you?
A. No. Because she told me on the phone she was going to come many times. I knew something had to be going on at the house, but I didn't know what was going on.
Q. Did you think he was messing around with other men?
A. I sensed it, but I didn't know for sure, so I couldn't keep throwing it in her face when I was talking to her. I asked her straight out, if you're dating somebody let me know. She said, no, I'm not dating nobody. I'm not seeing nobody. I don't want nobody else. That was her exact words to me.
Q. Now in the State's opening statement they talked about some letters you sent to her from jail. Did you send her letters from jail?
A. Many.
Q. The State referred to thing that you said in those letters. What kind of things did you say to her?
A. I asked her how she was doing? How the kids were doing. I told her I loved her, I missed her. I told her she meant the world to me.
Q. Were those things true?
A. Yes, sir, very much.
Q. Did you also say degrading things to her in

those letters?
A. Like the last two letters I put some bad words in there.
Q. Did you call her a slut?
A. I told her if she was out there messing around --
Q. James, did you call her a slut?
A. Yes, I did.
Q. Did you call her a whore?
A. I wrote that, yes.
Q. Did you ask her questions like, are you easy?
A. Yes.
Q. Why did you say these things to her?
A. Because so many things were happening while I was in jail. I was very depressed, upset, lonely, hurt devastated. She once told me on the phone that she would never abandon me in Las Vegas.
Q. James, did you see her on August 30th, 1995?
A. Yes, sir.
Q. Where did you see her?
A. At the city court house.
Q. Did she come to your court appearance that day?

A. Yes, sir.
Q. Did she testify against you?
A. No, sir.
Q. Did you plead guilty that day to domestic battery?
A. Yes, sir.
Q. Do you know on August 30th or August 31st that you would be released from custody?
A. Absolutely not.
Q. But you were released from custody, weren't you?
A. Yes, sir.
Q. And when you were released from custody, what did you do?
A. I walked from downtown to around Bonanza nd Lamb.
Q. How far is that, if you know, and how long did it take you to walk out there?
A. From around Las Vegas Boulevard, and Bonanza and Lamb, it would take about 45 minutes, 50 minutes.
Q. Why did you walk out there?
A. I was happy to be out. I just wantec to see my girl and my children.
Q. Where were you going?
A. I didn't go home at first.

Q. Where did you go?
A. To Vera Johnson project apartments.
Q. What did you do there at the Vera Johnson Apartments?
A. Went over there and just talked to a couple of people.
Q. Who did you talk to?
A. Some man over there named Ben and a couple other people.
Q. How far is Vera Johnson complex from where you lived at the Ballerina Sunrise place, if you know?
A. It's only, like, 2 blocks, so approximately it would take like probably 15 minutes to get from there to home.
Q. Did you borrow a bicycle there?
A. Yes, I did.
Q. Once you had the bicycle what did you do?
A. I went home.
Q. Now when you went home, this is the home at 839 North Lamb?
A. Yes, sir.
Q. This is the trailer that you shared with Debra?
A. Yes, sir.
Q. Did you expect her to be there?

A. No, I did not, because I called twice before I went home.
Q. Where did you call from, if you recall?
A. I called from downtown, and I called from Vera Johnson Apartments.
Q. Nobody answered?
A. No, sir.
Q. So you arrived at the trailer and what do you do?
A. I put the bike on the side of the house.
Q. James, I'm sorry, but your hands are in front of your mouth and the jury needs to hear this.
A. I put the bike on the side of house and went to the window.
Q. James, I'm going to interrupt you for a second and show you a picture again, State's Exhibit 1, which is a picture of the trailer. Is one of those windows there where you went to?
A. Yes.
Q. Is one of these windows where you entered the place?
A. Yes.
Q. Why did you go into your place through the window?
A. I had been through the window through many

of our residences in Arizona and Michigan, and I didn't figure nothing was wrong with that.
Q. Did you have a key to get inside to place?
A. I used to, but I lost it.
Q. You started climbing in the window and what happened?
A. I started climbing through the window and Debbie walked in the doorway and she asked me why didn't I knock at the door. I said I didn't know you were home. I said I just called, why didn't you answer the phone. She said I just got here.
Q. Do you know what time this is?
A. No, sir. I wasn't paying attention to the time. I know I had to be back downtown at 1:00 o'clock.
Q. So you get in the window, right?
A. Yes, sir.
Q. What happens? You get into the window and do you guys talk or what?
A. Yeah, we talked.
Q. What else did you do?
A. I got on my knees in front of her and she was sitting on the couch. I asked her what had she been doing while I was in jail. She said working full time and watching the kids.
Q. What happened next?

A. We talked about a couple of things that was said over the phone. She told me about a couple of things that her friends did while I was in jail.
Q. Were you glad to see her?
A. Absolutely.
Q. Did you think anything was okay?
A. Yes.
Q. How long did you all talk?
A. About 20 minutes.
Q. What did you all do then?
A. We kissed a couple of times.
Q. Then what happened?
A. We started taking each other's clothes off. We began to have sex on the couch.
Q. Where was the couch?
A. Excuse me?
Q. Where was the couch where were you having sex?
A. It was along the wall right at the corner of the kitchen.
Q. It was not in the master bedroom?
A. No.
Q. I guess it had been a long time since you had sex?
A. A very long time.

Q. But you had sex with her probably hundreds of thousands of times with her before?
A. A million, billions of times.
Q. And you loved her?
A. Extremely. She was the world to me.
Q. What happened?
A. When I entered her her vagina was all loose and wet and smelly and wasn't nothing like it used to be.
Q. What did you think? What did that mean to you?
A. I immediately thought that she had been messing around on me.
Q. You thought she was messing around with other men?
A. Yes, sir.
Q. What did you do?
A. I got up. I grabbed her and asked her who she had been with. She said nobody. She said I swear to God on my grandmother grave I ain't been with nobody. That was her exact words.
Q. Did you believe her?
A. Absolutely not.
Q. So what do you do then?
A. I walked away from her and started walking

is facing the death penalty even though (1) there is no finding by any jury that he acted with premeditation and deliberation; and (2) there is no aggravating circumstance other than a felony murder aggravating circumstance of NRS 200.033(4) or NRS 200.033(13). Under explained in McConnell, this situation fails to narrow application of the death penalty and is invalid under Zant, 462 U.S. at 877, Lowenfield v. Phelps, 484 U.S. 231, 241-46 (1988) and the Nevada Constitution. Accordingly, the aggravating circumstance is invalid and there are no remaining aggravating circumstances, so the sentence of death must be vacated.

Chappell's sentence of death must also be vacated because the State was permitted to divide the three felony murder aggravating circumstances by using two as the basis for felony murder and one as the basis of an aggravating circumstance. In McConnell, this Court held: "We further prohibit the State from selecting among multiple felonies that occur during 'an indivisible course of conduct having one principal criminal purpose' and using one to establish felony murder and another to support an aggravating circumstance." McConnell, 120 Nev. at 1069-70, 102 P.3d at 624-25. Although the State did not divide its aggravating circumstances in response to McConnell, as known by the fact that McConnell had not been decided at the time the State performed its division, the result is the same: the State used some felony -murder circumstances to establish felony murder and used an additional felony-murder circumstance to establish an aggravating circumstance. This result is not permitted under McConnell, so the aggravating circumstance here is invalid and must be vacated.

P. The Judgment Must Be Reversed Because of Cumulative Error.

Chappell's constitutional rights to a fair trial, a fair penalty hearing, due process, confrontation, cross-examination, and his right to be free from cruel and unusual punishment were denied by the multiple occurs which occurred during his trial. U.S. Const. amend. V, VI, VIII, XIV; Nevada Const. art. I, Sec. 3, 6 and 8; art. IV, Sec. 21.

"The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." Butler v. State, 120 Nev. 879, 102 P.3d 71, 85 (2004); U.S. v. Necoechea, 986 F.2d 1273, 1282 (9th Cir. 1993) (although individual errors may not separately warrant reversal, "their cumulative effect may nevertheless be so

prejudicial as to require reversal").

Chappell submits that the majority of the errors presented here are stand alone claims with sufficient prejudice to warrant reversal. If this Court concludes that no single issue, however, warrants reversal of his conviction and sentencing of death, the cumulative effect of the multiple errors which occurred before and during the first guilt phase and second penalty hearing warrant reversal of his conviction and sentence of death on federal and state constitutional grounds.

"The Supreme Court has clearly established that the combined effect of multiple trial errors violates due process where it renders the resulting criminal trial fundamentally unfair." Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007) (citing Chambers v. Mississippi, 410 U.S. 284 (1973); Montana v. Egelhoff, 518 U.S. 37, 53 (1996)). "The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." Id. (citing Chambers, 410 U.S. at 290 n.3). "[W]here the combined effect of individually harmless errors renders a criminal defense 'far less persuasive than it might [otherwise] have been,' the resulting conviction violates due process." Id. (quoting Chambers, 410 U.S. at 294, 302, 303). Reversal here should be granted because of the cumulative errors. In making this argument, Chappell incorporates each of the claims raised in this direct appeal from the original judgment and in the appeal from the order of the district court denying relief on the guilt phase issues presented in his post-conviction petition for a writ of habeas corpus.

VII. CONCLUSION

Chappell respectfully submits that both his judgment of conviction and sentence of death must be vacated for the reasons set forth herein.

Respectfully submitted this 19th day of May, 2008.

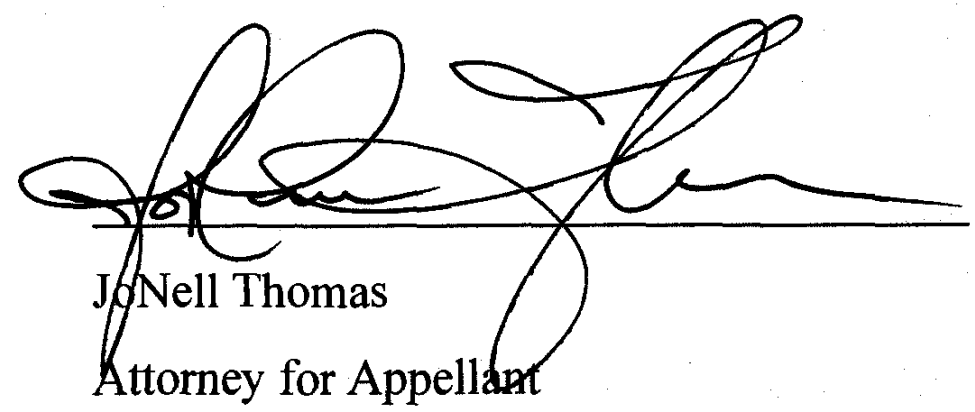
JoNell Thomas

Attorney for James M. Chappell

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 19th day of May, 2008.



JoNell Thomas

Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 19 day of May, 2008, I duly deposited for mailing, postage prepaid, at Las Vegas, Nevada, a true and correct copy of the above and foregoing **OPENING BRIEF**, addressed to the following:

David Roger
Clark County District Attorney
200 Lewis
Las Vegas, NV 89155

Catherine Cortez Masto
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

Kathleen Fitzgerald
An Employee of the Special Public Defender

EXHIBIT 159

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Supreme Court No. 49478

District Court Case No. C131341

FILED

JUN 15 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY A. Ingersoll
DEPUTY CLERK

REMITTITUR

TO: Steven D. Grierson, Clark District Court Clerk

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

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: June 8, 2010

Tracie Lindeman, Clerk of Court

By: A. Ingersoll
Deputy Clerk

cc (without enclosures):
Hon. Douglas W. Herndon, District Judge
Attorney General/Carson City
Clark County District Attorney
Special Public Defender

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on JUN 11 2010.

Heather Ungermann
Deputy District Court Clerk

RECEIVED
JUN 15 2010
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

RECEIVED
JUN 10 2010
CLERK OF THE COURT

10-14569

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Supreme Court No. 49478

District Court Case No. C131341

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

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

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows: "ORDER the judgment of conviction AFFIRMED."

Judgment, as quoted above, entered this 20th day of October, 2009.

JUDGMENT

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

Judgment, as quoted above, entered this 16th day of December, 2009.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada, this 8th day of June, 2010.

Tracie Lindeman, Supreme Court Clerk

By: A. Ingersoll
Deputy Clerk

EXHIBIT 160

56

0001
JAMES MONTELL CHAPPELL
BACK NO. 52338
Ely State Prison
P.O. Box 1989
Ely NV 89301
PETITIONER IN PROPER PERSON[1]

FILED
JUN 22 2010
CLERK OF COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

JAMES MONTELL CHAPPELL,
Petitioner,
vs.
WARDEN OF ELY STATE PRISON, and THE STATE OF NEVADA,
Respondent.

CASE NO. C 131341
DEPT. NO. ~~III~~ ✓

PETITION FOR WRIT OF HABEAS CORPUS
(POST CONVICTION)

DATE: June 20, 2010
TIME: 9:00 pm

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: Ely State Prison, White Pine County, Ely Nevada

2. Name and location of court which entered the judgment of conviction under attack: Eighth Judicial District Court, Clark County, Las Vegas Nevada

3. Date of judgement of conviction: 5/10/2007

4. Case number: C 131341

5. (a) Length of sentence: Death

[1]Prepared with the assistance of JoNell Thomas, Deputy Special Public Defender. A full review of the record was not conducted prior to filing this Petition as it is anticipated that an attorney will be appointed and new counsel will be filing a supplemental petition with additional issues and points and authorities in support thereof.

RECEIVED
JUN 22 2010
CLERK OF THE COURT

(b) If sentence is death, state any date upon which execution is scheduled: Sentence stayed pending appeal

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes _____ No XX

If "yes", list crime, case number and sentence being served at this time: N/A

7. Nature of offense involved in conviction being challenged: Burglary, Robbery with use of a Deadly Weapon, and Murder with Use of a Deadly Weapon

8. What was your plea? (Check one)

(a) Not guilty XX

(b) Guilty _____

(c) Guilty but mentally ill _____

(d) Nolo contendere _____

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: N/A

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one) N/A

(a) Jury XX

(b) Judge without a jury _____

11. Did you testify at the trial? Yes XX No _____

12. Did you appeal from the judgement of conviction? Yes XXX No _____

13. If you did appeal, answer the following:

(a) Name of court: Nevada Supreme Court

(b) Case number or citation: 49478

(c) Result: Conviction and Sentence Affirmed

(d) Date of result: 10/20/2009

(e) Issues raised:

(i) Whether Chappell's Conviction For First Degree Murder Must Be Reversed

Because The Jury Was Not Properly Instructed On The Elements Of The Capital Offense

(ii) Whether Chappell's Conviction For First Degree Murder Must Be Reversed Because The Jury Was Not Properly Instructed On The Elements Of Felony Murder

(iii) Whether Chappell's Sentence of Death Must Be Vacated Because NRS 177.055(3) Is Unconstitutional

(iv) Whether Chappell Was Entitled To Review By The District Attorney's Death Review Committee

(v) Whether Chappell's Death Sentence Is Unconstitutional Because of the Trial Court Failed to Dismiss Jurors For Cause Who Would Always Impose A Sentence of Death

(vi) Whether Chappell's Conviction Is Unconstitutional Because The State Was Permitted To Introduce Unreliable Hearsay Evidence During The Penalty Hearing In Support of The Aggravating Circumstance and as Other Matter Evidence

(vii) Whether The District Court Erroneously Admitted Presentence Investigation Reports

(viii) Whether The District Court Allowed Improper Victim Impact Testimony

(ix) Whether The District Court Erred In Allowing Admission of Chappell's Prior Testimony

(x) Whether The State Committed Prosecutorial Misconduct By Making Arguments Based Upon Comparative Worth Arguments

(xi) Whether The State Committed Extensive Prosecutorial Misconduct

(xii) Whether 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

(xiii) Whether The Jury's Failure to Find Mitigating Circumstances Was Clearly Erroneous and Requires That the Death Sentence Be Vacated

(xiv) Whether There Is Insufficient Evidence To Support The Sexual Assault Aggravator

(xv) Whether The Sexual Assault Aggravating Circumstance Is Invalid Under McConnell v. State

(xvi) Whether The Judgment Must Be Reversed Because of Cumulative Error.

14. If you did not appeal, explain briefly why you did not: N/A

15. Other than a direct appeal from the judgement of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgement in any court, state or federal? Yes _XX_ No ____

16. If your answer to No. 15 was "yes," give the following information:

(a) as to any first petition, application or motion:

(1) Name of court: Nevada Supreme Court

(2) Nature of proceeding: Direct Appeal from trial (JOC 12/31/1996)

(3) Grounds raised:

(i) 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.

(ii) The trial court abused its discretion by allowing state witnesses to testify regarding the state of mind of Panos, thereby improperly impeaching Chappell's credibility.

(iii) The trial court abused its discretion by allowing the State to introduce testimony regarding a shoplifting incident that occurred the day after the killing.

(iv) The trial court abused its 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 pre-trial Petrocelli hearing.

(v) 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.

(vi) The State discriminated against the defendant by uising peremptory challenges to selectively exclude the only two black persons qualified for the jury pool.

(vii) The State failed to prove beyond a reasonable doubt the charges of burglary,

robbery, and first degree murder.

(viii) The trial court committed reversible error by denying defendant's motion to strike the Notice of Intent to Seek Death Penalty.

(ix) The prosecutor committed misconduct during the closing argument by attacking the defendant's post arrest silence.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes XX No ___

(5) Result: conviction and sentence affirmed

(6) Date of result: 10/30/1998

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: Chappell v. State, 114 Nev. 1404, 972 P.2d 838 (1998)

(b) as to any second petition, application or motion, give the same information:

(1) Name of court: United States Supreme Court

(2) Nature of proceedings: Petition for Writ of Certiorari

(3) Grounds raised:

(i) The state discriminated against petitioner by using peremptory challenges to selectively exclude the only two black persons qualified for the jury pool

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes __ No XX

(5) Result: Denied

(6) Date of result: October 4, 1999

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: Chappell v. Nevada, 528 U.S. 853 (1999)

(c) As to any third or subsequent additional applications or motions, give the same information as above.

(c) as to any third petition, application or motion, give the same information:

(1) Name of court: Eighth Judicial District Court

(2) Nature of proceeding: Petition for Writ of Habeas Corpus (Post Conviction)

(3) Ground(s) raised:

(i) Trial counsel was ineffective in failing to call witnesses to testify on behalf of Chappell

(ii) Trial counsel failed to timely object to the system of jury selection that systematically excluded African Americans and wherein African Americans are under represented.

(iii) Trial counsel failed to object to unconstitutional and improper jury instructions.

(iv) Trial counsel failed to object to numerous instances of improper closing argument at the trial.

(v) Trial counsel failed to make contemporaneous objections on valid issues thereby precluding meaningful appellate review.

(vi) Appellate counsel failed to raise on direct appeal that a number of jury instructions given to the jury during the trial hearing were unconstitutional and improper.

(vii) Appellate counsel failed to raise the use of overlapping aggravating circumstances on direct appeal.

(viii) Appellate counsel failed to raise the issue of improper closing argument on direct appeal

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes XX No ____

(5) Result: The district court denied the petition as to the trial phase issues and granted the petition as to the sentencing phase issues; ordered a new sentencing hearing

(6) Date of result: April 2, 2004

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: June 3, 2004

(d) as to any fourth petition, application or motion, give the same information

(1) Name of court: Nevada Supreme Court

(2) Nature of proceeding: The State filed an appeal from the district court's order for a new sentencing hearing after the post conviction hearing. Petitioner/Defendant Chappell filed a cross-appeal from the denial of a new trial after the post conviction hearing.

(3) Grounds raised:

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ___ No XXX

(5) Result: The Nevada Supreme Court affirmed the district court's decision to deny a new trial and grant a new sentencing hearing

(6) Date of result: April 7, 2006

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: Case No. 43493

(f) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) Direct appeal from trial and first penalty hearing: Yes _ No ____

Citation or date of decision: _____

(2) Direct appeal from second penalty hearing Yes ___ No __

Citation or date of decision: _____

(3) Third petition, application or motion? Yes ___ No ____

Citation or date of decision: _____

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) N/A

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? Yes: XX NO: _____

If yes, identify: Chappell incorporates all claims raised in his previous post conviction petition concerning the guilt phase of his trial and the guilt phase issues of his first direct appeal

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list

briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

(a) Ineffective assistance of original trial counsel - including but not limited to, failure to properly prepare Chappell for his testimony at trial (which was also used against him during his second penalty trial), and failure to object to questions implicating Chappell's right to remain silent, and other issues to be addressed following the appointment of counsel.

(b) Ineffective assistance of original appellate counsel

(c) Ineffective assistance of penalty phase trial counsel - including but not limited to failure to present expert testimony on the fact that semen may be secreted without ejaculation, which was necessary to confront the testimony of Detective James Vaccaro; failure to investigate and call as witnesses court personnel who could have testified that Chappell would not have had the opportunity to meet with Panos and threaten her during court proceedings - as alleged by the State at the penalty trial; failure to object to the admission of two PSI reports on statutory and constitutional grounds, including the statement from Panos's mother that "The SOB does not deserve to live;" failure to object to victim impact evidence on the ground that no notice, under SCR 250, was provided of such testimony from non-family members; failure to object to prosecutorial misconduct; failure to object to a comparative value or comparative worth argument; failure to object to an argument on the role of mitigating circumstances; and failure to object to the jury instruction on Nevada's weighing equation and failure to proffer a correct instruction;.

(d) Ineffective assistance of penalty phase appellate counsel

(e) The conviction for first-degree murder is unconstitutional because the jury was not properly instructed on the elements of first-degree murder.

(f) The conviction for first-degree murder is unconstitutional because the jury was not properly instructed on felony-murder.

These issues were not raised previously as this is the first post conviction proceeding concerning the second penalty trial.

19. Are you filing this petition more than 1 year following the filing of the judgement of conviction or the filing of a decision on direct appeal? Yes: ___ No: XX

If yes, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgement under attack? Yes ____ No XX

If yes, state what court and the case number: N/A

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal:

Trial and first direct appeal: Clark County Public Defender's Office: Howard Brooks, Michael Miller, Morgan Harris, Kedric Bassett, and Will Ewing

Post Conviction Proceedings: David Schieck

Second Penalty Hearing and appeal: Clark County Special Public Defender's Office: David Schieck, Clark Patrick, and JoNell Thomas

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgement under attack? Yes _____ No XX If yes, specify where and when it is to be served, if you know: N/A

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) Ground one: I was denied my rights under the Sixth and Fourteenth Amendments as I did not receive due process of law or effective assistance of counsel at trial and at the first penalty hearing, including but not limited to

(i) failure to properly prepare Chappell for his testimony at trial (which was also used against him during his second penalty trial), and

(ii) failure to object to questions implicating Chappell's right to remain silent

(iii) The conviction for first-degree murder is unconstitutional because the jury was not properly instructed on the elements of first-degree murder.

(iv) The conviction for first-degree murder is unconstitutional because the jury was not properly instructed on felony-murder.

(v) any other issues to be addressed following the appointment of counsel.

I am indigent and do not understand the law and need counsel appointed to help me file a supplemental petition with additional issues and points and authorities and supporting facts.

(b) Ground two: I was denied my rights under the Sixth and Fourteenth Amendments as I did not receive due process of law or effective assistance of counsel on direct appeal from the first trial concerning the guilt phase of the trial..

(i) issues to be addressed following the appointment of counsel

I am indigent and do not understand the law and need counsel appointed to help me file a supplemental petition with additional issues and points and authorities and supporting facts.

(c) Ground three: I was denied my rights under the Sixth and Fourteenth Amendments as I did not receive due process of law for effective assistance of counsel at the second penalty hearing, including but not limited to:

(i) failure to present expert testimony on the fact that semen may be secreted without ejaculation, which was necessary to confront the testimony of Detective James Vaccaro;

(ii) failure to investigate and call as witnesses court personnel who could have testified that Chappell would not have had the opportunity to meet with Panos and threaten her during court proceedings - as alleged by the State at the penalty trial;

(iii) failure to object to the admission of two PSI reports on statutory and constitutional grounds, including the statement from Panos's mother that "The SOB does not deserve to live;"

(iv) failure to object to victim impact evidence on the ground that no notice, under SCR 250, was provided of such testimony from non-family members;

(v) failure to object to prosecutorial misconduct;

(vi) failure to object to a comparative value or comparative worth argument;

(vii) failure to object to an argument on the role of mitigating circumstances; and

(viii) failure to object to the jury instruction on Nevada's weighing equation and failure to proffer a correct instruction;.

(ix) any other issues to be addressed following the appointment of counsel

I am indigent and do not understand the law and need counsel appointed to help me file a supplemental petition with additional issues and points and authorities and supporting facts.

(d) Ground four: I was denied my rights under the Sixth and Fourteenth Amendments as I did not receive due process of law or effective assistance of counsel on appeal from the second penalty hearing.

(i) issues to be addressed following the appointment of counsel

I am indigent and do not understand the law and need counsel appointed to help me file a supplemental petition with additional issues and points and authorities and supporting facts.

WHEREFORE, Petitioner prays that the court grant Petitioner relief to which he may be entitled in this proceeding; and pursuant to NRS 34.820 moves this Court for an Order to appoint counsel to assist Petitioner in these proceedings.

EXECUTED at Ely State Prison on June 20, 2010

James M. Chappell #52338

JAMES MONTELL CHAPPELL, NO. 53228
Ely State Prison
P.O. Box 1989
Ely NV 89301

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the Petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

James M. Chappell #52338

JAMES MONTELL CHAPPELL, NO. 53228
Ely State Prison
P.O. Box 1989
Ely NV 89301

Mr. James M. Chappell #52338
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301

LAS VEGAS NV 89

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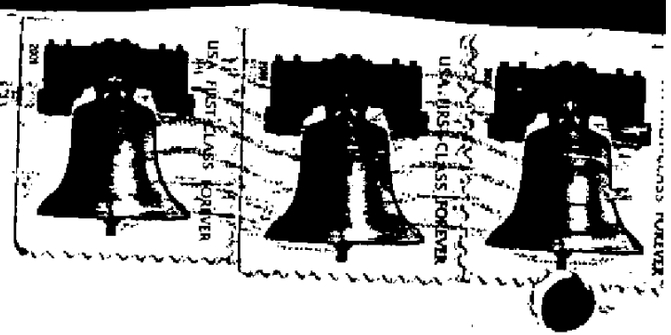

AA04123

Clark County Clerk
200 Lewis Ave., 3rd Floor
Las Vegas, Nevada
89155

#3101$630i

EXHIBIT 161

455-6273

Jim Gibbons
Governor

Phillip A. Galeoto
Director

John Allan Gonska
Chief

SOUTHERN COMMAND

- 215 E. Bonanza Rd.
  Las Vegas, NV 89101
- 620 Belrose St.
  Las Vegas, NV 89107
- 810 Belrose St.
  Las Vegas, NV 89107
- 4906 E. Tropicana Ave.
  Las Vegas, NV 89121

Division of Parole and Probation

Amended Presentence Investigation Report
May 02, 2007
The Honorable Douglas W. Herndon
Department III, Clark County
Eighth Judicial District

Prosecutor: Christopher J. Owens, Chief DDA and Pamela C. Weckerly, DDA **PSI:** 250520
Defense Attorney: David M Schieck, and Clark W. Patrick, Appt.

I. CASE INFORMATION

Defendant: James Montell Chappell
Date of Birth: 12-27-1969
Age: 37
SSN: 373-80-2907
Address: NDOC
City/State/Zip: Las Vegas, NV
Months/Years: 10 years
Phone: None
Driver's License: None
State: N/A
Status: N/A
POB: Lansing, MI
US Citizen: Yes
Notification Required Per NRS 630.307: No

Case: C131341
ID: 1212860
PCN: 07250016
P&P Bin: 1000808273
FBI: 284 918 JA6
SID: NV01780406
Resident: Yes
Offense Date: 08-31-1995
Arrest Date: 09-01-1995
Jury Verdict Date: 10-16-1996
Penalty Decision Count III: 03-21-2007
Sentencing Date: 05-10-2007

II. CHARGE INFORMATION

Offense: Count I - Burglary(F)
NRS: 205.060 **Category:** B
NOC: 00299
Penalty: By imprisonment in the NDOC for a minimum term of not less than 1 year and a maximum term of not more than 10 years, and may be further punished by a fine of not more than $10,000.
Previously sentenced on 12-30-1996

Offense: Count II - Robbery With Use Of A Deadly Weapon (F)
NRS: 200.380, 193.165: **Category:** B
NOC: 00118
Penalty: By imprisonment in the NDOC for a minimum term of not less than 2 years and a maximum term of not more than 15 years, plus an equal and consecutive minimum term of not less than 2 years and a maximum term of not more than 15 years for Use of a Deadly Weapon. **Previously sentenced on 12-30-1996**

Offense: Count III - Murder of the First Degree With Use of a Deadly Weapon (F)
NRS: 200.010, 200.030, 193.165 **Category:** A
NOC: 00095
Penalty: By Death, only if one or more aggravating circumstances are found and if any mitigating circumstances which are found do not outweigh the aggravating circumstances. Otherwise, by imprisonment in the NDOC for Life With or Without the Possibility of Parole. If the penalty is fixed at Life With the Possibility of Parole, eligibility for parole begins when a minimum of 20 years have been served or a definite term of 50 years with eligibility for parole after 20 years has been served, plus an equal and consecutive sentence for Use of a Deadly Weapon.

III. PLEA NEGOTIATIONS

A- Found guilty by Jury Verdict

IV. DEFENDANT INFORMATION

Physical Identifiers:
Sex: M **Race:** B **Height:** 5'11 **Weight:** 180
Hair: Black **Eyes:** Brown
Scars: None
Tattoos : None
Aliases: James M. Montell
Additional SSNs: None
Additional DOBs: None

Social History: The defendant refused to be interviewed on May 02, 2007. Therefore the following social history was obtained from the original Presentence Report that was prepared on December 05, 1996.

Childhood: His father abandoned the family while he was an infant and his mother was killed by a police officer when he was two years old. He was then raised by his maternal grandmother who provided a good family life.

Immediate Family Members- Names and Addresses:

Unknown

Marital Status: Single

Prior Marriages/Long Term Relationships: He was involved in a long term relationship with the victim in the instant offense.

Children : Three, age nineteen (son), seventeen (son) and fifteen (daughter)

Custody Status of Children: They have all been raised by their maternal grandmother.

Monthly Child Support Obligation: None

Employment Status: N/A

Number of Months Employed In The 12 Months Prior To Instant Offense: 0

Income: None **Other Sources:** None

Assets: None

Debts: None

Education: He completed high school through the tenth grade.

Military: No

Health and Medical History: He had no health concerns

Mental Health History: He attended domestic violence counseling in 1992.

Gambling History: Unknown

Substance Abuse History: He began consuming alcohol at age thirteen and drank three times per week. He began using marijuana at twelve or thirteen and started using cocaine at age eighteen. He became heavily involved in cocaine use in subsequent years. He had a drug problem at the time of the instant offense. He was not high at the time he committed the offense but smoked cocaine later that day. He had never been involved in any substance abuse counseling.

Gang Activity/Affiliation: None

V. CRIMINAL RECORD

As of March 27, 2007, records of the Las Vegas Metropolitan Police Department (SCOPE), the Federal Bureau of Investigation (FBI), the Nevada Criminal Justice Information System (NCJIS) and the National Crime Information Center (NCIC) reflect the following information:

CONVICTIONS: **FEL:** 2 **GM:** 1 **MISD:** 6

INCARCERATIONS: **PRISON:** 1 **JAIL:** 5

OUTSTANDING WARRANTS AND LEVEL OF OFFENSE : 0
-WARRANT NUMBER AND JURISDICTION: N/A
-EXTRADITABLE: N/A

PRESENTENCE INVESTIGATION REPORT
JAMES MONTELL CHAPPELL
CC#: C131341

SUPERVISION HISTORY:

CURRENT: **Probation Terms:** 0 **Parole Terms:** 0

PRIOR TERMS:

Probation:	**Revoked:** 1	**Discharged:**	**Honorable:** 1	**Other:** 0
Parole:	**Revoked:** 0	**Discharged:**	**Honorable:** 0	**Other:** 0

Adult:

Arrest Date:	**Offense:**	**Disposition:**
05-15-1988 (Lansing, MI)	Felony Stolen Vehicle (F)	11-12-1988; Convicted Motor Vehicle/Unlawful Use (M) 6 months jail.
08-18-1988 (Lansing, MI)	Assault Excluding Sexual (F)	09-20-1988; Convicted Assault or Assault and Battery (M) $150 fine, 15 days jail.
06-15-1993 (Tucson, AZ)	Disorderly Conduct (M)	10-12-1993; Convicted (M) community service, restitution.
02-23-1994 (Tucson, AZ)	Domestic Violence/Assault (M)	03-04-1994; Convicted (M) $2,500 fine, 180 days jail, 12 months probation.
02-18-1995 (LVMPD)	1. Burglary (F) 2. Under the Influence of Controlled Substance (F) 3. Possession of Burglary Tools (GM) RMD: 02-27-1995	1. Dismissed. 2. Convicted ITS Drugs (M) $500 fine. 3. CC#C126882, 04-27-1995 Convicted Possession of Burglary Tools (GM) 1 years CCDC, suspended, probation NTE 2 years. 06-27-1995; Probation violation. 08-01-1995; Probation reinstated. 09-02-1995; Probation violation. 10-26-1995; Probation Revoked. 06-20-1996; Expired sentence.
09-01-1995 (LVMPD)	1. Murder (F) 2. Grand Larceny Auto (F) RMD: 10-04-1995 1. Burglary (F) 2. Robbery With Deadly Weapon (F)	**Instant Offense; CC#C131341** 12-30-1996 sentenced on Count I - 120/48 months NDOC, Count II - 180/72 months months NDOC plus an equal and consecutive 180/72 months NDOC for the deadly Weapon enhancement, consecutive to Count I.

In addition to the above the defendant was convicted of the following misdemeanor offense of Petty Larceny that was satisfied by a short jail term.

Additionally, the defendant was arrested or cited in Arizona and Nevada between May 15, 1988 and August 31, 1995 for the following offenses for which no disposition is noted, prosecution was not pursued or charges were dismissed: Obstruct Judicial, Congressional, Legis., Possession of Narcotic, Possession of Marijuana, Sell Narcotics, Possession of Drug Paraphernalia (2), Trespassing, Failure to Appear, Under the Influence of Controlled Substance, FTA - (24), Battery Domestic Violence (2), Petty Larceny (3), Possession of Narcotic Paraphernalia.

Institutional/Supervision Adjustment: On April 27, 1996 the defendant was placed on probation in CC#C126882. He was charged with probation violation after he was cited for Possession of Narcotic Paraphernalia and Battery Domestic Violence. He was reinstated to probation and ordered to complete an in-patient substance abuse counseling program. On August 31, 1995 he was released from custody and on September 01, 1995 he was arrested for the instant offense. His probation was subsequently revoked.

Supplemental Information: N/A

VI. OFFENSE SYNOPSIS

Records of the Las Vegas Metropolitan Police Department and the Clark County District Attorney's Office reflect that the instant offense occurred substantially as follows:

On August 31, 1995, a friend of the victim contacted the police and advised them that she believed something was wrong with the victim, Deborah Panof. She stated she arrived at the victim's house and observed the defendant, James Montell Chappell, driving from the area in the victim's car. She was concerned because the victim had a Protective Order stopping the defendant from coming to her house. She also stated that she knew the victim had forbidden the defendant from driving her car.

Efforts to contact the victim were unsuccessful either by telephone or by knocking on the door so an officer entered the victim's house through a window to conduct a welfare check. He found the victim on the floor in the living room, apparently deceased. The officer then called the Fire Rescue Unit and Homicide Detectives.

Detectives observed that the point of entry into the mobile home appeared to be the master bedroom window as all the other doors were locked and all the windows were closed. The body of the victim was found laying on her back on the floor of the living room. There was a large amount of blood around her upper chest and face and numerous abrasions and contusions on her chin and around her eyes and cheekbones. She had multiple stab wounds to the neck, upper chest and pelvis area. Near the body, the officer found a steak knife believed to have been used to stab the victim. An autopsy later revealed that the victim had received thirteen stab wounds, two to the pelvis and abdomen, and eleven to the chest and neck. The cause of death was listed as multiple stab wounds and considered to be a homicide.

On September 11, 1995, an officer was dispatched to a local supermarket regarding a shoplifting incident. Upon arrival, he observed the defendant, who had been detained after attempting to shoplift several items. He identified himself as Ivri Marrell. It was later learned he was in fact Mr. Chappell who was wanted regarding the above murder. Two puncture wounds were observed on his hand. The store security officers advised the defendant had a set of keys, one of which belonged to a Toyota. When asked where the vehicle was he defendant replied "I parked it in back of the apartments across the street". The detectives subsequently found the victim's vehicle parked behind an apartment complex. Witnesses stated that they had observed the defendant parked the vehicle at that location on August 31, 1995. The defendant was then placed under arrest and transported to the Clark County Detention Center where he was booked accordingly.

VII. CO-DEFENDANT'S/OFFENDER'S INFORMATION

N/A

VIII. DEFENDANT'S STATEMENT

On May 02, 2007, an attempt was made to interview the defendant at the High Desert State Prison. He refused to be interviewed.

