No. _____

OCTOBER TERM, 2018

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT LEE MCCONNELL, Petitioner,

v.

WILLIAM GITTERE, Warden, et al., Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITIONER'S APPENDIX

CAPITAL CASE

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APPENDIX

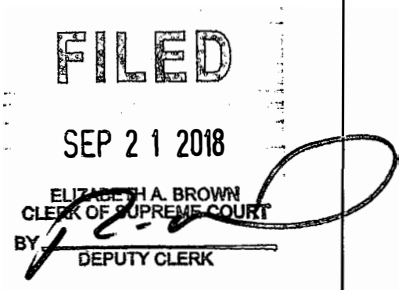
APPENDIX A

Order of Affirmance, *McConnell v. State*, Nevada Supreme Court Case No. 71061 (Sep. 21, 2018)

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT LEE MCCONNELL,
Appellant,
vs.
RENEE BAKER, WARDEN; AND CATHERINE CORTEZ MASTO, ATTORNEY GENERAL FOR THE STATE OF NEVADA,
Respondents.

No. 71061



ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Lidia Stiglich, Judge. Appellant contends that the district court erred by denying his petition. We disagree and affirm.[1]

Appellant filed his petition more than five years after remittitur issued from his direct appeal, *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004); thus, the petition was untimely pursuant to NRS 34.726(1). Moreover, because appellant had previously filed a postconviction petition, *McConnell v. State*, 125 Nev. 243, 245, 212 P.3d 307, 309 (2009), the petition was successive to the extent it raised claims that were previously litigated and resolved on their merits, and it constituted an abuse of the writ to the extent it raised new claims. *See* NRS 34.810(2). Further, any claims that could have been raised in prior proceedings were waived pursuant to NRS 34.810(1)(b). Accordingly, the petition was procedurally barred absent a

[1]Appellant asserts that the district court's orders and the State's answer do not adequately address all of his claims. We conclude that the district court's orders and the State's answer are sufficient given appellant's pleading. Similarly, we have endeavored to address each of appellant's contentions in this order, any claim not specifically addressed was considered and rejected as procedurally barred.

demonstration of good cause and prejudice, *see* NRS 34.726(1); NRS 34.810(1)-(3), or a showing that the procedural bars should be excused to prevent a fundamental miscarriage of justice, *see Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

Ineffective assistance of postconviction counsel

Appellant contends that he demonstrated good cause and prejudice to excuse the procedural bars because first postconviction counsel provided ineffective assistance. Because a petitioner sentenced to death is entitled to the appointment of counsel for his first postconviction proceeding, *see* NRS 34.820(1), he is entitled to the effective assistance of that counsel, and a meritorious claim that postconviction counsel was ineffective can provide cause to excuse the procedural bars, *Crump v. Warden*, 113 Nev. 293, 304-05, 934 P.2d 247, 254 (1997). To establish that postconviction counsel was ineffective, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness and a reasonable probability that the outcome of the first postconviction proceeding would have been different. *Id.* at 304 & n.6, 934 P.2d at 254 & n.6 (applying the deficiency-and-prejudice test described in *Strickland v. Washington*, 466 U.S. 668 (1984), to postconviction counsel).

Failure to challenge the waiver of the right to counsel

After waiving his right to counsel, appellant pleaded guilty to the charges and represented himself in a penalty hearing. He asserts that postconviction counsel should have challenged his waiver of the right to counsel on several grounds relating to his mental health. *See Faretta v. California*, 422 U.S. 806, 807 (1975) (holding that a defendant has a right

to represent himself at trial so long as his decision to waive the right to counsel is knowing and intelligent).[2]

First, appellant asserts that postconviction counsel should have argued that the trial court failed to adequately canvass him regarding his mental health and why he wanted to represent himself. He claims that had the trial court asked these questions it would not have granted his request. Appellant fails to demonstrate deficient performance or prejudice. This court has held that a trial court need not conduct a mechanical *Faretta* canvass and need only ensure that a defendant understands the risks of self-representation and the rights he is relinquishing. *Hooks v. State*, 124 Nev. 48, 53-55, 176 P.3d 1081, 1084-85 (2008). This court will uphold the trial court's decision permitting a defendant to waive his right to counsel so long as the record demonstrates that the defendant "knew his rights and insisted upon representing himself." *Id.* (internal quotation marks omitted). Here, the trial court appropriately canvassed appellant pursuant to *Faretta*. In doing so, the trial court asked appellant about his mental health history; appellant responded that he had no significant mental health history. Appellant points to no authority suggesting that the trial court should have looked past his response. *See* SCR 253(3)(c) (stating that the trial court's canvass of the defendant "may" include questions regarding his mental health history). Similarly, he points to no authority supporting his

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[2]Appellant repeatedly conflates his ability to represent himself with his ability to validly waive his right to counsel. Whether a defendant is "capable" of representing himself is not a relevant inquiry under Nevada law; thus, the relevant question for the purpose of this claim is whether appellant's waiver of the right to counsel was valid. *Johnson v. State*, 117 Nev. 153, 164, 17 P.3d 1008, 1015-16 (2001). We reject appellant's arguments based on *Indiana v. Edwards*, 554 U.S. 164 (2008), and decline to overrule *Johnson*.

assertion that the trial court was required to ask him why he wanted to represent himself. Importantly, the record establishes that appellant understood and accepted the risks of self-representation. Appellant has not demonstrated that the trial court's failure to inquire further into his mental health or ask why he wanted to represent himself undermined the validity of his waiver of the right to counsel. He also fails to demonstrate that the trial court would not have granted his self-representation request had it received additional information regarding his mental health. Because appellant has not established a meritorious challenge to his waiver of the right to counsel, his claim that postconviction counsel provided ineffective assistance by omitting that challenge fails.

Next, appellant asserts that postconviction counsel should have argued that trial counsels' failure to disclose appellant's mental health information during the *Faretta* canvass constituted the constructive denial of counsel. *See United States v. Cronic*, 466 U.S. 648, 659-60 (1984) (recognizing that the complete denial of counsel at a critical stage warrants the presumption of prejudice).[3] He relies on *Appel v. Horn*, which held that a defendant was constructively denied counsel when his attorneys mistakenly believed they did not represent him, and as a result, did not subject the issue of his competency to stand trial to any "'meaningful adversarial testing.'" 250 F.3d 203, 215, 217 (3d Cir. 2001) (quoting *Cronic*, 466 U.S. at 659). *Appel* is distinguishable: trial counsel in this case explained at the evidentiary hearing that they made a conscious decision to

[3]For purposes of this disposition, we refer to the lawyers who represented McConnell before he waived his right to counsel as "trial counsel." *Cf.* NRAP 3C(b)(1) (explaining that for purposes of rule governing fast track criminal appeals, which impose obligations on "trial counsel," that term "means the attorney who represented the defendant . . . in district court in the underlying proceedings that are the subject of the appeal").

avoid bringing up appellant's mental health information because appellant was adamant that they not disclose the information and they believed that appellant was competent based on the information available to them, including expert opinions and their own interactions with him. And, appellant has not demonstrated that his mental health issues precluded him from validly waiving the right to counsel. Because appellant has not established a meritorious challenge to trial counsels' performance in relation to the *Faretta* canvass, his claim that postconviction counsel provided ineffective assistance by omitting that challenge fails.

