days, but they never provided us with a game plan or what to expect when we took the stand. When they came out and spoke with us, the meeting lasted a few minutes. They told us not to mention that it was a capital murder case when we were took the stand. They didn't explain why. Like my other meetings with his attorneys, this was a group discussion. This encounter did not include discussions of strategy, preparation, or what we should expect to talk about on the witness stand. I had no idea what I was going to be asked ahead of time.

24. During my recent conversation with Herbert Duzant, of the Federal Public Defender, I discussed subject matters that were not brought up in my communications with James's prior counsel. I would have provided James's previous attorney with everything that I've said in this declaration had I been asked. I also would have testified to these facts.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and that this declaration was executed in Ingham County, Michigan, on April 17, 2016.

Benjamin Dean

EXHIBIT 53

Declaration of Carla Chappell

I, Carla Chappell, hereby declare as follows:

1. I am forty-nine years old and currently reside in Lansing Michigan, and I am the older sister of James Chappell. I am the second child of our mother Shirley Chappell's five children. My siblings include Lapriest Blocker, Willie "Ricky" Chappell, Jr., James Chappell and Myra Chappell-King.

2. I was born to Shirley and Willie Ricky Chappell, Sr. on March 15, 1967. I don't have many memories of my parents or my siblings during the first five or six years of life because I did not live with them. I lived with a woman named Mary Mendenhall, who I called "Mommy." This woman cared for me and tended to my needs on a daily basis. I recall my birth mother, Shirley's, image, but not her face. I just remember that she was a tall, pretty, light-complexed woman with long hair. Shirley visited me periodically to walk me to school, bring me gifts, or just to see me. One of the fondest memories I have of my birth mother is when she made a dress for me to wear on my first day of kindergarten and walked me to school.

3. I have no memories of my father Willie Chappell, Sr. in those early years because he was not around. I missed out on a lot of time with my father throughout my childhood because of his life of crime and subsequent incarcerations. On a couple of occasions during the 1970's, my father's brother Wendell Chappell took me and my brother Ricky Jr. to the prisons where our father was located for visits. James and Myra never came along because they were said to be the children of our mother's boyfriend, James Wells. Like Willie Sr., James Wells was a longtime drug abuser and was not a part of James and Myra's lives.

4. I did not move in with my grandmother Clara Axam until after the death of my mother in 1973. My mother was struck and killed by an Ingham County sheriff's squad car as she was walking in the middle of a highway road while intoxicated. I was told by my

mother's friends and relatives that she had been an alcoholic and drug addict for many years prior to her death. I was also told that my mother abused drugs and alcohol during her pregnancies with me and my siblings. My brother James and I seem to have suffered the most from our mother's prenatal substance abuse because we are both slow and struggle with similar deficits.

5. James and I were both special education students and were diagnosed with learning disabilities. James and I struggled with reading, math, and various school subjects throughout our upbringing, and we were both unable to finish high school. James and I often wrote backwards when we were in elementary school and possibly in junior high school as well. James and I also struggled in our social relationships, and we did not make a lot of friends outside of or within our immediate community. We were both very distrustful of others. Children in the neighborhood and schools picked on and teased James and me about being slow. We were even teased in our home by our siblings Willie Ricky, Jr and Myra. Ricky Jr. and Myra were smarter, not in special education classes, and more advanced than James and me, so they constantly teased us. I was able to fend for myself most of the time because I was older and bigger than Ricky Jr. and Myra, but James often shut down and cried a lot when he was teased. I often defended James and made our siblings stop teasing him.

6. I believe that mental slowness ran in our family because our mother, Shirley, and all of her siblings were said to have been in special-education-type-classes. Our mother and her siblings also had learning disabilities, difficulty with reading and writing, and none of them finished high school, except for Uncle Rodney. Although Rodney had a high school diploma, he was unable to read when he graduated.

7. James was called a "cry baby" when he was a young child and during his elementary school years because he cried a lot. James was also afraid of people, especially strangers, but also people he had met before. I recall one occasion when James cried a lot and was hard to calm down after our maternal Aunt Ticky tried to pick him up during a visit. James was about four or five years old at the time. James was also a very sensitive child,

and it was very easy to hurt his feelings and make him cry just by teasing him. I did not tease James and tried to protect him from other children who tried to provoke him at times.

8. James was a good child when he was growing up and did not get into trouble when he was by himself. Whenever James did get into mischief, it was usually because he was following our siblings, Ricky Jr. and Myra, or the neighborhood kids. James was a follower and very gullible.

9. James suffered from a severe bladder problem throughout most of his childhood until about age fourteen or fifteen. James often wet his bed while he was sleeping, and he sometimes wet his pants while he was awake. It was a very embarrassing issue for James because he was frequently teased about his condition by children in the neighborhood and our siblings at home.

10. When James was about thirteen years old, he was publicly humiliated by our Uncle Philip Underwood's close friend, Robert, who also went by the name "Marge." Marge was a gay white man and transvestite who lived in the neighborhood. Our Uncles Phillip and Rodney were also homosexual and cross dressed for certain events Marge always wore women's clothes, and she sometimes watched the house while Clara was away. Marge had become upset with James for wetting himself, so she took off his clothes and placed him in a diaper made from a bath towel. Marge then made James go outside and walk around the block as punishment. The kids in the neighborhood laughed, teased, and pointed at James. He was completely humiliated.

11. I have no idea whether James was sexually abused by Marge or anyone else when we were growing up, but I would not be surprised if he was because there were sexual predators around us. I was raped by Uncle Anthony Axam's close friend, James Jones, when I was only thirteen years old, but I was too afraid to talk about it for years afterwards. Clara's brother, Jimmy Underwood, once held me and attempted to rape me until someone walked in and caught him in the act. Uncle Jimmy let me go as the person

ran off to tell Clara, but she did not really do anything. Jimmy was allowed to continue coming around the house. My sister Myra's daughter, Jasmine, was sexually abused while living in Clara's home, but it occurred when she was too young to remember what happened. Evidence of Jasmine's abuse was discovered later when a doctor found signs of a previous sexual assault during an examination of her vagina.

12. The worst part of our childhood was the way that we were mistreated by our grandmother, Clara Axam. I have no recollections of Clara saying that she loved us, hugging us, picking us up, or playing with us. Clara constantly screamed and cursed at us over minor issues, or even when she was just having a bad day.

13. Besides being mentally cruel to me and my siblings, Clara physically abused us. She frequently beat us with her hands and various items in and around the house. Clara beat us with belts, shoes, clothes hangers, extension cords, broom sticks, wooden support sticks from the box spring located under her bed, and tree limbs and branches that she made us go outside to pick ourselves. If the limb we picked was too short, Clara would become angry and give more intense beatings after making us go back outside to retrieve a larger branch. Clara's beatings were long and loud because she screamed at us throughout the beatings. Her beatings almost always left bruises, welts, and sometimes cuts on our skin. Clara did not keep us out of school to hide or injuries. Whenever I told the teachers how I received my injuries, they usually looked at me with a smirk and asked me if I learned my lesson or told me that I needed to behave better. There were a couple times when child protective workers came to the house, but they did nothing to help us. Growing up in Clara's house gave me the sense that me and my siblings' lives did not matter. We were defenseless and had no one to turn to for help or compassion.

14. Ricky Jr. and I received the most severe beatings. James received beatings at times as well, but Clara generally did not brutalize our youngest sister Myra. I believe Clara may have had sympathy for Myra because Myra was one year old when our mother was killed. Out of all of us, I received the most beatings because I was the oldest and Clara

put me "in charge" of my younger siblings. Whenever she came home and found chores undone, I received beatings even if the chores were not my direct responsibility.

15. Clara beat me for little things that were insignificant. From the age of nine, I was responsible for cooking the meals for the house. Our uncle Rodney sometimes helped with cooking when he was around, but it was primarily my responsibility. Clara beat me when she thought that the food was undercooked. She also beat me if she thought that the food was overcooked. I recall one occasion when I had cooked chicken and slightly burned the edges. Clara walked into the kitchen, threw the plate into the garbage, severely beat and yelled at me, and made me cook more chicken.

16. James once received a terrible beating from Clara for eating too much food while she was on vacation in Hawaii. James was always hungry when we were growing up, because he had a good appetite. During the week that Clara was away, James ate seven packs of hotdogs and a giant bag of frozen potatoes in the space of about three days. When Clara returned from her trip and found the food missing, she confronted James and he told her the truth. Clara beat James with an extension cord, leaving welts on his body.

17. Clara beat me so frequently I eventually became immune to the pain and no longer cried. This angered Clara because she liked to see us shed tears while she was beating us. My beatings became more violent and longer when I stopped crying, and it traumatized James and my other siblings. Whenever Clara beat me, all of my siblings cried, begging me to cry and for Clara to stop. James often rocked himself back and forth as he cried and sucked his finger, with snot running from his nose and saliva drooling from his mouth. James also did this at times when he was teased too much by our siblings and other children. The actual beatings that Clara gave were traumatizing, but it was also traumatizing for my siblings and I just to watch one another being beaten.

18. Clara beat and mistreated my brother Ricky Jr. in the same manner that she did me. The main difference was that she beat me mostly for not following instructions, whereas Ricky was usually beaten for getting into trouble in school, around the community, and in

the house. I once witnessed Clara severely beating Ricky Jr. for an extended period as he was telling her that he had to go to the bathroom. Clara was not concerned with Ricky's need to go to the bathroom and just kept beating him. Ricky eventually was unable to hold his bowels, so he grabbed an empty shoe box, pulled down his pants, and began relieving himself into the box as Clara continued to beat him throughout the entire process.

19. I recall another occasion when Clara was severely beating Ricky to the point where he could no longer take it. To stop the beating, Ricky ran to a nearby window on the second floor of the house and leaped out.

20. Clara's brother, Bobby Underwood, sometimes came over to our house to discipline Ricky when he got into trouble. I hated when Uncle Bobby came over because his beatings were much more brutal that Clara's. To punish Ricky for doing wrong, Bobby made Ricky stand next to a wall and would proceeded to punch Ricky's head into the wall, which caused Ricky to collapse. Bobby would then pick Ricky up off the floor, steady him next to the wall again, and repeat the punches to the head several times. Bobby only did this to Ricky and did not beat the rest of us.

21. By all of the accounts that I've heard through the years, it is my understanding that Clara had very bad relationship with our mother Shirley. Clara also used to tell me how much I looked like and reminded her of my mother. Sometimes when she was beating me, she said things that gave me the impression that she was beating my mother. Clara sometimes called me "Shirley" as she was striking me. My Uncle Anthony sometimes intervened, held her hands to stop the beatings, and told Clara that I was not Shirley. Looking back on the way that Clara treated us all, I think we all reminded her of our mother. Clara seemed resentful over being left alone to raise me and my siblings following our mother's death.

22. Besides going to Cedar Point Amusement Park at times, Clara did not take us on road trips even though she frequently traveled out of state on vacations and gambling trips.

Clara frequently left us alone and unattended at home. Uncle Rodney lived in the house at times during our upbringing, but even when he was there, it was like we were alone. Rodney spent a lot of time outside of the house working and hanging out with his friends, so he was hardly there. Rodney also lived in the basement and did not keep an eye on us.

23. Uncle Anthony also lived in the house until he was murdered in 1981, but he too was hardly around. Nonetheless, losing Uncle Anthony was a major setback for me and my siblings because he was the only adult in the family who told us that he loved us, and showed us affection. He also protected us from Clara when he was around. James and I named our sons, my first and James's second, after Uncle Anthony to honor his memory. Uncle Anthony was stabbed to death in a street altercation that started in a neighborhood bar.

24. Uncle Anthony was not the only murder victim in the family. Our cousin Laura Underwood, the daughter of Clara's Sister Louise Underwood, and her boyfriend were shot to death in Louise's home during the 1980's. The bodies were not discovered until a few days afterwards and had begun to decay. No one was ever brought to justice for their murder. Laura grew up in our neighborhood and was more like a sister than a cousin to me and my siblings. One of our mother's best friends Nadine was murdered in Detroit during a domestic dispute. Nadine was beaten and then ran over several times with a truck. Nadine babysat us when we were young and was like an aunt to us.

25. The1980s was a time of great loss for the family. Our Uncle Bobby Underwood, Clara's brother, died from health complications the same year as Uncle Anthony's murder. Uncle James Underwood, who had been homeless, froze to death outside of a fast food restaurant in 1987. We lost our Great Grandmother, Gladys Underwood, in 1988, and our Great Grandfather, William Underwood, died a year later. Our Great Grand Parents were the ones who kept everyone in the family together. They arranged all of the family reunions, picnics, family events and other activities. Our Great Grandparents were loving and caring individuals, but they did not live close enough to have an impact on our daily home life. They were also too old and lacked the strength to contend with Clara's

abusive treatment of us. Many people in the family started to lose touch with one another after the deaths of our Great Grandparents.

26. When I was a teenager and still underage, Clara did not allow me to date guys unless they had a car, a job, money, and could do something for Clara. However, all of the guys who met her requirements were adult men. I was just sixteen years old when I began my relationship with Grover, the father of my first son. Grover was twenty-eight at the time. Glover's family lived across the street from Clara's home, on Nellers Court, and he used to pick me up and take me out whenever he wanted to. He also spent time with me in Clara's home. Clara allowed Grover to do whatever he wanted with me because he had a good job and regularly gave Clara money. Clara typically used that money to gamble, play bingo, and do other things for herself. Clara never threatened to call the authorities on Grover and encouraged our relationship.

27. Even though Grover and I were involved in an unhealthy relationship, he did not like the way that Clara sometimes treated me. One night Grover saw Clara mishandling me from his window across the street. She had stripped me naked and was about to beat me with an extension cord when Grover ran into the house and snatched it out of her hands. Grover then asked Clara how she would like it if he beat her. Grover took me out of the house ~~for the~~ that night, and I never returned. I was tired of the abuse and needed to get away from her. Clara threatened to have Grover arrested for statutory rape and hiding a runaway, so he dropped me off at my Father's place.

28. I stayed with my father, Willie Chappell, Sr., for a brief period of time, but we were put out of the place where he was staying because he was not paying the rent. My father was using all of his money to support his and his girlfriend's drug addiction. We then moved in with my Aunt Sharon for a short time, until I found a strange pill on her bathroom one day and asked if it belonged to her. My father and his girlfriend then started screaming at me and accusing me of bringing drugs into the house. They knew that Sharon would kick them out if she found out that they were getting high in her house, so they blamed me. I responded by ~~punch~~ punching ~~my father's~~ the girlfriend's head through a window and

Sharon told me to leave her house. I was pregnant with my first child at the time and had no place to turn.

29. I discovered that Willie Sr. was not my real father a few years earlier, when I ran away from home on another occasion. He was trying to determine whether I could stay with him at the time and had a conversation about the situation with his girlfriend in another room ~~about the matter~~. They spoke loud enough for me to hear what they were saying. The girlfriend wanted me to stay, but Willie Sr. told her that it was not his responsibility because he was not my father and that I was the daughter of his brother, Billy Ray Chappell. After hearing Willie Sr.'s comments, I confronted Uncle Billy and he admitted he was indeed my father. Uncle Billy explained that my mother Shirley briefly stayed with him after she had fallen on hard times because Willie Sr. was not around. I believe Uncle Billy said that Willie Sr. was locked up in the county jail at the time. Uncle Billy and my mother had been engaged in sexual relations while she was staying with him, and I was conceived. This was a secret that my mother, Uncle Billy, and Willie Sr. kept to avoid problems within the family. I confronted Willie Sr. with this information after speaking to Uncle Billy, but he denied everything and insisted that he was my real father. Willie Sr. even denied making the comments about me not being his daughter to his girlfriend, even though I heard this with my own ears. Nevertheless, I was a sixteen-year-old girl with no one to assist me or take me in, even though two men were claiming to be my father.

30. I ended up living on the street and staying in the homes of friends or wherever I could rest my head. I was attending Sexton High School at the time, but I had to drop out of school. I was not able to re-enroll in school because Clara refused to sign the necessary paperwork, and my father could not sign because he was not my official guardian. Clara was punishing me for running away from home. By my early-twenties, I began hanging out with a bad crowd of friends and my brother Ricky introduced me to crack cocaine. Ricky brought it home one day, when I was at Clara's home for a visit, and started cooking it up on the stove. Clara was not at home at the time. When I asked Ricky what he was making, he told me to try it. Ricky, James and I smoked crack together on that

occasion. Ricky and James ~~was~~ were about nineteen and eighteen years old at the time. James was just following along. James was always following and was easily lead by others to do things that he should not do.

31. At first, I used drugs recreationally and to help forget my problems, but I soon developed a drug habit and began engaging in illegal activities. Before I knew it, I was stealing, hustling, and selling my body to support my habit. My life became a replica of the life that my mother lived. I was doing everything that she did to support her drug habit, and I was even spending time around many of her friends who were still living the street life.

32. I was forbidden from returning to Clara's house after I ran away, and she completely turned her back on me. She provided me with no support and refused to help me get back into Sexton High School finish my studies. Clara always told me to go ask my father for help since I ran away to be with him. To see my siblings, I sometimes walked up to the house during evenings and secretly watched them through windows. They usually did not know that I was there. I also snuck into the house when Clara was away at work, gambling or on a trip somewhere.

33. Besides smoking crack cocaine, James had a drinking problem and smoked a lot of marijuana during his later teen years. James would keep empty bottles of his favorite drink, Boone's Farm wine, under his bed. While cleaning, I once found enough wine bottles in his room to fill three trash bags. This is when I realized that he had a real problem. James also drank a lot of Old English malt liquor beer every day, especially when hanging out in the home of a gay neighbor, Rob Williams, who lived down the street. Rob used to buy alcohol for James and his friends and frequently cook food for them outside on his barbeque as they all listened to music.

34. Uncle Rodney smoked a lot of marijuana and sometimes kept sacks of weed in the house. James and my other siblings used to steal and smoke Rodney's marijuana without him knowing most of the time. Myra was nine years old or younger when she started

smoking marijuana, so James must have been at least eleven or twelve years old. Rodney kept so much weed that he usually did not notice when my siblings were skimming off of the top. Rodney caught them stealing his weed on a couple occasions, but he only yelled at them and told them not to do it again.

35. Substance abuse has been a continual problem in our family across generations. Clara had siblings and cousins who abused alcohol and drugs. Our mother and her siblings all abused alcohol and drugs. Our fathers and the men in our mother's life abused drugs and alcohol. Substance abuse is now a problem for many of the children and the younger members of the extended family. The people in our family who do not struggle with some form of addiction are a small minority. Sometimes I feel like my siblings and I were destined to become drug addicts because of the environment that we were raised in.

36. As far as I know, Debbie Panos was the only girlfriend that James had. I did not see James with any other girls at all. At first, they seemed like a bit of an odd couple, but I soon found out how much they loved one another. Debbie's parents was racists and were against the relationship from the start. Debbie and James had to do a lot of sneaking around to see one another until her parents threw Debbie out of their home when she became pregnant with their first child, James Panos. James and Debbie stayed in several places before moving into my house just prior to Debbie leaving for Arizona.

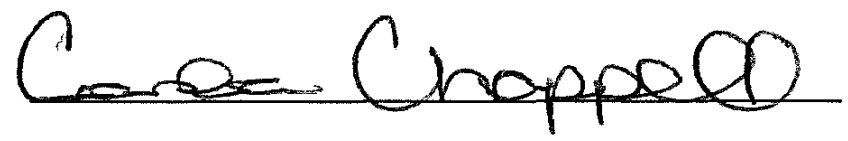
37. I had an opportunity to observe James's relationship with Debbie first hand. James's crack addiction worsened after the birth of their first child, and they were constantly getting into arguments over money. James was not able to keep jobs, so he babysat their first son while Debbie went to work. Debbie gave James an allowance, but it was not enough to support his drug habit. As a result, James began demanding more money from Debbie, even though she needed it to pay their bills and care for little James. There were times when the arguments became so heated that I had to step in to make sure nothing happened when James was losing his cool. The worst arguments between Debbie and James normally took place when James was intoxicated or in dire need of a fix. The difference in James's personality when he was high and when he was sober was like

night and day. Crack cocaine turned James into a completely different person who was scary to be around.

38. When James decided to join Debbie in Tucson, Arizona, I knew that it was a bad idea. Debbie's parents still hated James, and he did not have any system of support in Arizona, outside of his relationship with Debbie. James also did not have anyone to step in and stop him from doing anything crazy during his intoxicated altercations with Debbie. I'm convinced that James never would have been in his current situation had it not been for the drugs or if he stayed in Michigan.

39. I was never contacted by anyone working on James's behalf until my recent conversation with Herbert Duzant of the Federal Public Defender Office. I knew nothing about James's 1996 trial until it was over and James was already on death row. I also knew nothing about his second trial in 2007 until it was over too. I was living in Lansing, Michigan, during both of James's trials and could have easily been located if his attorneys bothered to look for me. I would have provided James's prior representatives with the information found in this declaration had I been asked, and I would have testified to these facts. I also would have asked the jury to spare my brother's life.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and that this declaration was executed in Lansing, Michigan, on April 23, 2016.



Carla Chappell

EXHIBIT 54

Declaration of Charles Dean

I, Charles Dean, hereby declare as follows:

1. My name is Charles Dean. I am forty-nine years old, and reside in Lansing, Michigan. The late Barbara Dean was my mother, and I am the brother of Benjamin and Fred Dean. James Chappell and I grew up in the same neighborhood and were childhood friends. I testified at James's second trial in 2007.

2. My family originally moved from Arkansas to James's neighborhood during the early 1970s. Otho Blocker, the father of James's eldest brother Lapriest, was a close family friend and also from Arkansas. Otho and his brother, Fred, helped my family relocate to Lansing, Michigan, and introduced us to James's family who were already living in the neighborhood. My mother and James's grandmother, Clara, became good friends, and our families were close.

3. My earliest memories of James are from the mid-1970s when we were both attending Moores Park Elementary School. I am four years older than James, so we were not in class together. James was also a special education student. Nevertheless, I saw James every day in school and around the community. My mother was a school lunch aide at our elementary school and interacted with James each day as well. James and I became good friends and spent a lot of time around one another. James was closer friends and in the same age group with my younger brothers Benjamin and Fred.