IX. VICTIM INFORMATION/STATEMENT

The victim, Deborah Panos, was a twenty-six year old female, leaving behind three children. Her mother was interviewed in 1996 when the first Presentence Report was prepared and stated there was no way to express her grief stating it is a "grief you live with every day". She lost her only child and has been raising her three grandchildren. She stated when the victim "finally got up the nerve after years and years of abuse", he was released and committed the instant offense. "The SOB does not deserve to live" she related. Living with the loss is a "very, very hard thing and her voice is in our mind all the time". It was difficult hearing her grandchildren, especially the youngest, talk about "Mommy being in heaven". She further related the defendant didn't have to commit the crime but could have gone back to stealing and using drugs. She stated he was arrested many times, even in Tucson, Az, for violence to victim and the Court slapped his hand and told him to go to counseling. The defendant just laughed and did what he wanted to do. When asked about financial costs, she stated the cost was $11,434.90 to transport the body to Michigan for the funeral. (VC2167293)

An attempt was made to call the victim's mother on April 30, 2007 but the phone was busy all day. Additionally, she did not respond to a Victim Impact letter mailed to her. However, contact was made with the Aunt of the victim who indicated her sister was extremely ill and that they do not plan to attend sentencing.

X. CONCLUSION

The defendant's prior criminal history consists of domestic violence, theft and drug related offenses. During the instant offense he violently killed his girlfriend and the mother of his children by stabbing her thirteen times during a domestic dispute less than one day after he was released from custody after being arrested for a previous domestic battery. He was previously sentenced to prison on Counts I and II, and the jury has determined he should be sentenced to death for Count III.

XI. CUSTODY STATUS/CREDIT FOR TIME SERVED

Custody Status: In Custody, High Desert State Prison

CTS: 3,976 DAYS: 09-01-1995 to 05-10-2007 (CCDC/NDOC) 4,269 Days
(293 days credited to CC#C126882)

XII. RECOMMENDATIONS

190 Day Regimental Discipline Program: N/A **Deferred Sentence Per NRS 453.3363:** N/A

FEES

Administrative Assessment: $25 **Chemical/Drug Analysis** N/A **DNA:** $150 and submit to testing

Domestic Violence: N/A **Extradition:** N/A

SENTENCE

COUNT I: BURGLARY-Sentenced on December 30, 1996 to a maximum term of 120 months with minimum parole eligibility of 48 months.

COUNT II: ROBBERY WITH USE OF A DEADLY WEAPON-Sentenced on December 30, 1996 to a maximum term of 180 months with minimum parole eligibility of 72 months, plus an equal and consecutive maximum term of 180 months with minimum parole eligibility of 72 months for the Use of a Deadly Weapon, consecutive to Count I

COUNT III: MURDER IN THE FIRST DEGREE WITH USE OF A DEADLY WEAPON:

Minimum Term: N/A **Maximum Term:** Death as imposed by Jury on 03-21-2007 **Location:** NDOC

Concurrent With: Count I **Probation Recommended:** N/A **Probation Term:** N/A

Fine: N/A **Restitution:** $11,434.90

_____ Pursuant to NRS 239B.030, the undersigned hereby affirms this document does not contain the social security number of any person.

__X__ Pursuant to NRS 239B.030, the undersigned hereby affirms this document contains the social security number of a person as required by NRS 176.145.

Respectfully Submitted,

JOHN ALLAN GONSKA, CHIEF

PREPARED AND APPROVED BY:

Charles C. Combs for Kathleen Houlihan
Parole and Probation Specialist IV
Unit VII
Southern Command, Las Vegas, Nevada

EXHIBIT 162

JChappell COR.A012086

6 [illegible] Good

VICTIM OF DOMESTIC VIOLENCE.

Badge # 1480786
I.D.# 467

42 + 43

Juror Questionnaire

Dear Prospective Juror:

You have been placed under oath. Please answer all questions truthfully and completely, as though the questions were being asked of you in open court. You may be asked additional questions in open court during the jury selection process.

Some of the questions ask your opinions. Be honest and state them. If you need more room on any question, use the margins or the next-to-last page, which has been left blank.

The purpose of this questionnaire is to help the court and the lawyers in their attempt to select a fair and impartial jury to hear this case. The answers provided by you in this document will be made available to counsel for both the state and defense. Your answers may also become part of the court's permanent record, and may, therefore, be a public document.

A summary of the case allegations and the procedure to be followed in this case are noted below. The fact that these allegations have been made does not mean they are necessarily true. The State has the burden of proving the allegations beyond a reasonable doubt.

Remember, you must fill out the questionnaire yourself, and when you are finished, please sign the oath on the last page and leave the questionnaire with a jury assistant.

Summary of Case

On August 31, 1995, Deborah Panos was found dead in her trailer at 839 North Nellis, Las Vegas. She died of multiple stab wounds. The next day, James Chappell, the father of Deborah's three children, was arrested and charged with murder with use of a deadly weapon and other charges related to the killing. The media covered the crime, and Mr. Chappell's arrest was reported.

Procedure

This is a murder case where the State is seeking the death penalty.

After the jury is empanelled, the trial will occur. The purpose of the trial is to determine, based on legally presented evidence, if the State can prove the criminal charges beyond a

reasonable doubt. Mr. Chappell is presumed innocent.

If the jury convicts Mr. Chappell of Murder in the First Degree, then the trial is followed by a Penalty hearing where the jury would hear evidence related to punishment. The jury would determine the sentence, and would choose among the following: death; a life sentence in prison with the possibility of parole; a life sentence in prison without the possibility of parole; or a fixed sentence of 50 years with the possibility of parole.

If the jury finds Mr. Chappell Not Guilty, or finds him guilty of charges other than First Degree Murder, then no penalty hearing will occur. If Mr. Chappell is found guilty of charges other than First Degree Murder, the Judge will sentence Mr. Chappell.

The parties anticipate that the trial of this case could last two weeks; a possible penalty hearing could last an additional week. All the trial and penalty proceedings in this case could last a total of three weeks.

1. Do you have any thoughts, concerns, or questions about this procedure:
No

2. Are you familiar with this case? Have you read media reports about it? Do you know Deborah Panos or James Chappell? No

Questions About You

3. Your full name Lois Jean Ochoa Race Caucasian

4. Age 38 Place of birth California Marital Status M.

5. Children 2

	Age	Sex	Education	Occupation
(a)	14	F.	Basic High School	still currently in a Special Ed. Program
(b)	15.	M	Basic High	Student
(c)				
(d)				

6. In what part of the county do you live? SE (Henderson)

7. Highest educational grade completed 12 / 1yr college

8. Any special schooling or training? No

JChappell CORA012088

9. Any courses or training in a legal field? NO

10. Your occupation and relevant duties for the last ten years:
9-93 to Present cage cashier
6-91 to 9-93 Housewife
1985 - 6-91 Waitress

11. What is your spouses's occupation, if you have a spouse?
Ceramic Tile finisher

12. Have you ever been in business for yourself? If yes, please explain.
NO

13. Ever been a supervisor or boss? If yes, explain.
NO

14. Ever served in the military? If yes, please provide some details.
NO

15. Do you attend religious services? If yes, what church or service, and how often?
NO

16. Have you ever changed religions? If so, why?
NO

17. Any relatives who are judges or attorneys? If yes, what is your relationship to them and how often do you talk to them? NO

18. Any relatives in law enforcement? If yes, what is your relationship, and how often do you talk to them NO

19. Ever been a juror before? If yes, what did you think of the experience?
NO

20. Have you or any member of your family ever had a drug or alcohol problem?
Yes. I had a problem with alcohol in my 20's & have been straight for 8 years

21. Have you or any members of your family ever been arrested? If so, why? And what

happened? Yes. Thirteen years ago at the age of 25, I was arrested on a controlled substance charge. The case was dismissed

22. Do you have any bias or ill feeling toward the police or the government or prosecutors as a result of any prior experience with law enforcement? NO

23. Have you or any one you know been a victim of domestic violence? Yes My 1st spouse abused me.

24. Have you or any one you know been affected by domestic violence? How? NO

Opinions, Interests, & Views

25. What do you think of the criminal justice system? Most of the time it works

26. What are your hobbies and interests? Computer & Sewing

27. Do you consider yourself to be a leader or a follower? Leader Why? Because I don't like trailing behind. I like to make my own decisions

28. What do you like to read? novels, my Bible, magazines.

What do you think of each of the following:

29. Defense attorneys I think they are doing their job to try to protect their clients

30. Public Defenders Same as above

31. State Prosecutors Trying to ~~keep~~ put criminals where

JChappell COR.4012090

they need to be

32. Federal Prosecutors Same as above

33. Police officers Thankful for their presence in our Society

34. Judges unbiased persons in a Court of law.

35. The Death Penalty it would depend on the circumstances

36. The statement: "An Eye for an Eye:" To me this does not necessarily mean Kill & be Killed. I believe in proper punishment for the Crime committed

37. The statement: "You Shall Not Kill:" I don't believe a person should be free to kill anyone they meet.

38. The statement: If a prosecutor has taken the trouble of bringing someone to trial, then the person must be guilty. Not Necessarily. I must know all the evidence 1st.

39. The statement: A defendant in a criminal trial should be required to prove his innocence: No. The prosecutor must prove guilt

40. The statement: The Death Penalty is appropriate in some cases, but not in others: I agree.

41. The statement: The Death Penalty is appropriate in all cases where somebody murders somebody: Not Necessarily. depends on the circumstances of the event.

42. The statement: A defendant's background should be considered in deciding whether or not the death penalty is an appropriate punishment: NO

43. The statement: The facts surrounding a killing, and not the killer's background, should be the main consideration in determining punishment: Yes

JChappell CORA012091

44. The statement: Black people cause more crime than white people: No Criminals come in every race, creed, & color.

45. The statement: It's Ok for black people and white people to date each other and have children together. If they're in love & committed to one another. All people are the same under the skin.

46. The statement: It may be Ok for people of different races to date each other, but I would have a hard time dealing with my child doing it: No. I am married to a hispanic. If my child was happy with any person it would be ok.

47. More than anything else, what should the attorneys in this case know about you in deciding whether you should be on the jury: The only thing is that I have severe psoriasis & receive photo-chemotherapy once a week.

48. Do you want to be on the jury? Why yes or Why no? Yes. I would like to do my duties as a citizen. I feel I am a fair person & would want someone like me on a jury if the tables were turned around.

49. If Mr. Chappell is convicted of first degree murder, and a penalty hearing is held, would you consider all four possible sentences, those being the death penalty, life without the possibility of parole, life with the possibility of parole, or a fixed term of 50 years with the possibility of parole

yes

50. In your present state of mind, can you, if selected as a juror, consider equally all four possible forms of punishment and select the one that you feel is the most appropriate depending upon the facts and the law?

yes

51. If you believed the evidence warranted the death penalty, could you personally vote to impose the death penalty? yes

52. Are you a member of any organization that advocates or opposes the imposition of the death penalty? NO

Explanation Area

Feel free to supplement any of your prior answers, or ask any questions which you may have.

Oath

I swear or affirm that the responses given are true and accurate to the best of my knowledge and belief.

Signature

10-2-96
Date

Admonition

You are instructed not to discuss this questionnaire or any aspect of this case with anyone, including other prospective jurors. You are further instructed not to view, read, or listen to any media account of these proceedings.

A. William Maupin, District Judge

EXHIBIT 163

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

JAMES CHAPPELL,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

S.C. CASE NO. 61967

APPEAL FROM DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AND SENTENCE OF DEATH
EIGHTH JUDICIAL DISTRICT COURT
THE HONORABLE JUDGE CAROLYN ELLSWORTH, PRESIDING

~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~

APPELLANT'S OPENING BRIEF

~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~

ATTORNEY FOR APPELLANT

CHRISTOPHER R. ORAM, ESQ.
Attorney at Law
Nevada Bar No. 004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

ATTORNEY FOR RESPONDENT

STEVE WOLFSON, ESQ.
District Attorney
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Las Vegas, Nevada 89101
(702) 671-2500

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UNITED STATES SUPREME COURT

NEVADA REVISED STATUTES

STATE OF NEVADA

FEDERAL JURISDICTIONS

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ISSUES PRESENTED FOR REVIEW

I. THE DISTRICT COURT ERRED IN FAILING TO HOLD AN EVIDENTIARY HEARING.

II. STANDARD FOR INEFFECTIVE ASSISTANCE OF COUNSEL.

III. MR. CHAPPELL RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE THIRD PENALTY PHASE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

IV. MR. CHAPPELL RECEIVED INEFFECTIVE ASSISTANCE OF PENALTY PHASE TRIAL COUNSEL AND APPELLATE COUNSEL FOR FAILURE TO OBJECT TO THE CUMULATIVE VICTIM IMPACT PANEL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

V. 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 .

VI. 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.

VII. 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.

VIII. 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.

IX. THE DEATH PENALTY IS UNCONSTITUTIONAL.

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.

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.

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

JURISDICTIONAL STATEMENT

Argument on the petition was held and Mr. Chappell's Petition for Writ of Habeas Corpus was denied on October 19, 2012 (21 ROA 4706). The Findings of Fact, Conclusions of Law and Order was filed on November 16, 2012 (20 ROA 4527). Mr. Chappell filed a timely notice of appeal on October 22, 2012 (20 ROA 4515). This Opening Brief follows.

STATEMENT OF THE CASE

Appellant James Chappell was charged, on October 11, 1995, via Information with one count each of burglary, robbery with use of a deadly weapon, and open murder with use of a deadly weapon (1 ROA 38). The State based its murder charge on alternative theories of felony murder and premeditated and deliberate murder (1 ROA 39). On November 8, 1995, the State filed its Notice of Intent to Seek Death Penalty (1 ROA 44). It charged aggravating circumstances of murder in the course of a robbery, murder in the course of burglary, murder while the person was engaged in sexual assault or the attempt thereof, and torture or depravity of mind (1 ROA 44-45). Prior to trial, Chappell filed a motion to dismiss several of the aggravating circumstances (1 ROA 250). He argued in part that the aggravating circumstance of sexual assault should be dismissed because Chappell was not charged with sexual assault and no evidence

was presented during the preliminary hearing that would support the aggravating circumstance (1 ROA 256). The State opposed the motion, but did not address the sexual assault issue (2 ROA 309-319). The Court denied the motion.

The jury trial began on October 8, 1996, and was presided over by the Honorable A. William Maupin (2 ROA 355). The jury was instructed on theories of premeditated murder and felony murder (7 ROA 1703, 1721, 1722). The jury was also instructed on robbery in general (7 ROA 1711). On October 16, 1996, the jury returned verdicts of guilty on charges of burglary, robbery, and first degree murder (7 ROA 1747-1749). No special verdict form was given to the jury, so it is unknown as to whether the jurors relied upon the premeditation theory, the felony murder theory, or both in finding Chappell guilty of first degree murder.

The penalty phase of the first trial began on October 21, 1996 (7 ROA 1757). On October 24, 1996, the jury returned its verdicts in which it found mitigating circumstances of murder committed while the defendant was under the influence of extreme mental or emotion disturbance and "any other mitigating circumstances" (9 ROA 2126, 2170-2171). It found aggravating circumstances of burglary, robbery, sexual assault, and torture or depravity of mind and returned a verdict of death (9 ROA 2127-2129, 2167-2169). Formal sentencing took place on December 30, 1996 (9 ROA 2179). The district court sentenced Chappell to the

maximum terms for burglary and robbery with use of a deadly weapon and ordered that those sentences run consecutively to the death sentence (9 ROA 2188).

The judgment of conviction was filed on December 31, 1996 (9 ROA 2190). Chappell filed a timely notice of appeal on January 17, 1997, which was docketed as number 29884 (9 ROA 2200). On December 30, 1998, this Court issued its opinion affirming the conviction (9 ROA 2273); Chappell v. State, 114 Nev. 1403, 972 P.2d 838 (1998). This concluded that the district court erred in failing to hold a Petrocelli hearing, but found admission of evidence of uncharged misconduct to be harmless. Id. at 1406, 972 P.2d at 840. It also concluded that there was sufficient evidence to support the aggravating circumstances of burglary, robbery and sexual assault, but insufficient evidence to support the aggravating circumstance of torture or depravity of mind. Id. at 1407, 972 P.2d at 841. In addressing the robbery aggravating circumstance, this Court noted Chappell's argument that the evidence showed that he took Panos' car as an afterthought and therefore could not be guilty of robbery, but rejected that argument because this Court had held "that in robbery cases it is irrelevant when the intent to steal the property is formed." Id. at 1408, 972 P.2d at 841. Although this Court found torture or depravity of mind aggravating circumstance to be invalid, it re-weighed the remaining three aggravating circumstances and the two mitigating

circumstances, found the aggravating circumstances clearly outweighed the mitigating circumstances, and found that a sentence of death was proper. Id. at 1410-1411, 558 P.2d at 842. This Court also rejected other issues raised by Chappell on appeal. Id. This Court denied rehearing on March 17, 1999 (9 ROA 2288).

Chappell's petition for certiorari was denied on October 4, 1999. Chappell v. Nevada, 528 U.S. 853 (1999). This Court's remittitur issued on November 4, 1999 (10 ROA 2353).

Meanwhile, on October 19, 1999, Chappell filed a proper person post-conviction petition for writ of habeas corpus (9 ROA 2258). A supplemental petition was filed on April 30, 2002 (10 ROA 2417). Among other issues, Chappell contended that his conviction was invalid because the jury instruction defining premeditation and deliberation was constitutionally infirm as it did not provide a rational distinction between first and second degree murder (10 ROA 2456-2459)(citing Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000)). He also asserted that the sentence of death was unconstitutional because of the use of overlapping aggravating circumstances (10 ROA 2465). The State filed its response to the petition on June 19, 2002 (10 ROA 2481). The evidentiary hearing took place before the Honorable Michael Douglas on September 13, 2002 (11

ROA 2554). Subsequently, on June 3, 2004, the district court entered its Findings of Fact, Conclusions of Law and Order (11 ROA 2745). It denied the petition as to the guilt phase issues, granted the petition as to the sentence, and ordered a new sentencing hearing (11 ROA 2748, 2278).

On June 18, 2004, the State filed its notice of appeal to this Court (11 ROA 2757). On June 24, 2004, Chappell filed a notice of cross-appeal (11 ROA 2761).

On April 7, 2006, this Court issued its Order of Affirmance in which it upheld the district court's decision (11 ROA 2783). Of relevance to this petition, is this Court's conclusion that there was no merit to the arguments presented concerning jury instructions (11 ROA 2790)(citing Garner v. State, 116 Nev. 770, 788-789, 6 P.3d 1013, 1025 (2000)). This Court also found the aggravating circumstances of burglary and robbery to be invalid under McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004)(11 ROA 2792-2795). The remittitur issued on may 4, 2006 (11 ROA 2797).

The second penalty phase began on March 12, 2007 (19 ROA 3932).

Following closing arguments, the jury returned their verdicts (15 ROA 3737, 3821). They found the aggravating circumstance of murder committed during the perpetration of a sexual assault (15 ROA 3737, 3822). The mitigating special verdict form listed the following mitigators: Chappell suffered from substance

abuse, he had no father figure in his life, he was raised in an abusive household, was the victim of physical abuse as a child, he was born to a drug/alcohol addicted mother, he suffered from a learning disability, and was raised in a depressed housing area (15 ROA 3739-3740, 3822-3823). The jury did not find the mitigating circumstance that Chappell's mother was killed when he was very young, that he was the victim of mental abuse as a child, and other mitigating circumstances that were asserted to exist by Chappell's counsel (15 ROA 3755). The jury found that the mitigating circumstances did not outweigh the aggravating circumstance (15 ROA 3738, 3822-3823). The special verdict form for the weighing equation did not indicate that it was the State's burden to establish beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances (15 ROA 3738). The jury returned a sentence of death (15 ROA 3741).

Formal sentencing took place on may 10, 2007 (19 ROA 4015, 4018). The judgment of conviction was filed the same day (15 ROA 3854). The district court ordered the judgment stayed pending appeal (19 ROA 4019; 15 ROA 3861). A timely notice of appeal was filed on June 8, 2007 (16 ROA 3872).

The Opening Brief was filed on June 9, 2008. was filed on October 23, 2008. This Court filed its Order of Affirmance on October 20, 2009. The Order

Denying Rehearing was filed on December 16, 2009. On May 11, 2010, the Petition for Writ of Certiorari was denied. On June 8, 2010, this Court filed its remittitur.

Chappell filed a timely Petition for Writ of Habeas Corpus on June 22, 2010. A supplemental brief was filed on February 15, 2012 (20 ROA 4562). The State's Response was filed on May 16, 2012 (20 ROA 4431). A Reply brief was filed on July 30, 2012 (20 ROA 4491). Argument on the petition was held and Mr. Chappell's Petition for Writ of Habeas Corpus was denied on October 19, 2012 (21 ROA 4706). The Findings of Fact, Conclusions of Law and Order was filed on November 16, 2012 (20 ROA 4527). Mr. Chappell filed a timely notice of appeal on October 22, 2012 (20 ROA 4515). This Opening Brief follows.

STATEMENT OF FACTS

The statement of facts are enunciated in Mr. Chappell's supplemental brief (20 ROA 4569-4582).

ARGUMENT

I. MR. CHAPPELL IS ENTITLED TO A REVERSAL OF THE DISTRICT COURT'S DENIAL OF THE POST-CONVICTION WRIT BASED UPON THE DISTRICT COURT'S REFUSAL TO GRANT AN EVIDENTIARY HEARING.

On February 15, 2012, Mr. Chappell filed a sixty-two page supplemental brief in support of defendant's writ of habeas corpus. Mr. Chappell specifically

requested the district court entertain an evidentiary hearing so that he could ineffective assistance.

On February 15, 2012, Mr. Chappell filed a motion for the authorization to obtain expert services and payment of fees at state expense (20 ROA pp. 4485).

In the motion, Mr. Chappell requested permission to retain an expert on the effects of fetal alcohol disorder. There was evidence that Mr. Chappell's mother may have been addicted to drugs and alcohol. Yet, there was no indication of the voluminous file that counsel investigated the possibility of fetal alcohol syndrome. Mr. Chappell also requested permission to obtain a full neurological examination of Mr. Chappell including but not limited to a PET Scan.

Additionally, Mr. Chappell filed a motion for the appointment of an investigator (20 ROA 4550).

At the conclusion of the briefing, a status check was held on August 29, 2012. At the August 29, 2012 hearing, Mr. Chappell and the State agreed that the district court should entertain oral argument on the briefs and the motions for the appointment of an investigator and experts (20 ROA 4415).

Oral argument was heard on October 19, 2012. During the argument, the district court indicated that she was "not persuaded" that there was ineffective assistance of counsel (20 ROA 4418). At the conclusion of the relatively brief oral

argument, the district court denied Mr. Chappell's request for the appointment of experts and an investigator. Mr. Chappell was denied the opportunity to present evidence at a meaningful evidentiary hearing. Mr. Chappell's writ was denied.

Mr. Chappell would respectfully request that this Court consider the denial of his reasonable requests to supplement the record proving ineffective assistance of counsel. Mr. Chappell's issues enunciated within this brief establish that he was entitled to his reasonable requests for experts/investigator and an evidentiary hearing.

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

II. STANDARD OF REVIEW FOR INEFFECTIVE ASSISTANCE OF COUNSEL.

To state a claim of ineffective assistance of counsel that is sufficient to invalidate a judgment of conviction, petitioner must demonstrate that:

1. counsel's performance fell below an objective standard of reasonableness,
2. counsel's errors were so severe that they rendered the verdict unreliable.

Lozada v. State, 110 Nev. 349, 353, 871 P. 2d 944, 946 (1994). (Citing Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 205, (1984)). Once the defendant establishes that counsels performance was deficient, the defendant must next show that, but for counsels error the result of the trial would probably have

been different. Strickland, 466 U.S. at. 694, 104 S. Ct. 2068; Davis v. State, 107 Nev. 600, 601,602, 817 P. 2d 1169, 1170 (1991). The defendant must also demonstrate errors were so egregious as to render the result of the trial unreliable or the proceeding fundamentally unfair. State v. Love, 109 Nev. 1136, 1145, 865 P.2d 322, 328 (1993), citing Lockhart v. Fretwell, 506 U. S. 364,113 S. Ct. 838 122 2d, 180 (1993); Strickland, 466 U. S. at 687 104 S. Ct. at 2064.

This Court has held a defendant has a right to effective assistance of appellate counsel on direct appeal. Kirksey v. Nevada, 112 Nev. 980, 923 P.2d 1102 (1996).

The constitutional right to effective assistance of counsel extends to a direct appeal. Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). A claim of ineffective assistance of appellate counsel is reviewed under the "reasonably effective assistance" test set forth in Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S.Ct. 2052 (1984).

In the instant case, Mr. Chappell's proceedings were fundamentally unfair.

The defendant received ineffective assistance of counsel. Based upon the following arguments:

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III. MR. CHAPPELL RECEIVED INEFFECTIVE ASSISTANCE OF

COUNSEL DURING THE THIRD PENALTY PHASE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In the instant case, penalty phase counsel failed to properly investigate and prepare for the penalty phase. There are multiple instances identified by Mr. Chappell included in this section.

1. Failure to obtain a P.E.T. Scan
2. Failure to test Mr. Chappell for the effects of fetal alcohol syndrom and/or being born to a drug addicted mother
3. Failure to properly prepare the expert witnesses: Dr. Etcoff, Dr. Grey, and Dr. Danton
4. Failure to present mitigation witnesses to the jury
5. Failure to obtain an expert regarding pre-ejaculation fluids
6. Failure to present lay witnesses

Pretrial investigation is a critical area in any criminal case and the failure to accomplish the investigation has been held to constitute ineffective assistance of counsel. In Jackson v. Warden, 91 Nev. 430, 537 P.2d 473 (1975), this Court held,

> It is still recognized that a primary requirement is that counsel...conduct careful factual and legal investigation and inquiries with a view towards developing matters of defense in order that he make informed decisions on his clients behalf both at the pleadings stage...and at trial. Jackson, 92 Nev. at 433, 537 P.2d at 474.

Federal courts are in accord that pretrial investigation and preparation are key to effective assistance of counsel. See, U.S. v. Tucker, 716 F.2d 576 (1983). In U.S. v. Baynes, 687 F.2d 659 (1982), the federal court explained,

Defense counsel, whether appointed or retained is obligated to inquire thoroughly into all potential exculpatory defenses in evidence, mere possibility that investigation might have produced nothing of consequences for the defense does not serve as justification for trial defense counsels failure to perform such investigations in the first place. The fact that defense counsel may have performed impressively at trial would not have excused failure to investigate claims that might have led to complete exoneration of the defendant.

Counsel's complete failure to properly investigate renders his performance ineffective.

> [F]ailure to conduct a reasonable investigation constitutes deficient performance. The Third Circuit has held that "[i]neffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice when s/he [sic] has not yet obtained the facts on which such a decision could be made." See U.S. v. Gray, 878 F.2d 702, 711 (3d Cir.1989). A lawyer has a duty to "investigate what information ... potential eye-witnesses possess[ ], even if he later decide[s] not to put them on the stand." Id. at 712. See also Hoots v. Allsbrook, 785 F.2d 1214, 1220 (4th Cir.1986) ("Neglect even to interview available witnesses to a crime simply cannot be ascribed to trial strategy and tactics."); v. Montgomery, 709 F.2d 690, 701 (7th Cir.1983) . . . ("Essential to effective representation . . . is the independent duty to investigate and prepare.").

In State of Nevada v. Love, 865 P.2d 322, 109 Nev. 1136, (1993), this Court considered the issue of ineffective assistance of counsel for failure of trial counsel to properly investigate and interview prospective witnesses.

In Love, the District Court reversed a murder conviction of Rickey Love based upon trial counsel's failure to call potential witnesses coupled with the

failure to personally interview witnesses so as to make an intelligent tactical decision and making an alleged tactical decision on misrepresentations of other witnesses testimony. Love, 109 Nev. 1136, 1137.

A. FAILURE TO PRODUCE TESTIMONY FROM JAMES FORD AND IVORY MORRELL

During the original post-conviction, counsel alleged that trial counsel had been ineffective for failure to produce several mitigation witnesses. Specifically, post-conviction counsel complained that James C. Ford and Ivory Morrell (friends of James Chappell) were not called to testify. At the conclusion of the post-conviction hearings, the district court granted the writ in part and denied the writ in part. The district court concluded that Mr. Chappell received ineffective assistance of penalty phase counsel for the failure to call mitigation witnesses. This decision was upheld on appeal from the first post-conviction. Thereafter, post-conviction counsel represented Mr. Chappell at the instant penalty phase. Interestingly enough, neither James C. Ford nor Ivory Morrell testified as to the mitigation evidence that they could have provided.

On March 19, 2007, penalty phase counsel advised the court that Mr. Morrell and Mr. Ford would not be able to testify (15 ROA 3669). Counsel explained that Mr. Morrell and Mr. Ford had been present since "Tuesday night of

last week" (15 ROA 3669). On the Friday before, both witnesses were in a situation where they would lose employment (15 ROA 3669). In fact, Mr. Ford's district supervisor stated that he would be fired if he was not present at work on Monday (the day that counsel was making the representations (15 ROA 3669). Penalty phase counsel was concerned that the employment depression in Lansing, Michigan was so severe that it necessitated letting the witnesses proceed back to Michigan. Counsel stated, "it was our decision to allow them - - we had them here and we could have enforced the subpoena on them causing them to lose their work and causing difficulty with out client, and causing them to lose their work, and we made the decision to allow them to return to Michigan, so that they will not be testifying" (15 ROA 3669).

In essence, counsel weighed the decision to relieve the two mitigation witnesses of their obligation to testify based on employment hardship versus the defendant's opportunity to have his life spared at a penalty phase. Nothing could be more important in the penalty phase. Penalty phase counsel had argued to the district court that trial counsel from the first trial was ineffective for failure to call these two witnesses. Yet, the two witnesses were then released. The difficulty with the issue is compounded by a review of the third penalty phase. Interestingly enough, the defense called a few witnesses out of order, in the State's case in

chief. Curiously, no attempts were made to put Mr. Ford and Mr. Morrell on the stand out of order. Most certainly, the district court would have accommodated the defense request, had defense counsel simply orally informed the court of the dilemma. Then, the witnesses would have undoubtedly provided the mitigation evidence which was so obviously necessary.

For instance, Dr. Etcoff's testimony was taken out of order. Yet, penalty phase counsel failed to make this request even though the district court and this Court had determined first penalty phase counsel to be ineffective for failure to call these witnesses (amongst other mitigation that was not presented). In the original post conviction, counsel provided the following synopsis of 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 penalty phase (10 ROA 2417).

Post conviction counsel explained, "Mr. Ivory Morrell [sic] 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 in the relationship with Chappell" (10 ROA 2431). The affidavits of these two individuals are as important today as they were during the original petition (11 ROA 2683). Penalty phase

counsel knew that this Court recognized the significance of these two individuals potential testimony. Upon their affidavits, Mr. Chappell received a new penalty phase. It was clearly ineffective assistance of counsel for failure to present these witnesses. The same analyses that was provided by this Court and the district court almost a decade ago applies today. More importantly, penalty phase counsel was aware of the significant influence of the potential testimony of the two witnesses.

The prosecution was so concerned with the failure to present mitigation witnesses, that the prosecutor raised the issue to the trial court (16 ROA 3803).

The prosecutor stated,

> I went back and reviewed the court's order which was the basis for the reversal of the penalty phase and the reason why we were in the proceeding, the decision by Judge Douglas, I believe, confirmed by the Supreme Court in the order of affirmance that the defense failed to call certain witnesses that would have made a difference in the outcome of the original case.
>
> There were eight or nine witnesses that were detailed in the briefs and the decision. For the record, my notation on that would indicate that would be Shirley Serrelly, James Ford, Ivory Morrell, Chris Bardo, David Greene, Benjamin Dean, Claira Axom, Barbara Dean, and Ernestine Harvey. Of those nine names the defendant only called two of them, by my understanding. There were five of them that were not called, no affidavits were submitted, no letters were written in, no testimony was given in summary by third parties (16 ROA 3803-3804).
>
> The prosecutor did note that Claira Axom's prior testimony was read into

the court record (16 ROA 3803).

Next, a review of the entire file portrays an extremely deficient investigation of a time when Mr. Chappell lived in Arizona. During the penally phase, the State provided witnesses from Arizona who testified to very damning events by Mr. Chappell. No rebuttal was offered by the defense. Mr. Chappell respectfully requests that this Court grant an evidentiary hearing to ascertain what efforts and investigation were conducted in Arizona in order to assist Mr. Chappell at the penalty phase.

This Court in Doleman v. State, 112 Nev. 843 921 P.2d 278 (1996) concluded:

> We conclude that the failure of Doleman's trial counsel to reasonably investigate the potential testimony of certain witnesses at Doleman's penalty hearing constituted ineffective assistance of counsel. In this case, the court found that trial counsel's failure to call witnesses from an institution where the convicted individual had attended school, who would have testified as to the convicted individual's ability to function in structured environments and adhere to institutional rules, constituted a violation of the reasonable effective assistance standard.

Defense counsel's failure to investigate the facts can render a result "unreliable"Buffalo v. State, 111 Nev. 1139, 901 P.2d 647 (1995).

The defense called their mitigation investigator who attempted to tell the jury the potential testimony of Ford and Morrell. Unfortunately, the testimony of a

mitigation investigator does not equate to the mitigation witnesses themselves.

B. FAILURE TO OBTAIN AN EXPERT

In the instant case, the sole aggravator found by the jury was that the murder was committed while Chappell was engaged in the commission of a sexual assault. On appeal from the penalty phase, appellate counsel argued that there was insufficient evidence to establish the sole aggravator beyond a reasonable doubt . This Court explained,

> Our review of the record reveals sufficient evidence to establish the sexual assault aggravator beyond a reasonable doubt as determined by a rational trier of fact. See, Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980); See also, Origel–Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1989); Jackson v. Virginia, 443 U.S. 307, 319 (1979).

One of the factors considered by the this Court was Chappell's assertion that he did not ejaculate into the victim during their sexual encounter, even when matching DNA was recovered from her vagina (Order of Affirmance, pp.3). In fact, this issue was vehemently argued to the jury by the prosecution. During his sworn testimony, Mr. Chappell admitted that he had vaginal sexual intercourse and oral sex with Debra Panos, before he killed her. Mr. Chappell testified that the sexual encounters were consensual but denied ejaculation. The State argued to the jury that this proved Mr. Chappell was a liar and had sexually assaulted the victim.

Apparently, this Court used this fact to determine there was sufficient evidence to convict of sexual assault.

Without the sexual assault aggravator, Mr. Chappell is not eligible for a sentence of death. Ms. Panos was found stabbed to death fully clothed. The knife wounds went through her clothing and into her body. Ms. Panos was not naked and therefore this provides proof of a prior consensual sexual encounter. This fact also corroborates Mr. Chappell's testimony that after the consensual sexual encounter he located letters he perceived as proof that she was unfaithful and went into a blind rage.

Counsel should have provided expert testimony that pre-ejaculation fluid may contain sperm. It has long been recognized in the medical community, a women can become pregnant even when ejaculation does not occur (Dr. Roger Wharms, M.D., Mayo clinic).

During the testimony of Detective James Vaccaro, he was questioned whether the results of DNA of James Chappell was found in Debra's vaginal cavity of Debra. Detective Vaccaro concluded, "I do know that the results were that the DNA of James Chappell was found in the form of semen inside the vagina of Debra Panos". The detective was then asked, "the fact that its in the form of semen would indicate that he ejaculated into her body"? The detective indicated

"yes" (14 ROA 3425).

Penalty phase counsel was ineffective for failing to provide expert testimony that sperm could be located in the vaginal cavity of the victim when the defendant sincerely believed he had not ejaculated. The simple fact which is provided to most high school students in health class, could have dispelled the belief that Mr. Chappell was lying and therefore sexually assaulted the victim. Mr. Chappell has specifically requested funding for an expert in this area. It was ineffective assistance of counsel for failure to obtain this expert testimony.

C. FAILURE TO OBTAIN A P.E.T. SCAN

In the instant case, Dr. Etcoff examined and tested Mr. Chappell. Mr. Chappell had an extremely low IQ. There was evidence that Mr. Chappell's mother may have been addicted to drugs and alcohol. A proper investigation should have been conducted to determine whether James was born to a mother who was ingesting narcotics and/or alcohol during her pregnancy. There is no indication in the voluminous file that counsel investigated the possibility of fetal alcohol syndrome. Additionally, Mr. Chappell's father was involved in controlled substances and criminal activities. Every one of Mr. Chappell's siblings were involved with controlled substances.

During closing argument, defense counsel explained, "his mother was

addicted to drugs and alcohol and it's quite possible she was using either drugs and/or alcohol while she was pregnant (16 ROA 3788). Fetal Alcohol Spectrum Disorders are a group of disorders that can occur in a person who's mother drank alcohol during pregnancy. The effects can include physical problems and problems with behavior and learning. There was evidence that Mr. Chappell's mother may have been addicted to drugs and alcohol. A proper investigation should have been conducted to determine whether James was born to a mother who was ingesting narcotics and/or alcohol during her pregnancy. There is no indication in the voluminous file that counsel investigated the possibility of fetal alcohol syndrome.

This Court in Riley v. State, 110 Nev. 638, 650, 878 P.2d 272, 280 (1994) explained, "even though we declined to reverse, we recognized that a defendant may be prejudiced by counsel's failure to investigate overall mental capabilities when a pretrial psychological evaluation indicates that the defendant may have serious mental health problems".