Appellant also asserts postconviction counsel should have argued that appellate counsel was ineffective for failing to challenge the *Faretta* canvass. To the extent he argues that appellate counsel should have challenged the canvass on the grounds described above, that appellate-counsel claim fails for the same reasons. To the extent appellant argues that appellate counsel should have argued that the trial court failed to inform him of potential defenses as required by *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948), we conclude that there is not a reasonable probability that this claim would have succeeded on direct appeal. *See Hooks*, 124 Nev. at 53-55, 176 P.3d at 1084-85; *cf.* SCR 253(3)(h) (the trial court "may" question a defendant about his knowledge of possible defenses). In particular, appellant does not identify a defense that he believes the trial court should have told him about. Accordingly, we conclude that no relief is warranted on this claim. Because appellant has not established a meritorious challenge to appellate counsel's performance in this respect, his claim that postconviction counsel provided ineffective assistance by omitting that challenge fails.

Conflicts of interest

Appellant asserts that postconviction counsel should have argued that trial counsel had numerous conflicts of interest. To be entitled to relief on a conflict-of-interest claim, a petitioner must show that (1) counsel had an actual conflict of interest, which (2) adversely affected their performance. *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). Appellant fails to establish a viable conflict-of-interest claim for three reasons.

First, appellant does not clearly identify the relationships that created the conflicts, nor does he adequately explain how those relationships would constitute an actual conflict of interest as described in *Cuyler*. Relatedly, he fails to demonstrate that any actual conflicts of interest existed. Although he argues he cannot do so because first postconviction counsel failed to adequately investigate, a petitioner alleging that an attorney should have conducted a better investigation must demonstrate what a better investigation would have revealed, *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004), which appellant has not done.[4]

Second, appellant fails to adequately distinguish between when he was represented by counsel and when he was representing himself. This matters because conflict-of-interest claims are grounded in the Sixth Amendment right to counsel, but appellant had no such right after he began representing himself. *See Harris v. State*, 113 Nev. 799, 804, 942 P.2d 151, 155 (1997); *see also United States v. Bruce*, 89 F.3d 886, 895 (D.C. Cir. 1996) (denying relief where the alleged conflict of interest occurred after the relevant time frame "and for that reason cannot be factored into the

[4]Because we conclude that appellant fails to demonstrate that trial counsel had a conflict of interest, we similarly conclude that he fails to demonstrate that appellate counsel had any conflicts of interest.

analysis of whether the conflict itself adversely affected the representation"). He therefore fails to demonstrate that any actual conflict of interest adversely affected counsels' performance during the relevant time frame.

Finally, even assuming that counsel had conflicts of interest, those conflicts were irrelevant to any issue of consequence. *See Moss v. United States*, 323 F.3d 445, 463-64 (6th Cir. 2003) (holding that there is no Sixth Amendment violation if "the conflict is as to a matter that is irrelevant"). For any alleged conflict to matter in this case, it must have played a role in appellant's decision to represent himself or undermined his waiver of the right to counsel in some appreciable way. *See generally Thomas v. Foltz*, 818 F.2d 476, 480 (6th Cir. 1987) (explaining that to successfully assert a conflict-of-interest claim where a defendant pleaded guilty, the defendant must demonstrate that the conflict had an adverse impact on the plea). Appellant points to nothing in the record to demonstrate that his decision to represent himself was influenced by an alleged conflict. Instead, the record indicates that appellant chose to represent himself for reasons unrelated to the alleged conflicts, and appellant did not testify to the contrary at the evidentiary hearing. To the extent appellant suggests that the uncertainty surrounding this issue renders his waiver of the right to counsel invalid as a matter of law, he points to no law to support this position. Because appellant has not established a meritorious conflict-of-interest claim, his claim that postconviction counsel provided ineffective assistance by omitting the conflict-of-interest claim fails.

Actual innocence of the death penalty

Appellant contends that the district court erred by denying his petition because he is actually innocent of the death penalty, which may excuse his failure to show good cause based on the ineffective assistance of his first postconviction counsel. *See Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). We disagree because at least one aggravating circumstance remains and therefore appellant remains eligible for the death penalty. *See Lisle v. State*, 131 Nev. 356, 362, 351 P.3d 725, 730 (2015) (explaining that actual innocence of the death penalty means that no rational juror would have found an appellant to be eligible for the death penalty, i.e., that the defendant is innocent of the capital offense or that there are no statutory aggravating circumstances); *Moore v. State*, 134 Nev., Adv. Op. 35, 417 P.3d 356, 363 (2018) (holding that a petitioner failed to demonstrate actual innocence of the death penalty where one aggravating circumstance remained).

Remaining claims

Appellant asserts that the district court erred by denying his claims that his guilty plea is invalid, the trial court erred by quashing a subpoena seeking his former girlfriend's parole and probation report and not letting him cross-examine her regarding restraining orders, appellate counsel was ineffective for failing to raise the trial court's decision to quash the subpoena as a constitutional claim, jury instructions given at his trial were invalid,[5] the introduction of victim impact evidence violated the constitution, his convictions and sentences are invalid because judges are

[5]Appellant argues that he has good cause to relitigate a jury instruction issue he previously raised, relying on the Supreme Court's decision in *Hurst v. Florida*, 577 U.S. ___, 136 S. Ct. 616 (2016). We recently rejected appellant's interpretation of *Hurst*. *See Jeremias v. State*, 134 Nev., Adv. Op. 8, 412 P.3d 43, 53 (2018).

elected, and cumulative error warrants relief. We conclude that no relief is warranted on these claims because they are procedurally barred and appellant either fails to explain why the procedural bars should be excused, does so superficially, or otherwise fails to adequately allege and demonstrate good cause and prejudice. *See Evans v. State*, 117 Nev. 609, 647, 28 P.3d 498, 523 (2001) (explaining that this court will decline to consider conclusory or catchall attempts to assert ineffective assistance of counsel). Finally, we conclude that no relief is warranted regarding appellant's claim that the death penalty is unconstitutional due to issues with the execution chamber.

Having concluded that no relief is warranted, we

ORDER the judgment of the district court AFFIRMED.[6]

Douglas, C.J.
Douglas

Cherry, J.
Cherry

Gibbons, J.
Gibbons

Pickering, J.
Pickering

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

cc: Department 8, Second Judicial District Court
Federal Public Defender/Las Vegas
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

[6]The Honorable Lidia Stiglich, Justice, did not participate in the decision in this matter.

APPENDIX B

Order Denying Rehearing, *McConnell v. State*, Nevada Supreme Court, Case No. 71061 (Dec. 21, 2018)

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT LEE MCCONNELL,
Appellant,
vs.
RENEE BAKER, WARDEN; AND CATHERINE CORTEZ MASTO, ATTORNEY GENERAL FOR THE STATE OF NEVADA,
Respondents.

No. 71061

FILED

DEC 21 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.[1]

Douglas, C.J.

Cherry, J.

Gibbons, J.

Pickering, J.

Hardesty, J.

Parraguirre, J.

cc: Department 8, Second Judicial District Court
Federal Public Defender/Las Vegas
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

[1]The Honorable Lidia Stiglich, Justice, did not participate in the decision in this matter.

APPENDIX C

Opinion Affirming Judgment, *McConnell v. State*, Nevada Supreme Court, Case No. 42101 (Dec. 29, 2004)

to arise in a substantial number of cases statewide.[29]

[6, 7] Whether NRS 41A.071 prohibits such amendments raises an interesting issue of separation of powers. Although the Legislature is certainly empowered to define substantive legal remedies, "[t]he judiciary has the inherent power to govern its own procedures." [30] Going further, "the judiciary, as a coequal branch of government, has inherent powers to administer its affairs, which include rule-making and other incidental powers reasonable and necessary to carry out the duties required for the administration of justice." [31] Thus, we must resolve the question of whether NRS 41A.071 prohibits amendments, to effect compliance with it, in a manner that does not improperly restrict the discretion of district courts in the procedural management of litigation, which includes conservation of judicial resources.