4. It was obvious to me that James was mentally slow from the time that I first met him in the mid-1970s. James spoke at a slow pace and sometimes had difficulty getting his words out. James had a limited vocabulary. He also used words that were simple and had few syllables. James had difficulties following conversations at times, especially if a person was speaking quickly or switching between subjects. James had a short attention span, which cause him to be unfocused. The only activity that held James's attention was watching music videos on MTV.

5. James struggled with reading and writing throughout his childhood and early adulthood. James sometimes needed help to read pretty basic items, but his close friends tried not to make a big deal about it. Nevertheless, there were times when James was teased, which made him feel embarrassed. James seemed to suffer from low self-esteem throughout the time that I knew him.

6. James did not talk much when he was in elementary and junior high school. Whenever he came around our group of friends, he silently stood off to the side watching us with his body slightly turned to the side. James followed behind us where ever the group went without saying anything. James was like the group's shadow. We tried to get him to talk more, but it took a while for him to be comfortable enough to say more.

7. Throughout James's teenage years he enjoyed following some of the neighborhood kids in a game they made up called "The Dash." It was a childish game that involved the players filling cups and bottles with mayonnaise, ketchup, mustard, Pine Sol cleaning fluid, and other liquids. After filling up the bottle and cups, the players then threw the contents on random people. There was a high concentration of special education and learning disabled students in our neighborhood. Most of the children who played the Dash were special needs kids like James. Ivri Marrell was one of them. James was a follower overall and not a leader.

8. James suffered from serious wardrobe issues and often dressed in bizarre clothing during his teenage years. James sometimes came outside of his house wearing wool hats, winter jackets, and sweat pants in the middle of the summer. He also would wear warm-up jackets over leather coats. When James dressed himself in these odd ways he often walked around the neighborhood with a misguided since of swagger, as if he believed that he was cool and impressing others.

9. James's personal hygiene was not the best during his teenage years and into his early twenties. James often wore the same clothes for three days at a time, and sometimes more. The scent of his body odor gave us the impression that he did not bathe every day.

James's hair often appeared to be in need of a washing, and he frequently rubbed body lotion all over it, especially when he was trying to look like the R&B singer, Prince. James used the body lotion to make his sideburns stick to his face and to pull the front of his hair together into a greasy bang. As was the case with his weird clothes, James walked around with his odd hairdos like he was very proud of himself.

10. James had a poor sense of direction throughout the entire time that I knew him in Lansing. James could only travel by himself to places he had already been. This was the case whether James was on foot, bike, or using public transportation. You could not just hand him an address and expect that he'd get there on his own. James constantly had to be driven around by me and our common friends.

11. James and his siblings were frequently left unattended in their home by their Grandmother Clara. Clara spent a lot of time outside of the house working and spending time with her friends. It seemed to me like James and his siblings had to fend for themselves and do the best they could. None of the fathers were in their lives, they had no male role models, and no mother. James's home was more unsupervised than any other home on the block, which is why it became the neighborhood hangout for teens in the community.

12. James was not a violent or aggressive person. I never saw him involved in a fight or even a heated argument. James was not a tough guy and often backed down when someone approached him in an aggressive or threatening manner. James backed down even when he was surrounded by friends who had his back and would not let the other person harm him. There were even girls in the neighborhood who could make James cower and run away when confronted. This is also something that James was teased about during his upbringing.

13. Our neighborhood was surrounded by the old Diamond Reo automobile plant, which closed during the mid-1970s. James and the other children in the vicinity spent a lot of time playing in and around the vacant facility. We used to play in the soil around the old

plant by throwing dirt balls at each other. We even played tackle football in the dirt around the old facility, even when it was being torn down in the 1980s. We all, including James, used to climb into the large storage tanks to play hide and seek. The tanks were all unlocked and empty, for the most part, but you could still smell strong scents of the chemicals that once filled them. It seemed like there was a dried residue of the chemicals left behind in the tanks. The scent was so strong in the tanks that it used to give me a headache. There was a huge fire that destroyed much of the facility during the late 1970s. The neighborhood was engulfed in a giant cloud of smoke during the fire and there was a terrible choking chemical odor. I had no idea that environmental toxins had been found in and around the Diamond Reo facility during the 1980s. I have no recollection of the community being told about this.

14. Whatever James was fed in his home did not seem like it was sufficient because he was always in a state of hunger. James ate wherever and whenever he could. My mother opened our home to anyone in the neighborhood who wanted a meal. James came over to our house to eat almost every day after school. James ate at our house more than anyone else in the neighborhood. When James was about fourteen and fifteen years old, he clean front yards, shoveled snow and collected bottles to make a few extra bucks. James used the money to buy food. His favorite meal back then was a plate of spaghetti from a local restaurant.

15. As James became older, his relationship with his grandmother became a little strained, and he did not always have a key to the house. Whenever there was no one home to open the door for James, he climbed through a window to get into the house. This happened a lot because his grandmother spent a lot of time outside of the house.

16. James started smoking marijuana and drinking alcohol around his early teens. James later got into smoking crack mixed with marijuana during his later teen years. James tried his hand at selling drugs for a while but it was short-lived liked. James was bad at math, so the junkies cheated him during sales. James was smoking crack-laced with marijuana by this time and he was getting high on his own supply. The dealers that he

was working with quickly fired James, but he was not harmed. People knew that James had mental health issues and the dealers gave him passes in these kind of circumstances. Another person might have been physically punished for mishandling a dealer's drug supply.

17. James was very dependent on his family and friends around the community. Everyone loved James and did their best to lookout for and protect him as best as we could. James's disabilities made him immature and somewhat vulnerable. This is why everyone tried to talk him out of leaving the state with Debbie. We knew that he would not be able to survive without the assistance of his family and friends.

18. I only met Debbie Panos on a couple of occasions, and I did not spend much time around her. However, I know from the things that James used to tell me that he loved her deeply. James even loved Debbie more than his grandmother, which is why he crossed the country to pursue a relationship with her. James had never been outside of the state of Michigan, much less his time zone, and knew nothing about life in other areas of the country. James usually had a fear of things he did not know, but his love for Debbie allowed him to take such a dramatic step in life. I believe that James's love for Debbie was based on the way she treated and took care of him. She was able to support James like his grandmother did, but she showed James the affection and attention that he was missing at home. James wanted to be loved and made to feel safe, and Debbie was like his security blanket. She was also the only girlfriend that James had ever had.

19. I had very limited contact with James's previous representatives. I have no recollection of being contacted by James's 1996 trial team. I met James's attorneys in February 2007, which was just a month prior to his second trial. Our discussion lasted about forty-five minutes, and took place in a group of about six or seven other people who were being interviewed at the same time. I was never individually spoken to about my knowledge of James's background until my recent conversation with Herbert Duzant of the Federal Public Defender Office. I spent more time speaking with Mr. Duzant than I did with all of James's previous representatives combined.

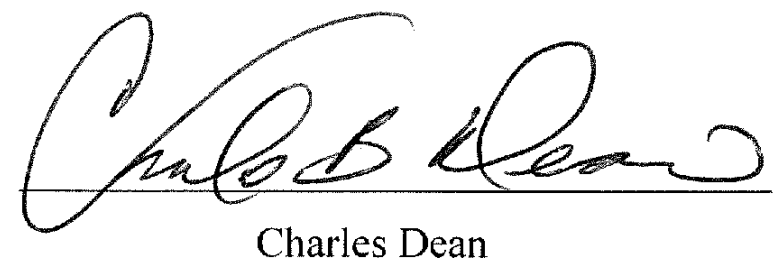
20. I was brought out to Las Vegas a week before I took the witness stand. James's attorneys initially informed us that we would be testifying within two or three days after our arrival, but this was a total misestimation. I called my job to let my supervisor know that I needed to stay in Las Vegas longer than anticipated. My job allowed me to stay after the relevant documents were faxed to them, including a notarized letter and documents that bore the court's seal. James Ford and Ivri Marrell were not as fortunate. They had to return to their jobs in Lansing before they had a chance to take the stand. Not having Ford's and Marrell's testimonies was a blow to James's case because they were his closest friends and knew the most about his life and relationship with Debbie.

21. Ivri Marrell was in poor health at the time he was in Las Vegas to testify. He suffered from heart and lung problems and was ill during the trip to Las Vegas. Marrell ultimately died in the years following James's 2007 trial.

22. James's attorneys did not prepare me or the other witnesses for our testimony. We only met with the attorneys once or twice in the week leading to our testimony. These exchanges were held in group conversations and lasted no more than five minutes. We spent most of our time walking around Las Vegas and going to casinos because we were not allow to sit in on the trial. We had a bad feeling about James's attorneys, so we spent some time gambling in hopes of raising enough funds to pay for new lawyers. Our trips to the casinos was ultimately a wasted effort because we all lost our money, and James was stuck with the same attorneys.

23. I have not been contacted by any of James's representatives since my trial testimony in 2007. Herbert Duzant has been the only person to contact me on James's behalf since his last trial. I would have provided James's state post-conviction counsel and previous trial attorneys with everything that I've said in this declaration had I been asked. I also would have testified to these facts.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and that this declaration was executed in Ingham County, Michigan, on April 19, 2016.



Charles Dean

EXHIBIT 55

Declaration of Ernestine "Sue" Harvey

I, Ernestine "Sue" Harvey, hereby declare as follows:

1. My name is Ernestine Harvey, but I am also known to my friends as "Sue." I am fifty-nine years old and reside in Clark County, Nevada. James Chappell was a friend of mine during the mid-1990s when I was living in the Vera Johnson Manor Houses on Lamb Boulevard. James was living at a nearby trailer park with his wife and children at that time.

2. I first met James at the apartment of our common friend, Bridget Glover. Bridget's house was a meeting place where people in the neighborhood gathered to hang out. Bridget did hair and nails, and sold various items out of her house. I did not really get to know James until he started coming around my building to sell frozen meats that he often boosted from nearby stores. James shoplifted so much that many people around the community regularly placed orders with him for numerous items. I was once arrested with James after he was caught shoplifting in a local K-mart store. I was just with him, so the police let me go but James was taken downtown and charged for the crime. The proceeds from James's shoplifting went towards money to support his drug habit.

3. James was a kind and gentle person by nature when he was sober. He enjoyed listening to music and dancing, which earned him the nickname "King of Pop." Although James frequently got high, he was not an aggressive person and I have no recollection of ever seeing James engaging in acts of violence. James talked about his family more than any other topic, and how much he loved his girlfriend and children. James never talked about wanting to harm his girlfriend.

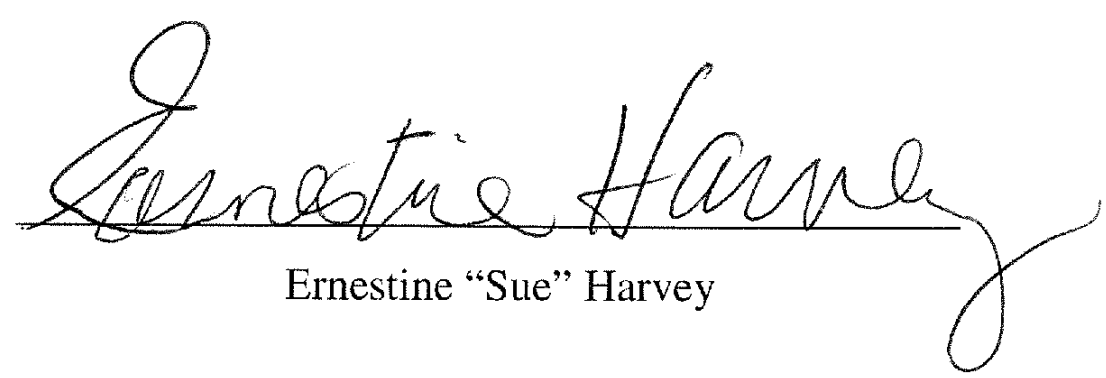
4. James's personality often changed for the worst when he smoked crack cocaine and became intoxicated. I saw the changes firsthand because James and I used to get high together. James usually visited my apartment every day when he was not locked up in the county jail. Crack had the effect of making James extremely paranoid at times.

During these occasions James would stop talking, stand up with his back against a wall, and start looking around like he was on the lookout for someone that was about to come after him. James sometimes talked about his suspicions during these intoxicated paranoid episodes, but I always told him that it was just the crack playing tricks on his mind.

5. James suffered from a terrible crack addiction. He smoked crack morning, noon, and night on a daily basis when he was not incarcerated. James smoked so much crack throughout the course of a day that I often lost count. In fact, I did not know anyone who smoked as much crack as James did at that time. James's whole life revolved around getting more money so that he could smoke more crack. He was truly strung out during the time that I interacted with him.

6. I was not contacted by anyone working on James's behalf until my recent conversation with Herbert Duzant of the Federal Public Defender Office. James's attorneys could have located me because I continued living in the same apartment at Vera Johnson until 1997. I also have not resided outside of Las Vegas in the twenty years since James's initial trial. I did not find out that James had been convicted until after the trial had already taken place. Had I been contacted by James's previous attorneys, I would have provided them with everything that I have stated in this declaration, and I would have testified to it.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and that this declaration was executed in Clark County, Nevada, on July 2, 2016.



Ernestine "Sue" Harvey

EXHIBIT 56

Declaration of Fred Dean

I, Fred Dean, hereby declare as follows:

1. I am 47 years old and currently reside in Tarrant County, Texas. I am one of James Chappell's close childhood friends. My late mother Barbara Dean and James's late grandmother Clara Axam were best friends, and our families lived in the same neighborhood beginning in the early 1970s.

2. My earliest memories of James are from our elementary school days. James and I both attended Moores Park Elementary School, but we were never in the same class. James was a special education student and I was in regular classes. I knew from the first time I interacted with James that he was mentally slow. Throughout the time I was around James, he spoke slowly and used simple words a person of a younger age might use. James made up his own words and phrases at times, some of which did not make any sense, but made people laugh. James sometimes did not get the jokes his peers told, and he was not always able to follow what was going on during group conversations among our friends. James was often the target of jokes in our group of friends. James was mainly teased about being slow and a special education student. James was also teased about wetting his bed, which he did into his teenage years. There was usually a strong scent of urine present in his room. Looking back, we probably should not have teased James as much as we did, but James was like a brother to us and I believe that he knew we loved him.

3. Generally speaking, James was always a follower who went along with the crowd. My brothers and I were the leaders among our group of friends and usually came up with the ideas of things to do. On the couple of occasions when James came up with an ideas of his own, it was usually something silly and juvenile and no one paid him much mind. James came up with one game that he called "The Dash." This game involved someone filling a cup or bottle with Clorox and various liquids and then randomly throwing the contents onto people's clothes and running away. Not a lot of us played this game

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * * * * * * *

JAMES MONTELL CHAPPELL, Appellant, v. WILLIAM GITTERE, et al., Respondents.	No. 77002 District Court Case No. (Death Penalty Case)

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May 02 2019 08:47 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPELLANT'S APPENDIX

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Appeal From
Eighth Judicial District Court, Clark County
The Honorable Valerie Adair, District Judge

RENE L. VALLADARES
Federal Public Defender
BRAD D. LEVENSON
Assistant Federal Public Defender
Nevada Bar No. 13804
Brad_Levenson@fd.org
SCOTT WISNIEWSKI
Assistant Federal Public Defender
Nevada Bar No. 144415
Scott_Wisniewski@fd.org
ELLESSE HENDERSON
Nevada Bar No. 14674C
Ellesse_Henderson@fd.org
411 E. Bonneville, Suite 250
Las Vegas, Nevada 89101
(702) 388-6577
Attorneys for Appellant

Docket 77002 Document 2019-19246

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 2nd day of May, 2019. Electronic Service of the foregoing Appellant's Appendix shall be made in accordance with the Master Service List as follows:

Steve S. Owens
Chief Deputy District Attorney
motions@clarkcountyda.com
Eileen.davis@clarkcountyda.com

/s/ Sara Jelinek
An Employee of the
Federal Public Defender
District of Nevada

statements were overly cumulative. For instance, the State provided live testimony of a witness and then having questioning the witness, asked the witness to read a statement that had been prepared prior to testimony. The written statements appeared to explain the same victim impact that had already been testified to.

Mr. Mike Pollard previously testified at the first trial. His testimony was read to the jury in its entirety (13 ROA 3114). Over the defense objection, the State was then permitted to call Mr. Pollard to provide live testimony (15 ROA 3678). The State admitted, "your honor, earlier in the case we read some testimony. We were unable to locate Mr. Mike Pollard. Later that day he - - we got a call from him so he's available. We would like to call him for a few brief questions with regard to impact" (15 ROA 3678). Unfortunately, Mr. Pollard's live testimony mirrored his testimony that was read in terms of the victim impact. This was objected to by trial penalty counsel but not raised on appeal. This is proof that the district court permitted overly cumulative presentation of victim impact that was not even associated with the victims family.

In both Mr. Pollard's live testimony and his previously read testimony, he indicated that he worked at GE Capital (15 ROA 3679; 13 ROA 3115). In both testimonies he indicated he met Debra at work (15 ROA 3679, 13 ROA 3115). In both testimonies he indicated that he had become close friends with the victim (15 ROA 3679,13 ROA 3116). In both testimonies, Mr. Pollard discussed that Debra had been on his sofa shortly before the murder (15 ROA 3679, 13 ROA 3131). In his live testimony, Mr. Pollard indicated that he had felt saddened that Debra's children would grow up without a mother (15 ROA 3679). In his live testimony, he described Debra as "a very sweet person" who was very friendly (15 ROA 3679). In his live testimony, Mr. Pollard explained that he ended up quitting his job because he could not concentrate and that he had to move out of Nevada, based on the victim impact (15 ROA 3679). In his previously read testimony, he described Debra as a kind hearted person who was very friendly (13 ROA 3134). In his previously read testimony he described how Debra loved her children very much (13 ROA 3134). Mr. Pollard described Debra as kind hearted and happy go lucky (13 ROA 3134).

Moreover, cumulative impact testimony is present during the testimony of Carol Monson (15 ROA 3681). Ms. Monson was Debra's Aunt. Ms. Monson testified regarding victim impact

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for approximately ten pages. Thereafter, Ms. Monson was permitted to read letters from other witnesses including Christina Reese, Ms. Dorris Waskowski (15 ROA 3684). Having read the letters from Ms. Reese and Ms. Waskowski, the State had Ms. Monson read further updated letters from both of these witnesses (Reese and Waskowski). If that wasn't sufficiently cumulative, the State had Ms. Monson read her own letter that is almost four further pages of text (15 ROA 3681-3686). Here, Ms. Monson was permitted to provide live testimony explaining the impact Debra's death had upon her. Then, she was permitted to read two prior letters written by individuals who had been impacted by Debra's death. Then, Ms. Monson was asked to read updated letters from those two individuals. Then, Ms. Monson was asked to read a letter that she had prepared.

The district court claimed it would preclude cumulative victim impact statements. Here, the cumulative effect was overwhelming. This was not raised on appeal to the Nevada Supreme Court.

"A district court's decision to admit particular evidence during the penalty phase is within the sound discretion of the district court and will not be disturbed absent an abuse of that discretion" Johnson v. State, 122 Nev. 1344, 1353, 148 P.3d 767, 774 (2006) (quoting, McConnell v. State, 120 Nev. 1043, 1057, 102 P.3d 606, 616 (2004)(quotation marks omitted). In the instant case, the district court abused its discretion when it permitted this continuously cumulative victim impact. This was specifically objected to by counsel at the penalty phase. On appeal, appellate counsel complained that the district court had permitted an excessive amount of victim impact. The supreme Court disagreed. On appeal, the Nevada Supreme Court held that individuals outside the victims families can present victim impact. See, Wesley v. State, 112 Nev. 503, 519, 916 P.2d793, 804 (1996). However, the Court cannot permit people to provide live testimony and then have their testimony read into evidence and then provide live testimony which mirrors the previously read testimony, regarding victim impact. The court cannot permit individuals to provide live testimony regarding the impact and thereafter read lengthy statements mirroring the impact. Clearly, the district court permitted overly cumulative victim impact over Mr. Chappell's objection.

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It was ineffective assistance of trial counsel to fail to object to the notice requirement which was raised on direct appeal. It was ineffective assistance of appellate counsel from the second penalty phase for failure to inform the supreme court regarding the extent to the cumulative victim impact that was presented. Had the Supreme Court known the extent of the error, Mr. Chappell's penalty phase would have been reversed.

IV. PENALTY PHASE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO IMPROPER PROSECUTORIAL ARGUMENTS DURING THE PENALTY PHASE IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Specifically, in appellant's Opening Brief on appeal from the second penalty phase, appellate counsel complained of excessive prosecutorial misconduct. Attached as "Exhibit B" is pages 64-70 of appellants Opening Brief wherein the argument of excessive misconduct is raised. On appeal, appellate counsel noted that trial counsel did not object to this misconduct and therefore the court had to consider the matter for plain error. U.S. v. Olano, 507 U.S. 525, 731 (1993); U.S. v. Leon, v. Reyes, 177 F.3d 816, 821 (9th Cir. 1999). The following is a list of arguments raised by penalty phase appellate counsel which were not objected to at the penalty phase.

1. Misstating the role of mitigating circumstances (Appellants Opening Brief pp. 66)
2. "Don't let the defendant fool you" (Appellant's Opening Brief pp. 67)
3. Justice and Mercy arguments (Appellant's Opening Brief pp. 68)

The Supreme Court specifically noted that Mr. Chappell failed to object to the comparative worth, role of the mitigating circumstances, the mercy argument, and the argument that Chappell conned the jury (Order of Affirmance pp. 22-24). The Supreme Court considered these arguments for plain error. Penalty phase counsel made numerous errors that taken as a whole must result in reversal.