Mr. Chappell had been sentenced to death by the first jury. Therefore, it was incumbent upon first post-conviction counsel (penalty phase trial counsel) to request funding for a P.E.T. scan and/or brain imaging of the defendant.

Mr. Chappell specifically requests funding to determine whether Mr.

Chappell suffered from fetal alcohol syndrome and requests permission for brain imaging.

D. FAILURE TO PROPERLY PREPARE EXPERT WITNESSES PRIOR TO PENALTY PHASE

The defense called Dr. Etcoff as a mitigation witness. Dr. Etcoff had interviewed Mr. Chappell for two hours almost a decade before his second penalty phase testimony. On cross-examination, it became painfully obvious that Dr. Etcoff had not been properly prepared. It was obvious that the defense had failed to provide a mountain of relevant evidence to Dr. Etcoff. On cross-examination, Dr. Etcoff admitted he had relied upon Mr. Chappell's statements. In fact, Dr. Etcoff believed that the couple was splitting up which had occurred in the last few months prior to the victim's death (15 ROA 3550). Dr. Etcoff admitted that he did not know that the domestic violence had been going on for a lengthy period of time (15 ROA 3550). Dr. Etcoff believed that the problems in the relationship occurred shortly before the murder because Mr. Chappell told him so (15 ROA 3551). Dr. Etcoff admitted that he was unaware that the problems had been occurring for years (15 ROA 3551). In fact, Dr. Etcoff admitted that he was not provided evidence that the domestic violence was occurring on a weekly basis which resulted in injuries to Debra Panos (15 ROA 3551).

Dr. Etcoff admitted that this information would be important in formulating his opinion (15 ROA 3551). However, Dr. Etcoff was unaware of these facts. Dr. Etcoff admitted that he was unaware of the incident on June 1, where the defendant had pinned the victim down and placed a knife to her throat (15 ROA 3552). Dr. Etcoff admitted that he had not interviewed any of the witnesses associated with the years of domestic violence (15 ROA 3553). Dr. Etcoff admitted that the defense had not provided him any of this information prior to his testimony (15 ROA 3553).

More importantly, Dr. Etcoff admitted in the ten years since his evaluation that the defense had not provided any additional information (15 ROA 3554). Dr. Etcoff admitted that the information was relevant for a psychologist. Yet, Mr. Etcoff freely admitted that he was now relying on very limited data because of the failure of the defense to provide him with the information (15 ROA 3554). Dr. Etcoff admitted he was not aware that Mr. Chappell had allegedly threatened to kill Debra the day before (15 ROA 3555). Dr. Etcoff admitted that he was not provided information that Debra had been shaking curled up in the fetal position shortly before the murder (15 ROA 3556). Dr. Etcoff admitted on cross-examination that Mr. Chappell's story regarding consensual sex did not make sense (15 ROA 3556). Dr. Etcoff admitted that he believed the story didn't make

sense now that he had an opportunity to be cross-examined regarding all the information he was unaware of (15 ROA 3556).

In fact, Dr. Etcoff was asked whether Mr. Chappell's story seemed "bogus" because there was semen found in Debra's vagina when Mr. Chappell denied ejaculation (15ROA 3557). Having concluded that Mr. Chappell's story was "bogus", Dr. Etcoff further concluded that the defense had not even provided him photos in the case (15 ROA 3557). At the conclusion of cross- examination, Dr. Etcoff explained that Mr. Chappell's statements that the fight occurred when he located the letters in Debra's car makes less sense (15 ROA 3558).

On redirect examination, defense counsel asked:

Q: And you knew he had a long history of domestic violence with Debbie?

A: I don't know if I knew. I don't believe I knew he had a long history of domestic violence and what it entailed, I don't believe I knew that stuff (15 ROA 3576).

In essence, Dr. Etcoff provided opinions to the jury on direct examination that were entirely refuted after cross examination. Dr. Etcoff apparently provided opinions that he withdrew based upon his lack of knowledge of the case. The excerpts from the penalty phase demonstrate that Dr. Etcoff was not provided relevant information to provide his opinion. Surely, in pre trial interviewing and/or

preparation defense counsel would have provided Dr. Etcoff's with the long history of domestic violence. That fact was uncontradicted during the penalty phase. Numerous witnesses described years of domestic violence. Yet, the defenses expert was unaware of these facts.

During the direct examination of Dr. Etcoff, he was asked if it was common procedure to interview people associated with the defendant rather than just talking to the defendant (14 ROA 3477). Dr. Etcoff replied,

> You want to, as a psychologist, you want if someone's mother, or brother, or sister, or wife, or someone who knows them well is around and you really want to get an outside opinion or collateral opinion of what their functioning had been like. I do that all the time with people in civil cases. I wanna know what the spouse thinks has been the cause of the accident, so to speak. And undoubtedly then ask deputy public defender Brooks if anyone in the family was available or could they be brought to Las Vegas so I could interview them, but that wasn't possible. So the only person I was able to interview at the time was Mr. Chappell (14 ROA 3477).

Dr. Etcoff was then asked by penalty phase counsel if he got an accurate evaluation from Mr. Chappell and Dr. Etcoff replied that it was "as accurate as you can get". The Court sustained the State's objection (14 ROA 3477).

Here, more than ten years after Dr. Etcoff had requested permission to speak to the defendant's family, penalty phase counsel never made family members available to Dr. Etcoff

The lack of pre trial preparation was evident and devastating to Mr. Chappell. By the conclusion of cross-examination, Dr. Etcoff admitted that Mr. Chappell's story regarding consensual sex made no sense and was in fact "bogus". Dr. Etcoff apparently admitted that Mr. Chappell's story that he did not ejaculate was also unfounded. This was at a direct result of the failure to properly prepare the witness with accurate information.

Dr. William Danton is a clinical psychology at the University of Nevada, Reno, school of Medicine (15 ROA 3317).

During Dr. Danton's direct examination, he explained different hypotheses for why Debra may have had sex with Mr. Chappell on the day of the murder. However, Dr. Danton stated "the only issue about that is if there were affairs with other men, that doesn't fit well with that hypothesis. Of course, the other hypothesis is forced. He forced her to have sex" (14 ROA 3327). Here, the defense expert provided approximately four possible reasons for a sexual encounter with Mr. Chappell on the day of the murder. Dr. Danton concluded that one scenario would be forced sexual activity, providing the jury with the conclusion that rape was a certain possibility.

Dr. Danton discussed domestic violence during his testimony. Unbelievably, Dr. Danton testified that he first met with Mr. Chappell (for two

hours) the night before his testimony on March 15, 2007 (15 ROA 3321). Here, the jury is aware that the case had been pending for years. Dr. Etcoff testified that he had evaluated Mr. Chappell ten years prior to his testimony. However, the jury learns that one of three defense experts analyzed the defendant for the first time the night before his testimony. Again, this expert was not properly prepared to testify. Was the defense preparing to call Dr. Danton irregardless of his interview with the defendant? Did the defense not prepare prior to trial in an effort to present a domestic violence expert? Why is the expert analyzing the defendant for the first time in the middle of the penalty phase? This fact establishes lack of pretrial preparation.

During Dr. Danton's testimony, he surmised that Mr. Chappel may have blacked out during the actual murder. This testimony would corroborate Mr. Chappel's trial testimony wherein he claimed he did not remember the actual facts of the stabbing. However, a juror asked a question of Dr. Danton. The juror asked "first off, in your opinion do you think that Mr. Chappell blacked out? If you have enough information to answer the question". (14 ROA 3371). Dr. Danton stated that he would be more on the side that Mr. Chappell did in fact black out (14 ROA 3371). However, Dr. Danton then stated, "although I have to, in all honesty, I don't have enough data to conclusively say he blacked out. There is testing that

could be done that might establish that, but I haven't done it" (14 ROA 3371). Additionally, Dr. Etcoff was extensively questioned as to whether he really believed if Mr. Chappell had blacked out. The State feverishly argued that Mr. Chappell was lying about his testimony that he had blacked out during the actual murder. During Dr. Danton's testimony, he was later confronted with Dr. Etcoff's opinion that Mr. Chappell had not blacked out. Again, Dr. Danton confirmed, "to my knowledge no tests were done that might specifically speak to that question" (14 ROA 3373). Here, the defense witnesses appear to be directly contradicting each other. Yet, the testing had not been conducted. More importantly, it is clear that defense counsel had not properly pretrialed the expert witnesses, otherwise counsel would have noticed that their witnesses were contradicting each other. Yet, defense counsel failed to confer with Dr. Danton and ensure that the testing was aware of was conducted. Further proof of the failure to properly prepare for the penalty phase.

The defense called Dr. Grey who testified that he had not seen the DNA report (13 ROA 3230). The following is an excerpt from cross-examination:

Q: So you didn't read the report that talks about the presence of sperm as well?
A: I did not see that.
Q: But that would be conclusive that there was ejaculation?
A: Yes (13 ROA 3230).

Again, penalty phase counsel failed to properly prepare their expert witnesses. If Dr. Grey had been given an opportunity to review the report and discuss the case with counsel in depth, he would have had knowledge of this fact. More importantly, this is more evidence that penalty phase counsel should have obtained an expert to establish that semen can be present without ejaculation.

The following expert demonstrate further evidence of the failure to properly prepare Dr. Grey occurred during cross examination:

> Q: And that is based on what the defendants's version of events were?
> A: Again, the specifics of how that information was gathered I do not know
> Q: So you didn't look at the actual photographs or look at the evidence that was seized fro the scene in order to come to your conclusion?
> A: The only pictures I saw were the ones related to the victims position (13 ROA 3230).

Dr. Grey also admitted that he had not been informed by the defense that Debra had been threatened in court the day before (13 ROA 3231). Additionally, Dr. Grey stated that he was unaware that Debra was shaking and afraid in the fetal position shortly before the murder (13 ROA 3231). Dr. Grey admitted that these threats were not taken into account regarding the issue of sexual assault (13 ROA 3231). Dr. Grey was unaware that Mr. Chappell had testified that he had pinned Debra down and that there was a knife present (13 ROA 3232). Dr. Grey admitted

that he had not read Mr. Chappell's testimony (13 ROA 3232).

There is a pattern of lack of preparation throughout the penalty phase where in experts do not appear to have the information necessary to provide accurate opinions. On cross-examination this lack of preparation was devastating to Mr. Chappell.

E. FAILURE TO PROPERLY PREPARE A LAY MITIGATION WITNESS

The defense called Benjamin Dean as a mitigation witness (15 ROA 3706). Mr. Dean attended school with Mr. Chappel (15 ROA 3706). Not only did Mr. Dean grow up with Mr. Chappell but he also knew Debra (15 ROA 3709). On direct examination, Mr. Dean was asked about the couple's relationship and he stated, "I didn't see any problems with them..." (15 ROA 3708). However, on cross-examination Mr. Dean was severely impeached with his prior affidavit. On cross-examination Mr. Dean was asked whether he believed Debra was controlling and manipulating. Mr. Dean responded indicating he had never said that (15 ROA 3709). On cross-examination Mr. Dean was asked whether Debra wanted to keep Mr. Chappell away from his old friends. Mr. Dean denied saying that (15 ROA 3709). Mr. Dean denied ever stating that Debra was verbally abusive to James. However, having denied making any of these statements the prosecution then

showed Mr. Dean his signed affidavit from March of 2003 (15 ROA 3709). In the affidavit, Mr. Dean affirmed that Debra was controlling (15 ROA 3709). The affidavit described Debra as manipulative and that she did not like his old friends (15 ROA 3709). The affidavit stated that Debra was abusive (15 ROA 3709). Mr. Dean had no credible answer for why his previous affidavit described Debra in such a poor light yet he denied making any of those statements in front of the jury.

Obviously, penalty phase counsel did not properly pretrial Mr. Dean. The first portion of the pretrial should have been to review Mr. Dean's prior affidavit. Furthermore, based on the direct examination of Mr. Dean it appears penalty phase counsel may have been unaware of Mr. Dean's prior affidavit. This was a part of a larger pattern of the failure to prepare. This is conclusive evidence that counsel proceeded to trial on a day to day basis without properly preparing witnesses in an effort to spare Mr. Chappell's life.

Mr. Chappell is entitled to a new penalty phase due to ineffective assistance of counsel.

IV. MR. CHAPPELL RECEIVED INEFFECTIVE ASSISTANCE OF PENALTY PHASE TRIAL COUNSEL AND APPELLATE COUNSEL FOR FAILURE TO OBJECT TO THE CUMULATIVE VICTIM IMPACT PANEL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

On March 15, 2007, defense counsel specifically objected to victim impact

statements being provided by witnesses that are not family members. (14 ROA 3271-3273). In response, the district court permitted victim impact statements from people other than family members but specifically stated, "as I said yesterday, to the extent we get to something overly cumulative in this presentation, I'll cut it off" (14 ROA 3273). On appeal, appellate counsel argued that the district court erred by permitting the prosecution to introduce "excessive victim impact testimony" (Order of Affirmance pp. 18). Specifically, appellate counsel complained that non-family members provided extensive impact evidence and that the State had failed to include in the notice mandated by Supreme Court Rule 250(4)(f).

First, on appeal, this Court explained, "however, Chappell did not object on the grounds of insufficient notice and thus the second claim is reviewed for plain error effecting his substantial rights". See, Archanian v. State, 122 Nev. 1019, 1031, 145 P.3d 1008, 1017 (2006). The failure to trial penalty phase counsel to object mandated a higher standard of review on appeal. Trial penalty phase counsel was therefore ineffective for failing to object.

Additionally, appellate counsel failed to inform the Supreme Court that the victim impact 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 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 this 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, this 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.

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 this Court known the extent of the error, Mr. Chappell's penalty phase would have been reversed.

V. 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. On appeal, 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
2. "Don't let the defendant fool you"
3. Justice and Mercy arguments

This 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. This Court considered these arguments for plain error. Penalty phase counsel made numerous errors that taken as a whole must result in reversal.

VI. 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 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). This 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, 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, this 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).

This 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 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 this 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.

VII. 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 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.

This 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), this 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.

VIII. 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.

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).

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.

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 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.

IX. THE DEATH PENALTY IS UNCONSTITUTIONAL[1]

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.

Nevada law requires that execution be inflicted by an injection of a lethal

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

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 unnecessary pain: Stephen Peter Morin: March 13, 1985 (Texas), Randy Woolls: August 20, 1986 (Texas), Raymond Landry: December 13, 1988 (Texas), Stephen McCoy: May 24, 1989 (Texas), Rickey Ray Rector: January 24, 1992 (Arkansas), Robyn Lee Parks: March 10, 1992 (Oklahoma), Billy Wayne White: April 23, 1992 (Texas), Justin Lee May: May 7, 1992 (Texas) John Wayne Gacy: May 19, 1994 (Illinois), and Tommie Smith: July 18, 1996

(Indiana).

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.

Mr. Chappell recognizes that this 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.

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 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.

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).

The failure to have a functioning clemency procedure makes Nevada's death penalty scheme unconstitutional, requiring the vacation of Mr. Chappell's sentence.

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. [2]

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.

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 State

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

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.

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)

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 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. 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 than a cold calculated judgement after premeditation and deliberation had occurred. 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.

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

In Dechant v. State, 10 P.3d 108, 116 Nev. 918 (2000), this Court reversed the murder conviction of Amy Dechant based upon the cumulative effect of the errors at trial. In Dechant, this 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.

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///

CONCLUSION

Based on the foregoing, Mr. Chappell respectfully requests this Court order reversal of his convictions.

DATED this 6th day of January, 2014.

Respectfully submitted:

/s/ Christopher R. Oram, Esq.

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JChappell CORA005648

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using 14 point font of the Times New Roman style.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(7)(b). Pursuant to NRAP 32(7)(b)(i), this appellate brief complies because although excluding the parts of the brief exempted by NRAP 32(7)(b), it does not contain more than 37,000 words and 80 pages.

Finally, I hereby certify that I have read this amended appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 6th day of January, 2014.

Respectfully submitted by,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on January 6, 2014. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ-MASTO
Nevada Attorney General

STEVE OWENS
Chief Deputy District Attorney

CHRISTOPHER R. ORAM, ESQ.

BY:

/s/ Jessie Vargas
An Employee of Christopher R. Oram, Esq.

EXHIBIT 165

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Supreme Court No. 61967
District Court Case No. C131341

FILED

DEC 04 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

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

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: November 17, 2015

Tracie Lindeman, Clerk of Court

By: Joan Hendricks
Deputy Clerk

cc (without enclosures):
Hon. Carolyn Ellsworth, District Judge
Christopher R. Oram
Attorney General/Carson City
Clark County District Attorney

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on NOV 20 2015.

Deputy District Court Clerk

RECEIVED
NOV 20 2015
CLERK OF THE COURT

RECEIVED
NOV 25 2015
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

EXHIBIT 166

Declaration of Rosemary Pacheco

I, Rosemary Pacheco, hereby declare as follows:

1. My name is Rosemary Pacheco and I am ~~sixty-one~~ fifty-nine years old. I currently reside in Pima County, Arizona. I was a coworker of Deborah "Debbie" Panos. We both worked at the Tucson Police Department's (TPD) Communications Division during the 1990s. I retired from the division a little more than five years ago.

2. I first met Debbie when she came to work at the TPD's communications division in the early 1990s. Debbie was a Public Service Operator (PSO), and I was a Public Service Dispatcher (PSD). Debbie was good at her job and very reliable throughout most of her time at the Communications Division.

3. I first met James and their sons, JP and Anthony, at a social gathering shortly after Debbie started working at the Division. I was very impressed with James and the way he cared for the children. James communicated with his sons in a very loving manner and he played with them. When one of the boys fell down, James immediately rushed to his side, picked him up and dusted him off, and made sure that he was alright. When it came time for the children to eat, James fixed both of them plates and patiently fed them, and then cleaned them up afterwards. JP and Anthony were both very well behaved, and I could tell that James and Debbie had done a great job with instilling manners and a sense of respect in both children. James and the boys were also immaculately clean, as was Debbie. I used to tell Debbie that she and her family always looked like they stepped out of a fashion magazine. I was so impressed by my first encounter with James that I pulled Debbie aside the next day at work to tell her about it. It's a rare thing to find a man, like James was back then, who was so loving and gentle as a caregiver and partner. I told Debbie that she was lucky. I saw James and the boys on several other occasions for almost a year after my initial encounter, and James was the same loving father to the boys and caring partner to Debbie.

4. James was working at a fast-food restaurant when I first met him. Debbie and James only had one vehicle, which they shared. To help them out, I began driving Debbie to and from work because we worked the same shift most days. James used the car to go to work and care for the children while Debbie was at work. There were endless opportunities for over-time at the TPD's Communication Division because we were always short staffed. Debbie frequently volunteered to work overtime to earn extra money for the family. Debbie told me that she would not have been able to work so much overtime had it not been for James's willingness and ability to take care of the children on his own. When James lost his job at the fast-food restaurant, he became a stay-at-home dad and Debbie worked more overtime hours to make ends meet. From all of Debbie's early accounts, James did an awesome job caring for the kids and taking care of the household while Debbie was at work.

5. There came a time when our colleague Dina Freeman invited Debbie and me to travel to San Diego for a brief weekend getaway, along with Dina's late friend Robin. Debbie initially had no intentions of going along at first, until James insisted that she go. James told Debbie that she worked hard, she deserved to have a break, and he wouldn't take "no" for an answer. He assured Debbie that he and the boys would be alright, and that she should go enjoy herself. I was impressed by James's concern and trust in Debbie to take a trip out of state without him. At the time he was not a jealous person. This was the only leisurely trip that Debbie took during the time that I knew her.

6. It seemed like Debbie and James had a wonderful life in those early times. However, things between them began to take turn a turn for the worse after about eight or nine months. James was working again, but he never had any money and could not explain why. James started demanding that Debbie give him increasingly more money, to the point where it was interfering with Debbie's ability to pay their bills. Debbie told James "no" at times, but he became aggressive and spoke in a threatening way towards her. Debbie told me that she believed that James was on drugs and she did not know what to do.

7. When Debbie became pregnant with their daughter, Chantel, things changed for the better. James was not acting aggressively and went back to being the caring person that he was. James also stopped demanding money from Debbie. Debbie seemed happy again and they both looked forward to having their third child. However, the improvements in their relationship proved to be short lived.

8. James fell back into his drug habit after Chantel was born, and his aggressive behaviors became worse. This was the time period when Debbie began showing up to work with bruises on her person. At first, Debbie made excuses for her injuries by telling me that she slipped and fell, bumped into things, and other things that made no sense. Eventually, Debbie told me the truth about her injuries and that she was being abused by James. The first question that I had was whether James was abusing the children as well, but Debbie insisted that James had never done anything to hurt their children. I then told Debbie that she needed to file a police report and leave James. Debbie rejected these suggestions because she believed that she could work through James's problems. Debbie had an eternal hope that James would get better and return to being the loving man that she once knew. Debbie often told me that James was the love of her life and she could not imagine him not being in the lives of their children.

9. When I dropped Debbie home one day and saw James for the first time in a while, his appearance and demeanor had totally changed. He was no longer the pleasant, clean and normal person that I knew. He was now grungy, unkempt, and displayed empty and angry expressions on his face. James look like many drug addicts that you'd see walking the streets.

10. Debbie also began to change. She went from being a positive, upbeat, and talkative person, to being withdrawn, sad, and cranky. Debbie's emotional state started effecting her job performance. There were times when she'd snap and start yelling at callers in need of police assistance, and her supervisor had to talk to her.

11. Although there was no policy regarding the associations of TPD Communications staff, it was generally frowned upon for an employee to be involved with people who committed crimes or were engaging in domestic violence. When James was stopped and arrested while driving Debbie's car, the police officers handling the case questioned Debbie. This was very embarrassing for Debbie. Debbie was not asked to leave the Communication Division, as far as I know, but I had the sense that she was pushed out.

12. When Debbie told me of her plans to relocate to Las Vegas, she also told me that she had broken up with James. But Debbie ended up moving James to Las Vegas to make sure that he was still a part of the children's lives. Debbie also thought that James had a better chance of overcoming his drug addiction if she could get him away from his negative associations in Tucson. I told Debbie that this was a bad idea because James would find the same associations and problems in Las Vegas. In fact, I warned Debbie that the situation in Las Vegas would be even worse for James, because it was a larger city and had more vice. I was ultimately unable to change Debbie's mind and she went ahead with her plans.

13. I briefly spoke with Debbie by phone on a few occasions after she moved to Las Vegas. Debbie told me that she was working and everything was alright. Debbie did not mention anything about James and I did not ask.

14. I found out about Debbie's death shortly after the incident occurred in 1995. I later took time off from work to attended James's entire trial in 1996. I spoke with Debbie's mother, but I was not approached by the State or defense attorneys.

15. My only contact with anyone related to James's case was with Herbert Duzant of the Federal Public Defender Office. Had I been contacted by James's previous counsel I would have provided them with the information that I have given 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 Pima County, Arizona, on August 9, 2016.

Rosemary Pacheco

Rosemary Pacheco

EXHIBIT 167

Declaration of Dina Richardson

I, Dina Richardson, declare as follows:

1. My name is Dina Richardson. My last name used to be Freeman. I testified at James Chappell's trials both in 1996 and in 2007. I was never interviewed by members of James's defense team prior to or at either trial. If I had been interviewed, I could have provided the following additional evidence.
2. Deborah Panos (Debbie) and I met at the Tucson Police Department, where both of us worked at the 911 call center. We worked together full-time for almost the entire time Debbie lived in Tucson. Debbie and I became friends.
3. Debbie was the breadwinner in her family and did everything in her power to make sure the bills were paid. Debbie was very dedicated to her children and to James. She strived to provide a better life for James, who had lived through a very difficult childhood. Debbie was committed to James and loved him one hundred percent.
4. James was a very good and engaged father. At gatherings he typically was the one playing with the children. I never saw James say or do anything inappropriate with the children. The children were clean, fed, and attended to, largely because of James.
5. I rarely interacted with James in-person, only now and again at our children's respective birthday parties. During these rare interactions James was reserved and usually engaged with the kids, not the adults.
6. Debbie was very protective of James. At one of the children's birthday parties at a local park, a Tucson Police Department colleague imitated James's voice. Even though the person was just kidding around, Debbie had an over-the-top reaction to this, loudly and firmly stating, ~~"You will not make fun of James. No one is to make fun of James again."~~ "Stop making fun of James." she shouted at the person.
7. Debbie told me that her mother did not like black people. My limited experience with Debbie's mother was not consistent with Debbie's claim.

8. Debbie and James's relationship became progressively more volatile during the couple's time in Tucson. This escalation seemed to parallel James's ballooning drug addiction.
9. With regard to the relationship balance between Debbie and James, on the one hand James's behavior seemed to control the entire family dynamic. However, Debbie came and went from home and work as she pleased, even though she had young children. Furthermore, Debbie took one or more vacations without James. For instance, Debbie, another coworker, and I spent a long weekend in San Diego visiting my brother and spending time at the beach.
10. Debbie fell in love with Las Vegas during a trip she made there a few weeks before the move. She told me she was going to "start a new life"—she was going to quit her job and move the children to Las Vegas without James and with financial help from her mother. A week or two before she was supposed to leave town, Debbie informed me that James was going to move to Las Vegas after all. Debbie was fully convinced that if James got away from drug connections in Tucson, he would also leave behind his crack addiction. As it turned out, that didn't happen.
11. James apparently made new drug connections in Las Vegas. While waiting to testify at James's trial in 1996, I encountered two female ~~crack addicts~~ who were also waiting to testify. They knew James from the streets. One of the women indicated that she had just been released on a robbery charge and had appeared in court earlier in the day for her own case. As the women were conversing two detectives—the ones who had taken my original statement—came around the corner and asked to speak to me. They pulled me aside and told me, "Those ladies are out of your league." They had pulled me away from the women as a courtesy so I did not have to deal with them. The detectives reiterated to me that one of the women had been released from jail on a robbery charge earlier in the day.
12. In my opinion, if Debbie had survived, she would have forgiven James a long time ago. Debbie also would be absolutely livid about James's death sentence. Debbie would have construed James's actions as a function of his bad upbringing and drug use.

13. On June 23, 2016, Tammy Smith, an investigator from the Office of the Federal Public Defender in Las Vegas, interviewed me at my home in Tucson. Prior to my meeting with Ms. Smith, I had never been contacted by an attorneys or investigators working on behalf of James Chappell.

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 Tucson, Arizona, on August 9, 2016.

Dina Richardson

Dina K. Richardson

EXHIBIT 168

Declaration of Angela Mitchell

I, Angela Mitchell, hereby declare as follows:

1. My name is Angela Mitchell and I am sixty years old. I currently reside in Pima County, Arizona. I was a coworker of the late Deborah "Debbie" Panos. We both worked at the Tucson Police Department's (TPD) Communications Division during the 1990s.

2. Debbie and I were hired by the TPD's Communications Division at the same time, and went through the training program together. We became friends almost instantly. I did not have a driver's license at the time, so Debbie occasionally drove me to and from work.

3. I visited with Debbie and her family when they lived at the River Oaks Apartments on East Broadway Boulevard and at the Spring Hills Apartments on East Lakeside Parkway. I may have visited Debbie at her family's trailer home on West Ajo Way on one occasion. Debbie and I used to go out to eat, attended work related gatherings and parties, and we sometimes went to the movies.

4. James was a stay at home dad when I first met Debbie, which was his primary responsibility throughout much of the time that I knew and interacted with them. James was a quiet person and did not say much when I was around, but he was a good caregiver in earlier times. James kept the house and the children clean, and he fed and cared for the children while Debbie was at work. Debbie seemed happy and did not complain about any problems in her household. James was very clean and Debbie kept him and the children dressed in nice name-brand-clothing. James wanted for nothing and Debbie was able to work as much as she needed to without having to worry about cleaning the house, bathing the children, or having to cook when she got home. Things seemed to be going well with Debbie and James for the first year and a half to two years that I knew them.

5. After about one and a half to two years into my friendship with Debbie, James developed a drinking problem. He was drinking forty once bottles of malt liquor beer on a daily

basis. James drank with neighbors and by himself in their apartment. I saw James drinking beer during some of my visits to the family home. This is the time when James began slacking off on his household duties. He stopped keeping the house clean and Debbie was often coming home to a messy kitchen, which was the source of arguments. I told Debbie that she should consider a different approach when dealing with her dissatisfaction, because she spoke to James in a manner that probably made him feel small and less of a man, which is a huge hang-up for many Black men who don't have much going on for themselves and suffer from addiction. I suggested that Debbie refrain from yelling at him, and try having a calm discussion about her concerns to avoid conflicts.

6. Within months of developing a drinking problem, James began smoking crack and spending a lot of time outside of the house, according to what Debbie told me. James was no longer taking care of his household responsibilities and he started acting aggressively and violently towards Debbie. James demanded money from Debbie and often took funds that were intended to pay their bills. James stole food and various items in the house and sold them on the street to get money to purchase crack. This was the time when Debbie started showing up to work with bruises. Debbie was honest with me and told me that James was abusing her.

7. I told Debbie to leave James from the moment that she told me that he was abusing her, because I knew from experience that things would not get better. My first husband, who was also named "James", used to abuse me. Like James and Debbie, we had three children and so there were a few parallels. I told Debbie that if a man hits you once he'll never stop. I suggested that Debbie look into the eyes of her children to develop the strength to leave, like I did, and not turn back. Debbie always responded by telling me that she knew I was right or "I hear what you're saying", but that she loved James and wanted him to be in the lives of their children. James never did anything to harm the children from what I observed and heard from Debbie. Debbie saw something in James that no one else did. Something that was worth holding onto and she was determined to fix him.

8. I recall James going home to Michigan at one point in the middle of their time in Tucson, but Debbie told me that he was only visiting. Debbie never told me that they had broken up. Debbie was a kind and sweet person, but she only told people things that she wanted them to know.

9. Debbie's last year in Tucson was the roughest period for her because James grew increasing paranoid. James demanded that Debbie come straight home from work and told her to stop spending time with many of her friends and colleagues. James acted like he was afraid that Debbie might meet someone else and leave him, which was ridiculous because Debbie was devoted to him, even as he seemed to be losing his mind. I have experience with being around crack addicted people, and it was clear to me that the drugs were taking over his mind. I had sympathy for James because I know drugs can take you out of your right mind. If James had been in a better environment, things might have gone better for him and Debbie.

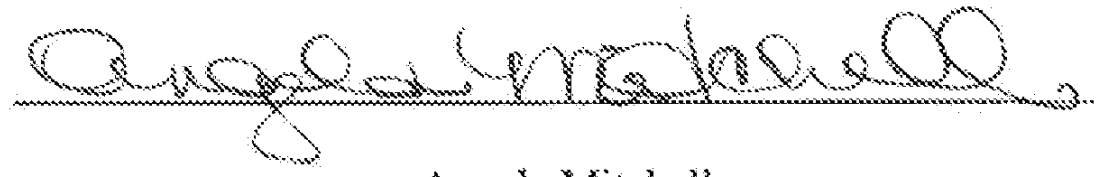
10. Near the end of Debbie's time in Tucson, everyone at the job pretty much knew what was going on in Debbie's home. One of the supervisors even went as far as to provide Debbie with counseling resources that she could take advantage of. However, Debbie never followed up.

11. Looking back, I feel that the Communication Division could have done more to assist Debbie. Everyone knew her struggles, but no one stepped up to provide Debbie with meaningful assistance or even an intervention. The Police Department as a whole had a culture of keeping a lid on domestic disputes amongst its employees, including police officers, in an effort to prevent loved ones from being arrested or the employees possibly losing their jobs. I wish more could have been done for Debbie.

12. I was happy when Debbie told me that she was breaking up with James in the fall of 1994, and moving to Las Vegas. Debbie told me that she wanted to have a fresh start for herself and their children, and I was proud of her. I did not stay in touch with Debbie after she left Tucson and had no idea that she took James to Las Vegas until it was announced on the job that she had passed.

13. No one had ever reached out to me in regards to James's case until my recent conversation with Herbert Duzant of the Federal Public Defender Office. Had I been contacted by James's previous counsel I would have provided them with the information that I have given 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 Pima County, Arizona, on August 9, 2016.



Angela Mitchell

EXHIBIT 169

TRAN
CASE NO. C-131341
DEPT. NO. 3

ORIGINAL

FILED IN OPEN COURT
March 20 2007
CLERK OF THE COURT
BY Carol Green
DEPUTY

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

STATE OF NEVADA, Plaintiff, vs. JAMES M. CHAPPELL, Defendant.	REPORTER'S TRANSCRIPT OF PENALTY HEARING

BEFORE THE HONORABLE DOUGLAS HERNDON
DISTRICT COURT JUDGE

DATED: MONDAY, MARCH 19, 2007

REPORTED BY: Sharon Howard, C.C.R. #745

TRAN
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DATED: MONDAY, MARCH 19, 2007

REPORTED BY: Sharon Howard, C.C.R. #745

APPEARANCES:

For the State: CHRISTOPHER OWENS, ESQ.
PAM WECKERLY, ESQ.

For the Defendant: DAVID M. SCHIECK, ESQ.
CLARK W. PATRICK, ESQ.

* * * * *

INDEX
OF
WITNESSES

LAS VEGAS, NEVADA; MONDAY, MARCH 19, 2007

9:00 A.M.

P R O C E E D I N G S

* * * * *

THE COURT: Let's go on the record in C-131341, State of Nevada versus James Chappell.

The record will reflect the presence of Mr. Chappell, with is attorneys, the State's attorneys, outside the presence of the jury.

Mr. Schieck, do you want to make a record at all regarding -- I know we're getting ready to read in Mr. Chappell's testimony from the underlying trial.

MR. SCHIECK: Yes, your Honor.

I need to make a record formally that we will object to the reading of Mr. Chappell's testimony from his first trial.

The basis of that objection -- I'll will inform the court candidly that the Nevada Supreme Court has indicated that prior sworn testimony is admissible in a subsequent trial, and that the waiver of your 5th Amendment right to remain silent, once waive, is always waived for purposes of that particular testimony.

However, there is a line of case law that talks about introducing that testimony in violation of

other constitutional rights, and it's our contention, and we would like to preserve for the record, that Mr. Chappell received ineffective assistance of counsel at the first trial when the trial counsel put Mr. Chappell on the stand and allowed him to testify as he did during that proceeding.

Again, this is just to preserve that issue so that if at a later date it needs to be raised, it can be raised.

We did not raise that as ineffective assistance of counsel in our post-conviction in state court that I personally was involved in filing. So to the extent that it's raised in that proceeding, may, quite candidly, was raised as part of our later proceeding. I wanted to preserve that at this point in time.

Additionally, if I may proceed, your Honor. There is an issue -- and this begins on page 64 of the statement. This is on the State's cross-examination. I was going to read it into the record.

THE COURT: Okay. Page 64?

MR. SCHIECK: Yes, your Honor.

THE COURT: Thank you.

MR. SCHIECK: Near the bottom:

Question: It's the second question from the bottom, where the questioning begins -- "you had a

substantial period of time to think about today, haven't you"?

Answer: "Yes, sir."

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

Answer: "Yes, sir."

And proceeds that he had given a lot of attention to what he was going to say.

It's our contention that reference to the fact that Mr. Chappell had a period of time to prepare what he was going to say was an implied reference to his right to remain silent, the fact that he had not previously made a statement to authorities concerning the information he was testifying to the jury about.

This was raised as a claim of ineffective counsel on appeal in affect, assistance of appellate counsel in our post-conviction and our petition was denied by then Judge Douglas, now Justice Douglas, and was not a basis for relief on appeal from the post-conviction proceeding.

For the record, I wanted to preserve that issue, still contained, his testimony we're going to read to this jury, to the extent there is ever found to be error that it was admitted at the first trial, it's our

contention it's error to admit it at the second trial -- penalty hearing.

THE COURT: Mr. Owens or Ms. Weckerly.

MR. OWENS: We don't have anything to add to that.

THE COURT: I do agree, and I appreciate your candor, Mr. Schieck, that the case law does allow for the use of prior testimony in a subsequent proceeding. But even though the Defendant was called as a witness by his own attorneys at the time trial, I think the State is allowed to use that testimony in this proceeding regardless of whether he's called to testify again or not.

In terms of the ineffective argument for allowing him to testify at the underlying trial, I know that that was not raised and I do think that there is a bar at this point in time. I'll also note the matter did proceed up on direct appeal where it was affirmed, then on post-conviction, where the penalty phase was reversed, there were issues involving the trial phase that were addressed in that post-conviction. And Judge Douglas found that the trial phase was basically error, for lack of a better word.

He didn't reverse the trial. He just reversed the penalty phase. Then that went up on appeal

by the State as to the reversal of the penalty hearing and the defense cross-appealed as to the non-reversal in the trial phase, and on those appeals, Judge Douglas' rulings were affirmed. So the trial phase stays with the conviction, and the penalty phase stays with the reversal, and that's why we're here today.

And the issue of the questions that were just brought up on page 64, of State's cross-examination, that was part of what was raised before Judge Douglas, and he didn't find merit to granting any post-conviction relief on that issue. And, again, it was appealed and that was affirmed.

So I think it would be appropriate to allow in the reading of that, along with the rest of defendant's testimony.

MR. SCHIECK: Your Honor, we've also agreed during the reading we would skip the portions where the court took breaks on the record and admonished the jury.

There's one on page 30 and there's another one at page 77, where apparently one of the jurors had requested a brief recess. And we're going to skip those portions.

In my perusal of the testimony, I don't see really any objections that we need to worry about. I

didn't see any objections at all.