We note that NRS 41A.071 is silent as to whether a district court may grant leave to amend where compliance with it is lacking. Notwithstanding this omission, we conclude that NRS 41A.071 clearly mandates dismissal, without leave to amend, for complete failure to attach an affidavit to the complaint. This interpretation is consistent with the underlying purpose of the measure, which is to ensure that such actions be brought in good faith based upon competent expert opinion. In this, the statute clearly works against frivolous lawsuits filed with some vague hope that a favorable expert opinion might eventually surface. To this extent, NRS 41A.071 does not unduly impinge upon the inherent power of the judiciary to economically and fairly manage litigation.

Our resolution of the basic affidavit requirement does not end this analysis. A different problem of interpretation will arise in the event of a legitimate dispute over whether a filed affidavit of merit complies with the statute. Because NRS 41A.071 contains no explicit prohibition against amendments, and because legislative changes in the substantive law may not unduly impinge upon the ability of the judiciary to manage litigation, we conclude that a district court, within its sound discretion and considering the need for judicial economy, may grant leave to amend malpractice complaints supported by disputed affidavits under circumstances where justice so requires. Retention of this discretion in conjunction with the requirements of NRS 41A.071 is consistent with well-recognized notions of separation of legislative and judicial powers.

CONCLUSION

Because the district court manifestly abused its discretion in granting Dr. Lovett's motion to dismiss, because our intervention to correct that error will further important considerations of judicial economy to prevent multiple proceedings arising from the same case, and because the issue here is in need of clarification for the bench and bar in general, we grant the petition. Accordingly, we direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order of dismissal and reinstate petitioner's action against real parties in interest James Lovett, M.D., and Lewis & Lovett, Ltd., d/b/a Desert West Surgery.

ROSE and DOUGLAS, JJ., concur.

29. *See supra* note 23.

30. *State v. Connery,* 99 Nev. 342, 345, 661 P.2d 1298, 1300 (1983).

31. *Goldberg v. District Court,* 93 Nev. 614, 615–16, 572 P.2d 521, 522 (1977) (citations omitted).

Robert Lee MCCONNELL, Appellant,

v.

The STATE of Nevada, Respondent.

No. 42101.

Supreme Court of Nevada.

Dec. 29, 2004.

Background: Defendant was convicted on his plea of guilty in the Second Judicial

District Court, Washoe County, Steven R. Kosach, J., of first degree murder, after which a jury sentenced him to death. Defendant appealed.

Holdings: The Supreme Court held that:

(1) statute mandating that death penalty be carried about by lethal injection did not constitute cruel and unusual punishment due to absence of codified guidelines for procedure to administer lethal injection to those who had been sentenced to death;

(2) admission during penalty hearing of "other matter evidence" in form of photographs of drawings defendant had made and taped to his prison cell wall, depicting victim in offensive manner, was not abuse of discretion;

(3) prosecutor's comments during penalty hearing did not constitute misconduct;

(4) victim's testimony during penalty hearing regarding her sexual assault and kidnapping by defendant was admissible "other matter evidence";

(5) felony may not be used both to establish first-degree murder and to aggravate the murder to capital status;

(6) Supreme Court's holding that basing aggravating circumstance in capital prosecution on felony upon which felony murder is predicated violated federal and state constitutional provisions guaranteeing due process and banning cruel and unusual punishment did not invalidate defendant's death sentence;

(7) sufficient evidence supported jury's finding of aggravating circumstance that defendant had mutilated victim's body; and

(8) death sentence was not imposed under influence of passion, prejudice or any arbitrary factor, nor was it excessive.

Affirmed.

Becker, J., concurred in result only, with opinion.

1. Sentencing and Punishment ⇨1788(4)

Issue as to whether absence of codified guidelines for procedure to administer lethal injection to those who had been sentenced to death, pursuant to statute mandating that death penalty be administered by lethal injection, rendered carrying out death penalty by lethal injection unconstitutional, was not properly before Supreme Court in first instance; capital murder defendant had cited no authority on this issue, his argument consisted of speculative accusations, he cited no part of record where he had challenged constitutionality of lethal injection before district court, and his claim raised fact-intensive issues which required consideration by fact-finding tribunal. West's NRSA 176.355, subd. 1.

2. Constitutional Law ⇨48(1)

Statutes are presumed valid, and the burden is on the person challenging the statute to prove it is unconstitutional through a clear showing of invalidity.

3. Sentencing and Punishment ⇨1624

Statute mandating that death penalty be carried out by lethal injection did not constitute cruel and unusual punishment due to absence of codified guidelines for procedure to administer lethal injection to those who had been sentenced to death. U.S.C.A. Const.Amend. 8; West's NRSA 176.355.

4. Sentencing and Punishment ⇨1752, 1789(7)

The decision to admit particular evidence during the penalty hearing of capital murder prosecution is within the sound discretion of the district court and will not be disturbed absent an abuse of that discretion.

5. Sentencing and Punishment ⇨1756, 1759, 1780(3)

Evidence that does not prove an aggravating circumstance in a capital murder case is still admissible if it relates to the offense, the defendant, or the victim and its probative value is not substantially outweighed by the danger of unfair prejudice; jury must be instructed that such evidence is "other matter evidence" which cannot be considered initially in determining whether the defendant is death eligible but only, after that

determination is made, in deciding the appropriate sentence.

6. Sentencing and Punishment ⇐1789(3)

In absence of objection during penalty hearing of capital murder prosecution that admission of letter defendant had written to another inmate had unfairly prejudiced him, defendant had to establish that any error in admitting letter was plain and affected his substantial rights. West's NRSA 178.602.

7. Sentencing and Punishment ⇐1760

Admission during penalty hearing of capital murder prosecution of "other matter evidence" in form of photographs of drawings defendant had made and taped to his prison cell wall, depicting picture of man, which was apparently victim, with his face crossed out and phrases "[f]uckin' coward" and "[s]ee you in hell faggot" written on it, as well as drawing depicting bullet entering victim's head, was not abuse of discretion; drawings concerned defendant's attitude toward victims, they were relevant and probative of his cruel and violent character and lack of remorse, although evidence was obviously prejudicial, it was not unfairly so because of its probative value, and jury had been properly instructed regarding proper use of this evidence.

8. Sentencing and Punishment ⇐1760

Admission during penalty hearing of capital murder prosecution of "other matter evidence" in form of audiotape recordings of portions of conversations defendant had had, while in custody, with his father and former roommate, during which defendant said, among other things, that he was going to cut victim's head off, was not abuse of discretion; defendant's remarks concerned his attitude toward victims, they were relevant and probative of his cruel and violent character and lack of remorse, although evidence was obviously prejudicial, it was not unfairly so because of its probative value, and jury had been properly instructed regarding proper use of this evidence.

9. Sentencing and Punishment ⇐1760

Admission during penalty hearing of capital murder prosecution of "other matter evidence" in form of letter defendant had written while in prison to another inmate, in which defendant had written, among other things, that he enjoyed his victim's pain and suffering, was not abuse of discretion; defendant's remarks concerned his attitude toward victims, they were relevant and probative of his cruel and violent character and lack of remorse, although evidence was obviously prejudicial, it was not unfairly so because of its probative value, and jury had been properly instructed regarding proper use of this evidence.