V. PENALTY PHASE COUNSEL AND PENALTY PHASE APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE SEVERAL INSTANCES OF IMPROPER PROSECUTORIAL ARGUMENT WHICH SHOULD HAVE BEEN RAISED SIMULTANEOUSLY IN MR. CHAPPELL'S APPEAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

During the cross-examination of Dr. Etcoff, testimony was elicited that Mr. Chappell had

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complained he had been arrested for a domestic violence incident in front of his children (15 ROA 3541-3542). The prosecutor questioned Dr. Etcoff stating:

> Q: Because it probably marked his otherwise sterling reputation he had with his children at that point to see the police for the tenth time taking their father off in handcuffs (15 ROA 3542).

Defense counsel objected and the court sustained the objection. This issue was not raised on appeal.

NRS 48.045(2) provides, Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

NRS 48.045 states, "[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. See, Taylor v. State, 109 Nev. 849, 853, 858 P.2d 843, 846 (1993). See also, Beck v. State, 105 Nev. 910, 784 P.2d 983 (1989). However, an exception to this general rule exists. Prior bad act evidence is admissible in order to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. See, NRS 48.045(2). It is within the trial court's sound discretion whether evidence of a prior bad act is admissible.... Cipriano v. State, 111 Nev. 534, 541, 894 P.2d 347, 352 (1995). See also, Crawford v. State, 107 Nev. 345, 348, 811 P.2d 67, 69 (1991).

In the instant case, there is no evidence that Mr. Chappell was arrested ten times in front of his children. However, undoubtedly the jury would have believed that the children were exposed to approximately ten arrests because the prosecutor posed the question in that manner. First, it is improper for a prosecutor to elude to facts outside of the record which deny the defendant a right to a fair hearing. Agard v. Portuondo, 117 F.3d 696, 711 (2nd Cir. 1997)(holding that alluding to facts that are not in evidence is prejudicial and not at all probative)(cert. granted on other grounds, 119 Sup. Ct. 1248 (1999). The Nevada Supreme Court has frequently condemned prosecutors from eluding to facts outside of the record. See, EG, Guy v. State, 108 Nev. 770, 780, 839 P.2d 578, 585 (1992)(cert. denied, 507 U.S. 109 (1993); Sandburn v. State,

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107 Nev. 399, 408-409, 812 P.2d 1279, 1286 (1999); Jimimez v. State, 106 Mev. 769, 772, 801 P.2d 1366, 1368 (1990); Collier v. State, 101 Nev. 473, 478, 705 P.2d 1126, 1129 (1985).

There was absolutely no proof that Mr. Chappell had been arrested ten times in front of his children. It was highly improper for the prosecutor to make such as assertion. The average juror has confidence that the obligations of the prosecutor will be faithfully observed. Consequently, improper suggestions, insinuations, and especially assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

This issue was not raised on appeal from the penalty phase. This question was highly improper. The statement violated NRS 48.045(b) and has been denounced by both state and federal courts. Had this issue been raised on appeal, the Nevada Supreme Court would have reversed Mr. Chappell's sentence of death.

Next, during closing argument, the prosecution described how Mr. Chappell "choose evil" (16 ROA 3778). The prosecution also stated that Mr. Chappell is "a despicable human being" (16 ROA 3779). This comments were neither objected to at the penalty phase nor raised on appeal. The attorneys were therefore ineffective. It is improper for prosecutors to ridicule or disparage the defendant. Indeed "the prosecutor's obligation to desist from the use of pejorative language and inflammatory rhetoric is as every bit as solemn as his obligation to attempt to bring the guilty to account" U.S. v. Rodriguez-Estrada, 877 F.2d 153, 159 (1st. Cir. 1989).

The Nevada Supreme Court has long recognized that a prosecutor has a duty not to ridicule or belittle the defendant. See. Earl v. State, 111 Nev. 1304, 904 P.2d 1029, 1033 (1995), Jones v. State, 113 Nev. 454, 937 P.2d 55, 62 (1997). In U.S. v. Weatherless, 734 F.2d 179, 181 (4th Cir. 1984), the Court stated that it was beneath the standard of a prosecutor to refer to the accused as a "sick man". (Cert denied, 469 U.S. 1088 (1984)). Court have held it improper for a prosecutor to characterize defendants as "evil men". See, People v. Hawkins, 410 N.E. 2d 309 (Illinois 1980). A prosecutor referring to the defendant as a maniac exceeded the bounds of propriety. People v. Terrell, 310 NE 2d 791, 795 (Illinois Ap. Ct. 1994). Improper for a prosecutor to refer to the defendant as "slime". Biondo v. State, 533 South 2d 910-911 (FALA

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1988). Reversing conviction where prosecutor referred to the defendant as "crud". Patterson v. State, 747 P.2d 535, 537-38 (Alaska, 1987). Condemning prosecutor's remarks referring to the defendant as a "rabid animal". Jones v. State, 113 Nev. 454, 468-69 937 P.2d at 62.

In the instant case, the comments made by the prosecutor taken as a whole must result in a reversal. Here, the prosecutor stated that the defendant had been arrested ten times in front of his children, which hurt his "sterling reputation". The defendant was referred to as a "despicable human being". The defendant "choose evil". These comments were not objected to during the penalty phase or on appeal from the penalty phase. If the Nevada Supreme Court had been aware that these comments had been made (and not isolated) the result of the appeal from the penalty phase would have resulted in reversal. Mr. Chappell received ineffective assistance of penalty phase trial counsel and appellate counsel.

VI. MR. CHAPPELL RECEIVED INEFFECTIVE ASSISTANCE OF PENALTY PHASE COUNSEL AND APPELLATE COUNSEL FOR FAILURE TO OBJECT TO IMPROPER IMPEACHMENT IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. Chappell called Fred Scott Dean as a mitigation witness. Mr. Dean was important to Chappell's mitigation because he had known Mr. Chappell throughout his life (15 ROA 3696-3697). Mr. Dean admitted that he had been convicted of federal drug trafficking and drug possession (State and Federal convictions) (15 ROA 3701). However, on cross-examination, the prosecutor elicited the following testimony from Mr. Dean:

Q: How long were you prison for?
A: Twelve years.
Q: That's a long time.
A: Yes sir.
Q: What kind of charges?
A: Like I said drug possession, and the other one was interstate drug trafficking.
Q: Were there other charges that were dismissed as part of your deal there?
A: There was no pretty much deal. That was just - - it was plead to the lesser charge versus the charge that I was charged with. Yes.
Q: So you plead to a lesser charge?
A: Yes.
Q: And the lesser charge was?
A: 12-30 - well, it was 20-30 the judge sentenced me to 12-30.
Q: And that was a drug charge?
A: Yes sir.
Q: What was the more serious charge that was reduced/
A: I was trying to think of how they titled it, possession of drugs over 65

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grams.
Q: Was this cocaine?
A: Yes sir.
Q: 65 grams is a lot of cocain.
A: Yes sir.
Q: So this was drug trafficking or this was trafficking quantity?
A: Yes sir.
Q: And the minimum sentence would have been a lot more severe if you hadn't done the deal?
A: When you say deal, what do you mean by that?
Q: Taking the lesser plea.
A: I would have been worse, yes sir (15 ROA 3702).

NRS 50.095 impeachment by evidence of conviction of a crime:

1. The purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is admissible but only if the crime was punishable by death or imprisonment for more than 1 year under the law under which the witness was convicted.

The Nevada Supreme Court and the federal courts have made it abundantly clear that impeachment with a felony conviction cannot go into the facts in details of the conviction. Here, Mr. Dean freely admitted that he had drug convictions. The prosecutor went into significant detail. This was highly improper.

For example, in Jacobs v. State, 91 Nev. 155, 532 P.2d 1034 (1975), the Nevada Supreme Court held that an inquiry into the credibility of a witness may be attacked by evidence that a witness has been convicted of a crime however it was error to allow questioning concerning the actual term that was imposed. Although a witness may be impeached with evidence of prior convictions, the details and circumstances of the prior crimes are not an appropriate subject of inquiry. Shults v. State, 96 Nev. 742, 616 P.2d 3 88 (1980).

The prosecutor elicited numerous answers which were in violation of the statute and case law. This statute mirrors the federal statutes on point. Neither counsel for Mr. Chappell at the penalty phase or on appeal objected. Mr. Chappell received ineffective assistance of counsel for failure to object to this issue. Pursuant to the prejudice standard enunciated in Strickland, the result of the appeal would have mandated reversal had this issue been properly raised.

VII. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN ALLOWING THE ADMISSION OF EVIDENCE OF SEVERAL BAD ACTS THUS VIOLATING APPELLANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS AND WARRANTING REVERSAL OF HIS PENALTY PHASE.

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During the State's case in chief, Ladonna Jackson was called as a witness. Ms. Jackson knew Mr. Chappell from the Vera Johnson Housing project (13 ROA 3198). Over defense counsel's object, Ms. Jackson was allowed to testify that Mr. Chappell made money "by stealing" (13 ROA 3203). Defense counsel objected and the court overruled the objection. The State is required to place the defendant on notice of evidence to be used at the penalty phase. There is no indication in the record that Mr. Chappell was on notice that Ms. Jackson would provide her opinion that Mr. Chappell was a thief. See, Nunnery v. State, 127 Nev. Adv. Op. 69(October 27, 2011).

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Once the court's ruled that evidence is probative of one of the permissible issues under NRS 48.045(2), the court must decide whether the probative value of the evidence is substantially outweighed by its prejudicial effect.

NRS 48.045 states, "[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. See, Taylor v. State, 109 Nev. 849, 853, 858 P.2d 843, 846 (1993). See also, Beck v. State, 105 Nev. 910, 784 P.2d 983 (1989). However, an exception to this general rule exists. Prior bad act evidence is admissible in order to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. See, NRS 48.045(2). It is within the trial court's sound discretion whether evidence of a prior bad act is admissible.... Cipriano v. State, 111 Nev. 534, 541, 894 P.2d 347, 352 (1995). See also, Crawford v. State, 107 Nev. 345, 348, 811 P.2d 67, 69 (1991).

"The duty placed upon the trial court to strike a balance between the prejudicial effect of such evidence on the one hand, and its probative value on the other is a grave one to be resolved by the exercise of judicial discretion.... Of course the discretion reposed in the trial judge is not unlimited, but an appellate court will respect the lower court's view unless it is manifestly

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wrong." Bonacci v. State, 96 Nev. 894, 620 P.2d 1244 (1980), citing, Brown v. State, 81 Nev. 397, 400, 404 P.2d 428 (1965).

In the instant case, Mr. Chappell should not have had to defend against unfounded allegations made during the penalty phase. It was ineffective assistance of appellate counsel for failure to raise this issue.

VIII. THE DEATH PENALTY IS UNCONSTITUTIONAL[2]

Mr. Chappell's state and federal constitutional rights to due process, equal protection, right to be free form cruel and unusual punishment, and right to a fair penalty hearing were violated because the death penalty is unconstitutional. U.S. Const. Amend. V, VI, VII, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

In support of this claim, Mr. Chappell alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

Nevada law requires that execution be inflicted by an injection of a lethal drug. NRS 176.355(1). Competent physicians cannot administer the lethal injection, because the ethical standards of the American Medical Association prohibit physicians from participating in an execution other than to certify that a death has occurred. American Medical Association, House of Delegates, Resolution 5 (1992); American Medical Association, Judicial Council, Current Opinion 2.06 (1980). Non-physician staff from the Department of Corrections will have the responsibility of locating veins and injecting needles which are connected to the lethal injection machine.

In recent executions in states employing lethal injection, prolonged and unnecessary pain has been suffered by the condemned individual by difficulty in inserting needles and by unexpected chemical reactions among the drugs or violent reactions to them by the condemned individual.

The following lethal injection executions, among others, have produced prolonged and

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[2]Mr. Chappell acknowledges that the Nevada Supreme Court has consistently denied this issue. However, Mr. Chappell presents this issue to preserve it for federal review.

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unnecessary pain:

Stephen Peter Morin: March 13, 1985 (Texas). Had to probe both arms and legs with needles for 45 minutes before they found the vein.

Randy Woolls: August 20, 1986 (Texas). A drug addict, Woolls had to help the executioner technicians find a good vein for the execution.

Raymond Landry: December 13, 1988 (Texas). Pronounced dead 40 minutes after being strapped to the execution gurney and 24 minutes after the drugs first started flowing into his arms. Two minutes into the killing, the syringe came out of Landry's vein, spraying the deadly chemicals across the room toward the witnesses. The execution team had to reinsert the catheter into the vein. The curtain was drawn for 14 minutes so witnesses could not see the intermission.

Stephen McCoy: May 24, 1989 (Texas). Had such a violent physical reaction to the drugs (heaving chest, gasping, choking, etc.) that one of the witnesses (male) fainted, crashing into and knocking over another witness. Houston attorney Karen Zellars, who represented McCoy and witnessed the execution, thought that the fainting would catalyze a chain reaction. The Texas Attorney General admitted the inmate "seemed to have a somewhat stronger reaction," adding "the drugs might have been administered in a heavier dose or more rapidly."

Rickey Ray Rector: January 24, 1992 (Arkansas). It took medical staff more than 50 minutes to find a suitable vein in Rector's arm. Witnesses were not permitted to view this scene, but reported hearing Rector's loud moans throughout the process. During the ordeal, Rector (who suffered serious brain damage from a lobotomy) tried to help the medical personnel find a vein. The administrator of the State's Department of Corrections medical programs said (paraphrased by a newspaper reporter) "the moans did come as a team of two medical people that had grown to five worked on both sides of his body to find a vein." The administrator said "that may have contributed to his occasional outburst."

Robyn Lee Parks: March 10, 1992 (Oklahoma). Parks had a violent reaction to the drugs used in the lethal injection. Two minutes after the drugs were administered, the muscles in his jaw, neck and abdomen began to react spasmodically for approximately 45 seconds. Parks continued to gasp and violently gag. Death came eleven minutes after the drugs were

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administered. Said Tulsa World reporter, Wayne Greene, "the death looked ugly and scary."

Billy Wayne White: April 23, 1992 (Texas). It took 47 minutes for authorities to find a suitable vein, and White eventually had to help.

Justin Lee May: May 7, 1992 (Texas). May had an unusually violent reaction to the lethal drugs. According to Robert Wernsman, a reporter for the Item (Huntsville), Mr. May "gasped, coughed and reared against his heavy leather restraints, coughing once again before his body froze . . . ." Associated Press reporter Michael Graczyk wrote, "He went into coughing spasms, groaned and gasped, lifted his head from the death chamber gurney and would have arched his back if he had not been bolted down. After he stopped breathing his eyes and mouth remained open."

John Wayne Gacy: May 19, 1994 (Illinois). After the execution began, one of the three lethal drugs clogged the tube leading to Gacy's arm, and therefore stopped flowing. Blinds, covering the windows through which witnesses observe the execution, were then drawn. The clogged tube was replaced with a new one, the blinds were opened, and the execution process resumed. Anesthesiologists blamed the problem on the inexperience of the prison officials who were conducting the execution, saying that proper procedures taught in "IV 101" would have prevented the error.

Emmitt Foster: May 3, 1995 (Missouri). Foster was not pronounced dead until 30 minutes after the executioners began the flow of the death chemicals into his arms. Seven minutes after the chemicals began to flow, the blinds were closed to prohibit witnesses from viewing the scene, and they were not reopened until three minutes after the death was pronounced. According to the coroner, who pronounced death, the problem was caused by the tightness of the leather straps that bound Foster to the gurney; it was so tight that the flow of chemical into his veins was restricted. It was several minutes after a prison worker finally loosened the strap that death was pronounced. The coroner entered the death chamber twenty minutes after the execution began, noticed the problem and told the officials to loosen the strap so that the execution could proceed.

Tommie Smith: July 18, 1996 (Indiana). Smith was not pronounced dead until an hour

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and 20 minutes after the execution team began to administer the lethal combination of intravenous drugs. Prison officials said the team could not find a vein in Smith's arm and had to insert an angio-catheter into his heart, a procedure that took 35 minutes. According to authorities, Smith remained conscious during that procedure.

The procedures utilized to conduct the executions described above are substantially similar to those utilized by the State of Nevada.

Because of inability of the State of Nevada to carry out Mr. Chappell's execution without the infliction of cruel and unusual punishment, the sentence must be vacated.

A. NEVADA'S DEATH PENALTY SCHEME DOES NOT NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY.

Under contemporary standards of decency, death is not an appropriate punishment for a substantial portion of convicted first-degree murderers. Woodson, 428 U.S. at 296. A capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty. Hollaway, 116 Nev. 732, 6P.3d at 996; Arave, 507 U.S. at 474; Zant, 462 U.S. at 877; McConnell, 121 Nev. At 30, 107 P.3d at 1289. Despite the Supreme Court's requirement for restrictive use of the death sentence, Nevada law permits broad imposition of the death penalty for virtually and all first-degree murderers. As a result, in 2001, Nevada had the second most persons on death row per capita in the nation. James S. Liebman, A Broken System: Error Rates in Capital Cases, 1973-1995 (2000); U.S. Dept. Of Justice, Bureau of Justice Statistics Bulletin, Capital Punishment 2001; U.S. Census Bureau, State population Estimates: April 2000 to July 2001, http://eire.census.gov/pspest/date/states/tables/ST-eest2002-01.php. Professor Liebman found that from 1973 through 1995, the national average of death sentences per 100,000 population, in states that have the death penalty, was 3.90. Liebman, at App. E-11.

The sates with the highest death rate for the death penalty for this period were as follows: Nevada – 10.91 death sentences per 100,000 population; Arizona - 7.82; Alabama - 7.75; Florida - 7.74; Oklahoma -7.06; Mississippi - 6.47; Wyoming -6.44; Georgia - 5.44; Texas - 4.55. Id. Nevada's death penalty rate was nearly three time the national average and nearly 40% higher than the next highest state for this 12 year period. Such a high death penalty rate in Nevada is due to the fact that neither the Nevada statues defining eligibility for the death penalty nor the case

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law interpreting these statues sufficiently narrows the class of persons eligible for the death penalty in this state.

Mr. Chappell recognizes that the Nevada Supreme Court has repeatedly affirmed the constitutionality of Nevada's death penalty scheme. See Leonard, 117 Nev. at 83, 17 P.3d at 416 and cases cited therein. Nonetheless, the Court has never explained the rationale for its decision on this point and has yet to articulate a reasoned and detailed response to this argument. This issue is presented here both so that this Court may consider the full merits of this argument and so that this issue may be fully preserved for review by the federal courts.

B. THE DEATH PENALTY IS CRUEL AND UNUSUAL PUNISHMENT.

Mr. Chappell's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, and a reliable sentence because the death penalty is cruel and unusual punishment and under the Eighth and Fourteenth Amendments. He recognizes that this Court has found the death penalty to be constitutional, but urges this Court to overrule its prior decisions and presents this issue to preserve it for federal review.

Under the federal constitution, the death penalty is cruel and unusual in all circumstances. *See* Gregg v. Georgia, 428 U.S. 153, 227 (Brennan, J., dissenting); id. at 231 (Marshall, J., dissenting); contra, id. at 188-195 (Opn. of Stewart, Powell and Stevens, JJ.); id. at 276 (White, J., concurring in judgment). since stare decisis is not consistently adhered to in capital cases, e.g., Payne v. Tennessee, 111 S.Ct. 2597 (1991), this court and the federal courts should reevaluate the constitutional validity of the death penalty.

The death penalty is also invalid under the Nevada Constitution, which prohibits the imposition of "cruel or unusual" punishments. Nev. Const. Art. 1 § 6. While the Nevada case law has ignored the difference in terminology, and had treated this provision as the equivalent of the federal constitutional prohibition against "cruel and unusual punishments, e.g. Bishop v. State, 95 Nev. 511, 517-518, 597 P.2d 273 (1979), it has been recognized that the language of the constitution affords greater protection than the federal charter: "under this provision, if the punishment is either cruel or unusual, it is prohibited. "Mickle v. Henrichs, 262 F. 687 (D. Nev. 1918). While the infliction of the death penalty may not have been considered "cruel" at the time

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of the adoption of the constitution in 1864, "the evolving standards of decency that make the progress of a maturing society. "Trop v. Dulles, 356 U.S. 86, 101 (1958) have led in the recognition even by the staunchest advocates of its permissibility in the abstract, that killing as a means of punishment is always cruel. *See* (Furman v. Georgia, 408 U.S. 238, 312 (White, J., concurring); *See* Walton v. Arizona, 110 S.Ct. 3047, 3066 (1990) (Scalia, J., concurring). Accordingly, under the disjunctive language of the Nevada Constitution, the death penalty cannot be upheld.

The death penalty is also unusual, both in the sense that is seldom imposed and in the sense that the particular cases in which it is imposed are not qualitatively distinguishable from those in which is it not. Further, the case law has so broadly defined the scope of the statutory aggravating circumstances that it is the rare case in which a sufficiently imaginative prosecutor could not allege an aggravating circumstance. In particular, the "random and motiveless" aggravating circumstance under NRS 200.033(9) has been interpreted to apply to "unnecessary" killings, e.g. Bennett v. State, 106 Nev. 135, 143, 787 P.2d 797 (1990), a category which includes virtually every homicide. Nor has the Court ever differentiated, in applying the felony murder aggravating factor, between homicides committed in the course of felonies and homicides in which a felony is merely incidental to the killing. CF. People v. Green, 27 Cal.3d 1, 61-62, 609 P.2d 468 (1980). Given these expansive views of the aggravating factors, they do not in fact narrow the class of murders for which the death penalty may be imposed, nor do they significantly restrict prosecutorial discretion in seeking the death penalty: in essence, the present situation is indistinguishable from the situation before the decision in Furman v. Georgia, 408 U.S. 238 (1972) when having the death penalty imposed was "cruel and unusual in the same way that being struck by lightning is cruel and unusual." Id. at 309 (Stewart, J., concurring). There is no other way to account for the fact that in a case such as Faessel v. State, 108 Nev. 413, 836 P.2d 609 (1992), the death penalty is not even sought and the defendant receives a second-degree murder sentence; in Mercado v. State, 100 Nev. 535, 688 P.2d 305 (1984), the perpetrator of an organized murder in prison receives a life sentence; and appellant, convicted of killing the woman he loved in a drug-induced frenzy, is found deserving of the ultimate penalty the state can

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exact.