THE COURT: Okay.

MR. OWENS: I did notice when I was reading that, that portion he was reading is underlined in here.

THE COURT: 64 through 65.

MR. SCHIECK: It's underlined on my copy. I assume that that was underlined by Mr. Brooks.

MR. OWENS: It could have been defense. It was initial on post-conviction and this comes out of the record on appeal. So I didn't notice a lot of other underlying here. There's a couple of random lines.

If the court -- the jury is not going to take a copy of this back to the jury room with them, if the court could just admonish them that any notations are to be ignored, underlining is of no consequence.

THE COURT: I will do that.

MR. SCHIECK: I can represent those are prior to my having a copy of the transcript. I highlight, not underline for the very reason you can't erase the underline.

We've also agreed that as it is Mr. Chappell was a defense witness that we would be reading the direct examination and the State would be reading the cross-examination, even though this is being

introduced during the State's case in chief at the penalty hearing.

THE COURT: I will make sure the jury realizes it's part of the State's case in chief.

Does anybody have anything else?

No. Okay.

(Jury brought in.)

Good morning, ladies and gentlemen.

On the record in C-131341 State of Nevada versus James Chappell.

The record will reflect the presence of Mr. Chappell with his attorneys, the State's attorneys are present, we're in the presence of our jury.

We're going to continue on with the State's case in chief. Mr. Owens, I understand we are going to read some testimony this morning.

MR. OWENS: This is a witness from the prior hearing, Jeri Earnst. I have a reader for her testimony. And we propose to read that from the prior transcript.

THE COURT: All right.

THE CLERK: You do solemnly swear to faithfully and accurately read the response set forth in this transcript, so help you God.

THE READER: I do.

THE COURT: Jeri, J-E-R-I -- Earnst, E-A-R-N-S-T, having been duly sworn testified as follows.

Mr. Owens.

BY MR. OWENS:

Q. Will you state your name, please.

A. My name is Jeri Earnst.

Q. Please spell your name for the record.

A. Jeri, J-E-R-I, last name Earnst, E-A-R-N-S-T.

Q. Are you employed?

A. Yes, I am.

Q. What is your business or occupation?

A. I'm a police officer with the City of Tucson.

Q. Officer Earnst, how long have you been employed with the Tucson Police Department?

A. With the Tucson police department, slightly over 17 years, with a total of 20 years, plus, of law enforcement now.

Q. 20 years, plus, in all?

A. Yes, sir.

Q. Were you an officer with the Tucson police department in Tucson, Arizona on February 23rd, 1994?

A. Yes, I was.

Q. On that date did you have occasion in the City of Tucson to make contact with a citizen identified to you as Debra Panos?
A. Yes, I did.
Q. Where is it that you made contact with Ms. Panos?
A. That would be at Fry's supermarket. A grocery story at 16th and Ajo.
Q. 16th and?
A. A-J-O.
Q. Ajo, I'm sorry. I went to school there.
Approximately what time was it that you made contact with Ms. Panos at that intersection?
A. That would be about 9:30 at night, when we actually arrived at that location.
Q. You said it was at a store?
A. Yes.
Q. You said it was Frys?
A. Yes.
Q. Will you spell that also.
A. F-R-Y-S.
Q. What was your purpose of making contact with Debra Panos?
A. I had been advised by an officer at that works in an off-duty capacity at that location that he had

a domestic violence victim at that location that needed a uniformed officer to respond.
Q. Who was the officer you spoke with that was off duty?
A. That was Ed Niekowski.
Q. Will you spell Niedkowski, please.
A. No.
Q. Would N-I-E-D-K-O-W-S-K-I be pretty close?
A. Okay.
THE COURT: Two tries is all that you get.
BY MR. OWENS:
Q. As a result of conversation you had with the off-duty officer did you then contact Ms. Panos?
A. Yes, I did. She was present when he was relating the information to me as to what -- how he'd been contacted by her.
Q. So you responded to the location of the Frys store and an off-duty officer and the alleged victim were both at that location?
A. Yes, sir.
Q. Inside or outside the store?
A. Outside the store.
Q. Did you then conduct some sort of interview of Debra Panos?

A. Yes. I then walked her away from the crowd and over to where I had parked my vehicle to speak with her in private.
Q. Tell us what occurred at that time?
A. She related to me that --
MR. SCHIECK: Object.
BY MR. OWENS:
Q. Before you go into what she related, will you describe how she acted when you walked the short distance away?
A. She was standing off and not doing anything at first, when Officer Niedkwoski advised me of what had happened I then needed to speak with her to determine whether I had enough to pursue this for an investigation or an arrest.
Q. So you apparently went off a short distance with her?
A. Yes, I did.
Q. What I'm asking you is when you went a short distance away and the two of you began to talk one-to-one, how did she act?
A. She started crying.
Q. How long did you spend talking with her?
A. I was with her out there probably 20 minutes, maybe 25 before we went.

Q. You said that she started crying. Did she cry throughout the interview?
A. Yes, she did.
Q. Was she, to you, obviously upset?
A. Yes, she was.
Q. What, if anything, in addition to the crying caused you to conclude that this individual was upset?
A. She was afraid. She did not want to go back. I asked her --
MR. SCHIECK: I'm going to object to hearsay and to lack of foundation for excited utterance.
MR. OWENS: I think we have shown a foundation, your Honor.
MR. SCHIECK: We object to lack of foundation. We don't know how much time passed since the actual event.
THE COURT: That would be my next concern.
BY MR. OWENS:
Q. We will address that. Did you learn in connection with the investigation when the alleged event had occurred?
A. At approximately half hour before my arrival at Frys, which makes it right around 9:00 o'clock.
Q. So it was your understanding that you were

speaking with a lady about thirty minutes after the event had happened?

A. That's correct.

MR. SCHIECK: Defense would object. Our position is that thirty minutes is clearly enough time for the victim to reflect on what has happened, which takes the statement that she makes outside the excited utterance rule.

THE COURT: Case law seems to clearly indicate that the time frame is acceptable for the admission of a statement of excited utterance under NRS 51.095.

MR. OWENS: Thank you.

BY MR. OWENS:

Q. You testified when you began to talk with her she started to cry?

A. Yes, she did.

Q. Was she emotional throughout the interview?

A. Yes, she was.

Q. What did you ask her and what, if anything, do you remember her saying to you?

A. I asked her what happened. She said that she had a fight with her boyfriend. This was her live-in boyfriend, father of her children. That she had come home

and found that he had sold the new dresser that she bought for her daughter, and she was very upset about that and confronted him about it. She had described him -- that he had hit her, not in any specific area, but had knocked her to the floor.

Q. She told you that her boyfriend hit her and knocked her down?

A. That's correct. Then she stated that when she was trying to get up he kicked her several times in the leg and her right leg was extremely sore.

Q. Did she complain to you at that time that the leg was sore still?

A. Yes, she did. She did refused medical attention.

Q. Did she continue to be emotional as she was giving you this account?

A. Yes, she was.

Q. You said that she was crying?

A. Yes, she was.

Q. Did you see tears or her face?

A. Yes.

Q. Do you know how it happened that the police were contacted?

A. She made -- she had driven from the trailer. When she grabbed the kids and got in the car and left, had

driven straight to Frys because of the fact that she knew an off-duty officer worked at that location and that specifically what she had done up there to do is go up there and make contact with him.

Q. The off-duty officer apparently had a second job at Frys store?

A. Yeah. They employ us in our police capacity to work just strictly in that particular function that evening.

Q. Did Ms. Panos identify to you the name of her boyfriend?

A. She did.

Q. Who had committed the acts of violence upon her?

A. Yes, she did.

Q. Did you learn where it was that they lived?

A. Yes, I did.

Q. What was the address that you listened?

A. 1655 West Ajo, I think it was space number 80, if I recall properly.

Q. As a result of the information that you had learned from Ms. Panos, did you respond to 1655 West Ajo, space 80?

A. Yes, I did, along with another officer.

Q. How soon after the interview of Debra Panos was it?

A. Immediately at the conclusion where I left her with Officer Niedkowski there at Frys. She did not want to go near the trailer while he was still there.

Q. You mentioned earlier she expressed being afraid of the boyfriend?

A. That's correct.

Q. Did it seem to be genuine fear to you. as you observed her manner?

A. Yes. She would not get in the car. I asked her if she wanted to show me where it was or give me the keys to get in the door, and she said that she would not go back over there.

Q. You said that you were contacted by some other officers or other officers?

A. One other officer.

Q. Who was the other officer?

A. Mark Vernon.

Q. Vernon?

A. Yes.

Q. V-e-r-n-o-n?

A. That one I can spell. Yes.

Q. I take it you and Officer Vernon proceeded to the address she had given you?

A. That's correct.
Q. Did you make contact at that location with an individual identified as James Chappell?
A. Yes, I did.
Q. Explain what happened when you approached the residence?
A. He was sitting inside watching TV.
Q. Could you see into the trailer?
A. Yes, I could. And I looked inside to observe that he was sitting inside watching TV, and we knocked a couple of times first and announced we were the police and he finally said just come in. He didn't ever get up from the couch to come out and let us in.
Q. Did you observe anyone else in the trailer?
A. No, I did not.
Q. Could you actually see that as you waited at the front door the individual that was inside was simple watching television?
A. That's what it appeared that he was doing. The TV was on, and he was sitting in front of it look at it.
Q. Did Mr. Chappell seem to be upset?
A. Well, he was when the police were there, but --

Q. Upset by the arrival of the police?
A. That's correct.
Q. Did you explain why you were there?
A. Yes, I did.
Q. Did he make any type of acknowledgment regarding the incident?
A. When I was reading over my report on the slip that I had for the booking, it says admissions made, I've got, yes, circled. I don't recall what was said.
Q. You do not recall the specifics?
A. Not specifically.
Q. Was he taken into custody?
A. Yes, he was.
Q. For what, domestic battery?
A. Yes. And he also had two warrants.
Q. And as far as you know from the cursory note written on your booking report, there was some acknowledgment by the defendant in connection with your contact with him that he had done something to her?
A. That's correct.
Q. May we have the courts indulgence.
What do you remember about the demeanor of the about that you subject, Mr. Chappell, that evening?
A. Extremely cocky.
Q. You sad what?

A. Extremely cocky.
Q. What do you mean by that?
A. It was like all right, your here, what do you got to do, you know, let's get it done and go away. No, it didn't seem there was any type of surprise that we were there. It was just like he didn't even care enough to get off the couch and let us in.
Q. Officer Earnst, while you were still having contact with the victim, Debra Panos, did you give her any type of advise about calling 911, or he getting in touch with police?
A. Yeah. I advised her that if she felt like she needed to talk she could call me. I provided her my pager number, which is always on and told her if she didn't want to call 911, based on the fact that's what she did for a living, that she could call me and I would see if there was something I could do to help her out or get her into a shelter away from the situation, whatever she needed.
Q. So you certainly did offer help -- to help her out?
A. Yes, sir.
Q. You gave her your pager number?
A. Yes, I did.
Q. Did she ever call you back after that --

A. No, she didn't.
Q. -- and ask you to assist?
A. No.
MR. OWENS: Thank you. That concludes direct, your Honor.
THE COURT: Cross.
MR. SCHIECK: Thank you.
BY MR. SCHIECK:
Q. Officer Earnst, you're still with the Tucson Police Department?
A. Yes.
Q. And you work how many days a week?
A. Kind of depends. I'm at a different function now.
Q. Since this time back in 1994, when this happened, you have probably responded to how many calls?
A. Shortly after that I went into the current assignment I'm in, so I haven't responded to that many call since.
Q. Do you ever find that you have responced to so many calls in the past that they tend to run together?
A. I have had those nights.
Q. Do you rely a lot on your officer reports to remember what happened?

A. Some of it, unless there's something special that stands out in my mind.
Q. Apparently this case stood out in your mind?
A. She was one of our employees, yes.
Q. I would like to just show you one thing real quickly. I think this is your report. Is there any mention in your report that she was actually crying during the time that you were talking her? It did indicate that she was crying earlier when she got hit by James, is there anything in your report about her crying at that time?
A. No.
Q. So this is something that you remembered, but you do not include in your report?
A. I remember thinking how good she was holding herself together while she was talking to the other officer.
Q. So apparently she contacted Officer Niedkowski first?
A. Right.
Q. And after she talked to the officer this case, do you know how long she talked to him?
A. I believe he called us at 21:28. I think that she must have got there about ten minutes prior.
Q. I don't think in military terms, like

9:30?
A. 9:28, and I arrived at 9:30.
Q. So what time do you estimate the actual act of hitting on her occurred?
A. Well, that's what she told me it was right at 9:00 o'clock.
Q. Roughly 9:00 o'clock?
A. Right.
Q. So you started talking to her about what time?
A. 9:30.
Q. How long did you talk to her?
A. Probably 25 minutes.
Q. I'm sorry?
A. About 25 minutes -- 20, 25.
Q. You testified here that she refused medical care; is that correct?
A. That's correct.
Q. In your mind is there a difference between refusing medical care and not requiring medical care?
A. It would be hard to tell. I have no way to look below the skin, you know. That's something an individual would have to determine.
Q. In your officer's report did you indicate that she refused medical care, or her wounds did not

require medical care in your report?
A. I said that she did not. The victim was complaining of pain in her right leg, but do not require medical attention. That's her words, not mine. I can't make that determination for people.
MR. SCHIECK: Thank you very much. No further questions.
THE COURT: Redirect.
MR. OWENS: No redirect, your Honor.
THE COURT: May this witness be discharged?
All right. Thank you.
THE COURT: Thank you, ma'am. You may step down. It's my understanding we're going to do another reading at this time.
MS. WECKERLY: We have one live witness we'll put on.
THE COURT: All right.
THE CLERK: You do solemnly swear the testimony you are about to give in this action shall be the truth, the whole truth, and nothing but the truth, so help you God.
THE WITNESS: I do.
THE CLERK: Be seated. State and spell your name for the record.

THE WITNESS: Officer Dan Giersdorf, G-I-E-R-S-D-O-R-F.
BY MS. WECKERLY:
Q. How are you employed, sir?
A. I'm a police officer with LVMPD.
Q. How long have you worked for Metro?
A. Just over 14 years now.
Q. And were you working for Metro in January of 1995?
A. Yes, I was.
Q. I would like to direct your attention to January 9th of 1995. On that date were you dispatched to a mobile home at 839 North Lamb?
A. Yes, I was.
Q. That's obviously in Las Vegas, Clark County, Nevada?
A. Yes, ma'am.
Q. Would that have been the Ballerina Mobile Home Park?
A. Yes, it was.
Q. Do recall about what time you arrived at the location?
A. About 11:30 at night. Roughly in that area.
Q. Were you the first agency to respond, or had

someone else responded ahead of you?
A. Fire and medical had already been dispatched and arrived prior to me arriving. I was first patrolman on the scene.
Q. So there was an ambulance there, I take it?
A. Yes, ma'am.
Q. When you first got to the location what did you do first?
A. Upon arrival it's a long approach to the trailer where I was, and as I drove in I could see the ambulance and I could see two med teches outside and a female being loaded in the back of an ambulance. So when I responded I drove right up to the ambulance and contacted them first.
Q. When you made contact with the ambulance, did you speak to the woman who was being loaded into the ambulance, I guess, on a gurney?
A. Yes, I did.
Q. Can you describe her appearance physically what you saw her?
A. When I saw her she was strapped down onto the bed with the safety restraints on. She had the white sheet pulled up to about mid level of her chest. She was laying on her back. Her face was swollen and covered in

blood. And the same with her hair. It was all up over her head on the pillow and it was soaked with blood.
Q. Could you see if she had -- obviously there's blood -- but could you see what her injuries where on her face?
A. Yes. She had two really predominant injury on her face at the time. She had a large cut that was over her eye and her nose was swollen to a point that it looked like it just covered the front half of her face.
Q. So her nose would have been extremely enlarged because of swelling?
A. Yeah. Her nose would have been about the size of my closed fist at the time on her face. It was that swollen.
Q. And also you mentioned there was a laceration, a bleeding injury on the top of her eye?
A. Right. It was over -- I believe it was over her right eye. There was a lot of blood coming out of her head and face still.
Q. Did you speak with this woman?
A. Yes, I did.
Q. What did she tell you?
A. She stated that she had gotten into a fight with her live-in boyfriend and that he had hit her in the face with a cup.

Q. When she was speaking with you, what was her demeanor emotionally?
A. She was extremely upset, crying, heavy breathing, a bit irrational. You could tell she was emotionally distraught. And she had trouble just trying to get her message across to me.
Q. Was it hard for her to talk because of being emotional or because of her injury?
A. The emotional played a part. But I believe because of the injuries it made it hard to breathe and speak and everything she said was muffled. Kind of a small gurgle sound you get from that type of a face injury.
Q. So from the bleeding from her nose?
A. Yes, ma'am.
Q. After she related to you that her boyfriend had hit her, did you attempt to make contact with the boyfriend?
A. Yes, I did.
Q. And was he out in the ambulance area at that point with her?
A. No, ma'am. I asked her initially where he was, and she said she believed he was still within the mobile home -- in the trailer within the mobile home park. At this time I made contact with him inside the trailer

still.
Q. How did you go about trying to make contact with him?
A. Walked up to around the side of the trailer, the door was open to the trailer. Knocked on the door and you can look into the open door, and I could see the male half sitting in the living room with his back to me watching TV.
Q. Did he appear to be by himself inside the trailer watching TV?
A. Yes, he was alone.
Q. When you were knocking did you announce you were a police officer?
A. Yes.
Q. Were you speaking in a fairly audible loud voice?
A. Yes.
Q. After you knocked and announced you were a police officer, what did the individual do that you were trying to talk to?
A. Initially, I stepped up to him and I asked him what happened, and he was just sitting in his chair eating a bowl of cereal. And he replied to me, something to the effect, I hit that bitch in the face.
Q. When you were speaking to him, how would you

describe him emotionally?
A. Extremely turned off. Extremely calm and cold. Almost like he was just -- a casual conversation to him, but with no kind of emotion at all in his voice.
Q. Did he ever express to you concern about the woman in the ambulance?
A. None whatsoever.
Q. I take it you arrested him for this incident?
A. Yes, I did.
MS. WECKERLY: Thank you. Your Honor, I'll pass the witness.
THE COURT: Thank you. Mr. Patrick or Mr. Schieck.

CROSS-EXAMINATION

BY MR. PATRICK:
Q. Good morning, officer.
A. Good morning, sir.
Q. You testified at James' last trial?
A. Yes, I did.
Q. Did you have a chance to review your testimony before today?
A. Yes.
Q. Did you have a chance to review any other records regarding that incident?

A. I reviewed the temporary custody record, the written declaration of arrest, and the dictated arrest report.
Q. Did you review the records from Mercy Ambulance?
A. No. I don't have access to those.
Q. Now, I believe you just said that Debra told you that James hit her with a cup?
A. Yes.
Q. Did you locate a cup?
A. Yes, I did.
Q. That was booked into evidence?
A. I don't believe it was booked into evidence.
Q. What did you do with it?
A. We just left it there.
Q. Did you ask Debbie how long her and James had been together?
A. Yes, I did.
Q. What did she tell you?
A. She told me that they'd been together in a relationship for approximately 9 years.
Q. Did she mention if they had any kids together?
A. Yes, she did. She told me they had three

kids in common.
Q. Were the kids in the ambulance?
A. The kids weren't at the residence that night.
Q. Now, you testified today that James told you something about, he hit that bitch in the face?
A. Yes, sir, I did.
Q. That was not part of your testimony last time, correct?
A. I don't believe it was. I don't think I was asked that question.
Q. Now, when you went in and talked to James was he combative?
A. Absolutely not.
Q. He was cooperative?
A. Extremely.
Q. Did you have an opportunity to perform any field sobriety tests on him?
A. We don't normally do field sobriety tests on a domestic arrest.
MR. PATRICK: That's all I have.
THE COURT: Ms. Weckerly.

REDIRECT EXAMINATION

BY MS. WECKERLY:
Q. Sir, over the years did this incident stick

out in your mind?
A. Yes, it did, extremely.
Q. Why is that?
A. At the time of this arrest I had only been on the department less than two years. I was only on the street for a year. But the reason it sticks out so much in my mind is because I make domestic violence arrests pretty much daily. It's a really common crime. But I have never met anybody that was so cold and emotionally turned off over that type of battery in my life.
So the reason that this arrest sticks out the most is the way his demeanor was, cold. He was -- it chilled me, and I still think about it and still see it every day.
MS. WECKERLY: Thank you. That's all, your Honor.
THE COURT: Mr. Patrick.
MR. SCHIECK: Nothing else, your Honor.
MR. OWENS: Court's indulgence a moment.
MS. WECKERLY: May I approach, briefly.
THE COURT: Sure.
BY MS. WECKERLY:
Q. Sir, having shown defense counsel what's been admitted as State's Exhibit D-9, does this appear to be a medical record from UMC -- University Medical

Center?
A. That's what it looks like to me.
Q. Just looking at the admit date, does it appear to be 1/9/95 the same date as this incident we've just been discussing with you?
A. Yes, it does.
MS. WECKERLY: Thank you. No other questions, your Honor.
THE COURT: Thank you. Mr. Patrick.
MR. PATRICK: No, Judge.
THE COURT: All right. Officer, thank you for your time. You may step down.
THE WITNESS: Thank you, Judge.
THE COURT: The State may call their next witness.
MR. OWENS: We have another reader for Officer Williams, your Honor.
THE COURT: All right.
THE CLERK: You do solemnly swear to faithfully and accurately read the responses set forth in this transcript, so help you God.
THE READER: I do.
THE COURT: The name is not on this transcript for the record. What's the name of the person testifying.

MR. OWENS: Allen Williams.
THE COURT: Allen Williams. Thank you.
All right, Mr. Owens or Ms. Weckerly.
BY MR. OWENS:
Q. Sir, what is your occupation and assignment?
A. I'm a police officer assigned to patrol with the Las Vegas Metropolitan Police Department.
Q. How long have you been a police officer?
A. Approximately 5-and-a-half years.
Q. What divisions have you worked on in your 5-and-a-half years?
A. Patrol.
Q. On June 1st of 1995, at approximately 10:08 p.m., were you dispatched by a 911 call to 839 North Lamb, space number 125?
A. Yes, I was.
Q. That's the Ballerina Mobile Home trailer park?
A. Correct.
Q. That's here in Las Vegas, Clark County, Nevada?
A. Yes.
Q. When you arrived at that location did you come into contact with a person by the name of Debra

Panos?
A. Yes, I did.
Q. Can you describe what her demeanor was like when you made contact?
A. She appeared to be pretty frighten and crying.
Q. As she was crying did she tell you why she summoned you?
A. Yes, she did.
Q. Why was that?
A. She stated that she had gotten into an argument with her boyfriend. I don't recall what the argument was over. He began yelling at her. He became angry and threw her down on the bed. He then climbed on top of her, pinning her arms down with his knees and pulled out a knife and held it to her throat and began threatening her with it.
Q. Did something happen that caused him to stop threatening her with this knife?
A. She stated there was a knock on the door and that's when he stopped.
Q. Was that a knock by her roommate?
A. I don't recall off-hand.
Q. Did you also come into contact with her boyfriend?

A. Yes, I did.
Q. What was his name?
A. His name was James Chappell.
Q. You see him here in court today?
A. Yes, I do.
Q. Can you point to him and describe an article of clothing for the record?
A. The gentleman in the grey suit.
Q. What color shirt is he wearing?
A. Yellow.
MR. OWENS: Your Honor, may the record reflect the witness identified the defendant.
THE COURT: It will.
BY MR. OWENS:
Q. Did Debra tell you how much time had passed between the time the call was made to the police department and the time you arrived?
A. It was a brief amount of time. I would have to refer to my report to tell you exactly.
Q. Would you like to refer to it --
A. Yes.
Q. -- for when the incident occurred prior to your arrival?
A. Approximately 5 to 10 minutes.
Q. Prior to your arrival?

A. Yes.
Q. Did you arrest the defendant for battery domestic violence?
A. Yes, I did.
Q. Did you transport him to the city jail?
A. Yes, I did.
Q. That would conclude direct, your Honor.
MR. PATRICK: No questions, your Honor.
THE COURT: All right. May the witness ne discharged.
MR. OWENS: Yes, Judge.
THE COURT: The witness will be excused.
Thank you, sir.
THE COURT: For purposes of the record, the testimony will be marked as a court exhibit and I'll write Allen Williams name at the top of it so that we know who this is.
MR. OWENS: Thank you.
THE COURT: The State may call its next witness.
MR. OWENS: The next thing we want to do is read the testimony of the Defendant from the former trial in this matter. We have a reader here to read the part of the Defendant.
THE COURT: Come up Mr. Stanton.

MR. OWENS: May we approach, your Honor.
THE COURT: Yes.
(Discussion held at the bench.)
THE CLERK: You swear to faithfully and accurately read the responses set forth in this transcript, so help you God.
THE READER: I do.
THE COURT: Let me clarify some things. This is a long transcript, that's why I'm giving you all copies so you can read along. It's not an exhibit at this time. It's not going to go back with the jury when you deliberate.
So you are still going to obviously have to be listening to, if you're are not going to have the transcript when you go back.
Thirdly, the State is still in their case in chief here, so they're the ones proffering the use of this. But the testimony actually occurred with the defendant being examined first by his attorney, so Mr. Schieck or Mr. Patrick will be reading direct examination first and the State will read the cross-examination.
Mr. Schieck or Mr. Patrick.
MR. SCHIECK: Thank you, your Honor.
BY MR. SCHIECK:

Q. James, could you state your name for the record and spell your last name, please.
A. James Chappell, C-H-A-P-P-E-L-L.
Q. James, where are you from originally?
A. Lansing, Michigan.
Q. Did you grow up in Lansing, Michigan?
A. Yes, sir.
Q. Where did you meet Debra Panos?
A. J.W. Sexton High School.
Q. You were a student there?
A. Yes, sir.
Q. Was she a student there?
A. Yes, sir.
Q. How old were you when you met her?
A. 16.
Q. What happened when you met her?
A. We had about a 5 minute conversation. She gave me her phone number and that was it. The first time we seen each other.
Q. What do you mean, that was it?
A. The bill had rank for us to go to class, so we couldn't talk for that long.
Q. Did you all become involved with each other?
A. Yes, sir.

Q. Did you become lovers?
A. Yes, sir.
Q. And you subsequently had children with her?
A. Yes, sir.
Q. When did you all have your first child?
A. April 23rd, 1988.
Q. What was the name of that child?
A. James Monte Panos.
Q. Where was that child born?
A. Sparrow Hospital, in Lansing, Michigan.
Q. Were you and Debra living together at that time?
A. Not when she was pregnant and had the child, no.
Q. Did you love her at that time?
A. Yes, sir.
Q. Did she love you?
A. Yes, sir.
Q. She was a white person, correct?
A. Yes, sir.
Q. And you're black?
A. Yes.
Q. How did her family react to your relationship with her?

A. They hated it.
Q. Did they hate the relationship, or did they hate you, or both?
A. Both.
Q. Did you ever get along with them when they were in Lansing?
A. Never.
Q. Did you have much contact with her parents there in Lansing?
A. We came in contact a couple of time.
Q. What kind of contact would you have with her parents?
A. They caught me in their house.
Q. What were you doing in their house?
A. Staying the night with Debbie.
Q. Did Debbie want you to spend the night with her?
A. Yes, sir.
Q. And you wanted to spend the night with her?
A. Yes.
Q. Did you graduate from high school in Lansing?
A. No, I did not.
Q. What happened to your education?

A. I got suspended a couple of times and my grandmother took me out of there and made be go to adult education.
Q. Did you ever end up finishing high school or getting a GED?
A. No.
Q. What were your plans in terms of a job?
A. I had many jobs in Michigan.
Q. What kind of jobs did you have?
A. Most of them were restaurant jobs. I had a janitorial job at the high school at one time.
Q. What kind of restaurant did you work -- did you do?
A. Would you like me to names the restaurants.
Q. If you can.
A. I work at Taco Bell, Ponderosa Steak House. I worked in the cafeteria at the adult education high school, a restaurant called Qupies, a restaurant called Chedders.
Q. These are all in Lansing?
A. Burger King.
Q. These are all in Lansing?
A. Yes, sir.
Q. Did you have trouble keeping your work at these places?
A. Yeah. I had some problems.
Q. How come you had a problem keeping your jobs?
A. I guess it was the friends I was harging around with.
Q. What kind of friends did you have?
A. Most of them were drug dealers.
Q. Were you using drugs during those times yourself?
A. Yes, sir.
Q. How about Debra, was she using drugs?
A. She said she tried marijuana once, but she didn't like it and I've never ever seen her do no drugs.
Q. Did she know that you were doing -- using drugs?
A. Yes, she did.
Q. Did her family know that you were doing drugs?
A. I don't think in Michigan. I don't think they -- I don't think they knew that.
Q. Now, her parents, both her mother and father, lived in Lansing, correct -- is that right?
A. Yes, sir.
Q. There came a time when her parents moved away?
A. Yes.
Q. Where did her parents move to?
A. Tucson, Arizona.
Q. What did Debbie do -- Debra Panos do when they moved off to Arizona?
A. She stayed with me because they wouldn't let her keep the child. They said if she didn't give up the child for adoption she couldn't live with them.
Q. Did they stick with that position or not?
A. For a couple of months.
Q. Then what happened?
A. They sent for her to come to Arizona.
Q. Did she go to Arizona?
A. Yes, sir.
Q. Do you recall when she went to Arizona, approximately?
A. JP was an infant, so about 2 months. He was about 2 months old, so it was about June of '98 -- '88, I mean.
Q. How did you feel about her going to Arizona with your son?
A. Pardon me?
Q. How do you feel about her going to Arizona with your son?

A. I was extremely hurt, but I wanted the best for her and him so I knew that they would be all right out there with her mother.
Q. She moved to Tucson. Did she keep in touch with you? And when I say she, I mean Debra Panos?
A. She had to sneak around. They put a lock box on the mailbox.
Q. What do you mean they put a lock on the mailbox?
A. She couldn't go to the mail box to get the mail out. They were always around her when she tried to do something.
Q. Could she talk to you on the telephone?
A. She would go to the mall and she would sneak away from them while they were in the store and she would call me from the mall.
Q. Would you ever call her at her house?
A. No.
Q. How come?
A. She wouldn't give me the number.
Q. Do you think she didn't want you calling there when her parents were there?
A. Exactly. Yes, sir.
Q. There came a time when you went down to Tucson and stayed with Debbie; is that right?

A. Yes.
Q. Describe how that happened?
A. Her mother and her step father took our two children. Anthony was born when she came back to me, after she had went out to Arizona the first time. She got pregnant back there and she went back, her mom and her step father drove from Arizona to Michigan with the two children and she sent for me to come out there.
Q. So her parents weren't home?
A. No.
Q. How long were they gone from the house where Debra lived?
A. He were gone for like 2 months.
Q. And you went out and stayed in that house while they were gone?
A. Yes, sir.
Q. How did you get to Tucson?
A. Plane.
Q. Who paid for the ticket?
A. Debra Panos.
Q. Where did you fly out from?
A. Detroit.
Q. You recall the airline?
A. Southwest Airlines.
Q. Where did you fly to?

A. Phoenix, Arizona.
Q. How did you get from Phoenix to Tucson?
A. A shuttle bus.
Q. So you stayed in the Panos house -- excuse me. So you stayed in the Panos' home in Tucson?
A. Yes, sir.
Q. How long did that go on?
A. For about 2 months.
Q. Did there come a time when you all -- when you all had a second child?
A. She had Anthony in Tucson.
Q. I apologize, but did Debra previously come back and visit you in Michigan?
A. Yes, she did.
Q. Is that when she got pregnant with your second child?
A. Yes, sir.
Q. Sorry, when was your second child born?
A. February 15th, 1990.
Q. And that child's name?
A. Anthony Michael Panos.
Q. So you're staying in the house with Debra and neither of your two kids are there; is that correct?
A. No, sir.
Q. Where are the two kids?

A. Her mom and step dad were on their way back to Michigan with them. They traveled with the two children.
Q. Were you intending to stay in Tucson with Debra at this time or not?
A. Yes, sir.
Q. What did you guys do when her parents returned?
A. He had gotten me a furnished studio apartment before they arrived.
Q. And is that where you started living?
A. Yes, sir.
Q. Did you get any kind of job?
A. Yes, sir.
Q. Where did you work?
A. I worked at the Smugglers in the hotel.
Q. What did you do there?
A. I was a dishwasher and a buser.
Q. How long did you keep that job?
A. About 4 months.
Q. Why did you lose that job?
A. Because James junior told his grandmother that I was out there and she kicked Debbie out and Debbie came to stay with me at the studio, and a neighbor downstairs told the office that there was a whole entire

family in the studio so we had to get a two bedroom apartment. And Debbie's job was better than mine, so I had to stay home and watch the children.
Q. Where was she working at that time?
A. The census bureau.
Q. Helping to take the census?
A. Yes, sir.
Q. Now there came a time when you left her, didn't you, and went back to Michigan?
A. Yes, sir.
Q. Why did you leave?
A. Because her mother and her step father.
Q. What do you mean by that?
A. They were always in our business.
Q. Had you still not reconciled with them?
A. No.
Q. Did you ever go over and socialize with them?
A. They wouldn't allow Debbie to show me where they lived, and I never even tried to find out where they lived.
Q. But you had stayed out there, didn't you?
A. They had moved after they came back. They moved to a different house.
Q. So you eventually went back to Michigan?

A. Yes, sir.
Q. When you went back to Michigan, how did you get their?
A. Plane.
Q. How did you afford that?
A. Debra paid for it.
Q. Why is it that Debra keeps paying for things?
A. She would always say she was going to do it and I didn't argue with her. I didn't argue with her and try to change her mind.
Q. Did you go back to Tucson after awhile in Michigan?
A. Yes, sir.
Q. Do you recall when you went back there?
A. It was in '91 sometime.
Q. And this time why did you go back there?
A. Because Debbie had begged me to come back there.
Q. You guys were keeping in touch still?
A. Yes, sir.
Q. How were you keeping in touch?
A. She had her own place where she could call any time she wanted t. She called a lot. We talked a lot.

Q. Were you glad that she was keeping the relationship alive?
A. Yes, sir, very much.
Q. When you went back what happened?
A. I got a job.
Q. Where at?
A. Ponchos Mexican Buffet.
Q. What were you doing there?
A. Prep cooking.
Q. What was your plan now that you were back in Tucson again?
A. To be with my woman and my children and get married.
Q. How come you didn't get married?
A. Because we planned on getting married in Las Vegas.
Q. That was a long-term plan?
A. Yes, sir.
Q. Could you afford to just come up there to Las Vegas and get married?
A. Not at that time.
Q. Were you planning on staying in Tucson, now, permanently or not?
A. Yes, sir.
Q. How did you get Debra pregnant again --

excuse me. Did you get Debra pregnant again?
A. Yes, sir.
Q. When did she have her third child?
A. June 26, 1992.
Q. Which child was this?
A. Chantelle Panos.
Q. Had her parents become more accepting of your relationship with their daughter after three children?
A. I remember calling her mother after the baby. I watched her have the baby. She was the only one I'd seen come out. I called her mother and we talked for a little while. Her mom came around after that.
MR. SCHIECK: We're going to skip the recess.
THE COURT: Top of page 31, ladies and gentlemen.
BY MR. SCHIECK:
Q. James, I think we have you in Tucson right now. You had your third child with Debra, and you're live with her there; is that right?
A. Yes, sir.
Q. Now we heard a lot of testimony during this trial about your job situation. You testified you had some jobs. Did you have jobs in Tucson during this period

of time?
A. Seven exactly.
Q. Seven different jobs?
A. Yes, sir.
Q. Why so many different jobs?
A. Some because of our baby sitting situation. Some because they gave me lousy raises and a couple I just didn't like.
Q. Was Debra working during this time?
A. Yes, sir.
Q. Did Debra pretty much always have a job?
A. Yes, sir.
Q. Was she the one that always brought in the money other than yourself?
A. Yes, sir.
Q. Were you using drugs while were you in Tucson?
A. Yes, sir.
Q. Were you doing drugs more when you were in Michigan or about the same?
A. I would say about the same, sir.
Q. You testified that you smoked, I think it was marijuana, in Michigan; is that correct?
A. Yes, sir.
Q. Had you been doing cocaine in Michigan?

A. I did it a couple of times, yes.
Q. Did you start doing cocaine in Tucson?
A. No. I did it in Michigan first.
Q. But did you do it in Tucson also?
A. Yes, sir.
Q. Did this interfere much with your work?
A. No.
Q. You never lost a job because of your drug problems?
A. No.
Q. We heard testimony during the State's case regarding a battery in Tucson where you and Debra were living in a trailer and she went to either 7/11 or Circle K or something and told them that she had been beaten up and the police came and arrested you. Did that happen?
A. Yes, sir.
Q. Why did it happen?
A. Because I had returned a dresser that she had bought. I returned it back to the store.
Q. Why did you do that?
A. Because I needed money at the time.
Q. What did you need money for?
A. For some drugs.
Q. She got mad at you?
A. Yes.