10. Criminal Law ⇐1171.1(2.1)

To determine if prejudicial prosecutorial misconduct occurred, the relevant inquiry is whether a prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process. U.S.C.A. Const.Amend. 14.

11. Criminal Law ⇐1171.1(2.1)

Supreme Court will not lightly reverse a criminal conviction on the basis of a prosecutor's comments standing alone.

12. Sentencing and Punishment ⇐1780(2)

Prosecutor's comments during penalty hearing of capital murder prosecution to effect that everything that prosecution would present during penalty hearing would be "to piss off this jury," that evidence was probative as well as prejudicial, and "we're going to try to prejudice him with this jury," did not constitute misconduct; even though language used by prosecutor was responding to and employing defendant's own words, language was unnecessary and unsuitable for courtroom, but comments occurred outside presence of jury and did not betray improper motive or tactic.

13. Sentencing and Punishment ⇐1789(3)

In absence of objection to prosecutor's comments during penalty hearing of capital murder prosecution addressing defendant's lack of remorse, to warrant relief, defendant had to establish that error in prosecutor's comments was plan and affected defendant's substantial rights. West's NRSA 178.602.

14. Sentencing and Punishment ⇐1780(2)

Prosecutor's comments during penalty hearing of capital murder prosecution addressing defendant's lack of remorse did not

implicate defendant's Fifth Amendment right to self-incrimination and were not improper; prosecutor did not rely on any silence on part of defendant to argue lack of remorse, but, rather, pointed to defendant's actions and statements after murder to show lack of remorse. U.S.C.A. Const.Amend. 5.

15. Sentencing and Punishment ⇐1780(2)

Prosecutor's question to capital murder defendant on cross-examination during penalty hearing as to whether defendant had acted "like a terrorist" did not constitute misconduct.

16. Sentencing and Punishment ⇐1780(2)

Prosecutor's question to capital murder defendant's brother during penalty hearing as to whether defendant had said, "[l]eave it to a wop to bring a knife to a gunfight" did not constitute misconduct.

17. Sentencing and Punishment ⇐1780(2)

Prosecutor's references during penalty hearing of capital murder prosecution to defendant's "legacies of tragedy," and to handcuff key defendant had possessed after his arrest did not constitute misconduct.

18. Sentencing and Punishment ⇐1789(3)

Capital murder defendant waived appellate review, absent showing of plain error, of issue of whether victim had improperly testified about details of her sexual assault and kidnapping by defendant during penalty hearing for murder of other victim, as defendant failed to object to testimony in trial court.

19. Sentencing and Punishment ⇐1759, 1760

Victim's testimony during penalty hearing of capital murder prosecution regarding her sexual assault and kidnapping by defendant was admissible "other matter evidence," as sexual assault and kidnapping occurred almost immediately after defendant had murdered victim's fiancee, and were thus sufficiently connected to murder to be relevant and more probative to defendant's character and motives for murder than unfairly prejudicial.

20. Sentencing and Punishment ⇐1789(3)

Capital murder defendant waived appellate review, absent showing of plain error, of issue of whether victim impact testimony from murder defendant's mother and stepmother during penalty hearing of capital murder prosecution was inappropriate, as he failed to object to any of this testimony in trial court.

21. Sentencing and Punishment ⇐1763, 1780(2)

Victim impact testimony from murder defendant's mother and stepmother during penalty hearing of capital murder prosecution, referring to birthdays, holidays, and the anticipated wedding of murder victim and his fiancee, was appropriate and within permissible bounds; nothing in state's questioning of murder victim's mother and stepmother supported contention that state had coaxed unfairly prejudicial responses from victims.

22. Sentencing and Punishment ⇐1778

Bifurcation of penalty hearing was not required in capital murder prosecution.

23. Criminal Law ⇐1144.15

Supreme Court presumes that juries follow the instructions they are given.

24. Constitutional Law ⇐270(2)
Sentencing and Punishment ⇐1660

The felony aggravator and the sexual-penetration aggravator fail to genuinely narrow death eligibility of felony murders and reasonably justify imposing death on all defendants to whom it applies, and thus it is impermissible under federal and state constitutional provisions guaranteeing due process and banning cruel and unusual punishment to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated. U.S.C.A. Const. Amends. 8, 14; West's NRSA Const. Art. 1, §§ 6, 8, subd. 5; West's NRSA 200.033, subds. 4, 13.

25. Sentencing and Punishment ⇐1660, 1681

Supreme Court's holding that basing aggravating circumstance in capital prosecution on felony upon which felony murder is predicated violated federal and state constitutional

provisions guaranteeing due process and banning cruel and unusual punishment did not invalidate murder defendant's death sentence, as state relied solely on theory of deliberate, premeditated murder to gain defendant's conviction for first-degree murder, and could thus use appropriate underlying felonies associated with murder as aggravators. U.S.C.A. Const.Amends. 8, 14; West's NRSA Const. Art. 1, §§ 6, 8, subd. 5.

26. Sentencing and Punishment ⇐1660

In cases where the state bases a first-degree murder conviction in whole or part on felony murder, to seek a death sentence, the state must prove an aggravator other than one based on the felony murder's predicate felony.

27. Criminal Law ⇐870

If the state charges alternative theories of first-degree murder intending to seek a death sentence, jurors in the guilt phase should receive a special verdict form that allows them to indicate whether they find first-degree murder based on deliberation and premeditation, felony murder, or both; without the return of such a form showing that the jury did not rely on felony murder to find first-degree murder, the state cannot use aggravators based on felonies which could support the felony murder.

28. Sentencing and Punishment ⇐1660

In a capital case, the state is prohibited 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.

29. Sentencing and Punishment ⇐1684

Sufficient evidence supported jury's finding of aggravating circumstance that capital murder defendant had mutilated victim's body; mutilation resulted when defendant dug into victim's body with a knife and then plunged knife into it, these actions went beyond act of killing and caused serious abuse that altered radically victim's torso or abdomen, which was essential part of body, and desecration of victim's body was also apparent in defendant's callous, disrespectful treatment of it. West's NRSA 200.033, subd. 8.

30. Sentencing and Punishment ⇐1789(3)

Supreme Court would review for plain error issue of whether state had argued facts in support of an aggravating circumstance without giving capital murder defendant required statutory notice, as defendant failed to object to state's argument that allegedly included theory that went beyond one set forth in notice of intent to seek death. Sup.Ct. Rules, Rule 250, subd. 4(c, f).

31. Sentencing and Punishment ⇐1789(9)

Capital murder defendant was not prejudiced by state's argument that included theories of intent for burglary that went beyond one set forth in its statutory notice of intent to seek death; evidence that defendant had committed burglary was overwhelming, defendant did not allege that no burglary had occurred, nor did he argue that state introduced or relied on any facts at penalty hearing for which he had no notice. Sup.Ct. Rules, Rule 250, subd. 4(c, f).

32. Sentencing and Punishment ⇐1789(3)

Supreme Court would review for plain error issue of whether trial court had failed to properly instruct jury in penalty hearing of capital murder prosecution, as defendant failed to object in trial court to any of instructions at issue.

33. Sentencing and Punishment ⇐1780(3)

Instructions given during capital penalty hearing did not fail to adequately guide jury to distinguish evidence relevant to aggravating circumstances from other evidence that had been presented against defendant; jury had been properly instructed according to case law regarding proper use of evidence presented at capital penalty hearing.