The United States Supreme Court, unfortunately, has continued to confuse means with ends: while focusing exclusively upon the procedural mechanisms which are supposed to produce justice, it has neglected the question whether these procedures are in fact resulting in the death penalty being applied in a rational and even-handed manner, upon the most unredeemable offenders convicted of the most egregious offenses. The fact that this case was selected as one of the very few cases in which the death penalty should be imposed is a sufficient demonstration that these procedures do not work. Accordingly, this Court should recognize that the death penalty as currently constituted and applied results in the imposition of cruel or unusual punishment, and the sentence should therefore be vacated.

C. EXECUTIVE CLEMENCY IS UNAVAILABLE.

Mr. Chappell's death sentence is invalid because Nevada has no real mechanism to provide for clemency in capital cases. Nevada law provides that prisoners sentenced to death may apply for clemency to the State Board of Pardons Commissioners. See NRS 213.010. Executive clemency is an essential safeguard in a state's decision to deprive an individual of life, as indicated by the fact that ever of the 38 states that has the death penalty also has clemency procedures. Ohio Adult parole Authority v. Woodward, 523 U.S. 272, 282 n. 4 (1998) (Stevens, J., concurring in part, dissenting in part). Having established clemency as a safeguard, these states must also ensure that their clemency proceedings comport with due process. Evitts v. Lucey, 469 U.S. 387, 401 (1985). Nevada's clemency statutes, NRS 213.005-213.100, do not ensure that death penalty inmates receive procedural due process. See Mathews v. Eldrige, 424 U.S. 319, 335 (1976). As a practical matter, Nevada does not grant clemency to death penalty inmates. Since 1973, well over 100 people have been sentenced to death in Nevada. Bureau of Justice Statistics Report, Capital Punishment 2006 (December 2007 NCJ 220219).

Mr. Chappell is informed and believes and on that basis alleges that since the reinstatement of the death penalty, only a single death sentence in Nevada has been commuted and in that case, it was commuted only because the defendant was mentally retarded and the U.S. Supreme Court found that the mentally retarded could no longer be executed. It cannot have been

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the legislature's intent to create clemency proceedings in which the Board merely rubber-stamps capital sentences. The fact that Nevada's clemency procedure is not exercised on behalf of death-sentenced inmates means, in practical effect, that is does not exist. The failure to have a functioning clemency procedure makes Nevada's death penalty scheme unconstitutional, requiring the vacation of Mr. Chappell's sentence.

IX. MR. CHAPPELL'S DEATH SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, AND A RELIABLE SENTENCE, BECAUSE THE NEVADA CAPITAL PUNISHMENT SYSTEM OPERATES IN AN ARBITRARY AND CAPRICIOUS MANNER. U.S. CONST. AMENDS. V, VI, VIII AND XIV; NEV. CONST. ART. I SECS. 3, 6 AND 8; ART IV, SEC. 21.[3]

In support of this claim, Mr. Chappell alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power and an evidentiary hearing:

1. Mr. Chappell hereby incorporates each and every allegation contained in this petition as if fully set forth herein.

2. The Nevada capital sentencing process permits the imposition of the death penalty for any first degree murder that is accompanied by an aggravating circumstance. NRS 200.020(4)(a). The statutory aggravating circumstances are so numerous and so vague that they arguable exist in every first-degree murder case. *See* NRS 200.033. Nevada permits the imposition of the death penalty for all first-degree murders that are "at random and without apparent motive." NRS 200.033(9). Nevada statutes also appear to permit the death penalty for murders involving virtually every conceivable kind of motive: robbery, sexual assault, arson, burglary, kidnapping, to receive money, torture, to prevent lawful arrest, and escape. *See* NRS 200.033. The scope of the Nevada death penalty statute is thus clear: The death penalty is an option for all first degree murders that involve a motive, and death is also an option if the first degree murder involves no motive at all.

3. The death penalty is accordingly permitted in Nevada for all first-degree murders,

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[3] Mr. Chappell acknowledges that the Nevada Supreme Court has consistently denied this issue. However, Mr. Chappell presents this issue to preserve it for federal review.

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and first-degree murder, in turn, are not restricted in Nevada within traditional bounds. As the result of unconstitutional form jury instructions defining reasonable doubt, express malice and premeditation and deliberation, first degree murder convictions occur in the absence of proof beyond a reasonable doubt, in the absence of any rational showing of premeditation and deliberation, and as a result of the presumption of malice aforethought. Consequently, a death sentence is permissible under Nevada law in every case where the prosecution can present evidence, not even beyond a reasonable doubt, that an accused committed an intentional killing.

4. As a result of plea bargaining practices, and imposition of sentences by juries, sentences less than death have been imposed for offenses that are more aggravated than the one for which Mr. Chappell stands convicted; and in situations where the amount of mitigating evidence was less than the mitigation evidence that existed here. The untrammeled power of the sentencer under Nevada law to declines to impose the death penalty, even when no mitigating evidence exists at all, or when the aggravating factors far outweigh the mitigating evidence, means that the imposition of the death penalty is necessarily arbitrary and capricious.

5. Nevada law fails to provide sentencing bodies with any rational method for separating those few cases that warrant the imposition of the ultimate punishment form the many that do not. The narrowing function required by the Eighth Amendment is accordingly non-existent under Nevada's sentencing scheme, and the process is contaminated even further by Nevada Supreme Court decisions permitting the prosecution to present unreliable and prejudicial evidence during sentencing regarding uncharged criminal activities of the accused. Consideration of such evidence necessarily diverts the sentencer's attention from he statutory aggravating circumstances, whose appropriate application is already virtually impossible to discern. The irrationality of the Nevada capital punishment system is illustrated by State of Nevada v. Jonathan Daniels, Eighth Judicial District Court Case No.C126201. Under the undisputed facts of that case, Mr. Daniels entered a convenience store on January 20, 1995, with the intent to rob the store. Mr. Daniels then held the store clerk at gunpoint for several seconds while the clerk begged for his life; Mr. Daniels then shot the clerk in the head at point blank range, killing him. A moment later, Mr. Daniels shot the other clerk. Mr. Daniels and two

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friends then left the premises calmly after first filling up their car with gas. Despite these egregious facts, and despite Mr. Daniels' lengthy criminal record, he was sentenced to life in prison for these acts.

6. There is not rational basis on which to conclude that Mr. Daniels deserves to live whereas Mr. Chappell deserves to die. These facts serve to illustrate how the Nevada capital punishment system is inherently arbitrary and capricious. Other Clark County cases demonstrate this same point: In State v. Brumfield, Case No. C145043, the District Attorney accepted a plea for sentence of less than death for a double homicide; and in another double homicide case involving a total of 12 aggravating factors resulted in sentences of less than death for two defendants. State v. Duckworth and Martin, Case No. C108501. Other Nevada cases as aggravated as the one for which Mr. Chappell was sentenced to death have also resulted in lesser sentences. See Ewish v. State, 110 Nev. 221, 223-25, 871 P.2d 306 (1994); Callier v. Warden, 111 Nev. 976, 979-82, 901 P.2d 619 (1995); Stringer v. State, 108 Nev. 413, 415-17 836 P.2d 609 (1992).

7. Because the Nevada capital punishment system provides no rational method for distinguishing between who lives and who dies, such determinations are made on the basis of illegitimate considerations. In Nevada capital punishment is imposed disproportionately on racial minorities: Nevada's death row population is approximately 50% minority even though Nevada's general minority population is less than 20%. All of the people on Nevada's death row are indigent and have had to defend with the meager resources afforded to indigent defendants and their counsel. As this case illustrates, the lack of resources afforded to indigent defendants and their counsel. As this case illustrates, the lack of resources provided to capital defendants virtually ensures that compelling mitigating evidence will not be presented to, or considered by, the sentencing body. Nevada sentencers are accordingly unable to, and do not, provide the individualized, reliable sentencing determination that the constitution requires.

8. These systemic problems are not unique to Nevada. The American Bar Association has recently called for a moratorium on capital punishment unless and until each jurisdiction attempting to impose such punishment "implements policies and procedures that are

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consistent with . . . . longstanding American Bar Association policies intended to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed . . . . " as the ABA has observed in a report accompanying its resolution, "administration of the death penalty, from being fair and consistent, is instead a haphazard maze of unfair practices with no internal consistency" (ABA Report). The ABA concludes that this morass has resulted from the lack of competent counsel in capital cases, the lack of a fair and adequate appellate review process, and the pervasive effects of race. Like wise, the states of Illinois and Nebraska have recently enacted or called for a moratorium on imposition of the death penalty.

9. The United Nations High Commissioner for Human Rights has recently studied the American capital punishment process, and has concluded that "guarantees and safeguards, as well as specific restrictions on Capital Punishment, are not being respected. Lack of adequate counsel and legal representation for many capital defendants is disturbing." The High Commissioner has further concluded that "race, ethnic origin and economic status appear to be key determinants of who will, and who will not, receive a sentence of death." The report also described in detail the special problems created by the politicization of the death penalty, the lack of an independent and impartial state judiciary, and the racially biased system of selecting juries. The report concludes:

> The high level of support for the death penalty, even if studies have shown that it is not as deep as is claimed, cannot justify the lack of respect for the restrictions and safeguards surrounding its use. In many countries, mob killings an lynching enjoy public support as a way to deal with violent crime and are often portrayed as "popular justice." Yet they are not acceptable in civilized society.

10. The Nevada capital punishment system suffers from all of the problems identified in the ABA and United Nations reports - the under funding of defense counsel, the lack of a fair and adequate appellate review process and the pervasive effects of race. The problems with Nevada's process, moreover, are exacerbated by open-ended definitions of both first degree murder and the accompanying aggravating circumstances, which permits the imposition of a death sentence for virtually every intentional killing. This arbitrary, capricious and irrational

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scheme violates the constitution and is prejudicial *per se.*

X. MR. CHAPPELL'S CONVICTION AND DEATH SENTENCE ARE INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, TRIAL BEFORE AN IMPARTIAL JURY AND A RELIABLE SENTENCE BECAUSE THE PROCEEDINGS AGAINST HIM VIOLATED INTERNATIONAL LAW. U.S. CONST. AMENDS. V, VI VIII AND XIV; NEV. CONST. ART. I SECS. 3, 6 AND 8; ART IV, SEC. 21.[4]

In support of this claim, Mr. Chappell alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power and an evidentiary hearing:

1. Both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights recognize the right to life. Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, Art. 3 (1948) [hereinafter "UDHR"]; International Covenant on Civil and Political Rights, adopted December 19, 1966, Art. 6, 999 U.N.T.S. 171 (entered into force March 23, 1976) [hereinafter "ICCPR"}. The ICCPR provides that "[n]o one shall be arbitrarily deprived of his life." ICCPR, Art. 6. Other applicable articles include, but are not limited to ICCPR, Art. 9 ("[n]o one shall be subjected to arbitrary arrest"), ICCPR, Art. 14 (right to review of conviction and sentence by a higher tribunal "according to the law"), ICCPR, Art. 18 ("right to freedom of thought"), UDHR, Art. 18 (right "freedom of thought"), UDHR, Art. 19 (right to "freedom of opinion and expression"), UDHR, Art. 5 and ICCPR, Art. & (prohibition against cruel, inhuman or degrading treatment or punishment); *See also* The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted December 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987). In support of such claims, Mr. Chappell reasserts each and every claim and supporting fact contained in this petition as if fully set forth herein.

2. The United States Government and the State of Nevada are required to abide by norms of international law. The Paquet Habana, 20 S.Ct. 290 (1900)("international law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdictions"). The Supremacy Clause of the United States Constitution specifically requires the

---

[4] Mr. Chappell acknowledges that the Nevada Supreme Court has consistently denied this issue. However, Mr. Chappell presents this issue to preserve it for federal review.

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State of Nevada to honor the United States' treaty obligations. U.S. Constitution, Art. VI.

3. Nevada is bound by the ICCPR because the United States has signed and ratified the treaty. In addition, under Article 4 of the ICCPR no country is allowed to derogate from Article 6. Nevada is bound by the UDCR because the document is a fundamental part of Customary International Law. Therefore, Nevada has an obligation not to take life arbitrarily.

4. A recent United Nations report on human rights in the United States lists some specific ways in which the American legal system operates to take life arbitrarily. Report of the Special Rapportuer on Extrajudicial, Summary or Arbitrary Executions, E/CN.4/1998/681 (Add. 3)(1998) [hereinafter "Report of Special Rapportuer"]. United Nations Special Rapportuer Bacre Waly Ndiaye found "[m]any factors other than the crime itself, appear to influence the imposition of the death sentence [in the United States]." Class, race and economic status, both of the victim and the defendant are key elements. Id., at 62. Other elements Mr. Ndiaye found to unjustly affect decisions regarding whether the convicted person should live or die include:

a. the qualifications of the capital defendant's lawyer;

b. the exclusion of people who are opposed to the death penalty from juries;

c. varying degrees of information and guidance given to the jury, including the importance of mitigating factors;

d. prosecutors given the discretion whether or not to seek the death penalty;

e. the fact that some judges must run for re-election.

5. The reasons why Mr. Chappell's conviction and sentence are arbitrary and, therefore, violate International Law are described throughout this petition; Mr. Chappell incorporates each and every and supporting facts as if fully set forth herein. However, to assist the court, Mr. Chappell provides the following examples of how his conviction and sentence are arbitrary in nature (they specifically correspond to the arbitrary factors listed above from the Report of Special Rapportuer):

a. People who were opposed to the death penalty were excluded from Mr. Chappell's jury;

b. A single aggravating action (sexual assault) was allowed to be used against

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Mr. Chappell in multiple ways in order to justify the imposition of the death penalty, while mitigating factors were not fully considered;

c. The prosecutor had discretion in whether or not to seek the death penalty;

d. The judge presiding over Mr. Chappell's trial was elected;

e. The Nevada Supreme Court which reviewed the case is elected;

f. Finally, an additional factor not listed in the Report of the Special Rapporteur but clearly an indication of the arbitrary nature of the imposition of the death sentence in Nevada, members of the judiciary admit that they do not read briefs regarding the death penalty cases before them.

6. These violations of international law were prejudicial *per se*. In the alternative, the State cannot show beyond a reasonable doubt that these violations did not affect Mr. Chappell's conviction and sentence and thus relief is required.

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XI. CHAPPELL'S CONVICTION AND SENTENCE ARE INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEE OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS, EFFECTIVE ASSISTANCE OF COUNSEL AND RELIABLE SENTENCE BECAUSE THE JURY INSTRUCTIONS GIVEN AT TRIAL WERE FAULTY AND WERE NOT THE SUBJECT OF CONTEMPORANEOUS OBJECTION BY TRIAL COUNSEL, NOT RAISED ON DIRECT APPEAL BY APPELLATE COUNSEL, NOT RAISED BY PENALTY PHASE APPELLATE COUNSEL, AND NOT RE-RAISED BY PENALTY PHASE COUNSEL.

In the instant case, Mr. Chappell is entitled to a reversal of his conviction based upon an unconstitutional instruction being used to convict Mr. Chappell of first degree murder.

The jury instruction given defining premeditation and deliberation was constitutionally infirm and denied Mr. Chappell due process and equal protection under the United States and Nevada Constitutions. The instruction failed to provide the jury with any rational or meaningful guidance as to the concept of premeditation and deliberation and thereby eliminated any rational distinction between first and second degree murder. The instruction given does not require any premeditation at all and thus violates the constitutional guarantee of due process of law because it is so bereft of meaning as to the definition of two elements of the statutory offense of first degree murder as to allow virtually unlimited prosecutorial discretion in charging decisions.

The United States Court of Appeals for the Ninth Circuit considered an identical issue in

Chambers v. E.K. McDaniel, 549 F.3d 1191, (9th Cir. 2008). In Chambers, the Court held that the defendant's federal constitutional right to due process was violated because the instruction given to convict him of first degree murder was missing an essential element and that the error was not harmless. 549 F.3d 1191, 1193. In Chambers, the defendant argued that the Nevada State Court's rejection of his due process argument regarding the jury instruction on premeditation "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" Id. at 1199.

In Chambers, the Ninth Circuit explained,

> In Polk v. Sandoval, 503 F.3d 903, 911 (9th Cir. 2007), we held that the same jury instruction on premeditation at issue here was constitutionally defective, and the Nevada court's failure to correct the error was contrary to clearly established federal law, as determined by the Supreme Court. Id. (Internal quotation marks omitted)

The federal court of appeals for the Ninth Circuit held that their decision in Polk was binding. Id. In Chambers, the Court conducted an identical analysis "as they did in Polk" as to whether the ailing instruction so infected the entire trial that the resulting conviction violated due process. The Court considered the instruction and compared it to the trial record. Id. See Estelle v. McGuire, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

In the instant case, an instruction lacking an essential element of first degree murder was used to convict Mr. Chappell.

The Byford instruction states,

> Murder of the first degree is murder which is perpetrated by means of any kind of willful, deliberate, and premeditated killing. All three elements willfulness, deliberation, and premeditation must be proven beyond a reasonable doubt before an accused can be convicted of first degree murder.
>
> Willfulness is the intent to kill. There need be not appreciable space of time between the formation of the intent to kill and the act of the killing.
>
> Deliberation is the process of determining upon a course of action to kill as a result of though, including weighing the reasons for and against the action and considering the consequences of the actions.
>
> A deliberate determination may be arrived at in a short period of time. But in all cases the determination must not be formed in passion, or if formed in passion, it must be carried out after there has been time for the passion to subside and deliberation to occur. A mere unconsidered and rash impulse is not deliberate, even though it includes the intent to kill.
>
> Premeditation is a design, a determination to kill, distinctly formed in the mind by the time of the killing.
>
> Premeditation need not be for a day, an hour, or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from

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the evidence that the act constituted the killing has been preceded by and has been the result of premeditation, no matter how rapidly the act follows the premeditation, it is premeditated.

The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into tan intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.

The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder in the first degree.

At trial, Mr. Chappell was given the following instruction:

> Premeditation is a design, a determination to kill, formed in the mind of the killer at any moment before or at the time of killing.
>
> Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. If the jury believes from the evidence that the act constituting the killing was preceded by and is the result of premeditation , no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder (Instruction 22).

In Chambers, the Court explained, "[E[ven though a constitutional error occurred, Chambers is not entitled to relief unless he can show that "the error had substantial and injurious effect or influence in determining the jury's verdict." Id. at 1200. (See also Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993). If there is grave doubt as to whether the error has such an effect the petitioner is entitled to the writ. Coleman v. Calderon, 210 F.3d 1047, 1051 (9th Cir. 2000).

In Chambers the Court concluded,

> Chambers' federal constitutional due process right was violated by the instructions given by the trial court at his murder trial, as they permitted the jury to convict him of first-degree murder without finding separately all three elements of that crime: willfulness, deliberation, and premeditation. The error was not harmless. The Nevada Supreme Court's decision denying Chambers' petition for an extraordinary writ and rejecting his due process claim was contrary to clearly established federal law. 549 F.3d 1191 (9th Cir. 2008).

In the instant case, the Kazalyn 116 Nev. 215, 994 P.2d 700 (2000) instruction given during Mr. Chappell's trial may well have caused a jury to return a verdict of first degree murder when a verdict less than first degree murder was probable. Hence, had the correct jury instruction been provided, a reasonable juror could have found that Mr. Chappell was acting rashly, rather

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than a cold calculated judgement after premeditation and deliberation had occurred. Since Mr. Chappell was provided with an incorrect instruction that failed to establish all elements of first degree murder, Mr. Chappell is entitled to a new trial.

In the instant case, Mr. Chappell's conviction must be reversed. Mr. Chappell is similarly situated to Mr. Polk and to Mr. Chambers. Any contention that the State could make that the error was harmless beyond a reasonable doubt is meritless. Therefore, the fact that all three elements of first degree murder were not enunciated to the jury in the form of an instruction mandates that Mr. Chappell should receive a new trial. Trial counsel was ineffective for failing to object to the giving of the Kazalyn instruction, direct appeal counsel was ineffective for failing to raise this issue on direct appeal, penalty phase counsel should have re-raised this issue before the district court prior to Mr. Chappell's third penalty phase, and counsel on appeal from the penalty phase was ineffective for failing to raise this issue.

This issue was raised on appeal and denied by the Nevada Supreme Court. However, Mr. Chappell re-raises this issue for purposes of preservation.

XII. MR. CHAPPELL RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BASED UPON CUMULATIVE ERROR.

In Dechant v. State, 10 P.3d 108, 116 Nev. 918 (2000), the Nevada Supreme Court reversed the murder conviction of Amy Dechant based upon the cumulative effect of the errors at trial. In Dechant, the Nevada Supreme Court provided, "[W]e have stated that if the cumulative effect of errors committed at trial denies the appellant his right to a fair trial, this Court will reverse the conviction. Id. at 113 citing Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). The Court explained that there are certain factors in deciding whether error is harmless or prejudicial including whether 1) the issue of guilt or innocence is close, 2) the quantity and character of the area and 3) the gravity of the crime charged. Id.

Based on the foregoing, Mr. Chappell would respectfully request that this Court reverse his conviction based upon cumulative errors of trial and appellate counsel.

XIII. MR. CHAPPELL IS ENTITLED TO AN EVIDENTIARY HEARING

A petitioner is entitled to an evidentiary hearing where the petitioner raises a colorable

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TEL. 702.384-5563 | FAX. 702.974-0623

claim of ineffective assistance. Smith v. McCormick, 914 F.2d 1153, 1170 (9th Cir.1990); Hendricks v. Vasquez, 974 F.2d 1099, 1103, 1109-10 (9th Cir.1992). See also Morris v. California, 966 F.2d 448, 454 (9th Cir.1991) (remand for evidentiary hearing required where allegations in petitioner's affidavit raise inference of deficient performance); Harich v. Wainwright, 813 F.2d 1082, 1090 (11th Cir.1987) ("[W]here a petitioner raises a colorable claim of ineffective assistance, and where there has not been a state or federal hearing on this claim, we must remand to the district court for an evidentiary hearing."); Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986) (without the aid of an evidentiary hearing, the court cannot conclude whether attorneys properly investigated a case or whether their decisions concerning evidence were made for tactical reasons).