Q. And you reacted by hitting her?
A. We argued for a little while, and she said a couple of things that made me upset.
Q. How do you feel about the fact that you hit her?
A. Extremely bad.
Q. You guys eventually decided to leave Tucson a move to Las Vegas?
A. Yes, sir.
Q. Now somebody says that she came to Las Vegas and you followed her to Las Vegas, is that true or false?
A. No, sir.
Q. How did you guys wined up coming to Las Vegas?
A. We came and visited first for a week. Me, her, and Chantelle stayed at Circus Circus, and we both looked for a job. We both looked for a home together.
Q. Did you all find a place to stay?
A. Yes, sir.
Q. Where did you find a place?
A. 839 North Lamb, space 125.
Q. When did you all actually move to Las Vegas?
A. If I'm not mistaken it was October 1st,

exactly.
Q. Of what year?
A. Of 1994, sir.
Q. Did you all come up here at the same time?
A. Yes, sir.
Q. How did you come up here?
A. We flew out of Tucson on Reno Air.
Q. You flew directly to Las Vegas?
A. Yes, sir.
Q. Did you have a car at that time?
A. Yes, sir.
Q. Where was the car?
A. We had a couple drive our U-Haul, and the car was on the back of it. They drove it from Arizona to Las Vegas. They were supposed to meet us here.
Q. Why did you all move to Las Vegas from Tucson?
A. One reason was because her job. They started getting in our private lives, trying to control her private life. She was upset about that and her mother was the one that suggested coming to Las Vegas.
Q. Do you know why Las Vegas was mentioned?
A. We had two choices, Las Vegas or Lansing, Michigan.
Q. Why Las Vegas?

A. Her mother talked her into coming to Las Vegas. It was more her mother's decision than it was hers.

Q. I'm going to show you a photograph the State introduced as State's Exhibit No. 1. It show the trailer where Debra died. Is that the trailer that you and she lived together in?

A. Yes, sir.

Q. I think we're going to post the exhibits as we go along, your Honor?

THE COURT: All right.

MR. SCHIECK: For the record, your Honor, I'm going to put number one up.

THE COURT: Thank you.

BY MR. SCHIECK:

Q. Was that your home in Las Vegas?

A. Yes, sir.

Q. That's where you lived from roughly October 1st of '94 until the time that she died, except for the times you were in jail?

A. Yes, sir.

Q. Did you find work in Las Vegas?

A. Yes, sir.

Q. Where did you work?

A. Ethel M. Chocolate Factory.

Q. Where is that?

A. Out there around Sunset.

Q. How long did you work out there?

A. About a month and a half.

Q. How come you lost that job?

A. Because day care had cost too much when we first got here and Debra was working two jobs. I told her I would stay home with the kids. I called them three times and they terminated me.

Q. They fired you?

A. Yes, sir.

Q. Did you start doing drugs here in Las Vegas?

A. Yes, sir.

Q. Did you start hanging out at the Vera Johnson projects doing drugs there?

A. Yes, sir.

Q. Did that interfere with your ability to be a good father?

A. No, it did not.

Q. Did it interfere much with your relationship with Debra?

A. I'm sure it did close to the end, but not at the beginning when we got here.

Q. Going back for just a second. Dina Freeman

testified about this phone conversation while you were still living in Arizona where she's got you saying in the background to Debra, I'm going to do an O.J. Simpson on your ass. Did you ever say that?

A. Honestly, no. I did not say that.

Q. Did you ever threaten her in front of Dina Freeman or on the telephone?

A. Never. Never. Never.

Q. Did you ever talk about O.J. Simpson in front of Dina?

A. No, sir, I did not.

Q. So she's not telling the truth when she testified to that?

A. No, she lied under oath, sir.

Q. You heard testimony regarding Debra receiving a broken nose on January 9, 1995 here in Las Vegas. Tell us what happened then.

A. We were both in the dining room. I forget what we were talking about. We were talking about doing something together and we got into an argument or something. I'm not sure exactly what it was, and she had went and laid down on the couch. And I was talking to her as she was laying down and she said something back to me, something smart. I don't remember her exact words, but I took a cup. It was like one of those thermal coffee cups

and I threw it and it came over the top of her head and it hit her right here. She got up and she ran to the bathroom. I ran in there after her. She was covering her face. She said I think my nose is broken. I said let me see. She removed her hand and she had a gash right here.

Q. Are you indicating the side of your nose?

A. Yes. Right here.

Q. Was she bloody?

A. It wasn't coming out at that time. It was open, but when I looked at it it looked like it was just a piece of meat right here. You could see in the inside. No blood was gushing out at the time.

Q. Who called 911?

A. I did, sir.

Q. Now, the medical records that were introduced by the State into evidence indicated a remark by Debra Panos that said, she had been beaten before, but never like this. How you do respond to that?

A. I couldn't picture her saying that. I threw a cup. That's all I did. I did not try to hit her in the face. It accidentally hit her in her nose and broke her nose. I'm sorry, but there's nothing I could do about it. I called 911 and got the ambulance there. The police came and they slammed me all over the place, took me to jail in

front of my children in my boxers and my socks. They weren't even listening to me. They thought I was lying. I showed them the cup.

Q. James, you have another allegation that you attacked her on June 1st of 1995. You were arrested again for domestic battery. What happened at that time?

A. Well, Debra had been gone all day the previous day before that and she went to work the next day. After she got off work she went somewhere else, so I didn't see her for a long time. When she came home another friend arrived. I guess they were talking about doing something else. We started arguing and we went in the bedroom and I pinned her down and I showed her a knife. When I realized what -- and when I realized that doing that wasn't going to get nothing out of her, I got rid of it. Claire knocked on the door.

Q. Who is Claire?

A. One of her so-called friends from Arizona.

Q. Was she living with you?

A. Yes.

Q. How long did she live there?

A. I would say approximately 2 months, sir.

Q. Go ahead. I'm sorry.

A. I let Debbie up. She went outside with both Claire and her other friend that was there. And then I

went outside. Then the cops pulled up, and I went to jail.

Q. Did you plead guilty to domestic battery in that case, eventually?

A. Yes, sir.

Q. That was June 1st of '95. How much of the summer did you spend in jail?

A. Could I just tell you the first time I went to jail when I got out when I went back.

Q. Sure, if you want to.

A. First time I went to jail was February 28, 1995 I stayed in jail until May 10. Debbie came and picked me up, took me home. When I got out, there was two friends living there.

Q. When you say two friends, male friends or female friends?

A. Female friends. I went back to jail for that domestic violence on June 1st, 1995, got out June 7th. Claire came and picked me up, took me back home. And we were back together. Then I went back to jail June 26th on Chantelle's birthday -- her third birthday.

Q. When did you get out of jail that time?

A. I didn't get out of jail until August 31st.

Q. Now, from that summer, let's say June 26th,

when you got arrested until the time got released on August 31st, did Debra accept your phone calls?

A. Yes, sir.

Q. How often would you call her, approximately, if you can remember?

A. Sometimes a couple times a day.

Q. Did she ever tell you this relationship was over?

A. Never. Never.

Q. Did anybody else ever tell you the relationship was over?

A. No, sir.

Q. Did you ever call that trailer and get mad because of who answered the phone?

A. Yes, sir.

Q. What was going on?

A. There was numerous different women answering the phone. Sometimes the children would pick up the phone, knock it over, and the phone would just be sitting on the floor and I could hear stuff in the background.

Q. What would you hear?

A. Music, people, voices. Another time there was men answering the phone.

Q. Did you know these men?

A. Absolutely not.

Q. Did that make you mad?

A. Yes, it did.

Q. Why did it make you mad?

A. Because when we moved here Debbie told me that I couldn't answer the phone because her mother would get upset about it. I gave her that respect. And then I turn around and go to jail and there's all kinds of people I don't even know answering our phone, hanging up on me.

Q. How did you feel about the idea of other men being in the trailer when you called your home?

A. I was stunned, hurt, afraid.

Q. What were you afraid of?

A. My children.

Q. What were you afraid of about your children?

A. We had numerous baby sitters in Arizona that wouldn't feed our kids sometimes. Some even hit them.

Q. You say that you would talk to Debra on the telephone. Did she ever come to visit you that summer in jail?

A. Between June 26 and August 31st, is that what you're talking about.

Q. Yes, sir.

A. No, she didn't.

Q. Do you know why she didn't come to visit

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)

APPELLANT'S APPENDIX

Volume 17 of 31

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

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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:

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EXHIBIT 156

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 49478

JAMES M. CHAPPELL

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Appeal from a Judgment of Conviction and Sentence of Death
Eighth Judicial District Court, Clark County
The Honorable Douglas Herndon, District Judge

APPELLANT'S OPENING BRIEF

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08-12894

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I. INTRODUCTION

In this capital case, Appellant James Chappell challenges the constitutionality of his sentence of death, which occurred as the result of a second penalty phase trial which followed a finding of ineffective assistance of counsel for the penalty phase of his first trial. Chappell was convicted of murdering his long-time girlfriend, who was also the mother of his three children. The only aggravating circumstance for the second penalty phase trial was murder committed during the perpetration of a sexual assault. As there was insufficient evidence to establish this aggravating circumstance, the sentence of death must be vacated and a sentence less than death imposed. In the alternative, Chappell is entitled to a new penalty hearing because of the substantial constitutional violations which occurred during the penalty trial. Finally, this Court should revisit two issues previously considered concerning the guilt phase of Chappell's trial based upon new authority which establishes that this Court's prior rulings were erroneous.

II. STATEMENT OF THE CASE

This is a direct appeal from a judgment of conviction, pursuant to a jury verdict, imposing a sentence of death based upon a conviction for one count of first degree murder.

III. STATEMENT OF THE ISSUES

A. Whether Chappell's Conviction For First Degree Murder Must Be Reversed Because The Jury Was Not Properly Instructed On The Elements Of The Capital Offense

B. Whether Chappell's Conviction For First Degree Murder Must Be Reversed Because The Jury Was Not Properly Instructed On The Elements Of Felony Murder

C. Whether Chappell's Sentence of Death Must Be Vacated Because NRS 177.055(3) Is Unconstitutional

D. Whether Chappell Was Entitled To Review By The District Attorney's Death Review Committee

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G. Whether The District Court Erroneously Admitted Presentence Investigation Reports

H. Whether The District Court Allowed Improper Victim Impact Testimony

I. Whether The District Court Erred In Allowing Admission of Chappell's Prior Testimony

J. Whether The State Committed Prosecutorial Misconduct By Making Arguments Based Upon Comparative Worth Arguments

K. Whether The State Committed Extensive Prosecutorial Misconduct

L. Whether 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

M. Whether The Jury's Failure to Find Mitigating Circumstances Was Clearly Erroneous and Requires That the Death Sentence Be Vacated

N. Whether There Is Insufficient Evidence To Support The Sexual Assault Aggravator

O. Whether The Sexual Assault Aggravating Circumstance Is Invalid Under McConnell v. State

P. Whether The Judgment Must Be Reversed Because of Cumulative Error.

IV. PROCEDURAL HISTORY

Appellant James Chappell was charged, on October 11, 1995, via Information with one count each of burglary, robbery with use of a deadly weapon, and open murder with use of a deadly weapon. I ROA 38. The State based its murder charge on alternative theories of felony murder and premeditated and deliberate murder. I ROA 39. On November 8, 1995, the State filed its Notice of Intent to Seek Death Penalty. I ROA 44. It charged aggravating circumstances of murder in the course of a robbery, murder in the course of a burglary, murder while the person was engaged in sexual assault or the attempt thereof, and torture or depravity of mind. I ROA 44-45. Prior to trial, Chappell filed a motion to dismiss several of the aggravating circumstances. I ROA 250. He argued in part that the aggravating circumstance of sexual assault should be dismissed because Chappell was not charged with sexual assault and no evidence was presented during the preliminary hearing that would support the aggravating circumstance. I ROA 256. The State opposed the motion, but did not address the sexual assault issue. II ROA 309-19. The Court denied the motion.

The jury trial began on October 8, 1996, and was presided over by the Honorable A. William Maupin. II ROA 355. The jury was instructed on theories of premeditated murder

and felony murder. VII ROA 1703, 1721, 1722. The premeditation instruction informed the jury that "[p]remeditation 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 as 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." VII ROA 1722. The jury was also instructed on robbery in general and was instructed specifically that 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 fear." VII ROA 1711. On October 16, 1996, the jury returned verdicts of guilty on charges of burglary, robbery and first degree murder. VII ROA 1747-49. No special verdict form was given to the jury, so it is unknown as to whether the jurors relied upon the premeditation theory, the felony murder theory, or both in finding Chappell guilty of first degree murder.

The penalty phase of the first trial began on October 21, 1996. VII ROA 1757. On October 24, 1996, the jury returned its verdicts in which it found mitigating circumstances of murder committed while the defendant was under the influence of extreme mental or emotion disturbance and "any other mitigating circumstances." IX ROA 2126, 2170-71. It found aggravating circumstances of burglary, robbery, sexual assault, and torture or depravity of mind and returned a verdict for death. IX ROA 2127-29, 2167-69. Formal sentencing took place on December 30, 1996. IX ROA 2179. The district court sentenced Chappell to the maximum terms for burglary and robbery with use of a deadly weapon and ordered that those sentences run consecutively to the death sentence. IX ROA 2188.

The judgment of conviction was filed on December 31, 1996. IX ROA 2190. Chappell filed a timely notice of appeal to this Court on January 17, 1997, which was docketed as number 29884. IX ROA 2200. On December 30, 1998, this Court issued its opinion affirming the conviction. IX ROA 2273; Chappell v. State, 114 Nev. 1403, 972 P.2d 838 (1998). This Court concluded that the district court erred in failing to hold a Petrocelli hearing, but found admission of evidence uncharged misconduct to be harmless. Id. at 1406,

972 P.2d at 840. It also concluded that there was sufficient evidence to support the aggravating circumstances of burglary, robbery and sexual assault, but insufficient evidence to support the aggravating circumstance of torture or depravity of mind. Id. at 1407, 972 P.2d at 841. In addressing the robbery aggravating circumstance, this Court noted Chappell's argument that the evidence showed that he took Panos's car as an afterthought and therefore could not be guilty of robbery, but rejected that argument because this Court had held "that in robbery cases it is irrelevant when the intent to steal the property is formed." Id. at 1408, 972 P.2d at 841. Although this Court found the torture or depravity of mind aggravating circumstance to be invalid, it reweighed the remaining three aggravating circumstances and the two mitigating circumstances, found the aggravating clearly outweighed the mitigating, and that a sentence of death was proper. Id. at 1410-11, 558 P.2d at 842. The Court also rejected other issues raised by Chappell on appeal. Id. This Court denied rehearing on March 17, 1999. IX ROA 2288.

Chappell's petition for certiorari was denied on October 4, 1999. Chappell v. Nevada, 528 U.S. 853 (1999). This Court's remittitur issued on November 4, 1999. X ROA 2353.

Meanwhile, on October 19, 1999, Chappell filed a proper person post-conviction petition for a writ of habeas corpus. IX ROA 2258. The post-conviction matter was assigned to the Honorable Mark Gibbons. X ROA 2354. A supplemental petition was filed on April 30, 2002. X ROA 2417. Among other issues, Chappell contended that his conviction was invalid because the jury instruction defining premeditation and deliberation was constitutionally infirm as it did not provide a rational distinction between first and second degree murder. X ROA 2456-59 (citing Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000)). He also asserted that the sentence of death was unconstitutional because of the use of overlapping aggravating circumstances. X ROA 2465. The State filed its response to the petition on June 19, 2002. X ROA 2481. The evidentiary hearing took place before the Honorable Michael Douglas on September 13, 2002. XI ROA 2554. Subsequently, on June 3, 2004, the district court entered its Findings of Fact, Conclusions of Law and Order. XI ROA 2745. It denied the petition as to the guilt phase issues, granted the petition as to the

sentence, and ordered a new sentencing hearing. XI ROA 2748, 2778.[1] On June 18, 2004, the State filed a notice of appeal to this Court. XI ROA 2757. On June 24, 2004, Chappell filed a notice of cross-appeal. XI ROA 2761. On April 7, 2006, this Court issued its Order of Affirmance in which it upheld the district court's decision. XI ROA 2783. Of relevance to this appeal is this Court's conclusion that there was no merit to the arguments presented concerning jury instructions. XI ROA 2790 n.20 (citing Garner v. State, 116 Nev. 770, 788-89, 6 P.3d 1013, 1025 (2000)). This Court also found the aggravating circumstances of burglary and robbery to be invalid under McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004). XI ROA2792-95. The remittitur issued on May 4, 2006. XI ROA 2797.

Prior to the second penalty hearing, several pretrial motions were filed which are relevant to this appeal.[2] Chappell filed a motion to strike the sexual assault aggravator. XII ROA 2801. The State opposed the motion. XII ROA 2890. The district court denied the motion. XII ROA 2905, 3019; XV ROA 3840.

Chappell filed a motion to remand for consideration by the Clark County District Attorney's Death Review Committee. XII ROA 2817. The State opposed the motion. XII ROA 2884. The district court denied the motion. XII ROA 2905, 3015; XV ROA 3837.

Chappell filed a motion for discovery of potential penalty hearing evidence. XII ROA 2826. The State opposed the motion. XII ROA 2888. The district court denied the motion. XII ROA 3026. On February 23, 2007, the State filed its notice of evidence in support of aggravating circumstances. XII ROA 3032.

Jury selection began on March 12, 2007. XIX ROA 3932. During the course of the trial, Chappell objected to the use of hearsay evidence during the penalty hearing on

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[1]The parties stipulated that these were the findings, conclusions and order of Judge Douglas and agreed that the order should be executed by the Chief Judge of the Eighth Judicial District Court due to Judge Douglas's appointment to this Court. XI ROA 2748.

[2]Judge Cherry briefly presided over the case and heard procedural matters, such as the setting of the trial date. XII ROA 2912, 2915, 2921. It appears that he may have reviewed the pretrial motions, but he did not rule upon them. XII ROA 2919, 2922.

Confrontation Clause grounds and noted that this Court had recently rejected this argument, but presented it so as it preserve the issue for further review. XIII ROA 3050. Chappell also objected to the presentation of victim impact evidence by persons who were not family members of Panos. XIII ROA 3107-08, 3177; XV ROA 3678. The district court found that it had discretion to admit victim impact evidence from non-family members. XIII ROA 3272-73. Over an objection by defense counsel, the district court permitted the State to use Chappell's testimony from the first trial. XV ROA 3632. Defense counsel had argued that the testimony was the result of ineffective assistance of counsel. The district court also overruled defense counsel's objection to questions asked by the prosecution and answered by Chappell concerning the allegation that Chappell had a lot of time to think about his testimony and to decide what he would say. XV ROA 3632. Chappell's counsel argued that this was a comment on Chappell's 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.

Jury instructions were read in open court on March 21, 2007. XV ROA 3742. Following closing arguments, the jury returned their verdicts. XV ROA 3737, 3821. They found the aggravating circumstance of murder committed during the perpetration of a sexual assault. XV ROA 3737, 3822. The mitigating special verdict form listed the following mitigators: (1) Chappell suffered from substance abuse; (2) he has had no father figure in his life; (3) he was raised in an abusive household; (4) was the victim of physical abuse as a child; (5) he was born to a drug/alcohol addicted mother; (6) he suffered from a learning disability; and (7) was raised in a depressed housing area. XV ROA 3739-40, 3822-23. The jury did not find the mitigating circumstance that Chappell's mother was killed when he was very young, that he was the victim of mental abuse as a child, and other mitigating circumstances that were asserted to exist by Chappell's counsel. XV ROA 3755. The jury found that the mitigating circumstances did not outweigh the aggravating circumstance. XV ROA 3738, 3822-23. The special verdict form for the weighing equation did not indicate that it was the State's burden to establish beyond a reasonable doubt that the mitigating

circumstances did not outweigh the aggravating circumstance. XV ROA 3738. The jury returned a sentence of death. XV ROA 3741.

Formal sentencing took place on May 10, 2007. XIX ROA 4015, 4018. The judgment of conviction was filed the same day. XV ROA 3854. The district court ordered the judgment stayed pending appeal. XIX ROA 4019; XV ROA 3861. A timely notice of appeal was filed on June 8, 2007. XIX ROA 3872. This Opening Brief now follows.

V. STATEMENT OF THE FACTS

The State alleged that Chappell killed his girlfriend, Deborah Panos, who was also the mother of his three children, because she intended to end their relationship. IV ROA 864. In support of this theory, the State claimed that Chappell had a history of violence toward Panos and that on August 31, 1995, after he was released from jail, he entered her trailer through a window, had a fight with Panos that resulted in her being beaten and stabbed to death, and then stole her car and social security cards belonging to her and their children. IV ROA 864-86 (guilt phase opening statement). The State also noted that Chappell's semen was found in Panos's body. IV ROA 887-88. It asserted that Chappell was guilty of burglary, robbery with use of a deadly weapon, and first degree murder with use of a deadly weapon. IV ROA 889. It relied upon theories of both premeditated murder and felony murder in urging the jury to return a verdict of first-degree murder. VII ROA 1627-29 (closing argument). In support of the felony-murder by robbery theory, the State relied upon Chappell's taking of Panos's car and social security card, which occurred after her death. VII ROA 1623-24, 1629. In support of its premeditation theory, the State relied upon Jury Instruction Number 22 which stated that "premeditation need not be for a day, an hour, or even a minute. It may be an instantaneous as successive thoughts of the mind." VII ROA 1630. See also VII ROA 1689. The State also argued that evidence of premeditation existed because Panos was stabbed 13 times, he did not seek medical attention for her after she had been stabbed, and he got high on crack cocaine following her death. VII ROA 1635-36.

Chappell acknowledged responsibility for Panos's death, but asserted that he did not commit the offense of burglary because he lived in the trailer and entered through a window

only because he did not have a key, and no one was home when he arrived at the trailer after having been in jail. IV ROA 892 (opening statement). The defense case was that Panos arrived home and was happy to see him, they had consensual sex, and then later had an argument because Chappell was jealous over the fact that Panos was seeing other men while Chappell was in jail. IV ROA 892-93. Later, Chappell discovered a letter by another man that implied sexual things to Panos, he went into a fit of rage, and killed Panos by stabbing her. IV ROA 894. Chappell contended that the evidence did not support a finding of first degree murder, that he took the car after Panos was dead because he did not know what to do besides leaving, and he was not guilty of burglary because he entered his home without any intent to commit an offense. IV ROA 892, 895. He asked the jury to return a verdicts of guilty on the lesser included charges of voluntary manslaughter with use of a deadly weapon and grand larceny auto. IV ROA 896; VII ROA 1660. During closing arguments, Chappell's counsel noted that he took full responsibility for killing Panos and therefore the issue at hand concerned premeditation, deliberation and intent. IV ROA 1641, 1645.

The State and Chappell's trial counsel entered into a stipulation as to certain facts concerning August 31, 1995: Chappell entered a trailer rented to Panos through a window; Chappell engaged in sexual intercourse with Panos; Chappell caused the death of Panos by stabbing her with a kitchen knife and the act was not an accident; and Chappell was jealous of Panos because he believed she was giving attention to or receiving attention from other men. IV ROA 844-45, 850; VI ROA 1312-13.

Evidence introduced at trial which is relevant to this appeal includes the following: A "sexual assault kit," which consisted of samples of biological evidence was taken from Panos's body. IV ROA 998. There was no testimony by either the coroner or the crime scene analyst assigned to assist with the autopsy which suggested in any way that there was bruising, cuts or other trauma in the area of Panos's vagina. IV App 962-1003. Panos was fully clothed when her body was discovered. IV ROA 996, 1024.

Chappell and Panos began dating in high school and had three children together. V ROA 1231, 1279; VI ROA 1367-68. They began their relationship in Michigan and

continued it as they lived in Arizona and Nevada. V ROA 1234-35, VI ROA 1368, 1372-74, 1383. There were previous occasions in which the two fought, broke-up and then reunited. V ROA 1235-40, 1257, 1311, 1321; VI ROA 1357, 1376-78, 1390. Chappell was possessive of Panos. V ROA 1247. Panos loved Chappell. V ROA 1250.

Chappell testified that after he was released from jail, he returned home to the trailer that he shared with Panos. VI ROA 1397. He climbed through the window because he had called shortly before and Panos did not answer and he had lost his key to the trailer. VI ROA 1397. Upon entering, he learned that Panos was in fact already home. They talked and everything was okay between them. VI ROA 1398. They then had sex on the couch. He began to think that she had been messing around on him, so he grabbed her and asked her who she had been with. VI ROA 1399. She said she had not been with anyone else and then performed oral sex on Chappell. VI ROA 1400. The sexual acts were consensual and he did not pressure her into having sex with him. VI ROA 1400. They got dressed, called the daycare center, and then left the trailer to pick up the children. VI ROA 1401-03. While in the car he found a letter to Panos from another man and read about the man having sex with her. VI ROA 1404-05. He was shocked and devastated, so he returned the car to their home, went back inside with her, and stabbed her with the knife. VI ROA 1405. Chappell did not recall details about the stabbing, did not know how many times he stabbed her or hit her and did not know why he killed her. VI ROA 1406. He was very upset, blacked out during the attack and then left immediately when he realized what had happened. VI ROA 1407, 1464. The letter that he read in the car was found next to her body. VI ROA 1407.

Dr. Lewis Etcoff, a psychologist, testified that Chappell was remorseful over Panos's death and sad over her death. VI ROA 1543. He noted that Chappell had an IQ of 80, which means that 91 out of 100 people have more intellectual skills. VI ROA 1546. His language score was especially low. VI ROA 1548-49. Dr. Etcoff described Chappell's personality issues, which includes low self-worth, little self-respect, social awkwardness, distrust of others, and fear of humiliation and rejection. VI ROA 1553. He had no relationship with his father and his mother died before he was three years old. He had a personality

characteristic of being hugely frightened and enormously afraid of being abandoned in a relationship, and was paranoid as a result. VI ROA 1554, 1571.

As noted above, the first jury considered this evidence and returned verdicts of guilty on the charges of first degree murder, robbery and burglary.

The testimony presented by the State during the second penalty hearing largely followed the evidence presented at the first trial, though a significant amount of hearsay evidence was also admitted that was not presented during the guilt phase of the first trial.

Michele Mancha testified that she worked with Panos and they were friends. XIII ROA 3089. Panos confided in her and told her about various incidents concerning Chappell: he broke her nose with a plastic cup; he took things of value from her trailer after climbing in through her window as he did not have a key to the trailer; he slapped her in the face while in the parking lot of her work. XIII ROA 3089-95. Mancha believed that Panos was trying to distance herself from Chappell. XIII ROA 3092. She testified that in June 1995, Panos said that Chappell choked her and the next day Mancha saw marks on her neck. XIII ROA 3096-97. Mancha also reported that Panos told her in June 1995 that Chappell sat on her and put a knife to her throat. XIII ROA 3098. She next asserted that Panos planned to move from her trailer and thought she had 90 days to do so as Chappell was supposed to be in custody, but he was let out less than 24 hours later. XIII ROA 3099. They had also planned to send Chappell back to Michigan, but he refused to go unless he could take his daughter with him. XIII ROA 3099. She asserted that Panos called the jail everyday to make sure that Chappell was still in custody and she was in the process of leaving her trailer and moving with the children. XIII ROA 3101.

Mancha also testified about court proceedings, even though she was not present at those proceedings. XIII ROA 3102. She asserted that Panos had a restraining order against Chappell and that Panos had been subpoenaed to testify against Chappell based upon the choking incident. XIII ROA 3103. Mancha claimed that Panos told her that Chappell threatened to kill Panos after she told him that it was over, that he was supposed to go to a 90-day drug rehabilitation program, and that they had time to get her possessions from the

trailer and move. XIII ROA 3103-04. Mancha stated that they were all scared and she tried to call Chappell's probation officer, Charlene Sumner, to tell her about the threat to Panos. XIII ROA 3105. On cross-examination Mancha acknowledged that Chappell had a problem with drugs and that he stole stuff from the trailer to buy drugs. XIII ROA 3109.

The Court permitted Mancha to give victim impact testimony, over an objection by the defense. XIII ROA 3107-08. She testified about her feelings at the time she learned that Panos had been killed, informed the jury that she was a wreck for days after, and that even ten years later it was still awful and that she misses Panos every day. XIII ROA 3108.

Mike Pollard's testimony from the first penalty hearing was read into the record. XIII ROA 3114. He testified that he worked with Panos and was friends with her. XIII ROA 3115-16. He did not ever meet Chappell, but he did see Chappell slap Panos while in the parking lot of her employer. XIII ROA 3118. This incident happened after the time that he broke her nose. XIII ROA 3119. There were other times when Panos was upset and Pollard believed this to be because of conversations or interactions with Chappell. XIII ROA 3120. Pollard asserted that Panos told him she was planning to move from her trailer and wanted to be gone before Chappell was released from custody. XIII ROA 3125. Pollard recited incidents in which Panos told him that Chappell took items from her and their children and either returned them to stores to receive cash or sold the items to other people. XIII ROA 3125. Pollard asserted that Panos was concerned about Chappell's release and that she repeatedly called the jail to find out when he would be released. XIII ROA 3128. Pollard claimed that Panos had tried to get Chappell to leave the state and had purchased a ticket for him to go to Michigan. XIII ROA 3128. Pollard also testified that Panos realized that Chappell would not leave, so she was planning to move out of the trailer even though she was in the process of buying it. XIII ROA 3129.

Pollard saw Panos on August 31, 1995. XIII ROA 3129. They got off work around noon and planned to barbecue at a park. XIII. ROA 3131. She left Pollard's house and returned about 20 minutes later. XIII ROA 3131. Pollard claimed that she sat in a ball, held her knees and shivered. XIII ROA 3131. She said that Chappell was out and that he had left

a message on her voice mail. XIII ROA 3131. Pollard told her to wait a few minutes until he was out of the shower and he planned to go with her to her trailer so she could pick up clothing, pick up the children from daycare, and then stay with him for a few days. XIII ROA 3132. She had stayed with Pollard in the past when she was afraid. XIII ROA 3132. Nonetheless, when Pollard got out of the shower, Panos was gone. XIII ROA 3133. He did not have a car so he could not follow her. XIII ROA 3133. He tried to phone her, but did not get a response. XIII ROA 3133. Pollard never met Chappell because he was always in and out of jail, but he was aware of claims that Chappell took Panos's furniture, televisions and VCRs. XIII ROA 3135.

After Pollard's testimony was read, he was located and then called as a witness for the purpose of giving victim impact evidence. XV ROA 3678. This testimony was given over a defense objection. XV ROA 3678. He testified that upon learning of Panos's death he was saddened for Panos and especially sad for her kids because they had to grow up without a mother. XV ROA 3679. He quit his job because he could no longer concentrate when he looked over and saw her empty desk. XV ROA 3679. He moved out of Nevada and still thinks of Panos and is still angry over the fact that if she would have waited for him he might have been able to save her. XV ROA 3679.

Lisa Larsen (formerly Duran), a co-worker and friend of Panos's, testified that she lived with Panos in the summer of 1995. XIII ROA 3169. She recalled the incidents in which Chappell slapped Panos, he broke her nose, and she arrived at work with bruises on her arms. XIII ROA 3170. She asked Panos why she did not get out of the relationship and Panos responded that she could not because her kids needed their father. XIII ROA 3170. Chappell was incarcerated during most of the summer of 1995. XIII ROA 3170. Panos instructed Larsen to accept his telephone calls and try not to make him angry. XIII ROA 3170. Larsen recited details from telephone calls and noted once incident in which Chappell asked "what other nigger she was laying up with underneath" when told that Panos was not home. XIII ROA 3171. After Larsen responded that she would not tell him anything like that, he told her to tell Panos that he called and that when he got out, she was not going to

have any kind of life or anything. XIII ROA 3171. In a later call, Chappell told Larsen that once he got out, Panos would not have any friends and that he was upset because Panos had stopped accepting his calls and writing. XIII ROA 3171. Larsen also described Panos's plan to move from her trailer before Chappell got out of custody. XIII ROA 3172.

Larsen testified that on August 30, 1995, Panos told Larsen she had been to court and she told Chappell it was done, it was over with, and she wanted to get on with her life. XIII ROA 3172. The next day Panos and Larsen planned to meet at the trailer in the afternoon. XIII ROA 3172. She saw Chappell driving Panos's car, tried to reach Panos by telephone, then went to the trailer and eventually called the police. XIII ROA 3173.

Over a defense objection, Larsen testified that she shut down after Panos's death, went to therapy for about a year, and learned information about domestic violence because she felt guilty that she did not help Panos after she told Larsen that Chappell was going to get her. XIII ROA 3177. She could not be in the house anymore and could not be at work because she was reminded of Panos. Larsen was afraid that Chappell would get out of custody and then come after her, so she started seeing a therapist and got on medication. XIII ROA 3178. This caused her to miss seven or eight months of work. XIII ROA 3178. Although Panos was killed almost a decade earlier, Larsen still has anger issues. XIII ROA 3178.

On cross-examination Larsen acknowledged that Panos was planning to move in with J.R., who was a man that she had been dating while Chappell was in custody. XIII ROA 3182. On occasions, Panos had told Larsen that she loved Chappell. XIII ROA 3183.

Charmaine Smith, a Parole and Probation Officer, testified that she was assigned to be Chappell's probation officer on April 27, 1995. XIII ROA 3235. He had been convicted of the gross misdemeanor offense of possession of burglary tools. XII ROA 3235. He was allowed to plead to that offense afte r being charged with two felonies and a gross misdemeanor. XIII ROA 3235. Smith claimed that Chappell did not report for probation and did not meet the conditions of his probation. XIII ROA 3236. She talked with Panos three or four times. XIII ROA 3236. Panos came to her office on one occasion and was upset because of Chappell and she said she was in fear for her life. XIII ROA 3236. Smith recited

allegations that Panos told her that Chappell once straddled her and held a knife to her. XIII ROA 3236. Smith suggested that Panos move away and return to Arizona.

Based upon Chappell's failure to comply with the terms of his probation, Smith sought revocation of his grant of probation. XIII ROA 3237. The court reinstated Chappell to his probation with an added condition that he enroll and successfully complete an impatient substance abuse program. XIII ROA 3237. The judge ordered that he be released only to the Department of Parole and Probation and then the department was to take him to the impatient treatment program. XIII ROA 3237. Smith explained the 90 day program to Panos when they were in court. XIII ROA 3237. On cross-examination Smith testified that Chappell listed Panos's address as his address. XIII ROA 3239.

William Duffy, a former Parole and Probation Officer, testified about his failure to place Chappell in the custody of an impatient drug treatment center, as ordered by the court as a condition of Chappell's release from custody. XIV ROA 3407-13.

Latrona Smith, a daycare director, testified about her conversation with Panos on the day she was killed. XIII ROA 3190. Smith asserted that Panos called, was crying, and asked her to call Panos with some kind of excuse so that she could leave the house. She called Panos five minutes later and Panos said she was on her way. XIII ROA 3191-92.

The testimony of Deborah Turner was read into the record. XIII ROA 3194. She testified that on the afternoon Panos was killed, Chappell sold shrimp and a pie to her and she rented the car he was driving for $15. XIII ROA 3195. His demeanor did not seem different than other days when she had seen him. XIII ROA 3196. On cross-examination Turner acknowledged that Chappell was a crack head. XIII ROA 3197. She was aware of other occasions in which Chappell rented out the car for an hour or two in exchange for rock cocaine. XIII ROA 3198.

The testimony of Ladonna Jackson was read into the record. XIII ROA 3198. She saw him on the afternoon of August 31, 1995, and he behaved as he usually did. XIII ROA 3201. She testified about renting Chappell's car and the fact that he made his money stealing. XIII ROA 3203. He also traded items that he stole for crack. XIII ROA 3204. She

testified that Chappell sold his children's diapers because he wanted drugs (but she did not provide explanation as to how she knew the diapers belonged to his kids). XIII ROA 3204.

Kimberly Sempson testified that she detained Chappell on charges of shoplifting on August 31, 1995. XIII ROA 3205. She saw him drop a social security card. XIII ROA 3207. On cross-examination she noted that Chappell had a small metal pipe in his pocket that was probably used to smoke crack. XIII ROA 3207.

Paul Osuch, a LVMPD detective, testified that in September, 1995, he was dispatched to the Lucky store at Lamb and Bonanza on a shoplifting call. XIV ROA 3275. He decided to arrest Chappell, who was the suspect in the shoplifting case, because he had drug paraphernalia in his possession. XIV ROA 3276. He mentioned the killing at the trailer park, which was nearby, and noticed that Chappell became nervous. XIV ROA 3276. He later saw four social security cards that had been in Chappell's possession and noticed the last name of Panos on the cards. Osuch confirmed that this one the last name of the person killed at the trailer and notified the homicide detectives. XIV ROA 3284.

Detective James Vaccaro testified as to details concerning his investigation. XIV ROA 3413-25. Relevant to this appeal are the facts that a sexual assault kit was collected at the autopsy, XIV ROA 3420; he knew that Chappell stated he had both consensual vaginal and consensual oral intercourse with Panos, XIV ROA 3415; a torn up letter was found near Panos's body, XIV ROA 3423-24; the letter was written to Panos from someone named Devon and a portion of the letter was found outside, XIV ROA 3429; Chappell's DNA was found inside of Panos's vagina, XIV ROA 3425; and letters from Chappell to Panos during the period of his incarceration were recovered, XIV ROA 3426-27. He also testified that the presence of semen indicated that Chappell ejaculated into Panos. XIV ROA 3425.

Russell Lee testified about his discovery of Panos's body inside the trailer. XIII ROA 3186. She was dressed and he observed a puncture mark in her clothing. XIII ROA 3187.