34. Sentencing and Punishment ⇐1789(9)

Failure of trial court to give instruction that, due to deadly weapon enhancement, capital murder defendant would not be eligible for parole for at least 40 years if given sentence allowing parole, did not prejudice defendant, given that jury returned verdict of death and not life in prison without parole.

35. Sentencing and Punishment ⇨1676

Death sentence imposed upon defendant was not imposed under influence of passion, prejudice or any arbitrary factor, nor was it excessive; evidence indicated that defendant had said that he had wanted to cut off victim's head after killing him, that he had phoned victim's family saying that victim had died like a coward, and that he had drawn offensive images of victim and written offensive comments on images, and defendant had committed murder with shocking degree of deliberation and premeditation, without any comprehensible provocation. West's NRSA 177.055, subd. 2.

36. Sentencing and Punishment ⇨1660

A felony may not be used both to establish first-degree murder and to aggravate the murder to capital status.

Michael R. Specchio, Public Defender, and Cheryl D. Bond, Deputy Public Defender, Washoe County, for Appellant.

Brian Sandoval, Attorney General, Carson City; Richard A. Gammick, District Attorney, and Terrence P. McCarthy, Deputy District Attorney, Washoe County, for Respondent.

Before the Court En Banc.[1]

OPINION [2]

PER CURIAM.

This is an appeal from a judgment of conviction of first-degree murder, pursuant to a guilty plea, and from a sentence of death, pursuant to a jury verdict. Appellant Robert Lee McConnell shot Brian Pierce to death in August 2002. The State charged McConnell with murder and sought the death penalty. After his preliminary examination, McConnell was allowed to represent himself. He then pleaded guilty. He presented a case in mitigation at his penalty hearing, but the jury returned a sentence of death. Initially, he moved to waive his appeal but eventually authorized his appointed counsel to fully brief all issues on appeal.

McConnell challenges the propriety of his penalty hearing and death sentence on various grounds. The most significant question raised is: in a prosecution seeking death for a felony murder, does an aggravator based on the underlying felony constitutionally narrow death eligibility? We conclude that it does not, but because McConnell admitted to deliberate, premeditated murder, the State's alternative theory of felony murder was of no consequence and provides no ground for relief.

FACTS

On August 7, 2002, McConnell shot Brian Pierce to death. Pierce lived with and planned to marry April Robinson, McConnell's former girlfriend. McConnell broke into the couple's home while they were at work. When Pierce returned and entered his front door, McConnell shot him repeatedly. Later, when Robinson came home, McConnell threatened her with a knife, handcuffed her, and sexually assaulted her. He then kidnapped her, forcing her to drive to California. Robinson was able to escape and alerted authorities. McConnell was later arrested in San Francisco.

The State charged McConnell with first-degree murder, alleging theories of deliberate, premeditated murder and of felony murder during the perpetration of a burglary. The State also charged him with sexual assault and first-degree kidnapping. After the preliminary hearing, the State filed a Notice of Intent to Seek Death Penalty and alleged three aggravators: the murder was committed during the course of a burglary, was committed during the course of a robbery, and involved mutilation. Before trial, McConnell successfully moved to represent himself; the Public Defender served as standby counsel thereafter. McConnell then pleaded guilty, without benefit of a plea agreement, to sexual assault and first-degree

1. The Honorable Deborah A. Agosti, Justice, voluntarily recused herself from participation in the decision of this appeal.

2. Pursuant to NRAP 34(f)(1) and SCR 250(6)(f), we have determined that oral argument is not warranted in this appeal.

kidnapping; judgment was entered accordingly, and he was sentenced to consecutive terms of life imprisonment with the opportunity of parole. He also pleaded guilty to first-degree murder, and a penalty hearing before a jury was set.

McConnell's penalty hearing began on August 25, 2003, and lasted four days. In his opening statement, McConnell said that he believed that the evidence would show four mitigating circumstances: he was acting under extreme emotional distress at the time of the murder; he had accepted responsibility for the crimes by pleading guilty; he had no significant prior criminal history in the way of violent felonies; and his behavior in custody was good.

The evidence at the hearing showed that Robinson met McConnell in Reno in 2000, and the two began dating. She broke up with him in the spring of 2001 and about eight months later became engaged to Pierce. Threats were exchanged between the couple and McConnell, and Robinson obtained a temporary protective order against McConnell.[3] After breaking up with Robinson, McConnell told another girlfriend, Lisa Rose, that he was going to murder Pierce. Rose was so concerned that she twice notified the Secret Witness Program and also contacted Robinson. McConnell eventually left the Reno area.

About a year later, McConnell returned to the area. On August 4, 2002, he contacted his former roommate, Alejandro Monroy. When the two men met, Monroy noticed that McConnell was still fixated on Robinson and displayed aggression toward her. Monroy tried to persuade McConnell to let his feelings for Robinson go and to grow up.

Three days later, when Robinson came home from work at around 4:30 p.m., she noticed some unusual things. The window blinds were closed, a golf-ball-sized hole was in the outside paneling, and a blanket was lying in front of the door inside the house. Most unusual of all, however, was that her fiancé, Brian Pierce, did not come outside to greet her. A few seconds after entering her home, Robinson saw a man dressed in black holding a knife. It took her a moment to realize that the man was McConnell, whom she had not heard from in months.

McConnell told Robinson, "Just shut the fuck up." He grabbed her arm, forced her into the master bedroom, threw her facedown on the bed, and handcuffed her. He then placed her on a couch and began talking to her. About 20 minutes later, McConnell cut Robinson's shirt and bra off with the knife and took off her pants and panties. Placing her facedown on the bed again, he duct taped her arm to her leg, duct taped her eyes and mouth, and placed a towel over her head. He then sexually assaulted her vaginally, anally, and orally with his finger and penis.

Afterwards, McConnell asked Robinson for money, and she gave him seven dollars. Robinson then got dressed, and McConnell told her that if she made any wrong moves he was going to shoot her in front of her neighbors. She saw that he had a gun in a holster with two magazine clips and believed him. She also saw that he had a wallet and car keys that appeared to belong to Pierce. When she asked about Pierce, McConnell told her that Pierce was locked up in a U–Haul, being watched by other people. McConnell said that she would have to take him to California if Pierce was ever going to be set free.

Robinson and McConnell drove to California in her car. He told her that everything that was occurring was a part of his plan. She realized that McConnell "had been keeping track of ... when Brian and I went to work, when we got home, the activity at the house, our cars, where they were parked, how many dogs we had, where we sat in the house." As they approached San Francisco, Robinson began suspecting that Pierce was not a hostage and that McConnell was even-

3. There was considerable discussion outside the presence of the jury as to whether the temporary protective order (TPO) would be admitted into evidence. Robinson mentioned the TPO during her direct examination. McConnell wanted to cross-examine her on the TPO, to show that she had violated its terms. The State objected, arguing that the TPO was irrelevant and potentially confusing. The district court agreed with the State and ruled that the TPO did not mitigate McConnell's actions and was not a proper subject of cross-examination.

tually going to kill her. After they stopped at a gas station, she was able to escape in the car. Robinson drove to a nearby hospital and contacted the police in San Mateo, California. She gave the police McConnell's backpack, which contained items such as a 9–millimeter semiautomatic handgun, bullet magazines, and handcuffs.

Early the next morning, on August 8, Washoe County Sheriff's Deputies responded to the reported kidnapping and sexual assault and arrived at Robinson's home. After kicking in the door and entering, the deputies found Pierce dead. He had suffered several gunshot wounds, and a knife was stuck in his torso. Underneath the knife was a videocassette entitled "Fear."