In the instant case, an evidentiary hearing is necessary to question counsel. Mr. Chappell's counsel fell below a standard of reasonableness. More importantly, based on the failures of counsel, Mr. Chappell was severely prejudiced, pursuant to Strickland v.Washington, 466 U. S. 668, 104 S. Ct. 205, (1984).

Under the facts presented here, an evidentiary hearing is mandated to determine whether the performance of counsel were effective, to determine the prejudicial impact of the errors and omissions noted in the petition, and to ascertain the truth in this case.

CONCLUSION

Based on the foregoing, Mr. Chappell would respectfully request that this Court grant this writ.

DATED this 15th day of February, 2012.

Respectfully submitted by:

CHRISTOPHER R. ORAM, ESQ.
Nevada Bar #004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563

Attorney for Petitioner
JAMES CHAPPELL

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

EXHIBIT A

EXHIBIT A

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

ATTORNEY FOR CHAPPELL

FILED

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Shirley B. Parraguirre
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

JAMES MONTELL CHAPPELL, Petitioner, vs. THE STATE OF NEVADA, Respondent.	CASE NO. C 131341 DEPT. NO. XI DATE: N/A TIME: N/A

AFFIDAVITS IN SUPPORT OF PETITION
FOR WRIT OF HABEAS CORPUS (POST CONVICTION)

See attached.

DATED: March 10, 2003.

RESPECTFULLY SUBMITTED:

DAVID M. SCHIECK, ESQ.

RECEIPT OF COPY

RECEIPT of a copy of the foregoing document is hereby acknowledged.

DATED: Mar. 10, 03

DISTRICT ATTORNEY'S OFFICE

200 S. THIRD STREET
LAS VEGAS NV 89155

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

AFFIDAVIT

STATE OF MICHIGAN)
) ss:
COUNTY OF EATON)

IVRI MARRELL, being first duly sworn, deposes and says:

I live in Lansing, Michigan and was friends with JAMES CHAPPELL ("JAMES") while were attending high school and after high school. I would say that along with myself, James Ford and Benjamin Dean were JAMES' best friends in Lansing. I was not interviewed prior to the trial and penalty hearing. When I was interviewed by Mr. Schieck in November, 2002, I was present along with James Ford and Benjamin. Much of what we discussed was a collective recollection of JAMES and his relationship with Deborah. We all were of the same general opinions and believes about what had transpired.

I was aware that JAMES worked at a number of places in Lansing, including Cheddar's Restaurant. JAMES was a good friend and kept me out of trouble on a number of occasions.

I also knew Deborah Panos through her relationship with JAMES. There was a great deal of animosity from Deborah's family toward JAMES because he was black. After their first baby was born the problems got even worse because her parents kicked her out of the house and wanted nothing to do with JAMES or the baby. They lived with Carla, JAMES' sister for a while and then Deborah moved back in with her parents. JAMES would have to sneak over to the house to even see Deborah or the baby.

I used to double date with JAMES and Deborah and have

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

personal knowledge of what their relationship was like before her parents forced her to move to Tucson and she convinced JAMES to come with her. Their relationship was never physically abusive and they appeared to be very much in love despite the objections and actions of her parents.

Deborah was very controlling and jealous of JAMES and wouldn't let him go out with the guys and would often verbally abuse him. I observed JAMES around his kids and he was crazy about them and never mistreated them and seeme to be a very good and caring father.

I was not aware of what happened after JAMES went to Tucson the first time because we did not talk very often, but I knew he was unhappy and told him that he should come back to Lansing where all of his friends and family were located. JAMES did come back from Tucson for a short period of time and lived with me for part of the time he was back in Lansing.

JAMES did not chase after Deborah after she went to Tucson, the opposite is true. She was always calling him and asking him to come back to Tucson and she sent him the ticket to go back to Tucson, which was against the advice that everyone gave to him.

I feel that there were a number of important things that I could have told the jury about JAMES and his relationship with Deborah. I have been told that at the trial a lot of things were said about JAMES that were not accurate and that I could have testified about. For instance, JAMES was never violent to my knowledge, especially toward Deborah and the children. He

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

put up with a lot from her and her family and never resorted to violence to my knowledge. If he became addicted to crack cocaine in Tucson or Las Vegas that may have changed him, but the JAMES I knew would never have been able to do the things that he is accused of doing.

I have always lived in Lansing and could have been easily located had anyone made an effort to find me or any of the other friends of JAMES that knew the true story about the relationship between JAMES and Deborah. If contacted I would have been more than willing to travel to Las Vegas to testify on behalf of JAMES at either the trial or the penalty hearing.

FURTHER, Affiant sayeth naught.

IVRI MARRELL

SUBSCRIBED AND SWORN to before me this 3 day of ~~November~~ March, ~~2002~~ 2003.

NOTARY PUBLIC

NANNETTE V. McGILL
Notary Public, Eaton County, MI
ACTING Ingham CO.
My Commission Expires 04/01/2003

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

AFFIDAVIT

STATE OF MICHIGAN)
) ss:
COUNTY OF EATON)

BENJAMIN DEAN, being first duly sworn, deposes and says:

I live in Lansing, Michigan and was friends with James Chappell while were attending high school and after high school. I would say that along with myself, Ivri Marrell and James Ford were James' best friends in Lansing. When I was interviewed by Mr. Schieck in November, 2002, I was present along with Ivri and James Ford. Much of what we discussed was a collective recollection of James and his relationship with Deborah. We all were of the same general opinions and beliefs about what had transpired.

After James came back from Tucson he told me about all the problems that he had to endure. He felt that it was his obligation to take care of Deborah and the kids and that another guy would not want to take care of her. He would do all the chores around their apartment such as cooking and cleaning and would take care of the children while Deborah worked. Despite this, Deborah was very controlling and demanding of him, often making racial comments to him. Her mother was very prejudiced and would call James a nigger.

I believe that when Deborah got to Tucson she made new friends that influenced her against James.

I have been told some of the negative testimony from the trial about James, and this is not the James that I knew for many years in Lansing. He was not violent, and was like a big

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

clown and was always real playful. He was the life of a party and would always make people laugh.

Deborah was his first real girlfriend and she changed him and his spirit. She was very manipulative of him, especially after the first child and did not like for him to be around his old friends. She came from a wealthy white family and James came from the poorer black section of Lansing. She seemed to hold this over his head and resented his true friends.

When he came back from Tucson, everything was fine until Deborah started calling him and asking him to come back to Tucson. Finally she sent him a ticket and went without telling any of his friends because we would have all advised him not to go back to Tucson. It was my opinion that she wanted to keep James away from his friends in order to control him and that is why she sent him the ticket

Deborah was very controlling and jealous of James and wouldn't let him go out with the guys and would often verbally abuse him.

I observed James around his kids and he was crazy about them and never mistreated them and seemed to be a very good and caring father.

My mother is Barbara Dean and she always was able to reach me with a phone call. When James' previous attorney and investigator came to Lansing they talked with me for a short period of time and had me show them around the neighborhood, but never asked me any questions about the relationship between James and Deborah or about his character. I would have been

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

more than happy to come to Las Vegas to testify on behalf of James at the trial or penalty hearing. From what I understand the jury was given a very distorted picture of James. His friends, such as myself could have told a more complete and detailed story about James.

FURTHER, Affiant sayeth naught.

BENJAMIN DEAN

SUBSCRIBED AND SWORN to before me

this 4th day of ~~November, 2002.~~ March 2003

Tsehai DeSta
NOTARY PUBLIC

TSEHAI DESTA
Notary Public, Ingham Co., MI
My Comm. Expires July 29, 2006

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

AFFIDAVIT

STATE OF MICHIGAN)
) ss:
COUNTY OF EATON)

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

I live in Lansing, Michigan and was friends with JAMES CHAPPELL ("JAMES") while we were attending high school and after high school. I would say that along with myself, Ivri Marrell and Benjamin Dean were JAMES' best friends in Lansing. I was not interviewed prior to the trial and penalty hearing. When I was interviewed by Mr. Schieck in November, 2002 I was present along with Ivri and Benjamin. Much of what we discussed was a collective recollection of JAMES and his relationship with Deborah. We all were of the same general opinions and beliefs about what had transpired.

I knew Deborah Panos through her relationship with JAMES. There was a great deal of animosity from Deborah's family toward JAMES because he was black. After their first baby was born the problems got even worse because her parents kicked her out of the house and wanted nothing to do with JAMES or the baby. They lived with Carla, JAMES' sister for a while and then Deborah moved back in with her parents. JAMES would have to sneak over to the house to even see Deborah or the baby.

Deborah was very controlling and jealous of JAMES and wouldn't let him go out with the guys and would often verbally abuse him.

I observed JAMES around his kids and he was crazy about them and never mistreated them and seeme to be a very good and

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

caring father.

I was not aware of what happened after JAMES went to Tucson the first time because we did not talk very often, but I knew he was unhappy and I told him that he should come back to Lansing where all of his friends and family were located. JAMES did come back from Tucson for a short period of time and lived with Ivri for part of the time he was back in Lansing.

JAMES did not chase after Deborah after she went to Tucson, the opposite is true. She was always calling him and asking him to come back to Tucson and she sent him the ticket to go back to Tucson, which was against the advice that everyone gave to him.

I feel that there were a number of important things that I could have told the jury about JAMES and his relationship with Deborah. I have been told that at the trial a lot of things were said about JAMES that were not accurate and that I could have testified about. For instance, JAMES was never violent to my knowledge, especially toward Deborah and the children. He put up with a lot from her and her family and never resorted to violence to my knowledge. If he became addicted to crack cocaine in Tucson or Las Vegas that may have changed him, but the JAMES I knew would never have been able to do the things that he is accused of doing.

I have always lived in Lansing and could have been easily located had anyone made an effort to find me or any of the other friends of JAMES that knew the true story about the relationship between JAMES and Deborah. If contacted I would

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

have been more than willing to travel to Las Vegas to testify on behalf of JAMES at either the trial or the penalty hearing.

It is shocking to me that JAMES received the death penalty because the person I knew was not a bad person. It is a terrible thing that Deborah was killed by JAMES, but it is also terrible that JAMES was sentenced to death by a jury that did not know the truth about him and the relationship with Deborah.

FURTHER, Affiant sayeth naught.

James Ford
JAMES FORD

SUBSCRIBED AND SWORN to before me
this 6th day of ~~November~~ March, ~~2002~~ 2003.

NOTARY PUBLIC

NANNETTE V. McGILL
Notary Public, Eaton County, MI
ACTING Ingham CO.
My Commission Expires 04/01/2003

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

EXHIBIT B

EXHIBIT B

& Lee L. Rev. 379 (2006).

The misconduct which occurred here was pervasive and constituted the theme of the prosecutor's closing argument. As a matter of plain error, this Court should reverse Chappell's judgment based upon the extreme prejudice to the jury's deliberations caused by this patently improper argument.

K. <u>The State Committed Extensive Prosecutorial Misconduct</u>

The State violated Chappell's state and federal constitutional rights a fair and reliable sentencing hearing, due process and right to be free from cruel and unusual punishment by committing prosecutorial misconduct throughout the closing arguments: U.S. Const. Amends. VI, VIII, XIV. Nev. Const. Art. I Secs. 3, 6, 8.

In addition to the comparative worth arguments that are set forth above, the prosecutors committed additional misconduct which warrants reversal of Chappell's conviction. It is well established that misconduct by a prosecuting attorney during closing arguments may be grounds for reversal. See Berger v. U.S., 295 U.S. 78 91935). The prosecuting attorneys represent a sovereign whose obligation is to govern impartially and whose interest in a particular case is not necessarily to win, but to do justice. Berger, 295 U.S. at 88. The prosecuting attorney may "prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Id. A prosecutor should not use arguments to inflame the passions or prejudices of the jury. Viereck v. U.S., 318 U.S. 236, 247-48 (1943). Although trial counsel did not object to this misconduct, this Court may consider this issue as a matter of plain error. U.S. v. Olano, 507 U.S. 725, 731 (1993); U.S. v. Leon-Reyes, 177 F.3d 816, 821 (9th Cir. 1999).

<u>Comment on Chappell's Right To Remain Silent</u>

The State introduced Chappell's prior testimony, including a cross-examination by the State that constituted commentary on Chappell's right to remain silent.:

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

A Yes, sir.

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

A Yes, sir.

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

A I didn't make up anything, sir.

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

A No.

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

A No, sir.

XV ROA 3654. Chappell's counsel argued that this was a comment on his right to remain silent but the district court rejected the argument after noting that the claim was found to be without merit in post-conviction proceedings. XV ROA 3632-33. The district court's reliance upon these ruling was misplaced as the post-conviction rulings do not support this conclusion. In its post-conviction ruling, the district court concluded that issues concerning the guilt phase of the trial were without merit because of overwhelming evidence of guilt. XI ROA 2746. The court did not rule on the merits of this issue. On appeal from the district court's order granting in part and denying in part Chappell's post-conviction petition, this Court noted "that overwhelming evidence supported Chappell's conviction and that any errors in . . . the prosecutor's remarks were harmless beyond a reasonable doubt, whether Chappell's trial counsel objected to them or not." XI ROA 2790.

The use for impeachment purposes of a defendant's silence at the time of arrest and after receiving Miranda warnings violates the Due Process Clause of the Fourteenth Amendment. Doyle v. Ohio, 426 U.S. 610 (1976). Likewise, this Court has found that the State may not comment on a defendant's silence, even if no Miranda warnings are given. Coleman v. State, 111 Nev. 657, 662-63, 895 P.2d 653, 657 (1995). The prosecutor here committed misconduct by introducing testimony which violated Chappell's constitutional rights.

Misstating Role of Mitigating Circumstances

The prosecutor committed misconduct by misstating the role of mitigating circumstances, commenting on matters th at were not in evidence, and improperly minmizing the mitigating evidence that was presented:

> People aren't perfect. Systems aren't perfect. But it's time, ladies and gentlemen, for the blame to stop and for there to be accountability. Yes, the defendant had difficulties in his early life. But they're not uncommon things. A lot of people grow up humbly. A lot of people grow up without a mother or a father or some other parent. There's grandparents raising kids all over the place these days.
>
> One commentator once said, pain is inevitable, but suffering is optional. We come back to the individuals we got in this case. In light of all these circumstances, yes, pain is inevitable. Everybody is going to have pain. Everybody is going to have difficulty. But how do we address that. Do we go around blaming everybody else and doing whatever we selfishly want to do, or do we rise above it. Because it's possible to become a better person, as a consequence of pain, not just get through it. Everybody knows that. We know that.

XVI ROA 3781.

> It's probably a certain prejudice that we all sort of internalize to some degree the idea that a murder between two people who knew each other isn't that bad. It's not as bad or scary as a stranger murder. Because if a stranger had climbed through Debbie Panos' window, raped her, had beat her up, stabbed her to death and then stole her car, there wouldn't by (sic) a whole lot of commentary about marijuana houses on the street he grew up on. There wouldn't be a whole lot of commentary about, well, maybe she liked him, or maybe she wanted him back. Wouldn't we discussing that at all. We'd be discussing the violence of the act of that day. And that's what this case it about.

XVI ROA 3797.

> Now certainly the fact that he had this troubled up-bringing and he was in an environment that apparently a lot of people were doing drugs than (sic), would make his life more difficult. But it doesn't mean that he didn't have chance, after chance, after chance to address the very drug problems that the defense now asks you to give him some credit for.
>
> It doesn't erase what he did. It's just part of his background. And most of us have a background that is less than ideal. Most of us have had parents or were raised be (sic) people who didn't do a perfect job. But it doesn't diminish what we do as adults. It doesn't take away his actions.

XVI ROA 3799.

These arguments constituted misconduct. See Berger, 295 U.S. at 88 (describing the role of prosecutors as unique because they are "representative not of an ordinary party to a controversy, but a sovereignty whose obligation to govern impartially is as compelling as its

obligation to govern at all" and a prosecutor is a "servant of the law" meaning prosecutors must "refrain from improper methods calculated to produce wrongful conviction"); U.S. v. Agurs, 427 U.S. 97, 110-11 (1976) (directing prosecutors to serve the "overriding interest" of justice before consideration of its secondary interest – vigorous prosecution); Caldwell, 472 U.S. at 328-41 (holding that the Eighth Amendment protects defendants from prosecutorial arguments that misinform juries on their roles in sentencing phase of capital trials); Darden v. Wainwright, 477 U.S. 168, 168 (1986) (noting protections given to defendants by the Due Process Clause's fair trial standards).

Defendants have a constitutional right to the presentation and consideration by the jury of any facts that may mitigate the jury's finding that death is the appropriate punishment. Lockett v. Ohio, 438 U.S. 586, 604 (1978). A Caldwell violation is established if the prosecutor argues in such a manner as to "foreclose the jury's consideration of . . . mitigating evidence" because the jurors are misled on their duty to consider this evidence. Depew v. Anderson, 311 F.3d 742, 749 (6th Cir. 2002); Buchanan v. Angelone, 522 U.S. 269, 277 (1998) (holding that a prosecutor's argument that undercut the defendant's mitigation case so significantly, and at times inaccurately, foreclosed the jury's consideration of mitigating evidence, thereby altering the jury's role assigned to it in violation of the Eighth Amendment). In addition to the Eighth Amendment Caldwell violation, the arguments here also violated Chappell's Fifth and Fourteenth Amendment rights. See Antwine v. Delo, 54 F.3d 1357, 1371 (8th Cir. 1995); Darden, 477 U.S. at 181.

"Don't Let The Defendant Fool You" Arguments

Additional misconduct was committed as the prosecutors argued that the jurors would be conned by Chappell, and they would be taking the easy way out, if they imposed a sentence less than death

> Don't be coned. (sic) It's interesting, Dr. Etcoff in the beginning of his testimony said, you know, the defendant, he's just not sophisticated enough to lie. I would know that. Then we heard on cross-examination all of these things the defendant flat out liked to him about, that the doctor didn't know. And here's a Ph.D. person who just got totally coned (sic) by the defendant, and he coned (sic) the system, and he coned (sic) the system, and he coned (sic) Mr. Duffy, sat across from him for two hours saying he really wanted to

> do something about that drug problem enough that Duffy let him go, and he went straight out over to kill Debbie.
>
> He would like to see you coned (sic) in this case, ladies and gentlemen. Don't be coned. (sic) Don't sell it short. Please, don't go for the lesser things because it's easier. Do the right thing, even though it's the harder thing, and that would be an imposition of the death penalty. Because ladies and gentlemen, the evidence in this case indicates this is the appropriate penalty in this case. It is the only appropriate penalty in this case.

XVI ROA 3786-87.

> And it wasn't just Dr. Duffy that got snowed by the defendant. Dr. Etcoff was snowed just as well. . . .

XVI ROA 3801.

Arguments that Chappell "conned" others constituted misconduct. See Cristy v. Horn, 28 F.Supp.2d 307, 318-19 (W.D. Pa. 1998) (holding that an argument that labeled the defendant as "the Great Manipulator," to whom prison was just a "revolving door," only served to inflame the jurors). See also U.S. v. Gonzalez, 488 F.2d 833, 836 (2d Cir. 1973) (condemning remarks such as "you have to be born yesterday" to believe appellant's defense, and the defense is "an insult to your intelligence,"); U.S. v. Drummond, 481 F.2d 62, 64 (2d Cir. 1973) (condemning remarks such as the defendant's "testimony is so riddled with lies it insults the intelligence of 14 intelligent people sitting on the jury"). Inflammatory arguments of this type misdirect the focus of jurors away from the facts and the law. Miller v. Lockhart, 65 F.3d 676, 684 (8th Cir. 1995); Tucker v. Zant,724 F.2d 882, 889 (11th Cir. 1984) (Due Process Clause does not tolerate misleading arguments). This argument was also improper and prejudicial because it was directed at the jurors and put them in the untenable position of "them" against Chappell. People v. Payne, 187 A.D.2d 245, 248 (N.Y. App. Div. 1993) (improper to suggest that defendant was trying to "sucker us," because the "message was that although the defendant has rights, those rights must be carefully measured because it is 'us' against him.").

Justice and Mercy Arguments

The prosecutor committed misconduct in arguing that the jury should not consider mercy:

But you can make some corrections now. We can't bring Debbie back, but we can see that justice is done. We're going to talk about justice in a few minutes.

XVI ROA 3780.

So the question for you as jurors is not really do you have it in yourselves, or are you a merciful person because as jurors you are serving a different role in this case. You don't just owe James Chappell the consideration of mercy, you owe the victims and the State of Nevada a just sentence as well. It's probably tempting in this case to give life without, that seems like a realistic sentence. You probably would feel like you are not giving him any breaks at all with a life without sentence.

But you need to ask yourself, is that truly justice fo what he did over the years. What punishment reflects what he did to Debbie Panos, not just that day, but over time. What punishment reflects how he degraded her by calling her bitch and slut. What punishment compensates for breaking her nose. She had to go to work with that object on her nose after it was broken and tell her friends what happened. He humiliated her. What punishment compensates her for holding a knife to her in her own home so he could get information because he thought she was gone too long that day.

This from the person who spent his days taking her money and going and getting high for the day. What punishment accounts for all of that. What punishment is justified for taking the life of a 26-year-old young woman, a mother of three. Or how about what punishment accounts for Norma Penfield's loss the (sic) day. She lost her daughter. James Chappell brutally murdered her only child that day. What compensates her.

Has that changed for her over ten years. Does she still bear that loss, that burden ten years later. I mean, really the reality is it was easy for him after he got arrested on September 1st, '95. It was all done for him at that point. He didn't have to deal with the aftermath of the devastation he caused. He didn't have to look two little boys in the face and tell then (sic) their mother wasn't coming back. He didn't have to listen to an eight-year-old boy ask for sleeping pills. he didn't have to listen to any of that. He didn't have to listen to a four-year-old girl talk about -- asking her grandmother to sing like mom did. he didn't have to see any of his children's faces when they wanted their mother over the years when the missed her. He didn't have to arrange, at all, for Debbie Panos; (sic) body to be transported to Michigan. He was spared all of that. Those pieces were picked up by Norma Penfield.