Dr. Green, a pathologist, testified as to details concerning Panos's injuries. XV ROA 3670. She had bruises on her neck and face, right arm, shoulder, right hand and the back of her right wrists. XV ROA 3671. She also had 13 stab wounds. XV ROA 3671. The cause

of death was knife wounds to the neck. XV ROA 3674. He believes the bruises were probably caused 15 to 30 minutes prior to the stabbings. XV ROA 3674.

Substantial evidence was also presented by the State concerning allegations about matters took place prior to the events of August 31, 1995:

Clair McGuire testified she worked with Panos in Tucson in the 1990s. XIII ROA 3242. She met Chappell and knew him to be Panos's boyfriend. XIII ROA 3243. She sometimes saw bruises on Panos's body and once saw Chappell trip Panos and push her into the wall. XIII ROA 3243. While Panos worked several jobs, she recalled that Chappell only had one job and was there less than a month. XIII ROA 3244. Panos had worked as a 911 operator but had to quit because she was involved with Chappell and she was not allowed to hang around with people who had a criminal record. XIII ROA 3244. McGuire visited with Panos in Las Vegas in March of 1995. XIII ROA 3244. She noticed that Panos did not have very much furniture and she said that Panos said that Chappell had taken it out of the house. XIII ROA 3244. She assumed he was selling it to get money for drugs. XIII ROA 3245. She also said that Panos said that new jackets she purchased for the kids had disappeared.

McGuire moved to Las Vegas in May 1995, and stayed with Panos. XIII ROA 3245. When she returned from a trip to Tucson she noticed that someone had been through her boxes and some items were missing. XIII ROA 3245. She discussed the missing items with Chappell and he said that he knew where they were and that for a small amount of money he would be able to return them to her. XIII ROA 3245. She did not give him the money. XIII ROA 3245. To her knowledge, Chappell did not have a key to the trailer. XIII ROA 3245. He stayed at the trailer on and off and would sometimes break in. XIII ROA 3246. She claimed that Panos was upset on one occasion in which Chappell tried to come into the trailer and noted that there was another occasion in which she talked with Panos on the telephone, Panos said that Chappell had gotten out of jail and wanted Panos to come home to the trailer, but Panos stayed at a friend's house instead. XIII ROA 3246. McGuire said that Panos told her that Chappell would rape McGuire and burn the house down so that Panos did not have a house to come home to. XIII ROA 3246. McGuire locked all of the doors and windows

and was still on the telephone with Panos when she heard Chappell trying to come inside the house through the front window. XIII ROA 3246. They used three-way calling to call 911 and then McGuire told Chappell that the police were at the door after Chappell came into her locked bedroom. XIII ROA 3246. The officers could not get inside because the doors were locked. XIII ROA 3247. Chappell then talked with Panos on the telephone as McGuire unlocked the door. XIII ROA 3247. The police entered and arrested Chappell. XIII ROA 3247. She noticed that there was a knife next to her bed and it was not there before he came in. XIII ROA 3247. There was another incident in June 1995 in which Chappell was angry and told Panos to go into her bedroom with him. XIII ROA 3247. McGuire called 911 and the police came to the trailer. XIII ROA 3247. Panos told them that Chappell held a knife to her throat and pinned her down while sitting on top of her chest. XIII ROA 3247. The police arrested Chappell. XIII ROA 3247.

Over a defense objection, McGuire testified that it was a very frightening situation and she could not believe that anybody could be in that situation for such a long period of time. XIII ROA 3248. She recalled that Panos was fun, happy, and she would do anything for her kids. XIII ROA 3248.

On cross-examination, McGuire testified that Chappell never threatened her and did not threaten her on the night he came into her bedroom. XIII ROA 3248. She did not ever see the knife in his hands. XIII ROA 3249. In regards to the incident in which McGuire claimed that Chappell pinned down Panos, McGuire acknowledged that she was unaware that when Panos wrote her statement to the police about that matter that she did not state that Chappell pinned her down or that he had a knife. XIII ROA 3249.

The testimony of Detective Paul Weidner, of the Lansing Michigan Police Department, was read into the record. XIII ROA 3251. He testified that on August 18, 1988, he arrested Chappell for assault. XIII ROA 3251. The arrest was based upon the allegation that Chappell and a friend threw a brick at a man's car and threw a brick or rock at the man after he got out of his car. XIII ROA 3252. Chappell gave a statement in which he said that his friend threw a brick at the car, but did not hit it, after the man drove his car down an alley

and almost ran them over. XIII ROA 3253. The man came out of his house with a bat and said "come on, you niggers, I'm not afraid of you" and then the friend threw a brick at the man and knocked him down. XIII ROA 3253. The friend picked up the man's bat when he went back into his house and then the man came out of the house with a gun. XIII ROA 3253. Other friends were present when this happened, but some of them ran off when the police arrived. XIII ROA 3253. The man identified Chappell as the person who threw a brick. XIII ROA 3253. The officer was not called to testify at court and did not know the disposition of the charges. XIII ROA 3253. The officer did not personally witness anything. XIII ROA 3253. Another witness to the incident reported that it was another man, not Chappell, who threw the brick at the man. XIII ROA 3253. There were no injuries to the man who was hit. XIII ROA 3253.

Dina Richardson testified that she knew Panos for five or six years in Tucson and they both worked with the police department in the 911 department. XIV ROA 3294. She learned of Panos's murder after being contacted by the Tucson Police Department out of concern that they had not yet caught the person who murdered Panos and they thought he might try to look for Richardson or Panos's mother. XIV ROA 3295. She met Chappell through Panos but did not spend much time with him. XIV ROA 3295. Richardson's perception of the relationship between Chappell and Panos was that he ran the relationship, was controlling, and she did what he wanted her to do. XIV ROA 3296. She noted an incident in which Panos asserted that Chappell sold t-shirts which Panos had purchased in San Diego and times when Panos came to work with bruises. XIV ROA 3298. Richardson claimed that Panos eventually told her that she had been assaulted by Chappell and it usually happened when he was high on drugs or wanted to be high on drugs and if she did not give him money, they would end up in an argument and he would assault her. XIV ROA 3299.

Richardson testified about a time in 1994 when Panos called her and claimed that Chappell had left her stranded at a grocery store after it refused to cash a check. XIV ROA 3300. She was then able to cash the check and she took the money to Richardson before going home to her kids because she believed that Chappell would beat her up if she came

home with the cash. XIV ROA 3301. Richardson recalled another time in 1994 when she was on the telephone with Panos and she could hear Chappell calling Panos names in the background because he was upset that she dated another man while he was in Michigan. XIV ROA 3301. She heard Chappell say that he did not care what she did, but she could not fuck around in front of his children or he would kill her ass. XIV ROA 3302. She recalled another telephone call around August 1994 in which she heard him in the background as he told Panos that he wanted the car or wanted some money or was going to do an O.J. Simpson on her ass. XIV ROA 3302.

Panos decided to move to Las Vegas and told Richardson that she was doing so because she wanted to have a new start and felt that if she brought Chappell here with her that he would not know anyone, he would get off the drugs, and they would live happily ever after. XIV ROA 3303. In November 1994, Richardson was talking on the telephone with Panos and heard Chappell say that he wanted her car keys or he was going to do an O.J. Simpson on her ass. XIV ROA 3303. She also heard the voices of their children in the background. XIV ROA 3303. Richardson heard things about Chappell from officers at the police department. She recalled a time or two when she heard that he was stopped in high drug activity areas. XIV ROA 3305. She also heard that there was also a domestic violence call. XIV ROA 3306.

Over objection, Richardson gave a victim impact statement and testified that Panos's death was devastating for her as they had daily contact and were friends. XIV ROA 3307. She talked with her department psychologist and attended a debriefing with about 40 other people who were affected by Panos's death so they could all talk about their feelings. XIV ROA 3307. There is a portrait of Panos that hangs in the police department briefing room that is in her honor. XIV ROA 3307.

On cross-examination Richardson testified that based upon her experiences with 911 she is aware of how dangerous domestic violence incidents can be, but she did not ever call the police after talking with Panos or hearing the telephone calls with Chappell speaking in the background. XIV ROA 3309. There were times when Chappell would leave messages

on Richardson's answering machine and would say things like "I love you Debbie, please come home." XIV ROA 3310. She also saw Chappell in person at some birthday parties. XIV ROA 3310. Richardson thought that Chappell was more violent when he was on drugs. XIV ROA 3310. She was unaware of details concerning Panos's urging of Chappell to move back to Tucson from Lansing Michigan and the fact that Panos visited Chappell in Lansing and became pregnant with their third child during that visit. XIV ROA 3312. She testified that Panos left the children with Chappell when she went on vacation to San Diego. XIV ROA 3313. When Panos stayed the night at Richardson's house, the children stayed home with Chappell. XIV ROA 3315.

Tanya Hobson testified that in 1995 she worked at Safe Nest, which was a temporary shelter for domestic violence victims. XIV ROA 3454. She assisted Panos in obtaining a temporary protective order on January 9, 1995 after Panos claimed that Chappell hit her. XIV ROA 3460. A hearing date was scheduled for January 11, 1995, but Panos did not appear. XIV ROA 3464. It is not unusual for a person to fail to appear at the hearing because of reconciliation with the other party. XIV ROA 3464. The protective order became void after she did not appear. XIV ROA 3465. On cross-examination Hobson testified that the application for the protective order was taken over the telephone and she did not conduct any investigation concerning the allegations. XIV ROA 3467.

The testimony of Jeri Earnst was read. XV ROA 3633. He was a police officer in Tucson and had contact with Panos in 1994. XV ROA 3634. She told him that she had a fight with her boyfriend because he sold a new dresser that she had purchased for their daughter and he hit her and knocked her to the floor. XV ROA 3635. She refused to get medical help. XV ROA 3635. She would not return to her trailer until Chappell was gone. XV ROA 3635. He was arrested for domestic violence. XV ROA 3636. Earnst offered to help Panos get into a shelter, but she never called him. XV ROA 3636.

Officer Dan Giersdorf testified that he was dispatched to the trailer on January 9, 1995. XV ROA 3637. He saw Panos being loaded into an ambulance and saw that she had a large cut over her eye and a swollen nose. XV ROA 3638. She stated that she got into a

fight with Chappell and he hit her in the face with a cup. XV ROA 3638. Giersdorf went inside the trailer and Chappell said that he "hit that bitch in the face." XV ROA 3638. Chappell was then arrested. XV ROA 3639. On cross-examination, he testified that Panos stated that she had been in her relationship with Chappell for nine years and they had three children together. XV ROA 3639. In his previous testimony he did not state that Chappell referred to Panos as a bitch. Giersdorft did not perform a field sobriety test. XV ROA 3639.

The testimony of Officer Allen Williams was read. XV ROA 3640. He testified about the June 1, 1995, incident in which it was alleged that Panos said that she got into an argument with her boyfriend, he pinned her arms down with his knee and threatened her with a knife. XV ROA 3640. He arrested Chappell for domestic violence. XV ROA 3641.

The State presented additional victim impact evidence through Panos's aunt, Carol Monson. XV ROA 3681. She testified that they had a very close family and always did everything together. XV ROA 3681. Panos was a sweet person, very giving, generous and would think of others before herself. XV ROA 3681. She loved elderly people and was close with her grandmother. XV ROA 3682. Monson described how she learned of Panos's death, her immediate reaction, and the reaction in the following days. XV ROA 3682-83. She described the impact of the loss on Panos's mother and other family members and the toll on her marriage. She read letters from other family members that were written both at the time of the first trial and at the time of the current hearing. XV ROA 3683-84. These letters referenced family get-togethers, Christmas and birthdays. XV ROA 3685. Monson also read her own letter, which also referenced past family gatherings at birthdays and holidays and discussed the fact that Panos's children had a difficult time handling the fact that their mother was not there for birthdays, holidays, school events and other major things that occurred in their growing years.[3] XV ROA 3685-86.

Norma Penfield, Panos's mother, also gave a victim impact statement. XV ROA

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[3]During pretrial proceedings the district court ordered that the State talk to Monson and explain the legalities of what she could and could not say. XV ROA 3843.

3686. She discussed Panos's childhood, her love for children and older people, and her personality. XV ROA 3687. Penfield asserted that Panos moved to Las Vegas because the police advised her to leave Arizona for her own safety. XV ROA 3687. Penfield noted the financial assistance that she gave to Panos. XV ROA 3687. She then told the jury about how she learned of Panos's death, how she acquired custody of the children, and Panos's funeral. XV ROA 3688. She discussed the reactions on Panos's three children to her death and noted that her daughter Chantelle, who was then three years old said she wanted to die so she could go to heaven and be with her mom. XV ROA 3688. She testified that the children do not want any mention of Chappell, they get angry, and the oldest child signed a letter stating that he did not want any contact with Chappell. XV ROA 3688. Penfield also read a letter that she prepared. XV ROA 3689. She remarked that Panos's death was brutal and senseless and she could not image how one human being could be so harmful to another. XV ROA 3689.

In response to questions from jurors, Penfield testified that Panos always had excuses for helping out Chappell and that Penfield told Panos to get away but Panos did not listen. XV ROA 3690.

Chappell's testimony from the first trial was then read to the jury. XV ROA 3641-68. The testimony is set forth above and is not repeated here. The State read in an exchange, which is set forth in the argument section below, concerning the fact that Chappell has had a lot of time to think about his testimony. XV ROA 3654. Chappell's counsel had objected to this testimony. XV ROA 3632, but the district court found the testimony to be admissible. XV ROA 3632.

Chappell's counsel called several witnesses to testify on his behalf. Dr. Todd Grey, a chief medical examiner for the state of Utah, testified that he reviewed the autopsy report, investigative reports of the Coroner's office, photographs on Panos's body at the scene of death, a transcript of the testimony of the autopsy doctor, and transcripts of the opening and closing statements of the prosecution and defense from the first trial. XIII ROA 3225. It was clear that Panos died as the result of multiple stab wounds. XIII ROA 3225. In making an assessment as to whether she was sexually assaulted prior to her death, Grey considered the

DNA recovered from Panos's vagina, the description of the vaginal area in the autopsy report and the autopsy photographs. XIII ROA 3225-26. He did not find any evidence of sexual assault during the course of the homicide. XIII ROA 3226. Coroner Green's report did not denote any findings that would indicate a sexual assault. If such findings were present, Dr. Green would have noted them in his report. XIII ROA 3226. Photographs of the scene of death supported his conclusion as Panos was fully dressed and there were stab wounds in the clothing that matched stab wounds to the body, all of which indicated that she was fully clothed when she was killed. XIII ROA 3226. There was no evidence that she was killed while being raped and no evidence of a sexual assault. XIII ROA 3227. On cross-examination Grey explained that he was using the medical definition of sexual assault, which would be forceful penetration. XIII ROA 3228. Bruises on Panos's upper body could have been caused 15 minutes or more prior to her death. XIII ROA3234.

Dr. William Danton, a clinical psychologist, testified that he reviewed Dr. Etcoff's report and talked with Chappell. XIV ROA 3321. He explained the circle of domestic violence and noted that typically the abuser controls the finances in the relationship. XIV ROA 3322. He also explained the "motorcycle syndrome" in which some women have a cold or distant relationships with their fathers, they want love and attention, and then unconsciously seek out cold and distant men because of the need to have the need for love and approval, rather than actual love and approval. XIV ROA 3323. If the man in this type of relationship converts and determines that he loves the woman and wants to be with her, then the woman rejects the man. XIV ROA 3323. He then analyzed the relationship between Panos and Chappell and explained Chappell's drug use in this context. XIV ROA 3324. Because of Chappell's borderline personality disorder, the threat of abandonment or less could be so intense for him that he would be prone to using drugs. XIV ROA 3325. Dr. Danton also explained the reasons why a person might stay in an abusive relationship and why such a person might engage in sex with the other person in the relationship. XIV ROA 3325. The primary reason is that the person still loves the other person. XIV ROA 3325. Other reasons might include feelings of guilt, appeasement, helplessness, or force. XIV

ROA 3326-27. Based upon his review of materials in this case, he believed that guilt/appeasement theory made the most sense. XIV ROA 3327. He also noted that Chappell described a relationship with Panos which was very poor in communication but which was good physically, and noted that this situation would be consistent with Chappell's very low IQ. XIV ROA 3328.

Dr. Danton further explained that Chappell had a sense of abandonment which was caused in part by the death of his mother at age two, the lack of a father figure, and the fact that his grandmother had a lot of kids to take care of and used corporal punishment. XIV ROA 3329. The early loss of his mother resulted in an abandonment anxiety, which happens with borderline personality and the person becoming very dependant on external anchors too feel okay. XIV ROA 3329. He would also rely on others to soothe because he is not able to soothe himself on the inside, resulting in a dependant personality type . XIV ROA 3329. Chappell would use sex as a type of soothing. XIV ROA 3330. Panos could have used sex as a way to calm Chappell down if he was angry and might do so even if there was not an immediate coercive threat. XIV ROA 3330.

On cross-examination Dr. Danton recited details of his conversation with Chappell, including his recitation of facts concerning the night Panos was killed. XIV ROA 3345-49. Chappell told him that they initially argued, but then they talked and she then initiated sex. XIV ROA 3349. Chappell stated that they first had vaginal sex, he then became upset because he believed that she had had sex with another man, and she then offered fellatio. XIV ROA 3351. She then went to the bathroom, cleaned up and talked to the woman from the day care center. XIV ROA 3352. They then went to the car where Chappell discovered a sexually explicit letter and went into a rage. XIV ROA 3354.

Dr. Lewis Etcoff, a psychologist, testified about his evaluation of Chappell prior to the first trial. XIV ROA 3476. Etcoff learned of Chappell's childhood history and noted the following facts: Chappell's father had no involvement in his life, though he did have a criminal record and a lot of other behavioral and substance related problems. XIV ROA 3481. Chappell first met his father when he was 10 years old, at which time his father asked

him to help rob a bank. XIV ROA 3481. Chappell declined to do so. XIV ROA 3482. Chappell's mother died in an automobile accident when he was about two and a half years old. XIV ROA 3482. He then moved with his siblings to the home of his grandmother, who was physically abusive and neglectful. XIV ROA 3482. His school records support a finding that he was psychologically disturbed early on and had difficulty forming attachments. XIV ROA 3483. School records further indicated that he was placed in special education classes very early on. XIV ROA 3483. Records from a social worker stated that in only grade two, Chappell was moody, had trouble fitting in with other kids, was not performing well at academic subjects, was wetting himself and sucking his fingers, which are indicative of a serious anxiety and possibly an attachment disorder. XIV ROA 3484. He was evaluated again in fourth grade, at which time he was functioning on a second grade level and he did not play with other kids. He built a relationship with a new teacher, but she suddenly left and he regressed to his old behaviors of not talking to anyone. The school isolated him to get his work done and recognized that he had a great deal of difficulty in forming meaningful relationships. XIV ROA 3485. The social worker recommended that he be placed in a smaller classroom and that he receive individual therapy outside of the school setting. XIV ROA 3485. He was classified as severely learning disabled and placed in a special class. There was no record indicating that he received the recommended therapy. XIV ROA 3486.

Chappell was later evaluated by a school psychologist when he was in high school. XIV ROA 3486. The psychologist noted that Chappell was in an emotionally handicapped classroom and that he felt he had little hope of succeeding lin life, especially in academics, and that he did not appear to have coping skills to deal with problems he encountered. XIV ROA 3486. He further noted that Chappell had a low self-concept, distrusted others, and had problems with attendance and motivation. XIV ROA 3487.

These findings were consistent with Etcoff's evaluation. XIV ROA 3487. Etcoff further noted that Chappell began using alcohol at 13 or 14 years old and was using rock cocaine on a regular basis by age 18. XIV ROA 3488. He became hooked on crack cocaine.

Etcoff informed the jury that with regular use of cocaine, there is a real good likelihood that the person will get psychotic, have paranoid delusions, become frazzled, and have trouble sleeping. XIV ROA 3488. It is a psychologically destructive drug which makes the person out of control of his behaviors and thoughts and can make the person think that things are real when in fact, they are not. XIV ROA 3488. Chappell had a verbal IQ of 77, which is lower than 94 out of 100 people his age. XIV ROA 3490. His overall IQ was 80, which is lower than 91 out of 100 people his age. XIV ROA 3491. Chappell's language deficit had an effect on his ability to think things through rather than just act, especially in stressful situations. XIV ROA 3493. Additional tests were conducted on Chappell which resulted in findings that he felt worthless, inadequate, was guilt ridden, sensitive to humiliation, had low self-esteem, and did not trust others. XIV ROA 3501. He was dependent on others, mistrustful, apprehensive, and easily humiliated. XIV ROA 3501. He was extremely dependant on Panos for his emotional support. XIV ROA 3502. Etcoff believed that Chappell was especially anxious because he was dependant on a woman who starting withdrawing from him, which would also result in the withdrawal of their three children from his life, and he was using cocaine. XIV ROA 3503. His drug use would help suppress his emotions and suppress disturbing memories. XIV ROA 3503.

Chappell described his relationship with Panos to Etcoff. XIV ROA 3504. He loved her and believed that she loved him, but acknowledged that they were having problems and that he had been abusive. XIV ROA 3504. He felt that she began to withdraw from their relationship when he was in jail on burglary charges and he concocted fantasies of her doing things that made him really upset. XIV ROA 3504. By the time of his release, he worked himself into a very irrational frenzy as he believed that Panos had cheated on him, and just as his mother had left him, the only person in his life he could depend on was also leaving and he lost it. XIV ROA 3505. His thoughts in jail would be especially painful for him to handle because he was not able to suppress them with drugs. XIV ROA 3506.

When Chappell met with Etcoff he broke down crying, was remorseful and was a wreck. XIV ROA 3506. He was angry at himself and very emotional. XIV ROA 3507.

Etcoff believed that if Chappell could turn back the clock and undue his actions he would as he now knows that it was the worst thing he could have done for her, their children, and himself. XIV ROA 3507. Etcoff believes that Chappell was delusional when he stated that he did not ejaculate when he had vaginal sex with Panos. XV ROA 3587.

During cross-examination the State focused on impeaching Etcoff's testimony on direct examination that Chappell's free will was limited because of his IQ, mental state and experiences. XV ROA 3518-25. The State also focused upon the fact that information concerning Chappell's criminal history and full details concerning his relationship with Panos were not given to Etcoff. XV ROA 3548-56.

Chappell's older brother Rick testified that their mother was killed in 1973, when Rick was about three and a half and Chappell was two years old. XV ROA 3690. They have an older brother, an older sister and one younger sister. XV ROA 3691. Their father was not around much and did not live with them. XV ROA 3691. After their mother was killed they lived with their grandma in Lansing Michigan. XV ROA 3691. Rick lived there until he was around 14 years old, when he went to a juvenile boys facility. XV ROA 3691.

Their grandmother was very abusive and hit Rick with broom sticks, a bed board, extension cords and her hands. XV ROA 3691-92. Rick did not know if his grandmother also beat Chappell with extension cords. XV ROA 3692. Chappell was beat with bed boards, branches or switches and belts. XV ROA 3693. There was no real father figure in their home, though they did have a couple of uncles. XV ROA 3691. Their home was not nurturing. XV ROA 3693. In addition, their grandmother worked a lot and had a lot of other personal time to herself. XV ROA 3693. She provided a shelter, food and clothing for the children but did not talk with them, help with schoolwork, get involved in activities or with friends. XV ROA 3693. There was not much supervision in their home, though their two uncles would sometimes stay with them. XV ROA 3694. Their uncle Anthony was killed, which was difficult on all of them, including Chappell. XV ROA 3694.

They did not speak about their mother in their home. Rick was told to shut-up when he asked questions about her. XV ROA 3694. They learned from people on the streets that

their mother had a drug problem. XV ROA 3694. His grandmother talked about their father and was really negative, saying that he was a "no good nigger" and that he was always a liar, he was no good, and "you're going to be just like your dad." XV ROA 3694.

Chappell did not do well in school and attended a special education school for his elementary education. XV ROA 3692. Rick was unable to help Chappell with his schoolwork because he had his own problems with homework and their grandmother also refused to help them with schoolwork. XV ROA 3692. Chappell also had problems with his urine and problems with his development. XV ROA 3693.

The neighborhood they lived in was a low income area that eventually had a lot of vacant houses as no one wanted to live in that neighborhood. Eventually his grandmother had to leave her house because the housing project was condemned. XV ROA 3692.

Chappell had a few friends from the neighborhood. XV ROA 3693. Drugs were easily accessible in the neighborhood and Rick started using drugs when he was around nine years old. XV ROA 3693. He did not know Chappell to be involved with drugs prior to the time that Rick left for the boys school. XV ROA 3693. Rick and their sister Carla both had problems with cocaine and he believes their sister Mira had problems with alcohol and marijuana. XV ROA 3695. Rick was on parole for an armed robbery offense and also had a stolen vehicle offense. XV ROA 3693. He believes that Chappell was internally angry and that it took a lot for him to express his anger. XV ROA 3695. He did not communicate to express himself or talk about his problems. XV ROA 3695. There was no adult in the house to go to if they had problems. XV ROA 3695.

Rick knew Panos, saw her together with Chappell, saw that they got along and did not ever see him get violent with her while in Lansing. XV ROA 3694. Chappell lived with Rick and his wife for a few weeks after he returned from Tucson. XV ROA 3696. Panos called Chappell and sent him money so that he could return to Tucson. XV ROA 3696.

Fred Dean was a friend of Chappell's from Lansing Michigan. XV ROA 3697. They were about the same age and lived near each other. XV ROA 3697. They were not in the same class because Chappell attended special education classes. XV ROA 3697. As

children they hung out together almost every day. XV ROA 3698. Chappell was not allowed to have friends over to his house until after his grandmother was gone. XV ROA 3698. The only supervision was by Chappell's brother Ricky. XV ROA 3698. Chappell's uncles would sometimes be there. XV ROA 3699. One of his uncles was killed near the neighborhood after he was stabbed to death. XV ROA 3699. He recalled that Chappell's grandmother would whoop him with an extension cord. XV ROA 3699. Chappell and Fred spent time trying to get alcohol and marijuana while they were in junior high and high school. XV ROA 3699. Fred recalled that Chappell met Panos after he moved to South Lansing from the housing project. XV ROA 3700. Chappell still visited Fred after moving away from the old neighborhood and he socialized with Chappell and Panos as she was often with Chappell and their group. XV ROA 3700.

Benjamin Dean, who is Fred's brother, also knew Chappell as they grew up near each other in Lansing. XV ROA 3706. As children they hung out at Chappell's house because there were no adults there. They knew his grandmother's work and bingo and horse track schedule and would leave before she returned. XV ROA 3707. As teenagers they would smoke weed and sometimes drink. XV ROA 3707. Chappell started using marijuana around age 13 or 14. XV ROA 3708. Benjamin recalled that Chappell was in special education classes during elementary school. XV ROA 3708. Benjamin knew Panos and saw her with Chappell. XV ROA 3708. He did not see any problems between them. XV ROA 3709.

Charles Dean, who is a brother of Benjamin and Fred, testified that he knew Chappell from Lansing. XV ROA 3718. The neighborhood they lived in abutted the train tracks, was one of the worse off of the neighborhood areas, and was a pretty bad place to live. XV ROA 3719. Their friends and neighbors James Ford and Ivory Morrell were in Las Vegas to testify for Chappell but had to return to Michigan. XV ROA 3708, 3719.

Mira Chappell King testified that she is Chappell's younger sister. XV ROA 3710. She lived with Chappell and their siblings with their grandmother. XV ROA 3710. They had necessities but their grandmother did not give them affection or attention, kiss them, say "I love you," tuck them into bed or things like that. XV ROA 3170. Their grandmother was

rarely at home as she worked and went to the horse races and bingo. XV ROA 3711. Their neighborhood consisted of run down houses and many of the houses were empty and abandoned. XV ROA 3711. Their grandmother used extension cords and switches to discipline Chappell and his siblings. XV ROA 3711. She never had anything nice to say and always said "stupid" and "idiot." XV ROA 3712. Chappell went to special education classes and was teased by his friends because of that. XV ROA 3712. Their grandmother did not put much effort into helping Chappell and did not help the four children with their homework. XV ROA 3712. While they were growing up she did not see Chappell have any problems with being violent. XV ROA 3712. Their grandmother did not talk about their mother or explain how she was killed. XV ROA 3712.

Mira saw Chappell and Panos while they were dating in high school. XV ROA 3714. They later lived together with Chappell and Mira's grandmother. XV ROA 3714. They lived together when Chappell and Panos's oldest child was a baby. XV ROA 3715. She saw Chappell as being very loving to the baby, cooked for him, watched him and cared for him while Panos worked. XV ROA 3715.

All four siblings had problems with drugs. They all used marijuana and alcohol as teenagers. XV ROA 3714. As she was growing up she saw Chappell be argumentative, but not violent. XV ROA 3715. She also learned that their mother had been involved with drugs. XV ROA 3715.

Marabel Rosales, a defense investigator, testified that Ford and Morrell had been present in Las Vegas to testify but had to return to Michigan because of job commitments and fear that they would be fired if they did not return. XVI ROA 3767. They were both very upset and very disappointed that they could not testify. XVI ROA 3767. They would have testified that they knew Chappell as a child and as a teenager. XVI ROA 3767. They also knew Chappell when he was dating Panos. XVI ROA 3767. There was great animosity from Panos's parents because Chappell was black, so they had to sneak around to date and then Panos was kicked out of her parent's home after JP was born. XVI ROA 3768. Chappell and Panos then lived with Ford for awhile. XVI ROA 3768. Chappell was a great father to

JP, he loved his son, took care of him, made sure that he was fed and pretty much lived for his son. XVI ROA 3768. After hearing about everything that happened in Las Vegas and Tucson, they said that he was not the person they knew in Lansing. XVI ROA 3768. On cross-examination Rosales was questioned about an affidavit which Ford had signed in which he stated that Panos was very controlling of Chappell, he had heard her screaming and recalled an incident in which she referred to Chappell using "the N word." XVI ROA 3768.

Chappell gave a statement in allocution in which he expressed his remorse. XVI ROA 3769.

In its rebuttal case the State presented a reading of the prior testimony of Chappell's grandmother, Clara Axam. XVI ROA 3771. She testified that Chappell's mother was killed in a car accident when he was two years old and that he had a hard reaction to her death. XVI ROA 3771. He did not talk for a year or more after her death. XVI ROA 3771. Chappell treated his grandmother well as a child and was not violent, but was slow and did not understand things as fast as a normal child. XVI ROA 3771. He was sent to special education classes in fifth grade and stayed there until high school. XVI ROA 3771. Axam knew Panos and felt that she was a very nice lady. XVI ROA 3771. Axam believed that Chappell should be punished based upon what happened to Panos but wanted Chappell to continue to be a part of her life. XVI ROA 3772.

The State introduced a presentence investigation report (PSI) for a gross misdemeanor offense, a PSI for this case, and a prison visiting log. XVI ROA 3772. Trial counsel did not object to the admission of the two PSIs, but did object to admission of Chappell's statements that were given during the PSI interviews.[4] XVI ROA 3770. The reports include information about arrests for which Chappell was not convicted and his statement. There was no indication that Chappell was given Miranda warnings prior to his interview for the presentence investigation report, no indication that his counsel was present, and no indication

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[4]The presentence reports are included in the Record on Appeal near the end of unnumbered Volume XVIII, immediately prior to the district court's minutes.

that the statement was not required. Page 5 of the 1996 report includes a statement by Panos's mother in which she stated "The SOB does not deserve to live."

Norma Penfield, Panos's mother, then took the stand again in response to the testimony that Penfield did not like Chappell because of his race. XVI ROA 3772. She stated that she did not like Chappell because he did not support Panos or the kids and because of his actions. XVI ROA 3772.

VI. ARGUMENT

A. Chappell's Conviction For First Degree Murder Must Be Reversed Because The Jury Was Not Properly Instructed On The Elements Of The Capital Offense

The failure of the trial court to instruct the jury on the element of deliberation violated Chappell's rights to due process, equal protection, and a reliable sentence under the state and federal constitutions. U.S. Const. Amends. V, VIII, XIV; Nev. Const. Art. I, Secs. 3, 6, 8; Art. IV, Sec. 21.

The premeditation and deliberation instruction used at the guilt phase of Chappell's trial for first-degree murder (the Kazalyn instruction), VII ROA 1722, misstated the law and allowed the jury to issue a finding of guilt, and ultimately impose the death penalty, in an unconstitutional manner.[5] The concept of "instantaneous" premeditation creates a reasonable

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[5]This issue is properly presented in this appeal as Chappell is on direct appeal and does not yet have a final judgment. See Johnson v. State, 118 Nev. 787, 802 n.31, 59 P.3d 450, 460 n. 31 (2002) (a conviction becomes final when judgment has been entered, the availability of appeal has been exhausted, and a petition for certiorari to the Supreme Court has been denied or the time for such a petition has expired) (citing Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987)); Doyle v. State, 116 Nev. 148, 157, 995 P.2d 465, 471 (2000) (same); Berman v. U.S., 302 U.S. 211, 212 (1937) ("Final judgment in a criminal case means sentence. The sentence is the judgment"). See also NRS 176.105 ("If a defendant is found guilty and is sentenced as provided by law, the judgment of conviction must set forth: (a) The plea; (b) The verdict or finding; (c) The adjudication and sentence, including the date of the sentence, any term of imprisonment, the amount and terms of any fine, restitution or administrative assessment, a reference to the statute under which the defendant is sentenced and, if necessary to determine eligibility for parole, the applicable provision of the statute; and (d) The exact amount of credit granted for time spent in confinement before conviction, if any." A judgment of conviction is not final until there is a written judgment setting forth

likelihood of convictions and sentences for first-degree murder without any rational basis for distinguishing it from second degree murder. See NRS 200.030; State v. Thompson, 65 P.3d 420, 425-29 (Ariz. 2003) (defining premeditation simply as "instantaneous" constitutes due process violation). The definition of first-degree murder is contrary to the statutory definition of first degree murder because it fails to include both the elements of "premeditation and deliberation" contained in NRS 200.030(1); Byford, 116 Nev. 215, 994 P.2d at 712-13; cf. Laird v. Horn, 414 F.3d 419, 425-28 (3rd Cir. 2005) (due process violation from jury instruction omitting intent element of offense).

This Court has held that Byford is not a constitutional ruling and is not to be given retroactive application. Garner, 116 Nev. at 782, 6 P.3d at 1025. This Court's holding in Garner, however, should be reconsidered in light of the recent decision of the Ninth Circuit Court of Appeals in Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007). In Polk, the Ninth Circuit held that this Court's holdings in Byford and Garner, that no constitutional violations occurred due to the use of the Kazalyn instruction, was contrary to clearly established federal constitutional law as determined by the United States Supreme Court. Polk, 503 F.3d at 909-11 (citing Sandstrom v. Montana, 442 U.S. 510, 521 (1979); Francis v. Franklin, 471 U.S. 307, 326 (1985); In re Winship, 397 U.S. 858 (1970)). If Garner is not overruled by this Court, defendants will have no choice but to pursue their federal constitutional claims in federal court, where they will obtain relief from their judgments upon a showing of prejudice. This process will result in unnecessary delay and expense, will deprive this Court of the opportunity to make the first assessment of prejudice, and will greatly delay the time for retrials. Accordingly, reconsideration is warranted.[6]

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the plea; the verdict or finding; and the adjudication and sentence, including the date of sentence and a reference to the statute under which the defendant is sentenced. Bradley v. State, 109 Nev. 1090, 1094, 864 P.2d 1272, 1275 (1993) (citing NRS 176.035(1)).

[6]Chappell recognizes that this Court found this issue to be without merit during the post-conviction appeal. XI ROA 2790. Reconsideration is warranted, however, based upon the Ninth Circuit's subsequent decision in Polk and because it would be a fundamental

Reconsideration is also warranted because this Court's holdings in Byford and Garner that constitutional rights were not implicated by the Kazalyn instruction were erroneous. A ruling that a definition confuses the distinction between first degree, capital-eligible murder, and second degree murder, is necessarily a ruling that implicates the federal constitutional guarantees cited. Consequently, the State is given virtually unlimited discretion in charging because there is no way to distinguish between first and second degree murder, Byford, 994 P.2d at 713, and it is also likely that the jury will arbitrarily convict similarly situated defendants for first-degree murder and impose the death penalty in violation of the equal protection guarantee of the constitution.

Chappell was prejudiced by the use of the Kazalyn instruction. The record reflects that Chappell, a man with a low IQ and substantial mental or personality disabilities, killed his long time girlfriend, who was the mother of their three children, during the heat of an argument over a letter to her from another man that Chappell discovered shortly before she was killed. IV ROA. 892-94; VI ROA. 1403-05, 1546. He used a common kitchen knife that was found in their home and did not bring a weapon with him. The first trial jury found a mitigating circumstance of murder committed while the defendant was under the influence of extreme mental or emotion disturbance, thus establishing that the jury had significant concerns about Chappell's mental state at the time of the offense. IX ROA 2126, 2170-71. Had the jury been properly instructed, there is a reasonable likelihood that they would have found him guilty of a lesser offense of second-degree murder or voluntarily manslaughter.