Dr. Christine Elliot, a forensic pathologist, performed an autopsy on Pierce's body. Pierce had suffered nine gunshot wounds. One gunshot wound behind his ear "appeared to be very close range or contact in nature." He had also suffered three stab wounds. Two stab wounds were the "most superficial," and a knife was still in the third wound. The lack of bleeding into the stab wounds suggested that they occurred postmortem. Pierce died from massive blood loss from the gunshot wounds.

Before his arrest, McConnell called his brother, Darren Bakondi, and asked him to send "money, things of that nature." Bakondi testified that McConnell was "kind of rambling" during the conversation: "He told me maybe he should kill himself. Or he said he might go out in a blaze of glory, maybe make the cops—maybe take a couple of them with him, or hopefully some kind of shootout or something."

Less than a week after the crimes, McConnell was arrested in San Francisco. He was extradited back to Nevada. While in custody, he made a number of drawings, had some recorded telephone conversations, and wrote a number of letters. These items were admitted as evidence against him. One item was a letter he wrote to Robinson after she testified at his preliminary hearing. The letter had a cover sheet with "Rest in peace" and "1977–2002" (the years of Pierce's birth and death) written on it. The letter read in part:

> I hope this letter finds you before you kill yourself. Just think. Now you can be with your mom and Brian forever. That was some performance last Thursday. You almost had me feeling sorry for you.
>
> You should thank me, you know. I could get into your house anytime I wanted. Just think. Brian would still be alive if you had locked that window. How does that really make you feel, April? Late at night, alone, when you cry yourself to sleep. Yes, it is a nightmare. And it won't end until you finish the job on your arm.

The last sentence referred to an earlier attempt by Robinson to commit suicide. She, however, never received the letter. (Other items admitted into evidence will be discussed below.)

At the time of his murder, Pierce was 26 years old, attending college and studying graphic design. His younger sister, Kristine Pierce, testified that he had many friends. She loved him and looked to him for guidance. She described Pierce as "a brave person and a real man." Pierce's mother, Pam McCoy, spoke of her pride for her only son and stated, "He never spoke hurtful words. He was loyal. He was a loving son."

Pierce's stepmother, Sheryl Pierce, described Pierce as "a great kid" who held a Bible study class in his bedroom every week while growing up. She thought of him every day. Mrs. Pierce also described two telephone calls she received one night at home after the murder. In the first call, when she heard McConnell say his name on her answering machine, she broke the connection. McConnell called back about a minute later and said on her machine, "Your son died like a coward." Mrs. Pierce was "absolutely horrified" and "couldn't imagine why anyone would be so cruel and mean as to call someone he doesn't even know just to cause that kind of pain."

McConnell called three witnesses. His longtime best friend, Luis Vasquez, who managed a Reno car dealership, described McConnell as one of the best car salesmen he ever had. Vasquez took family vacations with McConnell and trusted him to baby-sit

his children. Before the crimes, Vasquez told McConnell to "walk away" from his feelings for Robinson. He described McConnell as being "very, very depressed," and added that McConnell was crying and, at times, suicidal.

Misty Tackman, a receptionist at the car dealership where McConnell had worked, testified that Robinson once cursed at her and threatened to kill her with a knife.

Cassandra Gunther, the mother of McConnell's daughter, testified that she became pregnant in 1999 when she was 19 years old. McConnell pressured her into keeping the child, once threatening her life. Gunther ended the relationship, the child was born, and Gunther married another man. As Gunther wanted, McConnell had nothing to do with his daughter after the birth.

McConnell testified on his own behalf. He declined to give specific details about his childhood but stated that he and his mother did not get along. He said that he did not want to make excuses for his behavior because many people have bad experiences growing up. He added, "Everything I'm saying now is for the benefit of the Robinson and Pierce family." McConnell testified that initially his relationship with Robinson was great, but after he caught her cheating, things went downhill. She started spending time with Pierce, and McConnell began to get jealous and perceive Pierce as a threat. Threats between McConnell and Pierce were made "back and forth," but Pierce "wouldn't fight."

McConnell stated:

> I attempted to leave town, get away, because there was an instant where I was—I'm going to do something right now. I'm going to kill these people right now. . . .
>
> . . . .
>
> I should have got the counseling maybe to deal with some other issues. I never did.
>
> And, you know, at some point I just—I don't want to say snap. It wasn't instantaneous, you know. I came back with a plan to murder. I did. When I crossed country, I came back, this is about revenge. I'm going to get these people, Brian, April. . . . And in my mind the war is on. The words have been said. The threats on both sides. So I am justified in whatever I do because, you know, they shouldn't have messed with me; they shouldn't have talked shit to me.
>
> And but then there was the other side where, you know, what the hell are you doing? And I would go back and forth. . . .
>
> . . . .
>
> At some point on August 7th I did all the things they said. . . . You know, I was just kind of aimless, wandering around. But all of a sudden I became focused, and I did, and I just made the decision I'm going to do this. I'm going to retaliate against the people that ruined my life.

McConnell also said that

> I can't believe that I killed a Christian. . . . And to find out that I took the life of a person that goes to church and all this stuff that I find out, it hurts me now.
>
> At the time, yeah, very lack of remorse. I was pissed off. I admit to making those phone calls, the drawings on the wall. That was done absolutely, you know, on purpose . . . .
>
> . . . .
>
> But in—with respect to this murder, . . . I'm the coward. I ambushed Brian. He had no chance. Because of perceived threats or whatever, whatever I told myself for justification, you know, I took his life. You know, there's no excuse for that. And I have to answer to everybody.

He added, "I am sorry for what I did now. I really am."

Under cross-examination, McConnell described Pierce's murder on August 7. He had been watching Robinson's and Pierce's house with binoculars for two days before the murder. The morning of the murder, wearing a police-issue battle dress uniform, he broke into the house through an open window and took such things as bills, pictures, and notes to see what Robinson and Pierce had been doing.

McConnell reentered the home at around 12:20 p.m. and waited, determined to kill

Pierce when he came home. Once Pierce came in the door, McConnell pointed his gun at him and said, "Give me your wallet." Pierce threw his wallet toward McConnell and reached for the door. McConnell fired his gun ten times. He approached Pierce because he wanted to look into his eyes to see him die. He then dragged Pierce's body into a bedroom and cut into it two or three times to dig out a "Black Talon" bullet to see what one looked like inside a body. McConnell then stuck a knife into Pierce's torso because he was "still mad." He placed the videotape "Fear" that he found at the house on the body as a message for Robinson. He also took credit cards out of Pierce's wallet.

McConnell explained that his actions were the result of emotional duress. Because this duress continued even after he was in custody, he boasted of murdering Pierce and took pleasure in making Pierce's family suffer. McConnell said he had since had a change of heart, but he also admitted that violence was still in his nature.

The jury found all three aggravating circumstances, determined that any mitigating circumstances were insufficient to outweigh the aggravating circumstances, and returned a verdict of death.

DISCUSSION

The constitutionality of Nevada's use of lethal injection

[1] McConnell contends that Nevada's use of lethal injection as the method of execution is unconstitutional. Due to the absence of detailed codified guidelines setting forth a protocol for lethal injection, he argues that Nevada has failed to ensure that executions are not cruel and unusual punishment prohibited by the United States Constitution. Without codified guidelines, he argues, there is the potential for either accidentally "botched" executions or intentional abuse by Department of Corrections officials who could gratuitously inflict pain during the execution procedure. We are not persuaded by these arguments.