He got to sit and worry about himself and formulate the best spin on events, the best version. And that's all he has ever done his whole life. He got to tell the doctors about his problems and his troubled childhood. It's so typical of how he spent his whole life.

He sells those children's coats and shoes, and Debbie works three jobs so they can buy more. He beat Debbie in Tucson and she decides to move to Las Vegas so they can get a fresh start. He treats Debbie badly, and she tells her own mother, well, his grandmother wasn't nice to him, she threw him out. But the problem is what he did on that day, on August 31st, is so treacherous and so selfish and so evil there's truly no fixing what he did.

XVI ROA 3802.

We've all said and you all know at this point that the punishment should fit the crime. And when you consider the decade of torment that he inflicted on this woman, the loss that he imposed on three young children, the loss that he imposed on her mother, and his attitude after the fact, there's only one

punishment and that's the death penalty.

XVI ROA 3802.

It was misconduct for the prosecutor to argue that mercy for Chappell was not an appropriate consideration. Presnell v. Zant, 959 F.2d 1524, 1529-31 (11th Cir. 1992); Peterkin v. Horn, 176 F.Supp.2d 342, 372-73 (E.D. Pa. 2001); Lesko v. Lehman, 925 F.2d 1527, 1545-46 (3d Cir. 1991) (holding unconstitutional an argument that urged jurors to settle the score between the defendant and the victims). This Court has also condemned arguments of this type. Thomas v. State, 83 P.3d 818, 826 (Nev. 2004) (finding a prosecutor's argument was improper because it informed jurors that the "defendant is deserving of the same sympathy and compassion and mercy that he extended to [the victims]."). It was also misconduct to argue that the only manner to achieve justice for Paños and her family was to impose a sentence of death against Chappell. These arguments acted to inflame the emotions and passions of the jury. Young, 470 U.S. at 9 n.7 (citing ABA Standards of Criminal Justice 4-7.8); see also ABA Standards for Criminal Justice 3-5.8 ("The prosecutor should not make arguments calculated to appeal to the prejudices of the jury); Floyd, 118 Nev. at 173, 42 P.3d at 261 ("any inclination to inject personal beliefs into arguments or to inflame the passions of the jury must be avoided. Such arguments clearly exceed the boundaries of proper prosecutorial conduct."). The prosecutor's comments here did nothing to aid the jury in determining whether the death penalty was an appropriate sentence under NRS 200.035, but instead urged the jurors to return a sentence of death as vindication, which was based upon the inflamed passions of the jury.

Based upon each of these incidents of misconduct, as well as the cumulative impact of the misconduct, Chappell's sentence of death should be reversed.

L. The District Court Failed To Instruct The Jury That The State Was Required To Establish Beyond On Beyond a Reasonable Doubt That Mitigating Circumstances Did Not Outweigh Aggravating Circumstances

Chappell's death sentence is invalid under the reliability guarantees of the Eighth Amendment, the federal due process clause, under Blakely v. Washington, 542 U.S. 296 (2004), and under the Nevada constitution because the jury was not instructed that it was

ROC
CHRISTOPHER R. ORAM, ESQ.
Nevada State Bar #004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563

Attorney for Defendant
JAMES CHAPPELL

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA, Plaintiff, vs. JAMES CHAPPELL, Defendant.	CASE NO. C131341 DEPT. NO. XXV

RECEIPT OF COPY

RECEIPT OF COPY of the above and foregoing **SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT 'S WRIT OF HABEAS CORPUS (POST-CONVICTION)** is hereby acknowledge this _____ day of February, 2012.

CLARK COUNTY DISTRICT ATTORNEY

200 Lewis Avenue
Las Vegas, Nevada 89155

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

EXHIBIT 44

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ORIGINAL

0001
CHRISTOPHER R. ORAM, ESQ.
Nevada State Bar #004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563

Attorney for Defendant
JAMES CHAPPELL

FILED
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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA, Plaintiff, vs. JAMES CHAPPELL, Defendant.	CASE NO. C131341 DEPT. NO. XXV

MOTION FOR AUTHORIZATION TO OBTAIN AN INVESTIGATOR AND FOR PAYMENT OF FEES INCURRED HEREIN.

COMES NOW, Defendant, JAMES CHAPPELL, by and through his attorney, CHRISTOPHER R. ORAM, ESQ., hereby requests this Honorable Court to issue an order appointing an investigator for Mr. Chappell. Defendant also requests on Order authorizing payment in excess of the statutory maximum three hundred dollars ($300.00), not to exceed two thousand five hundred dollars ($2,500.00) per expert unless prior Court approval is granted.

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CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

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CLERK OF THE COURT

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Motion
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This motion is made and based pleadings and papers on file herein, the affidavit of counsel attached hereto, as well as any oral arguments of counsel adduced at the time of hearing.

DATED this 13th day of February, 2012.

Respectfully submitted

CHRISTOPHER R. ORAM, ESQ.
Nevada Bar #004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada, 89101

Attorney for Petitioner
JAMES CHAPPELL

NOTICE OF MOTION

YOU, AND EACH OF YOU, will please take notice that the undersigned will bring the foregoing **MOTION FOR AUTHORIZATION TO OBTAIN AN INVESTIGATOR AND FOR PAYMENT OF FEES INCURRED HEREIN** on for hearing on the 28 day of February 2012, at the Clark County Courthouse, 200 Lewis Avenue in District Court, Department XXV at the hour of 9 .m. or as soon thereafter as counsel may be heard.

Respectfully submitted

CHRISTOPHER R. ORAM, ESQ.
Nevada Bar # 004349
520 S. Fourth Street, 2nd Floor
Las Vegas, NV 89101

Attorney for Petitioner
JAMES CHAPPELL

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

POINTS AND AUTHORITIES

Nevada Revised Statute 7.135 states:

Reimbursement for expenses; employment of investigative, expert or other services: The attorney appointed by a magistrate or district court to represent a defendant is entitled, in addition to the fee provided by N.R.S. 7.125 for his services to be reimbursed for expenses reasonably incurred by him in representing the defendant and may employ, subject to the prior approval of the magistrate or the district court in an ex parte application, such investigative, expert or other services as may be necessary for an adequate defense. Compensation to any person furnishing such investigative, expert or other services must not exceed $300.00, exclusive of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is:

1. Certified by the trial judge of the court, or by the magistrate if the services were rendered in connection with a case disposed of entirely before him, as necessary to provide fair compensation of services of an unusual character or duration: and

2. Approved by the presiding judge of the judicial district in which the attorney was appointed . . .

In the instant case, Mr. Chappell is currently in his post-conviction proceedings regarding his sentence of death. In light of the seriousness of Mr. Chappell's conviction and his sentence of death, I believe it is necessary that an investigator be permitted to act in the capacity for Mr. Chappell through his post-conviction proceedings.

The above mentioned investigator will incur fees associated with his/her services, thus it is necessary that this Court permit payment of his/her fees incurred herein. Moreover, Mr. Chappell is financially unable to obtain an investigator on his own behalf.

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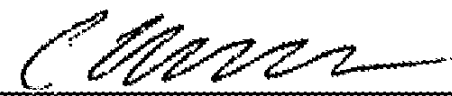
CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

WHEREFORE, for the foregoing reasons, Mr. Chappell requests this court to authorize an order granting the services of an investigator. Additionally, for this Court to allow payment for his/her fees in excess of the statutory maximum three hundred dollars ($300.00), not to exceed two thousand five hundred Dollars ($2,500.00) per expert unless prior Court approval is granted.

DATED this 13th day of February, 2012.

Respectfully submitted:



CHRISTOPHER R. ORAM, ESQ.
Nevada State Bar #004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101

Attorney for Petitioner
JAMES CHAPPELL

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

AFFIDAVIT OF CHRISTOPHER R. ORAM, ESQ.
IN SUPPORT OF MOTION FOR AUTHORIZATION TO OBTAIN AN INVESTIGATOR AND FOR PAYMENT OF FEES INCURRED HEREIN.

STATE OF NEVADA)
)ss:
COUNTY OF CLARK)

CHRISTOPHER R. ORAM, ESQ., having been duly sworn, deposes and says:

1. Your Affiant is an attorney duly licensed to practice law in the State of Nevada.

2. JAMES CHAPPELL, by and through his attorney, CHRISTOPHER R. ORAM, ESQ., hereby requests this Honorable Court to issue an order appointing an investigator for Mr. Chappell. Defendant also requests on Order authorizing payment in excess of the statutory maximum three hundred dollars ($300.00), not to exceed two thousand five hundred dollars ($2,500.00) per expert unless prior Court approval is granted

3. In the instant case, Mr. Chappell is currently in his post-conviction proceedings regarding his sentence of death. In light of the seriousness of Mr. Chappell's conviction and his sentence of death, I believe it is necessary that an investigator be permitted to act in the capacity for Mr. Chappell through his post-conviction proceedings.

4. The above mentioned investigator will incur fees associated with his/her services, thus it is necessary that this Court permit payment of his/her fees incurred herein. Moreover, Mr. Chappell is financially unable to obtain an investigator on his own behalf.

5. Therefore, it is essential that Mr. Chappell be permitted an investigator.

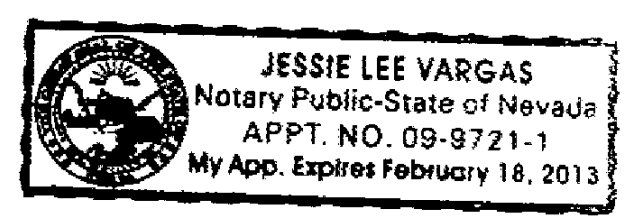
6. That this motion is being made in good faith and not for purposes of delay.

7. Further your affiant sayeth naught.

DATED this 13th day of February, 2012.

CHRISTOPHER R. ORAM, ESQ.

SUBSCRIBED AND SWORN to before me this 13th day of February, 2012.



NOTARY PUBLIC in and for said County and State

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

ROC
CHRISTOPHER R. ORAM, ESQ.
Nevada State Bar #004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563

Attorney for Defendant
JAMES CHAPPELL

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA, Plaintiff, vs. JAMES CHAPPELL, Defendant.	CASE NO. C131341 DEPT. NO. XXV

RECEIPT OF COPY

The above **MOTION FOR AUTHORIZATION TO OBTAIN AN INVESTIGATOR AND FOR PAYMENT OF FEES INCURRED HEREIN** is hereby acknowledged this _____ day of February, 2012.

Clark County District Attorney

By _____
200 Lewis Avenue
Las Vegas, Nevada 89155

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

EXHIBIT 45

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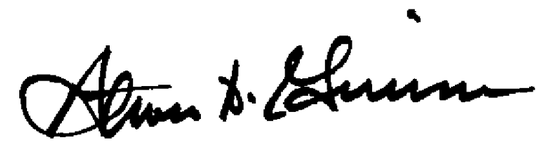

CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA Plaintiff vs. JAMES MONTELL CHAPPELL Defendant	CASE NO. C131341 DEPT. NO. V

BEFORE THE HONORABLE CAROLYN ELLSWORTH, DISTRICT COURT JUDGE

MONDAY, OCTOBER 19, 2012

RECORDER'S TRANSCRIPT RE:
EVIDENTIARY HEARING: ARGUMENT

APPEARANCES:

For the Plaintiff: STEVEN S. OWENS
Chief Deputy District Attorney

For the Defendant: CHRISTOPHER R. ORAM, ESQ.

RECORDED BY: LARA CORCORAN, COURT RECORDER

1 LAS VEGAS, NEVADA, FRIDAY, OCTOBER 19, 2012, 9:58 A.M.

2 * * * * *

3 MR. ORAM: – Your Honor.

4 THE COURT: You're not expecting them to have transported him,

5 right?

6 MR. ORAM: No, I am not, Your Honor. And I believe we can proceed

7 on argument without him.

8 THE COURT: Okay. All right. So, case number C131341, State of

9 Nevada versus James Montell – is it Chapel [phonetic] or Shapell [phonetic]?

10 MR. ORAM: It's Chapell [Chapel], Your Honor.

11 THE COURT: Chapell. All right. And do you have any particular order

12 you want me to hear, because there are the other – there's the petition for writ of

13 habeas corpus argument, but there are all these other motions that are also on?

14 MR. ORAM: Your Honor, perhaps I could just sort of address the case

15 as a whole at first and then get some guidance maybe from the Court or hear the

16 State's argument. I could probably just sort of address all of the arguments

17 because, in essence, what I'm going to be asking the Court to do is hold an

18 evidentiary hearing, and before that evidentiary hearing give me an opportunity to

19 have an investigator, at least one expert, and conduct a PET scan. And so that

20 would be what – the end conclusion of what I'm asking for.

21 THE COURT: Right. So just let me tell you so you can kind of tailor

22 your arguments, I suppose, that I read everything, that I'm not persuaded that there

23 was ineffective assistance or that your other assignments of error, you know, like

24 attacking the constitutionality, et cetera, of the – or of the death penalty scheme in

25 Nevada, or that it's cruel and unusual punishment, those things, I'm not persuaded

1 by any of those arguments.

2 Moreover, I don't see that an evidentiary hearing – and normally I grant
3 them, as you know; we've had many, but I don't see in this case that an evidentiary
4 hearing is going to add anything to what I already have before me. I don't think an
5 evidentiary hearing is warranted in this particular case and so I would be inclined to
6 deny the petition as well as all the motions.

7 So, go ahead.

8 MR. ORAM: Your Honor, if I could also say one housekeeping matter.
9 Mr. Hover, as you know he is in your court, he is also for one – for another case next
10 door –

11 THE COURT: Right.

12 MR. ORAM: – apparently there's a high-profile case – O. J. Simpson is
13 next door – so that case was not called. At some point I may need to go over to just
14 assist Mr. Hover, although it sounds like this particular argument may be relatively
15 short, and it's a busy court next door.

16 Your Honor, I would – again, I recognize that the Court will have read
17 everything. I don't have much to add, although I would be able to argue it this
18 morning. I'm prepared to argue for an hour, if need be, because I – but I would be
19 regurgitating every single thing that is in these.

20 Now, I recognize, as the Court said, in my supplemental brief from page
21 45 on, these are standard death-penalty arguments I would make in every single
22 case of mine, and they are always denied. We do it for federal preservation of the
23 issues.

24 Your Honor, I would – I would ask that an evidentiary hearing be held
25 so that I may flush out the arguments that I have done.

1 THE COURT: Tell me what you would think you would expect to
2 happen in an evidentiary hearing. What evidence do you think would come out in an
3 evidentiary hearing that would change or add to what we have already?
4 MR. ORAM: I would just sort of summarize it this way, Your Honor. I
5 would want to know why defense counsel had not at least met with their – or,
6 excuse me, with their experts – now, I can't tell you whether they did or they didn't –
7 and prepared them in a better fashion, that being Dr. Etcoff, Dr. Danton and Dr.
8 Grey, so that they had a good – had knowledge of the case, knowledge of the facts,
9 so that they weren't so blind-sided. It seemed to me when I was reading their
10 testimony that they testified on direct examination for the defense to one thing, but
11 by the time the skilled prosecutor, Mr. Owens, Christopher Owens, was done with
12 them it seemed that they were almost State witnesses because they didn't seem to
13 know about domestic violence; they didn't know about the facts of the case.
14 THE COURT: All right. So assuming that that's the case, that once
15 they were presented with the facts of the case their opinions were not favorable to
16 the defense, so how would them having all of that ahead of time changed that? In
17 other words, they would have, right, had they, as you say then had all this ahead of
18 time – now, let me digress a little bit.
19 Are you – you're talking about the second – we're focusing here on the
20 second penalty hearing; right?
21 MR. ORAM: That's correct.
22 THE COURT: Because they'd testified in the first hearing many years
23 earlier; correct?
24 MR. ORAM: Some of them did. I'm not sure that Dr. Grey did, Your
25 Honor, and so that I can't – as I'm standing here I cannot accurately answer whether

1 they absolutely testified in the first one. I know Dr. Etcoff did because Dr. Etcoff was
2 examined and said that he had met with the defendant for two hours in preparation
3 for the first penalty phase.
4 THE COURT: So the experts, anyway, took the stand and they testified
5 based upon their knowledge of the facts, and then on cross-examination when
6 additional facts were given to them, then their opinions apparently were changed;
7 right?
8 MR. ORAM: Correct. Yes.
9 THE COURT: Okay. So, had they had all those facts ahead of time
10 their testimony would've been the same. So, how is the failure then – alleged failure
11 to prepare them ahead, how did that prejudice the defendant?
12 MR. ORAM: Well, I think, on two levels, two factors there. First of all it
13 was surprising when you hear the doctors testify I didn't know this was a case really
14 about domestic violence. If I could summarize the case, which I won't do because
15 the Court's gone through it, but if the Court was going to summarize for, let's say, a
16 group of students what the case was about and what the facts of the case were
17 about, I'm sure one of the things the Court would say is that this is a case about a
18 history of domestic violence that then resulted in death. And it was surprising to see
19 experts say I didn't really know that, that fact.
20 That would seem to me to be something that you would sit down with
21 your expert in the first few minutes of talking to your expert and say exactly what I
22 just did, this is a case of a woman who was killed as a result of her significant other
23 being in a rage and this rage had been continuing on for a long period of time. It
24 was sort of that – almost a battered-woman syndrome that you see here. There's
25 battery. She then wants to reconcile. She reconciles and all the friends, family

1 members are always sort of appalled by her reconciliation, why are you going back
2 to this man. So it seems odd to me that there is experts saying I really didn't know
3 that, or – that was odd.
4 Another one that seems odd about the case to me is that you only have
5 the sexual assault as being the only aggravator left in the particular case, and when
6 I look at the Nevada Supreme Court's decision they say one of the five factors that
7 essentially gives a jury the opportunity to say sexual assault occurred, one of those
8 factors is that we have Mr. Chappell lying because Mr. Chappell said he had
9 consensual sex but he did not ejaculate and there is semen found. Therefore, the
10 detective says that must prove that he's lying, and the State says it.
11 There's no objection from the defense, and as I've pointed out it seems
12 like – if I had been defense counsel in that case, I think a reasonable attorney had
13 been looking at that situation would have called – you don't even need to call
14 experts, just start with the high schools. Call a health teacher in here and say can a
15 woman get pregnant without the man ejaculating, and the answer is going to be yes
16 every single time.
17 And so I don't know how that became a factor to prove sexual assault,
18 and that was one that I thought should be dispelled.
19 What I also thought was interesting is when, for example – Court's
20 indulgence. Dr. Etcoff, when he was given that scenario – in other words he did not
21 recognize that, he didn't know the facts well enough so that when Mr. Owens
22 questioned him, or it may have been the other prosecutor questioned him on cross-
23 examination and said, well, what if we – what if I told you that the defendant
24 admitted to having sex but denied ejaculation, yet we can prove that semen is there,
25 does that – what does that prove, and he actually said that proved the defendant's

1 story was bogus. And, to me, that had to just level the defendant. If the jury had to
2 sit there and think, well, the defendant's just lying through his teeth, he must have
3 sexually assaulted the woman.
4 And, so to me it seemed like, boy, you need to dispel that immediately,
5 and that would be one of the biggest things that I would think in an opening
6 argument you'd want to say is just because semen is located doesn't mean the
7 defendant lied. The defendant – I don't understand why a defendant would admit to
8 stabbing his wife to death, admit to having sex with her shortly before that occurred,
9 within an hour or two, but want to lie about ejaculation. That doesn't make much
10 sense. If you think you're gonna cover up a sexual assault but you won't admit
11 murder, then wouldn't you say I never had sex with that woman, don't know what
12 you're talking about and then you find semen, then you know, okay, he's lying.
13 So I don't understand why that occurred and why the experts were not
14 prepared to meet that challenge and why there were no experts on the side of the
15 defense to answer those questions. It seems like you could dispel that quite easily.
16 It almost seems like a myth occurred in the courtroom.
17 That was very troubling to me and I don't really know why the Supreme
18 Court actually put that as a factor, because, unless I'm missing something, I think – I
19 think it's a myth, and I think that anybody who has teenage kids would never advise
20 their teenage kids of this fact, that you can't – a woman couldn't get pregnant unless
21 there's ejaculation. It doesn't make sense to me.
22 And so that was one of the factors, to answer the Court's question, that
23 I would argue necessitates a evidentiary hearing to find out why the lack of
24 preparation. Does that answer the court's question at least as to my argument on
25 that? It does.

THE COURT: Okay.

MR. ORAM: Your Honor, I'm not sure, because it's so lengthy and because I sort of heard the Court's – what I perceive to be the Court's ruling. And another thing I want to make sure that I'm not doing is if the Court's mind is made up I'm not here to waste the Court's time if I cannot dissuade you from that decision I recognize that and I know that you have read everything and that obviously then we would appeal it. So I'm not sure if you want to hear argument or if you're saying, Mr. Oram –

THE COURT: Well, I would like Mr. Owens to address this whole issue of the ejaculation argument. It seemed a bit like a red herring to me, but tell me about that.

MR. OWENS: Certainly. And Mr. Oram says he'd like to put defense counsel on the stand and ask them why they didn't prepare their experts more on this ejaculation concept, as well as on perhaps other issues, and that apparently one of them didn't know it was a domestic violence issue. I know two of them talked at length about the pattern of domestic violence and reconciliation between these two

But specifically on the ejaculation that's really not what this case was about, whether he ejaculated in her or not. He admitted that they had sexual intercourse; that was not in dispute. What was in dispute was whether it was consensual or not, and so the presence of semen really became a non-issue because in his testimony he said that they had sexual intercourse. He just said that he withdrew prior to ejaculation. Yeah, well so what? The Nevada Supreme Court, yeah, they listed that as one of the factors that they looked at, but there was a number of factors for the Supreme Court to look at to affirm the sexual assault aggravator as well as the jury to look at to find that aggravator in the first place.