The State was relieved of its burden of proving each of the material elements of felony murder. Chappell's conviction must therefore be reversed. Sandstrom, 442 U.S. at 521; Francis, 471 U.S. at 326; In re Winship, 397 U.S. 858. Under these circumstances, the State cannot establish beyond a reasonable doubt that the unconstitutional jury instruction did not

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miscarriage of justice not to do so. See Arizona v. California, 460 U.S. 605, 618 n.8 (1983) (it is not improper to depart from the law of the case if a court believes its prior holding is "clearly erroneous and would work a manifest injustice"); Leslie v. Warden, 118 Nev. 773, 780, 59 P.3d 440, 445 (2002); Tien Fu Hsu v. County of Clark, 173 P.3d 724 (Nev. 2007).

contribute to the jury's verdict. See Chapman v. California, 386 U.S. 18 (1967); Neder v. U.S., 527 U.S. 1, 18 (1999).[7]

B. Chappell's Conviction For First Degree Murder Must Be Reversed Because The Jury Was Not Properly Instructed On The Elements Of Felony Murder

The failure of the trial court to instruct the jury on the element of felony murder violated Chappell's rights to due process, equal protection, and a reliable sentence under the state and federal constitutions.[8] U.S. Const. Amends. V, VIII, XIV; Nev. Const. Art. I, Secs. 3, 6, 8; Art. IV Sec. 21.

The State charged Chappell with felony murder based in part upon robbery, argued that he was guilty of felony murder based upon robbery, obtained an instruction on felony murder, and obtained a verdict of first degree murder which was likely premised on the robbery allegation. I ROA 38-39; VII ROA 1711, 1747-49. The felony murder theory was

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[7]It is anticipated that the State will argue that Chappell's conviction may still stand based upon a belief that the first jury may have found Chappell guilty under a theory of felony murder. The jury did not return a special verdict, so it is impossible to know the basis of the jury's decision. This Court has recently issued conflicting decisions on the standard to be utilized in this situation. Cf. Nay v. State, 167 P.3d 430 (Nev. 2007) (using a "beyond a reasonable doubt" standard and citing Neder v. U.S., 527 U.S. 1 (1999)) with Bolden v. State, 124 P.3d 191 (Nev. 2005) (using a "absolute certainty" standard and citing Keating v. Hood, 191 F.3d 1053 (9th Cir. 1999)). The Bolden standard is correct. Stromberg v. California, 283 U.S. 359 (1931); Ficklin v. Hatcher, 177 F.3d 1147, 1152 (9th Cir. 1999); Lara v. Ryan, 455 F.3d 1080, 1085-1086 (9th Cir. 2006).

[8]Just as the lack of proper instruction on premeditation and deliberation issue is properly before this Court, so to is this issue. Chappell is on direct appeal and does not yet have a final judgment. See Johnson, 118 Nev. at, 802 n.31, 59 P.3d at 460 n. 31; Griffith, 479 U.S. at 321 n.6 (1987); Doyle, 116 Nev. at 157, 995 P.2d at 471; Berman, 302 U.S. at 212; NRS 176.105.

Chappell recognizes that this Court found that felony murder could be premised on afterthought robbery, albeit in the context of the discussion of aggravating circumstances, on direct appeal. Chappell, 114 Nev. at 14087, 972 P.2d at 841. Consideration of this issue as it concerns the conviction for first degree murder is warranted because it would be a fundamental miscarriage of justice not to do so. See Arizona v. California, 460 U.S. at 618 n.8; Leslie, 118 Nev. at 780, 59 P.3d at 445; Tien Fu Hsu, 173 P.3d 724.

premised on the theory that (1) Chappell entered the trailer through a window with intent to commit an offense; and (2) he took Panos's car after she had been killed. I ROA 39. The jury was specifically instructed that it could find Chappell guilty of robbery even if the intent to commit robbery was formed after the murder and it could find Chappell guilty of felony murder based upon that robbery. VII ROA 1711, 1721. See also VII ROA 1623, 1628-29 (State's closing argument)

On direct appeal this Court considered this issue in the context of reviewing the aggravating circumstance of the felony murder robbery. Chappell, 114 Nev. at 1408, P.2d at 841. It rejected Chappell's argument that the aggravating circumstance was invalid because the evidence showed that Chappell took the car as an afterthought and found that "it is irrelevant when the intent to steal the property is formed." Id. This theory, however, was soundly rejected in Nay v. State, 167 P.3d 430 (Nev. 2007) as Chappell was essentially overruled on this point. In Nay, this Court found that "[r]obbery does not support felony murder where the evidence shows that the accused kills a person and only later forms the intent to rob that person." Id. at 435.

The jury here was instructed that it could find felony murder based upon afterthought robbery and the jury returned a verdict of guilty on the charge of first degree murder. As it is impossible to know which theory the jury relied upon in reaching its verdict, Chappell's judgment of conviction cor the offense of first degree murder must be reversed. Bolden; 124 F.3d 191; Stromberg, 283 U.S. 359; Ficklin, 177 F.3d at 1152; Lara, 455 F.3d at 1085.

C. Chappell's Sentence of Death Must Be Vacated Because NRS 177.055(3) Is Unconstitutional

NRS 177.055(3) is unconstitutional because it grants this Court the unfettered discretion to impose a sentence of less than death upon the finding of a constitutional violation. This Court's failure to impose a lesser sentence here violated Chappell's rights to due process, equal protection, and a reliable sentence and the state and federal constitutions. U.S. Const. Amends. V, VIII, XIV; Nev. Const. Art. I, Secs. 3, 6, 8; Art. IV Sec. 21.

Chappell was sentenced to death by the first jury. IX ROA. 2127, 2167. On direct

appeal this Court struck the aggravator based on torture or depravity of mind, but affirmed Chappell's conviction and sentence. Chappell, 114 Nev. 1403, 972 P.2d 838. On appeal from the partial grant and partial denial of his post-conviction petition for a writ of habeas corpus, he raised constitutional issues concerning his conviction and death sentence. This Court did not address all of these issues, but did reverse his death sentence based upon a finding of ineffective assistance of trial counsel. XI ROA 2783-96. This Court did not elect to set aside Chappell's death sentence and impose a sentence of imprisonment for life without the possibility of parole, as it was entitled to pursuant to NRS 177.055(3). Chappell's sentence of death is unconstitutional because NRS 177.055(3) is invalid on its face and as applied under the facts of this case.

NRS 177.055(3) grants this Court two options upon finding constitutional error in a capital case. It may a remand case for a new penalty hearing or set aside the death sentence and impose a sentence of life without the possibility of parole. This remand procedure provided this Court with complete and unfettered discretion to re-sentence Chappell to life imprisonment or to subject him to the risk of another death sentence after remand. See Johnson v. State 118 Nev. 787, 803-04, 59 P.3d 450, 461 (2002). The absence of standards and the absence of any rational narrowing of death eligibility in the statute renders NRS 177.055(3) unconstitutional.

NRS 177.055(3) allows this Court to act as a sentencer, see Sochor v. Florida, 504 U.S. 527, 539 (1992). Under Furman v. Georgia, 408 U.S. 238 (1972), a sentencing scheme in a capital case must channel the discretion of the sentencing body, comport with contemporary standards of decency and allow the sentencer to make an individualized sentencing determination. Lewis v. Jeffers, 497 U.S. 764, 774 (1990); Barclay v. Florida, 463 U.S. 939, 960 (1983). The sentencing scheme of NRS 177.055(3) fails to comport with any of Furman's constitutional principles: it does not supply any standards to channel the sentencer's discretion; its arbitrariness is offensive to contemporary standards of decency; and there are no criteria to allow the court to arrive at an individualized sentence by considering mitigators. The absence of any standards to guide the court's discretion is

exacerbated by the inherent limitations on an appellate court's ability to weigh the mitigators presented to the jury. Caldwell v. Mississippi, 472 U.S. 320, 330 (1985); Cabana v. Bullock, 474 U.S. 376, 388 n.5 (1986). This procedure also violates the Eighth Amendment's requirement of meaningful appellate review of death sentences. Clemons v. Mississippi, 494 U.S. 738, 749 (1990); Zant v. Stephens, 462 U.S. 862 875-76, 890 (1983).

NRS 177.055(3) grants this Court unfettered discretion to sentence a defendant to life imprisonment or to remand the case and allow the State to seek another death sentence. Such unfettered discretion is unconstitutional. See Harris v. Blodgett, 853 F.Supp. 1239, 1287-91 (W.D. Wash. 1994); Ortega-Rodriguez v. U.S., 507 U.S. 234, 246-49 (1993); NAACP v. Alabama, 357 U.S. 449, 456-58 (1958). The failure to channel the Court's discretion violates the Eighth Amendment because it may literally mean the difference between life and death. Chappell's sentence of death is unconstitutional because NRS 177.055(3) is unconstitutional.

D. Chappell Was Entitled To Review By The District Attorney's Death Review Committee

Chappell's state and federal constitutional rights to due process and equal protection, and his right to be free from cruel and unusual punishment were violated because the State refused to submit this case for consideration before the District Attorney's Death Review Committee, even though similarly situated defendants received such review. U.S. Const. amend. V, VI, VIII, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

Chappell contended that the Committee should review the prosecution's original 1995 decision to seek the death penalty because three of the four original aggravating circumstances were no longer applicable and because Chappell had adjusted well to prison and had not been subject to disciplinary actions during his decade of incarceration. XII ROA 2821. Despite the fact that over a decade had lapsed since Chappell was initially charged with death penalty, the State refused to resubmit this matter to its Death Review Committee and instead relied upon the original 1995 decision to seek death against him. XII ROA 2885 (citing Schoels v.State, 114 Nev. 981, 966 P.2d 735 (1998)). The district court denied Chappell's motion. XII ROA 2905, 3015; XV ROA 3837.

In evaluating whether a defendant should be subject to the death penalty, considerations of *contemporary* standards of decency must be considered. See Roper v. Simmons, 543 U.S. 551, 594 (2005); Atkins v. Virginia, 536 U.S. 304, 311 (2003); Woodson v. North Carolina, 428 U.S. 280, 301 (1976). The 1995 decision to seek the death penalty should not govern the 2007 prosecution as the intervening twelve years render the former decision dated and an unreliable reflection upon the contemporary standards of decency.

The State relied upon the Separation of Powers doctrine in arguing that it should not have been required to submit this matter to further review by its Committee. XII ROA 2885. A prosecutor's discretion, however, is subject to constitutional constraints. U.S. v. Armstrong, 517 U.S. 456, 464 (1996) (citing U.S. v. Batchelder, 442 U.S. 114, 125 (1979)). The Due Process Clause of the federal constitution prohibits a prosecutorial decision that is based on "'an unjustifiable standard such as race, religion, or other arbitrary classification[.]'" Id. (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)). Chappell respectfully submits that his due process rights, as well as his rights against cruel and unusual punishment, were violated by the State's arbitrary decision not to submit cases that were reversed on appeal for review by the prosecutor's death review committee. He further submits that the failure of the State to treat him in the same manner as other defendants who faced capital proceedings at the same time as his trial resulted in a violation of his rights to equal protection of the laws.[9]

E. Chappell's Death Sentence Is Unconstitutional Because of the Trial Court Failed to Dismiss Jurors For Cause Who Would Always Impose A Sentence of Death

The trial court violated Chappell's state and federal constitutional rights an impartial jury, and a reliable sentence by refusing challenges for cause of potential jurors who indicated their firm intent to impose a sentence of death. U.S. Const. Amends. VI, VIII,

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[9]The State's reliance on Schoels was misplaced. First, the State cited to a concurring opinion of one justice without noting that limitation in its opposition. See Schoels, 114 Nev. at 990-91, P.2d at 741-42 (concurring opinion of Justice Shearing). In addition, the Schoels court did not address the issue of whether the State is required to reconsider its decision to seek the death penalty upon reversal of a sentence of death.

XIV; Nev. Const. Art. I, Secs. 3, 6, 8.

The district court erred, and violated Chappell's constitutional rights, by failing to grant a challenge for cause of prospective juror Bundren. The following exchange makes it clear that the potential juror would not consider sentences of life with or without the possibility of parole:

MS. WECKERLY [The Prosecuting Attorney]: You think you'd automatically pick out a punishment without hearing the information?

PROSPECTIVE JUROR [Ms. Bundren]: I think I would.

MS. WECKERLY: And I take it, it didn't matter what the judge's instructions would be, you (sic) do it anyway?

PROSPECTIVE JUROR: I'd do what I thought was right.

MS. WECKERLY: So there is no way you could see yourself looking at all four punishments in this situation?

PROSPECTIVE JUROR: I don't think so. I can't say positive, but I don't think so.

MS. WECKERLY: That's sort of the question.

PROSPECTIVE JUROR: I really don't think so. I quite honestly cannot see how I could not punishment (sic) somebody that committed a murder.

MS. WECKERLY: You understand that not all murders are eligible for the death penalty?

PROSPECTIVE JUROR: I'm not familiar with things like that. I was just, off the questionnaire it said he used a weapon, things like that. And he murdered her, so that's what I would be going by.

MS. WECKERLY: And there are people that commit first degree murder with a weapon that are not eligible, legally, for the death penalty. Is that something you could accept?

PH: I would have to, if it's not an option.

MS. WECKERLY: Okay. So in that type of situation, you're saying you'd follow the law?

PROSPECTIVE JUROR: I can follow the law, sure.

MS. WECKERLY: And the law also tells you in and (sic) penalty hearing or this type of situation that you have to at least consider -- not telling you what weight you have to give certain pieces of information -- but you have to at least listen to information that's presented in a hearing like this. Would you be able to do that?

PROSPECTIVE JUROR: I could always listen.

MS. WECKERLY: After that, of course, the decision is left to you and your fellow jurors. I assume you can make a decision at that point?

PROSPECTIVE JUROR: I could.

MS. WECKERLY: Thank you, ma'am. Pass for cause, your Honor.

THE COURT: Mr. Patrick.

MR. PATRICK: Ms. Bundren, Ms. Weckerly asked you, you said you would automatically pick a penalty.

JP: I would automatically pick a penalty -- just off the questionnaire.

MR. PATRICK: What penalty would you automatically pick?

PROSPECTIVE JUROR: Death.

MR. PATRICK: In your questionnaire you said you've always thought this way about the death penalty?

PROSPECTIVE JUROR: I have.

MR. PATRICK: I think the last think you wrote on the questionnaire was that you are not open minded enough to think there's an excuse?

PROSPECTIVE JUROR: I'm very narrow minded about that.

MR. PATRICK: What you're telling us is your mind is made up?

PROSPECTIVE JUROR: It pretty much is.

MR. PATRICK: There's not much chance we'll change that, is there?

PROSPECTIVE JUROR: Not by going off the questionnaire, no.

MR. PATRICK: We'd challenge for cause, your Honor.

THE COURT: Let me ask you a question, Ms. Bundren, because a couple of times you kind of put a caveat to your statement about saying, off the questionnaire. You understand there's going to be a hearing where witnesses, evidence is going to come in. Both sides have to present whatever they want to examine the witnesses on. And that's the evidence that you're going to rely upon to make a decision, not --

PROSPECTIVE JUROR: Not the questionnaire. Right.

THE COURT: That being the case, can you listen to the evidence presented in the hearing.

PROSPECTIVE JUROR: I could.

THE COURT: And after having listened to that evidence, is it your statement today that you would be able to consider all of the forms of punishment?

PROSPECTIVE JUROR: I could if it was different from the statement.

THE COURT: I don't know that it's different from the statement, but obviously it's more expansive. You're going to get more information about things during the penalty hearing. So I don't want to say it's going to be different. I'm just going to say that I would expect

you'll receive more information about everything involved here.
So what I need to know is if you'll be able to consider all forms of punishment.
PROSPECTIVE JUROR: I could consider it.
THE COURT: Okay, yes or no?
PROSPECTIVE JUROR: Yes.

19 ROA 3907-09. Chappell respectfully submits that it is clear from this exchange that prospective juror Bundren would always return a sentence of death in the case of first degree murder and that she would not sincerely consider the alternative sentences of life with or without the possibility of parole. The district court erred in failing to grant the defense motion for cause. 19 ROA 3916. Ms. Bundren sat on the jury which imposed the sentence of death against Chappell. 12 ROA 3046.

Likewise, the district court erred in failing to grant a defense challenge for cause of prospective juror Hibbard as he was unwilling to consider mitigating circumstances other than insanity:

MR. PATRICK [defense counsel]: Just because somebody was on drugs, would you still be able to keep an open mind about things they had to say?

PROSPECTIVE JUROR: If you're asking if it mitigates what they do, no it doesn't. They have to control their actions and make decisions. They've got to be accountable for those decisions.

MR. PATRICK: In your questionnaire when they asked you what your feelings were about the death penalty, you put, good.

PROSPECTIVE JUROR: If the penalty meets the crime. That's what I'm trying to say, the penalty should fit the crime.

MR. PATRICK: Again, on the mitigation, you were asked there's mitigating circumstances and aggravating circumstances. You wrote that you could listen to both sides of that/

PROSPECTIVE JUROR: Yeah. Mitigation seems to be a broad spectrum now a days to justify a lot of things. I don't believe that mitigating circumstances for death penalty murder. I would have a hard time accepting mitigating circumstances for murder.

MR. PATRICK: So anything in a person's background or any drug activity, doesn't make any difference to you?

PROSPECTIVE JUROR: No.

MR. PATRICK: At all?

PROSPECTIVE JUROR: Not at all.

MR. PATRICK: Would you say you'd vote automatically for the death penalty?

PROSPECTIVE JUROR: I would have to hear the facts. Murder is a pretty severe action. Unless there's insanity at the time of committing it, I don't know how you justify that.

MR. PATRICK: So besides insanity, you wouldn't be able to find any mitigating circumstances?

PROSPECTIVE JUROR: It would be difficult.

MR. PATRICK: Court's indulgence.

THE COURT: Okay.

MR. PATRICK: I'll challenge at this time.

THE COURT: Let me ask you a question, Mr. Hibbard. The question isn't so much whether you think there are mitigating circumstances for the murder that justify a crime. The question here is sentence, punishment. Are there things out their in your mind that you would be able to consider that you think would be appropriate consideration as to mitigate what sentence somebody receives?

PROSPECTIVE JUROR: I think pretty hard about the victim, not so much the person. The victim doesn't have a lot of choices left.

THE COURT: In understand. But the question in terms of how he gets punished, both sides might be able to present evidence that they think --

PROSPECTIVE JUROR: The victim didn't choose his or her punishment.

THE COURT: I realize that. Would you be able to consider things that the defense brings up that they argue in mitigation of what sentence somebody should receive, or are you saying you wouldn't consider those at all?

PROSPECTIVE JUROR: I'm saying that I think that bringing up a cover for justifying committing murder is very difficult for me to understand.

THE COURT: All right. Thank you.

19 ROA 3957-58. The court denied the challenge for cause after concluding the following:

> Well, I'm going to deny the challenge as to Mr. Hibbard. There's a difference – there's several levels of what they need to be able to do here. Number one is can they consider – do they recognize and consider all four forms of punishment. And he indicated he could.
>
> Two, will you follow the instructions of the court. He indicated he would. And will you consider all the evidence. He indicated he would. Whether somebody agrees or disagrees with whether or not they think, you know, prospectively some type of mitigation is a good or a bad thing they're going to give weight to is really kind of a little lower down because you can't tell them the evidence yet. So they're kind of having to guess, well, do I think there's mitigation for murder or not, without having heard any facts of the case.

> I don't think the jurors need to say your mitigation is going to be good or bad to make them eligible to sit on the case. It's important that they indicate they will consider all the evidence, consider all forms of punishment and are not foreclosed to imposing just one penalty or another. So I think that he sufficiently answering things, so I'll deny the challenge for cause as to Mr. Hibbard.

19 ROA 3966. Chappell respectfully submits that it was clear from the record that prospective juror Hibbard was unwilling to consider mitigating evidence and that he was therefore not eligible to serve on the jury. The district court erred in failing to grant the defense challenge for cause of this juror.

Finally, the district court erred in failing to grant a defense challenge for cause of potential juror Ramirez. Ramirez expressed his belief that the death penalty was not enforced enough; that he comes from Texas and the concept that certain factors would have to be considered before a sentence of death could be imposed was news to him; that it was hard for him to say whether he would be able to follow the judge's instructions and hold the State to its burden; that he believes in an eye for an eye; that he agreed with the system in Texas where jurors did not have four choices as to the punishment, but only one choice which was the death penalty; and he doubted that if he were in Chappell's position that he would want 12 people like him sitting on the jury. 19 ROA 3976-78. Despite his strong convictions and the clear message that he would impose the death penalty, the district court denied the defense challenge for cause. 19 ROA 3990. The district court erred in doing so.

In Wainwright v. Witt, 469 U.S. 412 (1985), the United States Supreme Court held that "the proper standard for determining when a prospective juror may be excused for cause because of his or her views on capital punishment . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Id. at 424 (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)). It is apparent from voir dire that these three jurors should have been dismissed for cause because their views would prevent or substantially impair the performance of their duties. It is well settled that the Sixth and Fourteenth Amendments guarantee a defendant on trial for his life the right to an impartial jury. Witt, 469 U.S. at 424; Irvin v. Dowd, 366 U.S. 717,

722 (1961). Because Juror Bundren actually sat on Chappell's jury, his sentence of death must be overturned. Ross v. Oklahoma, 487 U.S. 81, 85 (1988). Likewise, Chappell was prejudiced by the failure to remove Hibbard and Ramirez from the jury panel because Chappell had to use his peremptory challenges against these prospective jurors and had they been removed for cause he could have used those challenges against other prospective jurors, such as Juror Bundren. Finally, Chappell was prejudiced because the examination of these jurors took place in the presence of the other potential jurors, and by failing to remove these jurors for cause the jurors who sat on Chappell's jury received the implicit message that the views of these jurors were acceptable under the law.

F. Chappell's Conviction Is Unconstitutional Because The State Was Permitted To Introduce Unreliable Hearsay Evidence During The Penalty Hearing In Support of The Aggravating Circumstance and as Other Matter Evidence

Chappell's conviction and death sentence are invalid under state and federal constitutional guarantees of confrontation, cross-examination, compulsory process, due process of law, equal protection, and a reliable sentence due to the trial court's improper admission of testimonial hearsay statements. Likewise, Chappell's constitutional rights to due process, a fair penalty hearing, and a reliable trial were violated by the introduction of unreliable hearsay statements. U.S. Const. Amends. V, VIII & XIV; Nev. Const. Art. I, Secs. 3, 6, 8; Art. IV, Sec. 21.

Chappell was deprived of his constitutional rights due to the admission of testimonial hearsay statements by declarants that he received no opportunity to confront or cross-examine. Out-of-court statements by witnesses that are testimonial are barred, under the Confrontation Clause, unless witnesses are unavailable and petitioner had prior opportunity to cross-examine them, regardless of whether such statements are deemed reliable by court. Considered singly and cumulatively, the introduction of inadmissible hearsay against petitioner was prejudicial. Charmaine Smith, a Parole and Probation Officer, testified that Panos told her that she was upset with Chappell and in fear for her life. XIII ROA 3236. She also reported a claim that Panos said Chappell had previously held a knife to her. XIII ROA 3236. Detective Vaccaro testified about tests revealing the presence of DNA in Panos's

vagina and the meaning of those tests. XIV ROA 3425. Clair McGuire testified about statements that Panos made to police officers in which she stated that Chappell held a knife to her throat and pinned her down while sitting on top of her chest. XIII ROA 3247. Lansing Police Department Detective Weidner testified about statements made by a man who was allegedly assaulted by Chappell in 1988. XIII ROA 3251-53. These statements were introduced both as evidence of the alleged aggravating circumstance and as "other matter" or character evidence.

Chappell was also deprived of his constitutional rights due to the admission of non-testimonial hearsay statements. Chappell had no opportunity to confront or cross-examine the declarants of these statements. Moreover, much of this evidence was unreliable, highly suspect and impalpable. Substantial evidence of this nature was introduced during the second penalty phase trial. Specifically, Michele Mancha testified that Panos told her about various incidents involving Chappell, Panos's alleged plan to leave Chappell, Panos's report of calling the jail to ensure that Chappell was still in custody. XIII ROA 3089-3101. She was also permitted to testify as to Panos's reports regarding court proceedings, even though Mancha was not present at those proceedings; report that Panos had a restraining order against Chappell, even though in fact that restraining order was no longer in effect as Panos did not appear for her court appearance; and report an alleged threat to Panos by Chappell, while he was in custody, during a court proceeding for which Mancha was not present. XIII ROA 3102-05. Mike Pollard also testified as to conversations he had with Panos in which she allegedly claimed that she was leaving Chappell, that he stole items from her and their children, and that Panos repeatedly called the jail because she was concerned about Chappell's release. XIII ROA 3114-29. Pollard also claimed that Panos said that she received a telephone message from Chappell and recited the contents of that alleged message. XIII ROA 3131. Lisa Larsen also presented testimony about her conversations with Panos, including Panos's alleged plan to move before Chappell got out of custody and her alleged conversation with Chappell in court the day before she was killed. XIII ROA 3169-72. Latrona Smith testified that on the day Panos was killed, she called Smith and asked her to

call back with some kind of excuse so that she could leave the house. XIII ROA 3191-92. Clair McGuire testified about statements that Panos had to quit her job as a 911 operator in Tucson because of Chappell's criminal record and statements by Panos that Chappell had sold her furniture and their children's jackets to get money for drugs. XIII ROA 3244-45. McGuire further stated that Panos said that Chappell would rape McGuire and burn the house down so that Panos would not have a house to come home to. XIII ROA 3246. These statements were introduced both as evidence of the alleged aggravating circumstance and as "other matter" or character evidence.

Chappell was prejudiced by this highly inflammatory and inadmissible evidence. Although this evidence was highly damaging, Chappell was not able to challenge it through cross-examination of the persons making the statements.

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The United States Supreme Court has repeatedly recognized that a defendant's Sixth Amendment right to confront his accusers "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." Crawford v. Washington, 541 U.S. 36, 54 (2004). See also Salinger v. U.S., 272 U.S. 542, 548 (1926); U.S. v. Reid, 53 U.S. 361, 364-65 (1851) (overruled on other grounds by Rosen v. U.S., 245 U.S. 467, 470 (1918)). Under the common law, the rule governing testimony by deceased witnesses was clear: absent a prior opportunity for cross-examination, a deceased's statements were inadmissible. As incorporated into the Sixth Amendment, this rule recognized only two exceptions: when that testimony consisted of the "dying declaration of a party murdered," 1 Joseph Chitty, a Practical Treatise on the Criminal Law 390 (London 1819), and "when it can be proved on oath, that the witness is detained and kept back from appearing by the means and procurement of the prisoner." Geoffrey Gilbert, the Law of Evidence 125 (6th ed. London 1801); see also Crawford, 541 U.S. at 56 n.6 (dying declarations), 62 (forfeiture by wrongdoing).

A defendant's right to confront and cross-examine the witnesses against him is a central procedural safeguard whose "very mission [is] to advance the accuracy of the truth-determining process in criminal trials." Tennessee v. Street, 471 U.S. 409, 415 (1985) (citing Dutton v. Evans, 400 U.S. 74, 89 (1970)). It is "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Pointer v. Texas, 380 U.S. 400, 405 (1965).

Chappell recognizes that in Summers v. State, 148 P.3d 778, 782 (Nev. 2006), this Court held in a 4-3 decision, that hearsay testimony is admissible in a capital penalty hearing. In doing so, this Court relied upon the United States Supreme Court's 1949 decision in Williams v. New York, 337 U.S. 241 (1949). Williams, however, should no longer be deemed controlling. This was a due process case decided nearly six decades ago that has been repeatedly limited by subsequent cases. "The United States Supreme Court has not addressed this precise issue [of the application of Crawford to capital sentencing] but has given very clear indications that Williams v. New York is no longer viable. Summers, 148 P.3d at 785 (Rose C.J., joined by Maupin and Douglas, JJ., concurring in part and dissenting in part). Williams should not be given rigid adherence given the undeniable evolution of the United States Supreme Court's jurisprudence on this matter over the succeeding decades. Id. There are many strong arguments for reconsidering and limiting Williams' reach. First, when Williams was decided, the Supreme Court had not yet held that the Confrontation Clause applied to the states, thus the Court did not analyze the issue presented under the Confrontation Clause. Second, Gardner v. Florida, 430 U.S. 349 (1977), confirms that Williams has less sweeping application under the Court's post-Furman capital sentencing jurisprudence – indeed, the Eleventh Circuit has extended the Confrontation Clause to capital sentencing based on precisely this reading of Gardner. Proffitt v. Wainwright, 685 F.2d 1227, 1253-54 (11th Cir. 1982).

The precedential force of Williams, at least with respect to capital cases, cannot be evaluated outside the context of the Supreme Court's ongoing reevaluation of the Sixth Amendment in recent years. When Williams was issued, capital sentencing proceedings

looked nothing like today's proceedings. They were formally characterized as informal procedures, with extraordinary discretion, and the Supreme Court's holding was premised on the idea that there was no real distinction between capital sentencing and ordinary sentencing. Williams, 337 U.S. at 252. That premise is no longer valid. See Barefoot v. Estelle, 463 U.S. 880, 898-03 (1983) (upholding the admission of demonstrably unreliable evidence against a due process attack because of "the benefit of cross-examination" to expose the flaws in such testimony); Specht v. Patterson, 386 U.S. 605 (1967) (non-capital defendant was entitled to procedural protections, including the right of confrontation, in facing an enhanced sentence for his crime which was contingent on proof of additional facts in a separate proceeding); Bullington v. Missouri, 451 U.S. 430, 446 (1981).

Other courts recognize that Crawford applies to the eligibility phase of a capital penalty trial. See Russeau v. State, 171 S.W.3d 871 (Tex. Crim. App. 2005); State v. Bell, 603 S.E.2d 93, 115-116 (N.C. 2004); U.S. v. Jordan, 357 F.Supp.2d 880 (E.D. Va. 2005); U.S. v. Johnson, 378 F.Supp.2d 1051, 1059-62 (N.D. Iowa 2005); State v. McGill, 140 P.3d 930 (Ariz. 2006). Still other courts have found that the Confrontation Clause applies to both the eligibility and selection phases of a capital penalty trial. Proffitt, 685 F.2d at 1254-55; U.S. v. Brown, 441 F.3d 1330, 1361 (11th Cir. 2006); U.S. v. Mills, 446 F.Supp.2d 1115, 1135 (C.D. Cal. 2006); Rodgers v. State, 948 So.2d 655, 663 (Fla. 2007).

Again, Chappell recognizes that in Summers, 148 P.3d at 779, this Court held, in a 4-3 decision, that Crawford does not apply to the penalty phase of a capital trail. See also Johnson v. State, 148 P.3d 767, 773 (2006); Thomas v. State, 148 P.3d 727, 733-34 (2006). He respectfully submits that these decisions are erroneous, clearly contrary to controlling federal authority, and should be overruled. In the alternative, he presents this issue here so that it may be preserved for federal review.

Chappell further contends that both the testimonial and non-testimonial hearsay statements which were introduced here were unreliable and rose to the level of highly suspect and impalpable evidence, which may not be introduced in a capital case. See Gallego v. State, 117 Nev. 348, 369, 23 P.3d 227, 241 (2001); Leonard v. State, 114 Nev. 1196, 1214,

969 P.2d 288, 289 (1998). Unverified and unreliable evidence of a suspect nature must not be allowed in a capital penalty hearing. D'Agostino v. State, 107 Nev. 1001, 1003-04, 823 P.2d 283, 285 (1991). As a matter of Due Process and the right to a fair trial, both of which are guaranteed by the state and federal constitutions, this evidence should not have been permitted. See Hicks v. Oklahoma, 447 U.S. 343 (1980) (a federal due process violation may be caused by depriving a person of a liberty interest under state law).

Particularly prejudicial here was the repeated testimony by Panos's friends that Chappell threatened to kill her the day before she was murdered and that Panos told Chappell that their relationship was over and she wanted to get on with her life. XIII ROA 3103-04 (Mancha); XIII ROA 3172 (Larsen). The friends were not present when these statements were allegedly made by Chappell, but were instead assertions by the friends of what they claim Panos said she heard Chappell say while they were in court. No evidence was introduced by any person who was present in court, including Chappell's probation officer who was present for the court proceeding. XIII ROA 3237. Although this testimony was highly damaging, it is highly suspect in that Panos did not make this statement to the probation officer, prosecutor, bailiff or judge at a time when they were agreeing that Chappell should be sent to a drug rehabilitation program rather than prison or jail. Had Chappell actually threatened to kill Panos in this context, it is probable that she would have told one of these people about his threat and urged them to keep him in custody. Likewise, this Court may take judicial notice of the fact that it is the general policy of the courts of this jurisdiction that inmates who are in custody are not allowed conversations with their girlfriends, or anyone else other than counsel, during court proceedings and it is therefore highly unlikely that such a conversation actually took place between Chappell and Panos. See Caballero v. Seventh Judicial Dist. Court, 167 P.3d 415, 419 n.21 (Nev. 2007); NRS 47.130(a). The State relied extensively on this evidence during the closing arguments and relied upon this evidence in arguing that Panos would not have had consensual sex with Chappell as it asserted the existence of the aggravating circumstance. See e.g. 16 ROA 3785. Reversal is warranted based upon the introduction of this highly prejudicial testimony.

G. The District Court Erroneously Admitted Presentence Investigation Reports

Chappell's conviction and death sentence are invalid under state and federal constitutional guarantees of due process of law, equal protection, and a reliable sentence due to the trial court's improper admission of two presentence investigation reports. U.S. Const. Amends. V, VIII & XIV; Nev. Const. Art. I, Secs. 3, 6, 8; Art. IV, Sec. 21.

The State introduced a presentence investigation report for a gross misdemeanor offense and a presentence investigation report for this case as evidence. XVI ROA 3772. Introduction of this evidence was plain error as such evidence is not admissible under Nevada law.

Shortly before the penalty phase trial, this Court reversed a defendant's conviction after it found that the prosecution committed plain error when it read a presentence report to the jury during the penalty phase of the defendant's trial. Herman v. State, 122 Nev. __, 128 P.3d 469 (2006). In Herman, the prosecutor read from the presentence report during the penalty phase, providing the jury with specific instances of his 17 prior arrests. Id. at __, 128 P.3d at 474-75. On appeal, this Court noted that pursuant to NRS 175.156(5), a presentence report cannot be made part of the public record. Id. at __, 128 P.3d at 474. Although the State did not submit the presentence report as a formal copy, the fact that the report was "essentially read into the record and transcribed" was "tantamount to entering it into and making it part of the public record." Id. at __, 128 P.3d at 474. This Court also noted that "[w]hile some of these arrests tend to indicate a pattern of conduct by [the defendant], ... the totality of their presentation makes the recitation substantially more prejudicial than probative." Id. at __, 128 P.3d at 475.

Chappell was prejudiced by the introduction of this evidence. The reports included information about arrests for which he was not convicted, including charges of possession of narcotics, criminal trespass, battery domestic violence and possession of narcotics for sale. XVIII ROA (1995 report). The 1996 report noted that Chappell had been arrested 17 times and convicted five times. XVIII (1996 report). The State also introduced written statements by Chappell that were included in the PSI and then used these statements against Chappell.

XVI ROA 3780; XVIII ROA (1995 and 1996 reports). The report included incorrect information, including a statement by Panos's friend that she was worried when she saw Chappell driving near Panos's home because she "had a Protective Order stopping the defendant from coming to her house." XVIII ROA (1996 report at page 4). The report also includes a statement by the PSI author that Chappell "battered this woman repeatedly for several years and when she finally attempted to make him stop by complaining to the police and obtaining [a] Protective Order, he went to her house, entered through a bedroom window, and killed her with a steak knife." XVIII ROA (1996 report at page 7). The author was not called as a witness and did not have any direct knowledge of the events at issue. His opinion was not fairly supported by the evidence and should not have been presented to the jury. Most significantly, the 1996 report included a statement from Panos's mother as to her thoughts on whether Chappell should receive the death penalty: "The SOB does not deserve to live." XVIII ROA (1996 report at page 5). It is well established that such evidence is not admissible and this statement would not have been before the jury had the PSI been excluded as evidence. See Floyd v. State, 118 Nev. 156, 174, 118 Nev. 156, 42 P.3d 249, 261 (2002), Kaczmarek v. State, 120 Nev. 314, 339, 91 P.3d 16, 33 (2004).

Chappell objected to the introduction of his statements on the grounds that no Miranda warnings were given prior to the time that they were obtained and it was unfair to introduce the statements under these circumstances. XVI ROA 3770. It does not appear that Chappell's counsel from his first trial was present when this statement was given and there is no indication on the statement form that it is a voluntary or elective statement, that the defendant has the right to decline writing a statement, or that he has a right to consult with counsel while writing the statement. Under these circumstances, as well as the reasons set forth in Herman, the district court erred and violated Chappell's constitutional rights by allowing these statements to be introduced at trial.

H. The District Court Allowed Improper Victim Impact Testimony

The trial court violated Chappell's state and federal constitutional rights to a fair and reliable sentencing hearing, due process and right to be free from cruel and unusual

punishment by permitting the State to introduce excessive victim impact testimony. U.S. Const. Amends. VI, VIII, XIV. Nev. Const. Art. I, Secs 6, 8; Art. IV Sec. 21.