[2] Nevada executed prisoners by means of lethal gas until 1983, when the Legislature changed the authorized method of execution to lethal injection.[4] NRS 176.355(1) provides that a sentence of death in Nevada "must be inflicted by an injection of a lethal drug." NRS 176.355(2)(b) requires the Director of the Department of Corrections to "[s]elect the drug or combination of drugs to be used for the execution after consulting with the State Health Officer." [5] "[S]tatutes are presumed valid, and the burden is on the person challenging the statute to prove it is unconstitutional" through "a 'clear showing of invalidity.' " [6]

McConnell cites no authority from this or any other jurisdiction that deems lethal injection unconstitutional as a matter of law because of the absence of detailed codified guidelines for the procedure. He cites a single law review article criticizing lethal injection,[7] but provides no specific facts or allegations indicating that executions in Nevada have either accidentally or intentionally been administered in a cruel or unusual manner. Rather, McConnell's argument largely consists of speculative accusations, and he cites no part of the record where he challenged the constitutionality of lethal injection before the district court.[8] McConnell's claim raises fact-intensive issues which require consideration by a fact-finding tribunal and

4. *See* 1983 Nev. Stat., ch. 601, § 1, at 1937.

5. *See also* NRS 453.377(6) (providing that otherwise controlled substances may be legally released by a pharmacy to the Director of the Department of Corrections for use in an execution); NRS 454.221(2)(f).

6. *Castillo v. State,* 110 Nev. 535, 546, 874 P.2d 1252, 1259 (1994) (quoting *Sheriff v. Martin,* 99 Nev. 336, 340, 662 P.2d 634, 637 (1983)), *disapproved on other grounds by Wood v. State,* 111 Nev. 428, 430, 892 P.2d 944, 946 (1995).

7. *See* Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us,* 63 Ohio St. L.J. 63, 141, 185, 228 (2002).

8. *See Leonard v. State,* 117 Nev. 53, 63, 17 P.3d 397, 403 (2001) (''Generally, failure to object will preclude appellate review of an issue.'').

are not properly before this court in the first instance.[9]

[3] To the extent that McConnell argues that the statutes mandating lethal injection are unconstitutional on their face, we reject that argument. More than 80 years ago in *State v. Jon*,[10] this court rejected an almost identical claim challenging execution by lethal gas. In *Jon*, the appellants challenged their execution by lethal gas on the basis that Nevada's statute authorizing execution [11] by lethal gas was "indefinite and uncertain as to the formula to be employed" and therefore constituted cruel and unusual punishment.[12] The appellants contended that this court "must take judicial notice of facts and conclusions reached as the result of scientific research, and . . . declare that the law in question provides a cruel and inhuman method of enforcing the death penalty." [13]

This court rejected the appellants' argument:

> It is true that the [death] penalty has been inflicted in different ways; for instance, by hanging, by shooting, and by electrocution; but in each case the method used has been to accomplish the same end—the death of the guilty party. Our statute inflicts no new punishment; it is the same old punishment, inflicted in a different manner, and we think it safe to say that in whatever way the death penalty is inflicted it must of necessity be more or less cruel.
>
> But we are not prepared to say that the infliction of the death penalty by the administration of lethal gas would of itself subject the victim to either pain or torture. . . .
>
> . . . We must presume that the officials intrusted with the infliction of the death penalty by the use of gas will administer a gas which will produce no such results, and will carefully avoid inflicting cruel punishment. That they may not do so is no argument against the law.
>
> . . . The legislature has determined that the infliction of the death penalty by the administration of lethal gas is humane, and it would indeed be not only presumptuous, but boldness on our part, to substitute our judgment for theirs . . . .
>
> . . . The present statute provides that the judgment of death shall be inflicted by the administration of lethal gas, and that a suitable and efficient inclosure and proper means for the administration of such gas for the purpose shall be provided. We cannot see that any useful purpose would be served by requiring greater detail.[14]

The reasoning in *Jon* remains sound and applies to McConnell's claim. We therefore deny McConnell relief on this issue.

The admission of character evidence during the penalty hearing

McConnell contends that the district court improperly admitted several pieces of "bad act" evidence against him during the penalty hearing. He calls the evidence irrelevant, inflammatory, and more prejudicial than probative. He also contends that the evidence was improper because it did not prove any aggravating circumstance. We conclude that the evidence was properly admitted.

[4, 5] "The 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." [15] Evidence that does not prove an aggravating circumstance is still admissible if it relates to the offense, the defendant, or the victim and its probative value is not substantially outweighed by the danger of unfair prejudice.[16] The jury must be in-

9. *See* NRS 177.025 ("The appeal to the Supreme Court from the district court can be taken on questions of law alone.").

10. 46 Nev. 418, 211 P. 676 (1923).

11. The statute was the predecessor to Nevada's current lethal injection statute, NRS 176.355, and contained similar language. *See* 1921 Nev. Stat., ch. 246, § 431, at 387.

12. *Jon*, 46 Nev. at 435, 211 P. at 681.

13. *Id.* at 436, 211 P. at 681.

14. *Id.* at 436–38, 211 P. at 681–82.

15. *McKenna v. State*, 114 Nev. 1044, 1051, 968 P.2d 739, 744 (1998).

16. *Hollaway v. State*, 116 Nev. 732, 746, 6 P.3d 987, 997 (2000); *McKenna*, 114 Nev. at 1051–52, 968 P.2d at 744; NRS 48.035(1).

structed that such evidence is "other matter evidence" which cannot be considered initially in determining whether the defendant is death eligible but only, after that determination is made, in deciding the appropriate sentence.[17]

The evidence that McConnell challenges falls into three categories: photographs of drawings he made and taped to his prison cell wall, recordings of telephone conversations he had with his father and a former roommate, and portions of a letter he wrote to another inmate.

McConnell had several drawings hanging in his cell, and photographs of these drawings were admitted into evidence. These drawings included a picture of a man (apparently the victim, Pierce) with his face crossed out and the phrases "Fuckin' coward" and "See you in hell, faggot" written on it. Another drawing depicted a "Black Talon" bullet entering Pierce's head. McConnell unsuccessfully objected to their admission into evidence.

Two audiotape recordings contained portions of conversations McConnell had while in custody: one with his father, the other with his former roommate. McConnell said, among other things, "I was going to cut his [Pierce's] head off," "I got him ten times before he could even hit the ground," and "I'll just kill people from here on out." McConnell apparently boasted of his satisfaction in committing the crimes and his intent to control the criminal justice system. McConnell also objected unsuccessfully to admission of the recordings.

[6] A letter McConnell wrote while he was in prison to another inmate was admitted into evidence. During redirect examination of April Robinson, the prosecutor read the following portion of the letter: "So don't patronize me or try to coerce, bribe or threaten to testify against me. You wanna get out—I don't. I could care less about anything else that I'm charged with. I enjoy my [victim's] pain and suffering. It makes my job worth it that much more." The prosecutor asked Robinson, "Is that more the defendant you know?" She replied, "Yes." McConnell did not object that the letter was unfairly prejudicial; therefore, he must establish that any error in admitting it was plain and affected his substantial rights, *i.e.,* was prejudicial.[18] We see no error in regard to any of the evidence.