1 There's so much other weighty evidence that this issue about
2 ejaculation simply would not have changed the fact that Chappell threatened
3 his girlfriend that he's going to do an O.J. Simpson on her ass. I mean, that alone –
4 THE COURT: Wasn't there testimony from one of the experts, defense
5 experts where he conceded that she could have – in fact that was – wasn't that his
6 opinion, that she could have in fact had sex with him just to – out of fear and that
7 would still be a sexual assault, out of – if she was trying to placate him to try and
8 keep him from harming her –
9 MR. OWENS: Absolutely.
10 THE COURT: -- that would still be sexual assault.
11 MR. OWENS: Absolutely.
12 THE COURT: And didn't the Supreme Court consider that?
13 MR. OWENS: Absolutely. Their doctors testified that they were really
14 looking for physical evidence under the medical definition of sexual assault, vaginal
15 bruising or tearing or something, and they found no evidence of sexual assault, but
16 on cross-examination they admitted that medical science doesn't tell them about the
17 consensual nature of the activity. Absent some medical findings medicine doesn't
18 say whether or not he had a knife to her throat at the time that he did this, whether
19 she was threatened and felt I need to avoid getting beat, I need to agree and give in
20 to this. That's really a jury decision that the medical science is simply not going to
21 help us on.
22 So the jury heard about all these threats. They heard about the victim
23 curling up in a fetal position when she heard the defendant was getting out of jail
24 again. They heard and knew that he came in through the window. They knew that
25 there was this phone call about the – her children and her calling – or asking the

1 woman to call back so that she could have an excuse or reason to get out of there.
2 There's an awful lot of facts and threats that she would – that he would seriously
3 hurt her if she was with another man, and she had been with another man while he
4 was in jail.
5 And that is all the facts that point out whether or not this was
6 consensual, and it's not going to be proven dispositively by any kind of expert or
7 medical science, it's going to be the totality of all the facts and circumstances which
8 haven't changed, which the jury was free to consider to find that this aggravator had
9 been found beyond a reasonable doubt. In fact, two different juries have found that
10 – existence of that aggravator beyond a reasonable doubt now. There's
11 overwhelming evidence.
12 And so, yeah, I would say to now go out and get an expert to testify to
13 what defense counsel admits every high school student is taught, well, that's
14 common knowledge that there could be pre-ejaculate. That's not going to really
15 bear on – or change the outcome of the case. It's not going to bear on the issue of
16 consent here, and so for that reason I don't – I don't think we need to have an expert
17 or an evidentiary hearing. It just is not a significant fact.
18 And I already mentioned the domestic violence, failure to prepare the
19 experts. One of them specifically was called to testify about domestic violence and
20 the nature of this specific relationship over time. We're looking in hindsight at how a
21 skilled prosecutor was able to cross-examine a witness. You can't anticipate in
22 advance every single way in which a witness might potentially get tripped up, and so
23 it's very speculative to say that if they'd been better prepared they might've been
24 able to respond more appropriately to the cross-examination, but the reality is is that
25 seldom do people say the exact same thing the exact same way every time and

1 there are always little ways in which a prosecutor can cross-examine someone to
2 find inaccuracies in their testimony or to question the weak parts of their opinion that
3 they are advancing to the jury.
4 That's simply not going to change and it's not something we can fault
5 the attorneys for in hindsight just because the prosecutor might have had some
6 headway. I don't remember anything on the DV issue, but maybe there was a little
7 bit of headway on the ejaculation issue and getting some sort of admission from
8 their expert, but, like I said, it really wasn't relevant to the issue of consent.
9 I don't really see their experts having fundamentally changed their
10 opinion as a result of the cross-examination. Any little inroads that the prosecutor
11 was able to get did not undermine their opinion of the jury that this was consensual
12 'cause there was no evidence that this was forced, that the pattern of the
13 relationship was such that it was consistent that she would continually make up
14 each time with the defendant, and that fundamental opinion did not change for any
15 of the three experts despite any effect of cross-examination.
16 So, none of that would have made a difference in the case; therefore, I
17 think it should all be denied.
18 THE COURT: All right. Oh, and as far as the PET scans and the
19 neurological, again, I mean I don't think there was any showing as to what that
20 would've changed since there was plenty of evidence that he was – his, you know,
21 mother used alcohol when she was pregnant with him, that he had a learning
22 disability, that his IQ was in the low to moderate range, you know, all of those things.
23 And, of course, the jury found those mitigating factors; they just didn't feel that they
24 outweighed the aggravators.
25 So, I just don't see it and I don't – in this case I don't see that an

evidentiary hearing is going to change that. So I'll deny that. And the State will prepare the findings of fact, conclusions of law for my review, also to present them to the defense for them to look over, and, as well, will you prepare the orders denying the motions, too.

MR. OWENS: I will, and I'll do an order for the transcript from today so I can have that to aid me in doing the findings.

MR. ORAM: Thank you very much, Your Honor.

THE COURT: Thank you.

Oh, let me just say that my – the reasons for denying the petition for writ of habeas corpus are the reasons and arguments that are set forth in the State's opposition.

MR. OWENS: Okay. Thank you.

MR. ORAM: Thank you, Your Honor.

PROCEEDING CONCLUDED AT 10:17 A.M.

* * * * * * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings with the sound recording in the above-entitled case.

Beverly Sigurnik

BEVERLY SIGURNIK
Court Recorder/Transcriber

EXHIBIT 46

151

ORIGINAL

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

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

JAMES MONTELL CHAPPELL,	)	CASE NO. C 131341
	)	DEPT. NO. XI
Petitioner,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	DATE: 4-18-02
	)	TIME: 9:00 A.M.

SUPPLEMENTAL PETITION FOR WRIT
OF HABEAS CORPUS (POST CONVICTION)
POINTS AND AUTHORITIES IS SUPPORT THEREOF

COMES NOW, Petitioner JAMES MONTELL CHAPPELL, by and through his attorney DAVID M. SCHIECK, ESQ., and hereby files this Supplemental Petition for Writ of Habeas Corpus and Supplemental Points and Authorities in Support Thereof. Petitioner is being held in custody in violation of the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States of America, and Article I, Sections 3, 6, 8 and 9 and Article IV, Section 21 of the Constitution of the State of Nevada.

STATEMENT OF THE CASE

Petitioner JAMES MONTELL CHAPPELL (hereinafter referred to

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

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as CHAPPELL) is currently in the custody of the State of Nevada at Ely State Prison in Ely, Nevada pursuant to a judgement of conviction and sentence of death. E.K. McDaniel is the Warden of Ely State Prison.

CHAPPELL'S was charged by way of an Information filed on October 11, 1995 with burglary, robbery with use of a deadly weapon, and murder with use of a deadly weapon. The State filed a Notice of Intent to seek the death penalty alleging four aggravating circumstances: the murder was committed while the person was engaged in the commission of or an attempt to commit a robbery; the murder was committed while the person was engaged in the commission of or an attempt to commit any burglary or home invasion; the murder was committed while the person was engaged in the commission of or an attempt to commit any sexual assault; and the murder involved torture or depravity of mind.

The jury trial commenced on October 7, 1996 and the jury convicted CHAPPELL of all charges and imposed a sentence of death. The District Court imposed consecutive sentences on the burglary and robbery charges.

CHAPPELL pursued a direct appeal to the Nevada Supreme Court with the conviction and sentence being affirmed on December 30, 1998. Chappell v. State, 114 Nev. 1404, 972 P.2d 838 (1998). CHAPPELL filed for Rehearing and on March 17, 1999 an Order was entered Denying Rehearing. A Petition for Writ of Certiorari was filed with the United States Supreme Court and

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

Certiorari was denied on October 4, 1999. The Nevada Supreme Court issued it's Remittitur on October 26, 1999. CHAPPELL timely filed the instant Petition for Writ of Habeas Corpus on October 19, 1999.

STATEMENT OF THE FACTS

For purposes of these Supplemental Points and Authorities CHAPPELL will incorporate the Facts from the decision of the Nevada Supreme Court, with the caveat that CHAPPELL contends that no proper investigation was conducted before either the trial or penalty hearing and therefore the testimony presented was virtually unopposed at trial and penalty hearing and does not accurately portray the facts of the case. (See e.g. Buffalo v. State, 111 Nev. 1145, 901 P.2d 647 (1995) wherein the Court found that the overwhelming evidence that appeared after trial was entirely different from the evidence that came to light after post-conviction pleadings).

> "On the morning of August 31, 1995, James Montell Chappell was mistakenly released from prison in Las Vegas where he had been serving time since June 1995 for domestic battery. Upon his release, Chappell went to the Ballerina Mobile Home Park in Las Vegas where his ex-girlfriend, Deborah Panos, lived with their three children. Chappell entered Panos' trailer by climbing through the window. Panos was home alone, and she and Chappell engaged in sexual intercourse. Sometime later that morning Chappell repeatedly stabbed Panos with a kitchen knife, killing her. Chappell then left the trailer park in Panos' car and drove to a nearby housing complex.
>
> The State filed an information on October 11, 1995, charging Chappell with one count of burglary, one count of robbery with the use of a deadly weapon, and one count of murder with the use of a deadly weapon. On November 8, 1995, the State filed a

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

notice of intent to seek the death penalty. The notice listed four aggravating circumstances: (1) the murder was committed during the commission of or an attempt to commit any robbery; (2) the murder was committed during the commission of or an attempt to commit any burglary and/or home invasion; (3) the murder was committed during the commission of or an attempt to commit any sexual assault; and (4) the murder involved torture or depravity of mind.

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

Chappell took the witness stand on his own behalf and testified that he considered the trailer to be his home and that he had entered through the trailer's window because he had lost his key and did know that Panos was at home. He testified that Panos greeted him as he entered the trailer and that they had consensual sexual intercourse. Chappell testified that he left with Panos to pick up their children from day care and discovered in the car a love letter addressed to Panos. Chappell, enraged, dragged Panos back into the trailer where he stabbed her to death. CHAPPELL argued that his actions were the result of a jealous rage.

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

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

Chappell v. State, 114 Nev. 1404, 972 P.2d 838 (1998)

ISSUES RAISED ON DIRECT APPEAL

NRS 34.810(b) provides that grounds raised in a Petition for Writ of Habeas Corpus should be dismissed if the grounds could have been presented to the trial court, raised on direct appeal or in any other proceedings taken by the Petitioner. CHAPPELL hereby reasserts each of the issues raised on direct appeal, both substantively as stated, and as having been denied as a result of ineffective assistance of counsel in violation of his State and Federal Constitutional rights.

On direct appeal, CHAPPELL was represented by Howard Brooks of the Clark County Public Defender and raised the following issues to the Nevada Supreme Court. The decision of the Court as to each issue is contained in parenthesis following each enumerated issue

1. The trial court abused its discretion by allowing the State to introduce evidence of prior domestic batteries by CHAPPELL when that evidence was not relevant to matters in issue. ("...we conclude that the record is not sufficient for the court to consider whether the evidence was admissible under the test for admissibility of prior bad acts evidence. In light of the overwhelming evidence of guilt in this case, however, we conclude that had the district court not admitted the evidence, the result would have been the same")

2. The trial court abused it's discretion by allowing state witnesses to testify regarding the state of mind of

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

Panos, thereby improperly impeaching CHAPPELL'S credibility. (This issue was addressed only in a cursory fashion as one of a number of issues wherein the Court stated "We have reviewed each of these issues and conclude that they lack merit")

3. The trial court abused it's discretion by allowing the State to introduce testimony regarding a shoplifting incident that occurred the day after the killing. (This issue was not addressed by the Court, but presumably falls within the holding that other bad act evidence was harmless error despite no evidentiary hearing)

4. The trial court abused it's discretion by allowing the State to introduce character evidence that CHAPPELL was unemployed and a chronic thief and this evidence was admitted without the scrutiny of a pretrial Petrocelli hearing. (This issue was not addressed by the Court, but presumably falls within the holding that other bac act evidence was harmless error despite no evidentiary hearing)

5. The cumulative effect of the trial court's evidentiary rulings was to allow the State to introduce overwhelming character evidence at trial, thereby denying CHAPPELL his due process rights to a fair trial. (This issue was not addressed by the Court, but presumably falls within the holding that other bac act evidence was harmless error despite no evidentiary hearing)

6. The State discriminated against the defendant by using

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

peremptory challenges to selectively exclude the only two black persons qualified for the jury pool. (This issue was addressed under the heading of "Additional issues raised on appeal" with the Court stating only "We have reviewed each of these issues and conclude that they lack merit")

7. *The state failed to prove beyond a reasonable doubt the charges of burglary, robbery and first degree murder.* ("We conclude that there is sufficient evidence to support the aggravating circumstances for robbery, burglary and sexual assault")

8. *The trial court committed reversible error by denying defendant's motion to strike the Notice of Intent to seek death penalty.* (This issue was addressed under the heading of "Additional issues raised on appeal" with the Court stating only "We have reviewed each of these issues and conclude that they lack merit")

9. *The prosecutor committed misconduct during the closing argument by attacking the defendant's post arrest silence.* (This issue was not addressed by the Court)

10. *The state committed prosecutorial misconduct in the penalty phase by appealing to the jury for vengeance.* (This issue was addressed under the heading of "Additional issues raised on appeal" with the Court stating only "We have reviewed each of these issues and conclude that they lack merit")

11. *Appellant was denied a fair penalty hearing when the*

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

State's witnesses implored the jury to impose "death" upon the defendant. (This issue was addressed under the heading of "Additional issues raised on appeal" with the Court stating only "We have reviewed each of these issues and conclude that they lack merit")

12. The State failed to prove beyond a reasonable doubt the existence of certain aggravating circumstances. ("We conclude that there is sufficient evidence to support the aggravating circumstances for robbery, burglary and sexual assault")

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

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

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

ARGUMENT

I.

CHAPPELL IS ENTITLED TO AN
EVIDENTIARY HEARING ON HIS PETITION

It has long been the holding of the Nevada Supreme Court that if a Petition for post conviction relief contains allegations, which, if true, would entitle the Petitioner to relief, an evidentiary hearing is required. Bolden v. State, 99 Nev. 181, 659 P.2d 886 (1983); Grandin v. State, 97 Nev. 454, 634 P.2d 456 (1981); Doggett v. State, 91 Nev. 768, 542 P.2d 1066 (1975).

It is anticipated that the State, as it usually does, will ask this Court to deny CHAPPELL an evidentiary hearing and deny his Petition based on the perceived strength of the State's case at trial without considering the allegations of the Petition. In Drake v. State, 108 Nev. 523, 836 P.2d 52 (1992) the Court remanded the case for an evidentiary hearing over the State's objection where trial counsel had not adequately opposed a Motion in Limine filed by the State. The purpose of the hearing was to determine whether counsel had sufficient cause for the noted failure. Drake, 108 Nev. at 527-528.

The Petition filed by CHAPPELL fits squarely within the parameters of the decision in Hargrove v. State, 100 Nev. 398, 686 P.2d 222 (1984), and contrary to the anticipated argument of the State, Hargrove mandates that an evidentiary hearing be granted. In Hargrove, the Nevada Supreme Court stated:

"Appellant's motion consisted primarily of 'bare' or 'naked' claims for relief, unsupported by any specific factual allegations that would, if true, have entitled him to withdrawal of his plea. Specifically, appellant's claim that certain witnesses could establish his innocence of the bomb threat charge was not accompanied by the witness' names or descriptions of their intended testimony. As such, to the extent that it advanced merely 'naked' allegations, the motion did not entitle appellant to an evidentiary hearing. See Vaillancourt v. Warden, 90 Nev. 431, 529 P.2d 204 (1974); Fine v. Warden, 90 Nev. 166, 521 P.2d 374 (1974); see also Wright v. State, 619 P.2d 155, 158 (Kan.Ct.App. 1980) (to entitle defendant to an evidentiary hearing, a post-conviction petition must set forth 'a factual background, names of witnesses or other sources of evidence demonstrating . . . entitlement to relief')."

During the trial portion of the case, only three witnesses were called by the defense, Bret Robello, Dr. Lewis Etcoff and CHAPPELL. Robello was a neighbor and his testimony was limited to the messy condition of the mobile home. As set forth in the affidavit of CHAPPELL attached hereto, he had requested a number of witnesses be called on his behalf. These Supplemental Points and Authorities contain the names of the witnesses and a description of their expected testimony. As such the allegations are not "naked" and an evidentiary hearing should be conducted.

It is respectfully urged that this Court grant an evidentiary hearing to CHAPPELL.

II.

CLAIMS FOR RELIEF

CLAIM ONE

CHAPPELL'S conviction and death sentence are invalid under

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

the State and Federal guarantee of effective assistance of counsel, due process of law, equal protection of the laws, cross-examination and confrontation and a reliable sentence due to the failure of trial counsel to provide reasonably effective assistance of counsel. United States Constitution Amendments 5, 6, 8, and 14; Nevada Constitution Article I, Sections 3, 6 and 8; Article IV, Section 21.

The Sixth Amendment guarantees that a person accused of a crime receive effective assistance of counsel for his defense. The right extends from the time the accused is charged up to and through his direct appeal and includes effective assistance for any arguable legal points. Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The United State Supreme Court has consistently recognized that the right to counsel is necessary to protect the fundamental right to a fair trial, guaranteed under the Fourteenth Amendment's Due Process Clause. Powell v. Alabama, 287 U.S. 45, 53 S.Ct.55, 77 L.Ed. 158 (1932); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Mere presence of counsel does not fulfill the constitutional requirement: The right to counsel is the right to effective counsel, that is, "an attorney who plays the role necessary to ensure that the trial is fair." Strickland, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 657 (1984); McMann v. Richardson, 439 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d. 763 (1970).

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

Pre-trial investigation is a critical area in any criminal case and failure to accomplish same has been held to constitute ineffective assistance of counsel. The Nevada Supreme Court in Jackson v. Warden, 91 Nev. 430, 537 P.2d 473 (1975) stated:

> "It is still recognized that a primary requirement is that counsel . . . conduct careful factual and legal investigations and inquiries with a view toward developing matters of defense in order that he make informed decisions on his client's behalf both at the pleading stage . . . and at trial."

Jackson 91 Nev. at 433, 537 P.2d at 474. The Federal Courts are in accord that pre-trial investigation and preparation for trial are a key to effective representation of counsel. U.S. v. Tucker, 716 F.2d 576 (1983).

In U.S. v. Baynes, 687 F.2d 659 (1982) the Court, in language applicable to this case, stated:

> "Defense counsel, whether appointed or retained is obligated to inquire thoroughly into all potential exculpatory defenses and evidence, mere possibility that investigation might have produced nothing of consequences for the defense could not serve as justification for trial defense counsel's failure to perform such investigations in the first place. Fact that defense counsel may have performed impressively at trial would not have excused failure to investigate defense that might have led to complete exoneration of the Defendant."

In Warner v. State, 102 Nev. 635, 729 P.2d 1359 (1986) the Nevada Supreme Court found that trial counsel was ineffective where counsel failed to conduct adequate pre-trial investigation, failed to properly utilize the Public Defender's full time investigator, neglected to consult with other attorneys although urged to do so, and failed to prepare for

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

the testimony of defense witnesses. See also, Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1991).

In support of CLAIM ONE CHAPPELL alleges the following facts, among others to be presented at an evidentiary hearing:

A. Trial counsel was ineffective in failing to call witnesses to testify on behalf of CHAPPELL. The only witnesses called at the trial portion of the case were a next door neighbor that said the house was messy, Dr. Etcoff and CHAPPELL. The State's entire case was built around portraying CHAPPELL as a chronic abuser, thief and individual of poor character. A number of witnesses were called by the State to describe the relationship between CHAPPELL and Panos and did so in a fashion that was totally derogatory to CHAPPELL. Numerous witnesses could have been called from Nevada, Michigan and Arizona that intimately knew the relationship between them and would have described it as loving and not abusive. Further contrary to the testimony at trial, witnesses could have shown that Panos followed CHAPPELL to Arizona, but rather she begged him to come out and be with her. All of this testimony would have had an impact on the State's case and corroborated the defense theory that of defense that the killing was not first degree murder. The witnesses, who are described in CHAPPELL'S affidavit attached hereto, are as follows:

-Ernestine (Sue) Harvey. Sue was a friend of CHAPPELL and Ms. Panos and could have testified as the relationship. Her testimony would have greatly rebutted the testimony from the

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

State's witnesses that portrayed CHAPPELL as being abusive, but instead had a loving relationship.

-Shirley Sorrell. Shirley knew Debra and CHAPPELL for many years and talked with them on the phone even after they moved to Arizona and then Nevada. She knew that Debra had followed CHAPPELL to Arizona and the details of our relationship.

-James C. Ford. CHAPPELL'S best friend in Michigan. CHAPPELL grew up with Mr. Ford and he was around Debra and CHAPPELL during the first five years of our relationship. He also knew about CHAPPELL'S employment history and could have testified at both the trial and the penalty hearing.

-Mr. Ivri Marrell was also a friend of CHAPPELL and Debra in Michigan and stayed in contact with them in Arizona. He could have testified to Debra's behavior and the relationship with CHAPPELL.

-CHAPPELL'S sisters, Mrya Chappell and Carla Chappell had been around Debra a lot and knew about the type of relationship that they had together. They lived with Carla for a period of time after the baby was born and she would babysit for them on occasions.

-Chris Bardow and David Green. Both were friends of CHAPPELL in Arizona and could have rebutted most of the testimony that was introduced concerning the events that allegedly took place in Arizona.

B. Trial counsel failed to timely object to the system of

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

jury selection that systematically excluded African Americans and wherein African Americans are under represented, as described in CLAIM TWO set forth below, which is incorporated by this reference. If the State asserts that the claim is barred because it should have been raised at trial, CHAPPELL hereby asserts that it was a Sixth Amendment violation for counsel not to have timely raised the issue.

C. Trial counsel failed to object to unconstitutional and improper jury instruction as are specifically set forth in CLAIM FIVE below, and failed to offer proper and constitutional instructions that did not violate CHAPPELL'S rights under the Eighth and Fourteenth Amendments. CHAPPELL incorporates hereat the arguments from CLAIM FIVE, below. If the State claims that the failure to object at trial bars consideration of the constitutionality of the discussed instructions, CHAPPELL asserts that his Sixth Amendment right to effective counsel was violated by the failure of trial counsel to do so.