An extraordinary amount of victim impact evidence was introduced against Chappell. As set forth in detail above, the jury heard victim impact evidence not only from Panos's mother, who testified to the impact of Panos's death upon herself, her sister Carol Monson and brother-in-law Maynard Monson, and the three children of Panos and Chappell; but also heard victim impact testimony from Panos's aunt Carol Monson (who also testified as to impact on Panos's mother and other family members), cousin, friend Michele Mancha, friend Mike Pollard, friend Lisa Larsen, friend Clair McGuire, friend Dina Richardson (who also testified as to victim impact on 40 additional people at the Tucson Police Department). XIII ROA 3107-08, 3177-78, 3248; XIV ROA 3307; XV ROA 3678-79, 3681-89. In addition, letters from Panos's cousin and aunt were read into the record and admitted as exhibits. XV ROA 3694-85. These letters referenced family gatherings at birthdays and holidays. XV ROA 3685. Chappell objected to the presentation of victim impact evidence by persons who were not family members of Panos. XIII ROA 3107-08, 3177; XV ROA 3678. The district court found that it had discretion to admit victim impact evidence from non-family members. XIII ROA 3272-73.

This victim impact evidence exceeded that for which notice was provided in the State's Notice in Evidence in Support of Aggravating Circumstances as the State only referenced victim impact evidence by Panos's mother, aunt and uncle, children and family members Al Granger, Christina Rees and Doris Wichtoski. XII ROA 3037. The State made no mention of its intention to elicit victim impact testimony from Panos's friends and co-workers. "SCR 250(4)(f) requires the State to file, no later than 15 days before trial, a notice of evidence in aggravation 'summarizing the evidence which the state intends to introduce at the penalty phase of trial . . . and identifying the witnesses, documents, or other means by which the evidence will be introduced.'" McConnell, 120 Nev. at 1071, 102 P.3d at 626. See also Mason v. State, 118 Nev. 554, 561-62, 51 P.3d 525 (2002) (finding that SCR 250(4)(f) applies to any evidence which the State intends to introduce at the penalty phase

of trial and rejecting the State's 'substantial compliance' argument). "Consistent with the constitutional requirements of due process, defendant should be notified of any and all evidence to be presented during the penalty hearing." Emmons v. State, 107 Nev. 53, 62, 807 P.2d 718, 724 (1991), modification on other grounds recognized by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000). Chappell's due process rights were violated by the admission of victim impact evidence from witnesses who were not identified as giving this evidence in the State's notice.

Chappell's rights were further violated by the introduction of this evidence because it exceeded the limited scope of victim impact evidence allowed by Payne v. Tennessee, 501 U.S. 808 (1991). This Court recognizes that in Payne, the United States Supreme Court held "that there is no per se Eighth Amendment bar to a capital jury's consideration of a prosecutor's argument or evidence related to the victim's personal characteristics or the emotional impact of the crime on the victim's family." Kaczmarek, 120 Nev. at 338, 91 P.3d at 33. This Court has held that "the district courts have discretion to admit such evidence under NRS 175.552, so long as it does not render the proceeding fundamentally unfair." Id. (citing Floyd, 118 Nev. at 174, 42 P.3d at 261). NRS 175.552(3)[10] provides that "evidence may be presented concerning aggravating and mitigating circumstances relevant to the offense, defendant or victim and on any other matter which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible." "Nevertheless, NRS 48.035(1) remains applicable in a capital penalty proceeding and provides that even relevant evidence 'is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, or confusion of the issues or of misleading the jury.'" Floyd, 118 Nev.

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[10]In contrast, NRS 176.015 limits victim impact evidence to the direct victim, the surving spouse, parents or children of a person who was killed as a direct result of the commission of the crime, and any other relative or victim who requests in writing to be notified of the hearing. Chappell submits that it is a violation of his state and federal constitutional rights to due process of law and equal protection to limit victim impact testimony for non-capital cases while not limiting victim impact evidence in capital cases. But see Hardison v. State, 104 Nev. 530, 763 P.2d 52 (1988).

at 174-75, 42 P.3d at 261. In Floyd, this Court approved of the district court's ruling limiting victim impact witnesses to one per murder victim and prohibiting victim impact evidence from other people who were at the scene. Id. at 175, 42 P.3d at 262.

Chappell recognizes that this Court has previously permitted victim impact testimony by neighbors, co-workers, and other persons outside of the victim's family. Wesley v. State, 112 Nev. 503, 519-20, 916 P.2d 793, 804 (1996); Lane v. State, 110 Nev. 1156, 1166, 881 P.2d 1358, 1365 (1994). The testimony here, which was presented by both family and non-family members, exceeded that in Wesley and Lane and should not have been permitted. In the alternative, Wesley and Lane should be overruled as to this issue in that they permitted victim impact testimony beyond that allowed by Payne.

This evidence was unduly prejudicial to Chappell and therefore violated the due process clause. Payne, 501 U.S. at 825. As set forth in detail below, at pages 56 to 63, the State's closing argument built an entire theme around this evidence as it argued that Panos was a worthwhile person and Chappell was not. The evidence here went far beyond briefly portraying Panos's character to the jury and informing the jury of the impact of her loss, and instead became a primary focus of the penalty hearing. Chappell's sentence of death must therefore be vacated

I. The District Court Erred In Allowing Admission of Chappell's Prior Testimony

The trial court violated Chappell's state and federal constitutional rights a fair and reliable sentencing hearing, due process, right to be free from cruel and unusual punishment and right to effective assistance of counsel by permitting the State to introduce Chappell's testimony from his original trial. U.S. Const. Amends. VI, VIII, XIV; Nev. Const. Art. I, Secs. 6, 8; Art. IV Sec. 21.

Over Chappell's objection, the district court permitted the State to use his testimony from the first trial. XV ROA 3632. Defense counsel had argued that the testimony was the result of ineffective assistance of counsel. The district court did not hold a hearing regarding this issue or otherwise hear argument concerning the claim of ineffective assistance of counsel, but instead permitted the State to introduce this evidence. It was error to do so.

Prior testimony is not admissible if it implicates a constitutional violation during the trial in which it was obtained. Byford, 116 Nev. at 225, 994 P.2d at 707; Harrison v. U.S., 392 U.S. 219, 222 (1968); U.S. v. Pelullo, 105 F.3d 117, 125 (3d Cir. 1997). An assertion of ineffective assistance of counsel is a claim of a constitutional violation under the Sixth Amendment. See Strickland v. Washington, 466 U.S. 668 (1984). Under these circumstances, the district court should have conducted a full inquiry concerning whether the decision to testify, and preparation for testimony at the first trial, were the result of the effective assistance of counsel. Its failure to do so warrants reversal of the sentence of death.

J. The State Committed Prosecutorial Misconduct By Making Arguments Based Upon Comparative Worth Arguments

The State violated Chappell's state and federal constitutional rights a fair and reliable sentencing hearing, due process, right to be free from cruel and unusual punishment, and right to be free from prosecutorial misconduct by making arguments comparing Chappell's worth to the worth of Panos. U.S. Const. Amends. VI, VIII, XIV. Nev. Const. Art. I, Secs. 3, 6, 8; Art. IV, Sec. 21.

Chappell's death sentence is unconstitutional because of prosecutorial misconduct in argument at sentencing comparing his worth to that of the victim. During closing arguments of the penalty phase the prosecutors made repeated and extensive comparisons between the life of the defendant and the life of the victim in arguing that the death penalty should be imposed against Chappell:

> Debbie loved life. She loved life. She loved people, but she was afraid. She was very scared and had a lot of reason to be afraid.
>
> Look how she chose to live her life over that then years of what was a living hell with the defendant. This thing of weekly beatings by him, the pain, the concern for her children. She had every reason to want to give up. She had every reason to take it out on other people, but how did she respond to that. I don't think of all of the misery, but the beauty that still remains. A quote from a young woman that lived decades ago that suffered a lot of pain and anguish and fear for an extended period of time, as well.
>
> And yet the beauty that still remains. You know it really is a matter of perspective. It's a matter of how people pick themselves up and go on with their lives. And we've got the whole spectrum of that in this case. The whole spectrum.
>
> We have in Debbie Panos an individual who had every reason to be bitter and dysfunctional. Yet, what did we hear about her. She not only was up, she was a person that other people loved to be around. She loved people.

She worked at jobs. She worked two jobs. Sometime she worked three jobs to take care of her family, her three little children that she dearly loved.

She was enough of a giver beyond this, outside of this sphere and difficulty she had, that people liked being around her. How did they describe her. That she was giving. That she was compassionate. That she would do anything for other people.

It was just the way that Debbie was. That was how she chose to be in her life. She was even a giving person with regard to the defendant, Mr. Chappell, the person that killed her, the person that took her life. And what a difference we see there. He is the total opposite end, because he chose evil. He chose evil.

He chose, rather than to make the best of his situation, to love other people, to be kind to other people, he chose to abuse other people, to take advantage of them. He chose to only think of himself. And in the end he chose to take the life of Debbie Panos.

There are heroes in these lives that we've heard about. There are smaller heroes and there are greater heroes. We heard about a grandmother who received a call about the death of her daughter it cost her the anguish in her heart to fall to the floor and began screaming. The picked herself up, went and got her three little grandchildren and has raised them in a home of love and compassion. And what is really a great tribute to the life that Debbie led.

What an amazing difference of choices we have in this case, ladies and gentleman. Debbie loved clowns. That makes sense, doesn't it. She liked things that made her happy. She liked things that made other people happy.

We were told how she loved older people. How she loved younger people. How she adored her own children. We saw the pictures how she liked to dress up like a clown. We heard about how she liked to collect clowns. We heard about how she liked hanging out with people from work. How she liked to take her children and they would go on picnics, go the (sic) Disneyland and all the other activities she had to work so hard as a single mother to be able to provide for them. And still deal with the things that the defendant put her through over this entire time. It's just stunning, what she went through.

XVI ROA 3778-79.

We've listened to days now, from people that knew him, both sides of this, and some people in the middle of it, some people that just went out there. The police, observed it. Weren't friends of Debbie. Weren't friend (sic) of his. Other individuals that saw this think, and the way that he was acting and the way he was treating Debbie. And there was nothing, nothing redeeming about this man that came out.

We had days to present that. He's a despicable human being. We're talking about a guy that sells his baby's diapers. It's just appalling. You've got little children, they get some shoes from the shoe store. And this guy is out there taking all the children's shoes back. Their mother goes to Disneyland and gets shirts for the kids. Takes them home. The defendant takes the shirts out and sells them so he can get money form himself, take care of his needs, because he thinks he's more important and his needs should come first.

XVI ROA 3779.

Opposition is a principle that has always been with us. And a lot of times, when you really think about it, it's the decisions we make against opposition that really define us, do (sic) they. It's choices that people make

in times of difficulty. Those are the people we call heroes. Like the grandmother here, maybe both grandmothers, who stepped in a situation that was thrust upon them and stood up and did a very heroic thing for these children.

The ripple affect (sic) of the defendant's actions are just amazing. I mean, it's more than just Debbie's death and the horrible way she died. It's a horror, that she was gurgling in her own blood. There is no way to sugarcoat that. I don't care if it was 15 second (sic) of (sic) 15 minutes, it was a horror. And like her mother said on the stand or her aunt, probably the last thing she was thinking of was her children. What would she be thinking. Who is going to take care of them. I'm not going the (sic) be there to take care of them. I love them so much - the ripple effect.

XVI ROA 3781-3782.

There's nothing about this man that recommends to you mercy in this particular case. He had a mother that died at an early age. Are we prepared to immunize everybody from the death penalty that had a mother that died at an early age or didn't know their father. maybe he had a father that wasn't nice to them, or say that's enough right there, not going to get the death penalty.

Everybody has mothers. All mothers and father (sic) are different. All grandmothers, grandfathers are different. Some people have ups, some people have downs. And it's what you do with it, that makes all of the difference.

But those things do not recommend and compel mercy. We have that phone off the hook. Debbie tried to crawl or get over to that area again, maybe after she set up the plan, she didn't get all the way outside the door. The mercy the defendant gave her, the jury trial the defendant gave her, the sentence the defendant gave her, ladies and gentlemen, this is Debbie Panos' parole eligibility right here, none.

What about her family. What about her little children. Her daughter said she wanted to die so that she could be with her mother. The ripple affect (sic) in this, where is the parole for the rest of her family. They have no parole.

They can't go and visit Debbie in an institution. They can't give her presents that she could respond to. They can't have conversations with her. If you put the defendant in jail or (sic) the rest of his life, his family will still have those opportunities. We put the visitations (sic) logs in pertaining to this defendant. There's been just a few people that have come over the years to visit with him, but he has that access in the prison system. Where is that access for the family members that are left picking up the pieces of their lives.

I don't care if it's ten minutes after the crime, ten years after the crime, the enormity of what he did is no different. Nothing has changed and we saw that as these people where (sic) on the stand. We saw their anguish, even after all this time they're living with in Tucson. They keep her picture in the police department.

Some of these people held up well. Some lost it right toward the end. It's amazing after this much time this woman's life still has this kind of affect on people. Made all the worse by the fact she was so violently taken from them.

We're back to blame. We're back, hopefully, now to choice and accountability, because that's what this is about. Choices the defendant made and you're holding him accountable for those choices with the ultimate punishment here, and that is the death penalty. That is the penalty that is fair and appropriate. And anything else is selling short what he did.

> It's time to put the blame where the defendant does not want to put it, to put it back on Mr. James Chappell and nobody else. And your verdict of the death penalty, will do that. And it will be a verdict that speaks to fairness in this case, and a verdict that speaks to equality under the law, and a verdict that speaks to being balanced with the totality of what he did in wrecking and destroying so many lives, and, yet, lives so different from his, these people have been able to stand up and do everything that he didn't do, and rise above it.

XVI ROA 3786-87.

The United States Supreme Court has concluded that a prosecutor may appropriately argue, and a jury may appropriately consider, "victim impact" evidence concerning the victim's personal characteristics at a capital sentence hearing. Payne, 501 U.S. at 823. The use of victim impact evidence in this case, however, far exceeded that authorized by Payne and Chappell is therefore entitled to a new penalty hearing.

In his closing arguments, the State repeatedly emphasized the comparative worth of the lives of the Panos and Chappell. The State consistently and systematically contrasted the apparently virtuous and productive life of Panos with Chappell's allegedly worthless existence, and asked jurors to impose a death sentence on that basis.

If the State had merely used victim impact evidence to illustrate the "victim's uniqueness as an individual human being," Payne, 501 U.S. at 823 (internal quotations omitted), his actions would be beyond scrutiny. Likewise, the State could further have independently challenged Chappell's character and criminal history, and there would be no grounds for objection. The problem is that the State did not stop there. Instead, the State drew repeated comparisons between the value and worth of the victim's life and that of the defendant, an argument which was designed to secure a death sentence from the jury. The way in which Panos led her life was repeatedly contrasted with the way Chappell had led his. Likewise, the way in which Panos's family and friends led their lives was also contrasted with the way Chappell had led his. The State purposely contrasted the life of the victim with the life of the defendant in order to exhort the jury to return a death sentence on the basis of the latter's relative lack of worth.

Chappell is not challenging the fact that victim impact evidence has an important and legitimate place in capital sentencing proceedings. The United States Supreme Court in Payne v. Tennessee made it clear that "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar." Payne, 501 U.S. at 827. "A state may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." Id. Victim impact evidence, however, is limited in that it is supposed to allow the jury "a quick glimpse of the life" that a defendant "chose to extinguish"; it demonstrates the full impact of a crime, not only on the victim, but also on loved ones left behind. Id. at 822 (internal quotations omitted). While states plainly "remain free to devise new procedures and new remedies to meet felt needs," id. at 824-25, neither Payne nor any other Supreme Court case has held that victim impact evidence may be used without limit, constraint, or reference to the harm caused by the crime to those aggrieved. To the contrary, the Payne Court clearly limited the introduction and use of victim impact evidence by prohibiting victim impact evidence "that is so unduly prejudicial that it renders the trial fundamentally unfair." Id. at 825.

Of particular importance to this case, the Supreme Court has disapproved of the use of victim impact evidence to make comparative human worth arguments. The Payne Court noted the concern "that the admission of victim impact evidence permits a jury to find that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy." Id. at 823. It concluded that "[a]s a general matter . . . victim impact evidence is not offered to encourage comparative judgments of this kind -- for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not." Id. at 823. It is designed to show instead each victim's "uniqueness as an individual human being," whatever the jury might think the loss to the community resulting from his death might be. Id.

The Payne Court also set forth a framework for determining the legitimate and illegitimate uses of victim impact evidence. The Court found that "in the majority of cases

. . . victim impact evidence serves entirely legitimate purposes." Id. at 825. But it also concluded that "in the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." Id. at 825. Victim impact evidence that emphasizes the harm a murder caused the victim, his family, and his loved ones is unquestionably legitimate. However, the comparative worth argument presented in this case, calling for a death sentence based on the relative value of Panos's and Chappell's lives, falls squarely within the category of prosecutorial conduct that may be so prejudicial that it renders a trial fundamentally unfair.

Victim impact evidence must be used to further the traditional purposes of sentencing: that a sentence reflect such factors as the nature and severity of the crime, the criminal history of the defendant, the defendant's characteristics and history, and the consequences of the crime upon the unique lives of the victim and her family. To permit a sentence of death to be returned on the explicit and pointed comparative worth argument in this case pushes Payne so far that the major objective of victim impact evidence is lost, which is "informing the sentencing authority about the specific harm caused by the crime in question." Payne, 501 U.S. at 825.

The comparison between Panos and Chappell that formed the focus of closing argument was intended to tell the jury that Panos's life was put to good use, that Chappell's was not, and that Chappell should be executed based upon their comparative worth or value. Arguments of comparative worth are not authorized by Payne and constituted prosecutorial misconduct. The comparative worth argument relied on here fell within the category of factors that the United States Supreme Court has prohibited as unduly prejudicial in the death penalty sentencing context. See Johnson v. Mississippi, 486 U.S. 578, 584-85 (1988) (quoting Zant, 462 U.S. at 885) (prohibiting death penalty decisions predicated on mere caprice or on factors that are constitutionally impermissible or totally irrelevant to the sentencing process). See also California v. Brown, 479 U.S. 538, 545(1987) (O'Connor, J., concurring). The argument here was not a permissible basis under the Due Process Clause on which to condemn Chappell to death.

In addition to violating the limits of Payne, the argument here also violated the Supreme Court's decision in Caldwell, 472 U.S. at 328-41. The law requires jurors to use a certain type of analysis in making their sentencing decision. By making a comparative value argument, the State encouraged jurors to use a different analysis. Urging jurors to misapply to the law infected the penalty phase hearing with arbitrariness in violation of the Eighth Amendment, in violation of Caldwell.

The type of analysis required of a capital jury is well established and mandated by controlling authority by the United States Supreme Court as well as state statutes. Post-Furman, the Supreme Court insists that state sentencing procedures not "create a substantial risk that the death penalty will be inflicted in an arbitrary and capricious manner." Lockett v. Ohio, 438 U.S. 586, 601 (1978). State sentencing schemes must provide a meaningful way to distinguish between "the cases in which [death] is imposed from the many cases in which it is not." Id. at 601 (citing Gregg v. Georgia, 428 U.S. 153, 158 (1976)). In Nevada, jurors must determine unanimously and beyond a reasonable doubt whether aggravating circumstances exist, determine individually whether mitigating circumstances are present, and then determine unanimously and beyond a reasonable doubt that any mitigating circumstances do not outweigh the aggravating circumstances before a sentence of death may be considered. Johnson, 118 Nev. at 802-803, 59 P.3d 450; Archanian v. State, 145 P.3d 1008, 1015 (Nev. 2006). Following that determination, jurors may consider "character" evidence or "other matter" evidence in determining the sentence to be imposed. Id. The State's comparative worth argument was contrary to this firmly established scheme in that it urged the jury to sentence Chappell to death for reasons contrary to this scheme. Instead of weighing aggravating and mitigating circumstances, the jurors were instead urged to weigh the value of Chappell's life against the value of Panos's life. Although such an argument could be made in the vast majority of murder cases, it does nothing to assist the jurors in determining if the defendant is one of the "worst of the worst," or one of the few first degree murderers who should receive the death penalty. Accordingly, no narrowing function is served by such an argument. See State v. Storey, 901 S.W.2d 886, 902 (Mo.

1995). The use of victim impact evidence in this manner taints the sentencing process with arbitrariness. See Hall v. Catoe, 601 S.E.2d 335, 340-41 (S.C. 2004); State v. Koskovich, 776 A.2d 144, 182 (N.J. 2001)

The comparative worth argument presented by the State also influenced the jurors to improperly use mitigation evidence. The law requires jurors to give consideration to mitigating evidence. McKoy v. North Carolina, 494 U.S. 433, 444 (1990); Mills v. Maryland, 486 U.S. 367, 375 (1988); Lockett v. Ohio, 438 U.S. 586, 608 (1978). The arguments here minimized the importance of the mitigating evidence presented by Chappell and instead urged the jurors to find that Chappell should have risen above his circumstances and bettered his life, as had his victim Panos. Arguments which create the risk that jurors will misuse mitigation evidence violate Caldwell.

Other courts recognize that arguments such as this are improper. See Hall, 601 S.E.2d at 341 (South Carolina court findsing that the prosecutor impermissibly compared the defendant's life to the victims' lives, the argument was emotionally inflammatory and directed the jurors to conduct an arbitrary balancing of worth, thus entitling the defendant to a new sentencing hearing); Koskovich, 776 A.2d at 182 (New Jersey court holds that the court's directive to jurors that they balance the victim's background against that of defendant was akin to asking the jury to compare the worth of each person, which is inherently prejudicial and might prompt jurors to impose the death penalty arbitrarily); State v. Muhammad, 678 A.2d 164, 179 (N.J. 1996) ("Victim impact testimony may not be used . . . as a means of weighing the worth of the defendant against the worth of the victim."); State v. Storey, 901 S.W.2d 886, 902 (Mo. 1995) (en banc) (finding ineffective assistance of counsel because of the failure to object to prosecutor's arguments: "Whose life is more important to you? Whose life has more value? The Defendant's or [the victim's]?"). See also State v. Gallion, 654 N.W.2d 446, 454 (Wis. Ct. App. 2002) (expressing a concern for the use of comparative value arguments at jury sentencing proceedings as an unconstitutional use of victim impact evidence, although there is no death penalty in this jurisdiction). See also Note Tipping the Scales: Seeking Death Through Comparative Value Arguments, 63 Wash.

& 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 Panos 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

required to find that aggravating circumstances must outweigh mitigating circumstances beyond a reasonable doubt. U.S. Const. Amends. V, VI, VIII, XIV; Nev. Const. Art. I, Secs. 3, 6, 8; Art. IV, Sec. 21.

The United States Supreme Court held in Blakely that any fact not found in the guilt phase jury instructions which operates to increase the penalty imposed above the statutory maximum must be submitted to the jury and proven beyond a reasonable doubt. Blakely, 542 U.S. at 301-02. The factors necessary to support eligibility for the death penalty in Nevada, in addition to the conviction on all the elements of first degree murder, as (1) the existence of one or more aggravating factors, and (2) that the aggravating factors are not outweighed by the mitigation. NRS 200.030(4); Johnson, 118 Nev. at 802-803, 59 P.3d 450; Archanian, 145 P.3d at 1015. Those factors must be proved to and found by a jury beyond a reasonable doubt. Chappell's jury was instructed that aggravating factors must be proved beyond a reasonable doubt:

> Instruction No. 6:
>
> The State has alleged that one aggravating circumstance is present in this case.
>
> The Defendant has alleged certain mitigating circusmtances are present in this case. It shall be your duty to determine:
>
> (a) whether the aggravating circumstance is found to exist; and
>
> (b) whether a mitigating circumstance or circumstances are found to exist; and
>
> (c) based upon these findings, whether the Defendant should be sentenced to a definite term of 100 years imprisonment, life imprisonment with or without the possibility of parole or death.
>
> The jury may consider 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 no 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.
>
> Otherwise, the punishment imposed shall be imprisonment in the State Prison for a definite term of 100 years imprisonment, with eligibility for parole beginning when a minimum of 40 years has been served or life with or without the possibility of parole.

XV ROA 3747. The jury was not instructed, however, that it had to find that aggravation

was not outweighed by mitigation beyond a reasonable doubt, or by any standard at all, in order to find Chappell eligible to receive the death penalty. Id. The law is now clear, however, that every fact necessary to imposition of an increased punishment must be proved to and found by a jury beyond a reasonable doubt. Ring v. Arizona, 536 U.S. 584, 589, 609 (2002); Apprendi v. New Jersey, 530 U.S. 466, 483 (2000); Johnson, 118 Nev. at 802-803. Other states are in accord. Whitfield v. State, 107 S.W.2d 253, 259 (Mo. 2003); Woldt v. People, 64 P.3d 256, 265 (Colo. 2003). See also B. Stevenson, The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing, 54 Ala. L. Rev. 1091, 1126-27, 1129 n.214 (2003).

Chappell's sentence must therefore be reversed, because an error with respect to the burden of proof is structural, which results in reversal without any attempt to analyze prejudice. Sullivan v. Louisiana, 508 U.S. 275, 281-282 (1993). In the alternative, Chappell was prejudiced by the instruction as the jury found seven mitigating circumstances, only one aggravating circumstance, and the State cannot establish beyond a reasonable doubt that the jury would have returned a death sentenced had it been properly instructed.

M. The Jury's Failure to Find Mitigating Circumstances Was Clearly Erroneous and Requires That the Death Sentence Be Vacated

The jury failed to find mitigating factors that were clearly established and uncontested. The jury's failure to find these mitigating circumstances was clearly erroneous and resulted in an unreliable sentence that must be vacated U.S. Const. Amends. V, VI, VIII, XIV; Nev. Const. Art. I, Secs. 3, 6, 8; Art. IV, Sec. 21.

As noted above, one or more of the jurors found seven mitigating circumstances: Chappell suffered from substance abuse; he had no father figure in his life; he was raised in an abusive household; he was the victim of physical abuse as a child; he was born to a drug/alcohol addicted mother; he suffered from a learning disability; he was raised in a depressed housing area. XV ROA 3739-40, 3822-23. The jury did not find the mitigating circumstance that Chappell's mother was killed when he was very young, that he was the victim of mental abuse as a child, and other mitigating circumstances that were asserted to

exist by Chappell's counsel. XV ROA 3755.

As set forth above, the evidence at the penalty phase trial was uncontested as to these mitigating circumstances. This evidence was clear, credible and uncontroverted. The jury's failure to find the existence of this mitigating factor was thus clearly erroneous and renders the death sentence unreliable.

The United States Supreme Court has repeatedly recognized that evidence that a defendant suffered a difficult, abusive childhood and adolescence has significant mitigating value that must be considered by the trier of fact in determining whether a sentence of death is the appropriate punishment. Thus, in Eddings v. Oklahoma, 455 U.S. 104 (1982), the Court reversed a death sentence where the trial judge refused as a matter of law to consider evidence of the defendant's troubled childhood. The Court declared: "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.... The sentencer ... may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." Id. at 113-14. The Eddings Court also expressly recognized that evidence of a defendant's turbulent childhood has mitigating weight that may not be ignored by the sentencer. Id. at 115 (citation omitted). Similarly, in Parker v. Dugger, 498 U.S. 308 (1991), the Court reversed a death sentence on the grounds that the state supreme court had erred in concluding that the trial judge, in overriding the jury's recommendation of life, had failed to find nonstatutory mitigation. In that case, the defendant had presented the testimony of numerous witnesses indicating, inter alia, "a difficult childhood, including an abusive, alcoholic father...." Id. at 314. One factor supporting the Court's conclusion that the sentencing judge must have considered this nonstatutory mitigation was the fact that "substantial evidence, much of it uncontroverted, favoring mitigation" had been presented. Id. at 318. See also Hitchcock v. Dugger, 481 U.S. 393 (1987) (reversing death sentence where advisory jury and sentencing judge did not consider nonstatutory mitigating evidence); cf. Penry v. Lynaugh, 492 U.S. 302 (1989) (reversing sentence on grounds that Texas special issues unconstitutionally precluded

jury from full consideration of evidence of childhood abuse and mental retardation). See also Smith v. McCormick, 914 F.2d 1153, 1168 (9th Cir. 1990).

Several courts have recognized that a sentencer's failure to find mitigating circumstances that are plainly supported by the evidence is reversible error. Thus, in Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990), the Florida Supreme Court reversed a death sentence and remanded for imposition of a life sentence where the trial judge erroneously rejected mitigating evidence the reviewing court concluded demonstrated that the death sentence was disproportionate, observing:

> Where uncontroverted evidence of a mitigating circumstance has been presented, a reasonable quantum of competent proof is required before the circumstance can be said to have been established. [citation omitted] Thus, when a reasonable quantum of evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved.

Similarly, in Evans v. State, 598 N.E.2d 516, 519 (Ind. 1992), the Indiana Supreme Court set aside a death sentence and remanded for the imposition of a life sentence on the grounds that the trial court erroneously rejected several nonstatutory mitigating factors. The court observed that the sentencer's rejection of uncontroverted mitigating evidence of parental neglect, abnormal behavior, psychiatric disorder and of the defendant's immediate surrender to authorities demonstrated that "the trial court's conclusion that the death penalty is appropriate was arrived at without the required discrete and individualized consideration of the character of the offender." Id. See also Magwood v. Smith, 791 F.2d 1438, 1449-50 (11th Cir. 1986) (habeas relief granted on grounds that the trial judge's rejection of mitigating circumstances was not fairly supported by the record); Gray v. Lucas, 710 F.2d 1048, 1055 n. 5 (5th Cir. 1983) (observing that had evidence of defendant's mental illness been presented at the penalty phase, he "would most probably now be entitled to a peremptory instruction to consider a mitigating circumstance that his capacity to conform his conduct to the requirements of law was substantially impaired...."); State v. Kirkley, 302 S.E.2d 144, 158 (N.C. 1983) ("when a mitigating factor is uncontroverted the trial judge must give a peremptory instruction to the jury on that circumstance. The effect of this type of instruction

is to remove the question of whether the mitigating circumstance exists from the jury's determination and to conclusively establish the existence of that factor."); Sanders v. State, 585 A.2d 117, 134 (Del. 1990) (requiring jury instruction that a finding of "guilty but mentally ill" mitigates as a matter of law).

Just as a jury's consideration of an improper aggravating factor skews its weighing process in assessing punishment and renders the sentence unreliable under the Eighth Amendment, see Stringer v. Black, 503 U.S. 222, 232 (1992), the erroneous failure to find and weigh relevant mitigation that is supported by the evidence infects the formal process of deciding whether death is the appropriate punishment.

The failure of the jury to find clearly applicable mitigators mandates one of two findings: either (1) the jurors did not understand the jury instructions defining mitigating circumstances; or (2) the jurors did understand the instructions, but they elected to disregard the instructions and the law defining mitigation. In either event, Chappell was deprived of his rights to due process, equal protection, a reliable sentence, and right to be free from cruel and unusual punishment.

N. <u>There Is Insufficient Evidence To Support The Sexual Assault Aggravator</u>

The State alleged, and the jury found, the aggravating circumstance of murder committed in the perpetration of a sexual assault. There was insufficient evidence, however, to support the existence of this aggravating circumstance. Accordingly, Chappell's conviction is unconstitutional. U.S. Const. Amends. V, VI, VIII, XIV; Nev. Const. Art. I, Secs. 3, 6, 8; Art. IV, Sec. 21; In re Winship, 397 U.S. 358, 361-63 (1970).

This Court holds that the prosecution has the burden of proving both "act and intent beyond a reasonable doubt and that the prosecution must establish proof of every element of the crime beyond a reasonable doubt." Chambers v. State, 113 Nev. 974, 983, 944 P.2d 805 (1997). The same reasoning applies to aggravating circumstances.

NRS 200.366(1) defines sexual assault as:

> A person who subjects another person to sexual penetration, or who forces another person to make a sexual penetration on himself or another, or on a beast, against the will of the victim or under conditions in which the

> perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct, is guilty of sexual assault.

In order to find the sexual assault aggravator, the State must prove beyond a reasonable doubt: (1) forced sexual penetration (2) upon another person (3) against the will of the victim (4) or that the victim is physically incapable of resisting or understanding the nature of his conduct. Consent is recognized as a defense to a claim of sexual assault as it negates the necessary elements of the offense. See Hardaway v. State, 112 Nev. 1208, 1211, 926 P.2d 288, 290 (1996).

Here, the State not only failed to prove any of the elements of a sexual assault, the State did not even charge Chappell with a sexual assault as an offense. The evidence presented during the second penalty hearing failed to establish, beyond a reasonable doubt, that Chappell sexually assaulted Panos. Moreover, the evidence failed to establish, beyond a reasonable doubt, that Panos was killed during the course of the alleged sexual assault.

Chappell's testimony from the first trial, which was presented by the State during the second penalty hearing, was that he had consensual intercourse with Panos prior to the circumstances that led to her death. VI ROA 1398-1400. Evidence presented during the penalty phase was consistent with his testimony. Both the coroner and the defense expert acknowledged that although Chappell's DNA was found in Panos's vagina, there was no evidence of bruising or other trauma to her vaginal area. IV App. 962-1003. Panos was fully clothed when her body was found and the stab wounds were inflicted while she was fully clothed. IV App. 996, 1024. Although evidence was presented that Chappell and Panos had difficulties in their relationship, the evidence also revealed that they had been together for nearly 10 years and they had reconciled numerous times following previous disputes during that 10 year period. VI ROA 1357, 1367, 1376-78, 1390. The evidence also revealed that Panos was aware that Chappell had been released from custody prior to the time that she returned to her trailer and that she went to her trailer alone rather than taking her friend with her. XIII ROA 3131-33. Under these circumstances, the State failed to establish beyond a reasonable doubt that Panos did not consent to sexual intercourse with Chappell. Likewise,

the State failed to establish a nexus between the sexual assault and the killing. The record was uncontested as to the fact that Panos was fully dressed at the time she was stabbed. Even under the State's theory, the sexual assault occurred well before the stabbings and did not occur during the perpetration of the sexual assault.

As there is insufficient evidence to support the sole aggravating circumstance of murder in the perpetration of a sexual assault, Chappell's conviction must be vacated.

O. <u>The Sexual Assault Aggravating Circumstance Is Invalid Under McConnell v. State</u>

Chappell's constitutional rights to a reliable sentence and to free from cruel and unusual punishment were violated by application of the sexual assault aggravating circumstance under the circumstances presented here. U.S. Const. amend. V, VIII, XIV; Nevada Const. art. I, Sec. 3, 6 and 8; art. IV, Sec. 21.

As noted above, Chappell was charged with first degree murder under theories of premeditated and deliberate murder and felony murder. I ROA 38. The felony murder claim was based upon underlying felony offenses of robbery and burglary. I ROA 39. When the State filed its notice of its intention to seek the death penalty it included aggravating circumstances of robbery, burglary and sexual assault. I ROA 44. The original jury convicted Chappell of first degree murder but did not provide a special verdict form indicating the theory or theories upon which it based its verdict. VII ROA 1747-49. The original jury also found the existence of all three aggravating circumstances. IX ROA 2127-29. In post-conviction proceedings, however, this Court found the robbery and burglary aggravating circumstances to be invalid under <u>McConnell v. State</u>, 120 Nev. 1043, 102 P.3d 606 (2004), <u>reh'g denied</u>, 107 P.3d 1287 (2005). Thus, upon remand for a new penalty hearing, the State was limited to the sexual assault aggravating circumstance. Prior to trial, Chappell's counsel argued that this aggravating circumstance was invalid and they sought its dismissal. XII ROA 2801. The district court rejected the argument and ultimately the jury returned a death sentence based upon this sole aggravating circumstance. XV ROA 3737.

The sexual assault aggravating circumstance is invalid under McConnell because it fails to narrow application of the death penalty in these circumstances, and because it permits the State to divide felony murder aggravating circumstances in that it allowed two to be used for the basis of felony murder and one to be used as an aggravating circumstance.

"The Eighth Amendment prohibits the infliction of cruel and unusual punishments." McConnell, 120 Nev. at 1063, 102 P.3d at 620 (citing U.S. Const. amend VIII). "In 1972, the Supreme Court held that capital sentencing schemes which do not adequately guide the sentencers' discretion and thus permit arbitrary and capricious imposition of the death penalty violate the Eighth and Fourteenth Amendments." Id. (citing Gregg v. Georgia, 428 U.S. 153 (1976) summarizing Furman, 408 U.S. 238). "As a result, the Court has held that to be constitutional a capital sentencing scheme 'must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" Id. at 1063, 102 P.3d at 621-22 (quoting Zant, 462 U.S. at 877). This Court has also concluded that Nevada's own constitution bans against the infliction of "cruel and unusual punishments" and the deprivation of life" without due process of law" require this same narrowing process." Id. (citing Nev. Const. art. 1 §§ 6, 8(5)).

"Nevada's current definition of felony murder is broader than the definition in 1972 when Furman v. Georgia [408 U.S. 238] temporarily ended executions in the United States." McConnell, 120 Nev. at 1066, 102 P.3d at 622. "So it is clear that Nevada's definition of felony murder does not afford constitutional narrowing." Id. "As Professor Richard Rosen points out: "At a bare minimum, then, a narrowing device must identify a more restrictive and culpable class of first degree murder defendants than the pre-Furman capital homicide case. Id. (citing Richard A. Rosen, Felony Murder and the Eighth Amendment Jurisprudence of Death, 31 B.C.L. Rev. 1103, 1124 (1990)).

Under the facts of this case, the original jury may have found Chappell guilty under a theory of felony murder and the sole aggravating circumstance found by the jury in the second penalty hearing is also a felony murder aggravating circumstance. Thus, Chappell