D. Trial counsel failed to object and move to strike overlapping aggravating circumstances that were alleged by the State and utilized to unconstitutionally impose the death penalty against CHAPPELL.

CHAPPELL herein asserts that overlapping and multiple use of the same facts as separate aggravating circumstances resulted in the arbitrary and capricious imposition of the death penalty. Trial counsel failed to file any pretrial motion challenging the aggravating circumstances, failed to

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

object at trial, failed to offer any jury instruction on the matter, and the issue was not raised on direct appeal.

The original notice of intent to seek the death penalty filed by the State on November 8, 1995, alleged the presence of four (4) aggravating circumstances, i.e., the murder was committed while the person was engaged in the commission of or attempt to commit any robbery; the murder was committed while the person was engaged in the commission of or an attempt to commit any burglary; the murder was committed while the person was engaged in the commission of or an attempt to commit any sexual assault; and the murder involved torture or depravity of mind.

After the penalty hearing the jury found that all four (4) of the aggravating circumstances existed and found two mitigating circumstances; the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance and any other mitigating circumstance. On direct appeal the Nevada Supreme Court found that there was insufficient evidence to uphold a finding of torture or depravity and that aggravating circumstance was invalidated.

Nonetheless, in essence the State was allowed to double count the same conduct in accumulating three of the aggravating circumstances. The robbery, burglary and sexual assault aggravating circumstances are all based upon the same set of operative facts and unfairly accumulated to compel the jury toward the death penalty. The use of the same set of operative

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

facts to multiple aggravating circumstances in a State that uses a weighing process, such as Nevada does, violates principles of Double Jeopardy and deprived CHAPPELL of Due Process of Law. United States Constitution, Amendments V, VII, XIV; Nevada Constitution, Article I, Section 8.

The Double Jeopardy Clause of the Fifth Amendment guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The traditional test of the "same offense" for double jeopardy purposes is whether one offense requires proof of an element which the other does not. See, Bockburger v. U.S., 284 U.S. 299, 304 (1932). This test does not apply, however, when one offense is an incident of another; that is, when one of the offenses is a lesser included of the other. U.S. v. Dixon, 509 U.S. 688, 113 S.Ct. 2849, 2857 (1993); Illinois v. Vitale, 447 U.S. 410, 420 100 S.Ct. 2260 (1980).

Courts of other jurisdictions have found the use of such overlapping aggravating circumstances to be improper. In Randolph v. State, 463 So.2d 186 (Fla. 1984) the court found that the aggravating circumstances of murder while engaged in the crime of robbery and murder for pecuniary gain to be overlapping and constituted only a single aggravating circumstance. See also Provence v. State, 337 So.2d 783 (Fla. 1976) cert. denied 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977).

The California Supreme Court in People v. Harris, 679 P.2d

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

433 (Cal. 1984) found that evidence showed that the defendant traveled to Long Beach for the purpose of robbing the victim and committed a burglary and two murders to facilitate the robbery. In determining that the use of both robbery and burglary as special circumstances at the penalty hearing was improper the court stated:

> "The use in the penalty phase of both of these special circumstances allegation thus artificially inflates the particular circumstances of the crime and strays from the high court's mandate that the state 'tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty' (Godfrey v. Georgia, (1980) 446 U.S. 420 at P.28, 100 S.Ct 1759 at p. 1764, 64 L.Ed.2d 398. The United States Supreme Court requires that the capital - sentencing procedure must be one that 'guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death.' (Jurek v. Texas (1976) 428 U.S. 262 at pp. 273-74, 96 S.Ct. 2950 at pp 2956-2957), 49 L.Ed.2d 929). That requirement is not met in a system where the jury considers the same act or an indivisible course of conduct to be more than one special circumstance."

Harris, 679 P.2d at 449.

Other States that prohibit a "stacking" or "overlapping" of aggravating circumstances include Alabama (Cook v. State, 369 So.2d 1251, 1256 (Ala. 1978) disallowing use of robbery and pecuniary gain) and North Carolina (State v. Goodman, 257 S.E.2d 569, 587 (N.C. 1979) disallowing using both avoiding lawful arrest and disrupting of lawful government function as aggravating circumstances).

It can be anticipated that the State will argue that any error that occurred as a result of the inappropriate stacking

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

of the aggravating circumstances was harmless error in this case because of the existence of other valid aggravating circumstances. The Nevada statutory scheme has two components that would seem to foreclose the existence of harmless error at a penalty hearing. First the jury is required to proceed through a weighing process of aggravation versus mitigation and second, the jury has the discretion, even in the absence of mitigation to return with a life sentence irregardless of the number of aggravating circumstances. Who can say whether the numerical stacking of aggravating circumstances was the proverbial straw that broke the camel's back and tipped the scales of justice tempered by compassion in favor of the death penalty?

> "When there is a 'reasonable possibility that the erroneous submission of an aggravating circumstance tipped the scales in favor of the jury finding that the aggravating circumstances were 'sufficiently substantial' to justify the imposition of the death penalty,' the test for prejudicial error has been met. (citation omitted) Because the jury arrived at a sentence of death based upon weighing . . . and it is impossible now to determine the amount of weight ascribed to each factor, we cannot hold the error of submitting both redundant aggravating circumstances to be harmless."

State v. Quisenberry, 354 S.E.2d 446 (N.C. 1987). A reweighing is especially inappropriate in this case as the Nevada Supreme court has already thrown out one aggravator that went into the decision to impose the death penalty.

Justice Gunderson in his concurring opinion in Moses v. State, 91 Nev. 809, 815, 544 P.2d 424 (1975) stated with

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

respect to harmless error that:

> "...judicial resort to the harmless error rule, as in this case, erodes confidence in the court system, since calling clear misconduct [or error] 'harmless' will always be viewed by some as 'sweeping it under the rug.' (We can at best, make a debatable judgment call.)"

The stacking of aggravating circumstances based on the same conduct results in the arbitrary and capricious imposition of the death penalty, and allows the State to seek the death penalty based on arbitrary legal technicalities and artful pleading. This violates the commands of the United States Supreme Court in Gregg v. Georgia, 428 U.S. 153 (1976) and violates the Eighth Amendment to the United States Constitution and the prohibition in the Nevada Constitution against cruel and unusual punishment and that which guarantees due process of law.

Trial counsel was deficient in failing to strike the duplicate and overlapping aggravating circumstances and appellate counsel should have raised the issue on direct appeal and urged plain error, even in the absence of contemporaneous objection at trial.

E. Trial counsel failed to object to numerous instances of improper closing argument at the trial and penalty hearing. On direct appeal only two instances of improper argument were raised, that the state was commenting on CHAPPELL'S post arrest silence and that it was improper to argue that CHAPPELL be shown the same mercy he showed to Panos.

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

1. During her closing argument at the penalty hearing the prosecutrix improperly argued that it was not appropriate for the jury to consider rehabilitation stating:

> "And this is a penalty hearing. It's a penalty hearing because a violent murder occurred on August 31st of 1995. So it's not appropriate for you to be considering rehabilitation. This isn't a rehabilitation hearing."(11 ROA 2017)

It is improper for the prosecution to make arguments that minimize the existence and utilization of mitigating circumstances in the weighing process. Recently in Hollaway v. State, 116 Nev. Ad. Op. 83 (2000) the Nevada Supreme Court reversed a death penalty based in part on the argument of the prosecution against the existence of mitigation. In Hollaway the Court stated:

> "The United States Supreme Court has held that to ensure that jurors have reliably determined death to be the appropriate punishment for a defendant, 'the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime.' *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989). In *Penry*, the absence of instructions informing the jury that it could consider and give effect to certain mitigating evidence caused the Court to conclude that
>
> > 'the jury was not provided with a vehicle for expressing its reasoned moral response to that evidence in rendering its sentencing decision. Our reasoning in [Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982),] thus compels a remand for resentencing so that we do not risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'"

Hollaway, 116 Nev. Ad. Op. 83 at page 10. The Court then went

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

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

A prosecutor may not comment that the defendant is unlikely to be rehabilitated, or that the defendant's potential for rehabilitation cannot be considered as a mitigating factor. Bowen v. Kemp, 769 F.2d 672, 678 (11th Cir. 1985) (improper for prosecutor to express opinion about prospects for rehabilitation in support of death penalty), cert. denied, 478 U.S. 1021 (1986). Flanagan v. State, 104 Nev. 105, 108, 754 P.2d 836, 838 (1988) (concluding that prosecutor's reference to defendant's improbable rehabilitation was "particularly objectionable" and ordering new penalty hearing), vacated on other grounds, 504 U.S. 930 (1992).

2. Without objection from trial counsel the prosecutor improperly referred to facts not in evidence at the penalty hearing:

> "The death penalty deters. We know that all we need to do is look in the newspapers or turn on the television set and we all recognize that a very large percentage of the murders that are committed out there today are murders by individuals who have abused their victims in the past just like in this case" (11 ROA 2018).
>
> "We know the death penalty deters. It sends out a message and what message has the defendant sent out in this case besides domestic violence ends in murder?" (11 ROA 2020).

No evidence was presented at the penalty hearing concerning

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

deterrence or the percentage of murders that came from abusive relationships.

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

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

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

testimony based on facts outside record.

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

> "The defendant has stated many times, during the trial in the guilt phase, that he feels lower than dirt, yet, ironically, ladies and gentlemen, the only thing lower than dirt is Deborah Panos' decomposed and lifeless body" (11 ROA 2021).
>
> "A lot of people have paid for the chances that this system has given this defendant and we can thank our system who gave these chances to this defendant for the last memories to little Chantell and little JP and Anthony of their mom and dad, that perhaps of daddy being taken away from jail crying, as they cry, and mommy getting taken away in an ambulance. Or perhaps we can thank this defendant for his last memory of the day of being with their mother, of being placed into Child Haven into protective custody yet another time. And we can thank the defendant for the fact that this four year old child sits there and wants to die. A four year old wants to die so she can be in heaven with her mommy. How pathetic and a little eight year old child, who's afraid to talk about the violence he's witnessed, and wants sleeping pills at the age of eight years old. Eight year olds shouldn't want sleeping pills, ladies and gentlemen. That is a depressed little eight year old. That is a guilty little child because he could not protect his mommy from this man. He could not protect his brothers and sisters from that man right there" (11 ROA 2048-2049).
>
> "...I'm asking you not to forget about Deborah Panos. It may be that it's been a year since her death and that, perhaps, weeds have grown around her tombstone and that only piece of Deborah Panos' body left is this -- her blood and her vaginally swabs and her pieces of skin that we casually pass around this courtroom..." (11 ROA 2050).

At a sentencing hearing, it is most important that the jury not be influenced by passion, prejudice, or any other

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

arbitrary factor. Hance v. Zant, 696 F.2d 940, 951 (11th Cir. 1983)

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

A prosecutor may not pressure jurors by telling them to do their "job," to fulfill their civic duty, to act as the conscience of the community, to cure society's ills, or to send out a message by finding the defendant guilty. Such comments may also constitute an impermissible assertion of a personal opinion and a reference to facts outside the record. In U.S. v. Young, 470 U.S. 1, 5-7 (1985) the court reminded prosecutors to "refrain from improper methods calculated to produce a wrongful conviction" in holding that it was improper for a prosecutor to tell jurors that "[i]f you feel you should acquit him for that it's your pleasure. I don't think you're doing your job as jurors in finding facts as opposed to the law..." Similarly the Court in Viereck v. U.S., 318 U.S. 236, 247 (1943) (held that the prosecutor's statement, including telling jurors that "[t]he American people are relying upon you ladies and gentlemen for their protection against this sort of a crime" compromised the defendant's right to a fair trial. See also U.S. v. Leon-Reyes, 1999 WL 314682, at *5 (9th Cir. 1999) ("A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such

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

prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear.").

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

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

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

5. During closing argument at the guilt phase of the

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

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

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

It must be remembered that the above argument was during the trial portion of the case where victim impact is not admissible, even under the decision in Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) which dealt exclusively with the admissibility of such evidence during the penalty or sentencing phase of a criminal proceeding. Likewise the ruling of the Nevada Supreme Court in Homick v. State, 108 Nev. 127, 136, 825 P.2d 600 (1992) dealt with error claimed to have occurred during the penalty hearing. The argument in the instant case was as follows:

> "All evil required was a cowering victim. Deborah Ann Panos, 26 years of age, the mother of three little children aged seven, five, and three. Where is the promise of her years once written on her brow? Where sleeps that promise now?" (9 ROA 1607).

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

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

argument.

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

The improper argument was the following:

> "A reasonable doubt is one based on reason. It's a reasonable doubt. It's not mere possible doubt. So it's not possibilities, it's not speculation because it says, 'Doubt to be reasonable must be actual, not mere possibility or speculation,' okay. It's got to be based on reason, okay. It's not an impossible burden, ladies and gentlemen. Prosecutors across the country everyday meet this burden. It's not an impossible burden. It's a doubt based on reason.
>
> It's a type of doubt that would control a person in the weighty affairs of life. What is a weighty affair of life? Well, for some people it could be the decision to get married. For some people it could be the decision to have a child or switch occupations or perhaps -- let me put it to you this way. You have all made reasonable doubt or, excuse me, you have all made weighty affair of life decisions. You have all made them. You have all probably, at some time, bought a home. So, what are some of the things you look for in buying a home? . . . . ."

There was no objection to this improper argument wherein the prosecutor equates decisions in "every day life" that are unanswered to the constitutional standard applicable to criminal cases. Quillen v. State, 112 Nev. 1369, 1382, 929 P.2d 893, 902 (1996) the Court found persuasive the reasoning of the Ninth Circuit model instruction, "because decisions like 'choosing a spouse, buying a house, borrowing money, and the like...may involve a heavy element of uncertainty and risk-taking and are wholly unlike the decision jurors ought to make

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

in criminal cases'". See, 9th Cir. Crim. Jury Inst. 3.03 CMT (1995).

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

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

In McCullough v. State, 99 Nev. 72, 657 P.2d 1157 (1983) the Court discussed at some length the attempts to clarify or quantify reasonable doubt stating in summary that:

> "The concept of reasonable doubt is inherently qualitative. Any attempt to quantify it may impermissibly lower the prosecutor's burden of proof, and is likely to confuse rather than clarify."

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

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

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

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

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

1. During the penalty hearing, the aunt of Panos, Carol Monson testified and told and urged the jury to give CHAPPELL the death penalty, stating: "We only pray now that justice will do what it needs to do and not fail her children again. By that, I mean to give James what he gave Debbie, death" (11 ROA 1960). The was no objection by trial counsel and no request that the jury be admonished to disregard the improper comment.

The next witness, Norma Penfield, the mother of Panos, made a similar improper request during her testimony: "My only wish now is that justice will punish to the fullest the person who took her life" (11 ROA 1964). She finished up her testimony telling the jury: "I feel the system has let her down once. I hope to heaven they don't do it again" (11 ROA 1974)

While a victim may address the impact the crime has had on the victim and victim's family, a victim can only express and opinion regarding the defendant's sentence in a non capital

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

case. Witter v. State, 112 Nev.908, 921 P.2d 886 (1996); Randell v. State, 109 Nev. 5, 846 P.2d 278 (1993).

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

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

> "Q You've had a substantial period of time to think about today, haven't you?
>
> A Yes, sir.
>
> Q You've known for quite awhile, haven't you, that at some point you would take the witness stand and give the jury your version of what occurred?
>
> A Yes, sir.
>
> Q And once you had made that decision, whenever it was, you've given a lot of attention to what you would tell the jury?
>
> A I didn't make up anything, sir.

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

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

A No.

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

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

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

4. CHAPPELL was denied effective assistance of counsel when his trial attorneys failed to move to strike the death penalty being sought in violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution to Due Process and Equal Protection, in that the decision to seek the death penalty was made in racial biased manner, when

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

compared to other murder cases involving non-African American defendants.

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

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

In Penry v. Lynaugh, 492 U.S. 302, 326-28 (1989) the United State Supreme Court held that prosecutorial misconduct in argument violates right to individualized sentencing under Eighth and Fourteenth Amendments. Restricting consideration of sentencers to a handful of specified mitigating factors violates the Eighth and Fourteenth Amendments. Lockett v. Ohio, 438 U.S. 586, 604 (1978). See also State v. DePew, 528 N.E.2d 542, 557 (Ohio 1988) (explaining that "[i]f the

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

defendant chooses to refrain from raising some of or all of the factors available to him, those factors not raised may not be referred to or commented upon by the trial court or the prosecution"), and State v. Bey, 709 N.E.2d 484, 497 (Ohio 1999) ("As in State v. Mills, ..., here 'the prosecutor did err by referring to statutory mitigating factors not raised by the defense, when he explained why those statutory mitigating factors were not present.'").

CLAIM TWO

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

CHAPPELL is an African American and was tried by a jury that was under represented of African Americans. There were no African Americans on the trial jury. Clark County has systematically excluded from and under represented African Americans on criminal jury pools. According to the 1990 census, African Americans -- a distinctive group for purposes of constitutional analysis -- made up approximately 8.3 percent

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

of the population of Clark County, Nevada. A representative jury would be expected to contain a similar proportion of African Americans. A prima facie case of systematic under-representation is established as an all-white jury was seated in a community with an 8/3 percent African American population.

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

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

CHAPPELL was denied his Sixth Amendment right to a jury

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

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

CLAIM THREE

CHAPPELL'S conviction and sentence are invalid under the State and Federal Constitutional guarantee of due process, equal protection of the laws, effective assistance of counsel and reliable sentence because CHAPPELL was not afforded effective assistance of counsel on direct appeal. United States Constitution Amendments 5, 6, 8, and 14; Nevada Constitution Article I, Sections 3, 6 and 8; Article IV, Section 21.

Appellate counsel failed to provide reasonably effective assistance to CHAPPELL by failing to raise on appeal, or completely assert all the available arguments supporting constitutional issues raised herein. In addition, specific

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

errors that occurred during the case and which were not raised on appeal due to the ineffectiveness of appellate counsel include the following:

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

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

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

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

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

F. Appellate counsel failed to challenge the improper

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

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

CLAIM FOUR

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

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

The opinion affirming CHAPPELL'S conviction and sentence was only endorsed by three members of the five person court as

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

Justice Springer and Maupin recused themselves. The absence of a full court to consider a capital direct appeal aptly demonstrates the absence of a full and complete review by the entire court. The opinion references that a mandatory review was conducted pursuant to NRS 177.055(2), however, there is no discussion of the factors just a blanket statement that review as conducted and the conclusion reached that the punishment imposed was not excessive.

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

CLAIM FIVE

CHAPPELL'S conviction and sentence are invalid under the State and Federal Constitutional guarantee of due process, equal protection of the laws, effective assistance of counsel and reliable sentence because the a number of jury instructions given at trial were faulty and were not the subject of contemporaneous objection by trial counsel, and not raised on direct appeal by appellate counsel. United States

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

Constitution Amendments 5, 6, 8, and 14; Nevada Constitution Article I, Sections 3, 6 and 8; Article IV, Section 21.

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

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

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

> "Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.
>
> Premeditation need not be for a day, an hour or

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

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

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

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

The instructions do not define, explain or clarify for the jury the phrases "premeditated", "willful" and "deliberate". The instructions correctly inform the jury that there are three (3) necessary and distinct elements to the crime of First Degree Murder. NRS 200.030(1)(a). The use of the conjunctive "and" crystallizes that the elements are separate and each one is required to support a verdict of murder in the first degree. The jury, however, was only given an instruction relating to premeditation for further guidance with no guidance whatsoever at the meaning of deliberate.

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

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

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

> "...To the extent that our criticism of the *Kazalyn* instruction in *Byford* means that the instruction was in effect to some degree erroneous, the error was not plain. . . .
>
> Therefore, under *Byford*, no plain or constitutional error occurred here. Independently of *Byford*, however, Garner argues that the *Kazalyn* instruction caused constitutional error. We are unpersuaded by his arguments and conclude that giving the *Kazalyn* instruction was not constitutional error.. . . .
>
> . . .Therefore, the required use of the *Byford* instruction applies only prospectively. Thus, with convictions predating *Byford*, neither the use of the *Kazalyn* instruction nor the failure to give instructions equivalent to those set forth in *Byford* provides grounds for relief."

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

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

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

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

> Any moment before the time of the killing. It didn't have to a day, an hour or a minute. If I walked up to any one of you and I had a gun and I drew down and shot any one of you, there is no doubt that that's first degree murder. That is a simple act of drawing down and shooting someone is premeditation.
>
> All premeditation is successive thoughts in the mind. It's not like TV. Successive thoughts in the mind." (9 ROA 1687).

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

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

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

> "Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.
>
> Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart."

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

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

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

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

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

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

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

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

direct appeal.

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

Instruction 28, stated in relevant portion:

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

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

The anti-sympathy instruction given violated CHAPPELL'S Eighth Amendment rights because it undermined the jury's constitutionally mandated consideration of mitigating evidence. An alleged error in jury instructions in the sentencing phase

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

of a capital case requires a determination of how a reasonable juror could construe the instruction in such ways to make its sentencing decision improper. If such a way exists the reviewing court should reverse the sentencing decision. Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988).

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

In the instant case, the language of the instruction at issue, is not modified by the word "mere" which was crucial in the decision to uphold the instruction in California v. Brown, supra. The instant instruction is comparable to the instruction that was struck down in Parks v. Brown, 860 F.2d

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

1545 (10th Cir. 1988), which was as follows: "You must avoid any influence of sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence." In reaching this conclusion, the 10th Circuit found the instruction precluded any consideration of sympathy and thus created an impermissible risk that a reasonable juror might disregard mitigating evidence.

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

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

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

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

Instruction number 22 at the penalty hearing set forth the

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

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

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

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

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

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

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

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

GROUND SIX

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

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

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

CLAIM SEVEN

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

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

> "4. A person convicted of murder of the first degree is guilty of a category A felony and shall be punished:
>
> (a) By death, only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances; or
>
> (b) By imprisonment in the state prison: ..."

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

Instruction No. 7 spelled out the process as follows:

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