[7–9] The drawings, recordings, and letter concerned McConnell's attitude toward his victims. They were relevant and probative of his cruel and violent character and lack of remorse. Although this evidence was obviously prejudicial, it was not unfairly so because of its probative value. The jury could properly consider the items as "other matter evidence" of McConnell's character in considering whether to sentence him to death. And the jury was instructed correctly under *Evans v. State* [19] regarding the proper use of evidence presented at a capital penalty hearing. (Instruction no. 20.) The evidence was also relevant, at least in part, to rebut McConnell's evidence of mitigation—his assertion that he felt remorse for the victims. Therefore, McConnell has failed to show that the district court abused its discretion by admitting the evidence.

Claims of prosecutorial misconduct

McConnell contends that he was denied a fair penalty hearing because of prosecutorial misconduct. He claims that the State made several improper remarks to the jury that exacerbated the prejudicial nature of evidence admitted against him. We find no merit in this claim.

[10, 11] "To determine if prejudicial prosecutorial misconduct occurred, the relevant inquiry is whether a prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due pro-

17. *See Hollaway,* 116 Nev. at 746, 6 P.3d at 996–97; *Byford v. State,* 116 Nev. 215, 238–39, 994 P.2d 700, 715–16 (2000); NRS 175.552(3).

18. *See* NRS 178.602 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."); *Gallego v. State,* 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

19. 117 Nev. 609, 635–36, 28 P.3d 498, 516–17 (2001).

cess." [20] This court will not lightly reverse a criminal conviction " 'on the basis of a prosecutor's comments standing alone." ' [21]

[12] When McConnell moved to exclude the evidence of his drawings and phone calls, he argued that the evidence was overly prejudicial and was "just going to piss off the jury." The prosecutor responded that "everything I—or we present during this penalty phase will be, to quote Mr. McConnell, to piss off this jury." The prosecutor also stated that the evidence was probative as well as prejudicial and "we're going to try to prejudice him with this jury." These remarks, McConnell argues, prove that prosecutorial misconduct occurred, and he repeatedly underscores his other contentions of misconduct by referring to these remarks. But the essential objective of the prosecution during a penalty hearing is to convince jurors that the defendant deserves to be sentenced to death.[22] This objective is obviously "prejudicial" to the defendant, but the State's tactics must not be *unfairly* prejudicial. Here, even though the prosecutor was responding to and employing McConnell's own words, the language was unnecessary and unsuitable for the courtroom. However, the remarks occurred outside the presence of the jury and did not betray an improper motive or tactic. We conclude that they were not misconduct and did not prejudice McConnell.

[13, 14] McConnell next contends that the State committed misconduct when it remarked on and emphasized his lack of remorse. However, he failed to object on this ground. Therefore, to warrant relief from this court, he must establish that the error was plain and affected his substantial rights.[23] He fails to show any error. McConnell relies on *Brake v. State,* where this court held that the district court violated a defendant's Fifth Amendment right against self-incrimination by considering the defendant's lack of remorse in its sentencing decision.[24] In *Brake,* however, the defendant maintained his innocence.[25] Here, McConnell pleaded guilty and professed remorse. The State did not rely on any silence on his part to argue lack of remorse; rather, it pointed to McConnell's actions and statements after the murder. Consideration of this issue in the penalty phase did not implicate his Fifth Amendment right against self-incrimination.

[15–17] Next, McConnell contends that the State committed misconduct by asking him on cross-examination if he had acted "like a terrorist." He also complains that the State improperly asked his brother if McConnell said, "Leave it to a wop to bring a knife to a gunfight." [26] His brother conceded that McConnell made the statement. McConnell objected to neither question, and there was no plain error in either instance.[27] He also did not object to a remark referring to his "legacies of tragedy" or to evidence and argument regarding a handcuff key he possessed after his arrest, and we discern no misconduct.

The proper scope of the testimony of the sexual assault victim and victim impact testimony regarding special occasions

[18] McConnell contends that April Robinson improperly testified about the details of her sexual assault and kidnapping. He

20. *Thomas v. State,* 120 Nev. 37, 47, 83 P.3d 818, 825 (2004).

21. *Hernandez v. State,* 118 Nev. 513, 525, 50 P.3d 1100, 1108 (2002) (quoting *United States v. Young,* 470 U.S. 1, 11, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985)).

22. *See Jones v. State,* 113 Nev. 454, 468, 937 P.2d 55, 64 (1997).

23. *See* NRS 178.602; *Gallego,* 117 Nev. at 365, 23 P.3d at 239.

24. 113 Nev. 579, 584–85, 939 P.2d 1029, 1032–33 (1997); U.S. Const. amend. V.

25. 113 Nev. at 584–85, 939 P.2d at 1032–33. McConnell also cites *Mitchell v. United States,* 526 U.S. 314, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999), but it is no more apposite to his case than is *Brake.* Moreover, the Court in *Mitchell* "express[ed] no view" on "[w]hether silence bears upon the determination of a lack of remorse." 526 U.S. at 330, 119 S.Ct. 1307.

26. This was apparently a quote from dialog in the movie *The Untouchables.*

27. *See* NRS 178.602; *Gallego,* 117 Nev. at 365, 23 P.3d at 239.

maintains that this testimony, regarding crimes to which he had already pleaded guilty, was irrelevant in his penalty hearing for the murder of Pierce. He further contends that the testimony violated the position the State took during a pretrial hearing when the prosecutor stated that Robinson was "not going to testify about the sexual assault." Robinson did testify in detail about her sexual assault and kidnapping. However, the State clarified its position later in the pretrial hearing and expanded the anticipated scope of Robinson's testimony. But regardless of the State's pretrial representations, McConnell did not object to the testimony and therefore waived the issue for appellate review absent a showing of plain error.[28] He fails to show any error.

[19] The State argued and the evidence showed that McConnell killed Pierce out of jealousy and revenge because he was Robinson's fiancé. McConnell's sexual assault and kidnapping of Robinson almost immediately after the murder were sufficiently connected to Pierce's murder to be both relevant and more probative of McConnell's character and motives for the murder than unfairly prejudicial. Therefore, Robinson's testimony was admissible "other matter" evidence.[29]

[20, 21] McConnell also contends that the penalty hearing was rendered fundamentally unfair because victim impact testimony referred to such events as birthdays, holidays, and the anticipated wedding of Robinson and Pierce. McConnell acknowledges that the State itself did not make these remarks but contends that the State improperly coaxed the victims into doing so. This argument is meritless.

"This court has repeatedly held that so-called 'holiday' arguments are inappropriate . . . [because they] 'have no purpose other than to arouse the jurors' emotions.' "[30] McConnell cites to five instances where Pierce's stepmother and mother testified about special occasions such as birthdays, holidays, and the anticipated wedding. He must demonstrate plain error because he did not object to any of this testimony.[31] He fails to demonstrate any error. Nothing in the questioning supports his contention that the State coaxed unfairly prejudicial responses from the victims. Rather, the victim impact testimony was appropriate and within its permissible bounds.

The failure to bifurcate the penalty hearing

[22, 23] McConnell argues that the penalty hearing should have been bifurcated. We have rejected this argument before, most recently in *Johnson v. State.*[32] McConnell asserts that *Johnson* did not consider the United States Supreme Court's relatively recent decision in *Ring v. Arizona.*[33] In *Johnson,* we did consider *Ring*'s impact on Nevada's capital sentencing scheme.[34] Though we did not apply *Ring* to the bifurcation issue, McConnell fails to explain how it has any such application. Additionally, as previously discussed, the jury in this case received an appropriate instruction on the use of the evidence admitted during the penalty hearing. We presume that juries follow the instructions they are given,[35] and McConnell has not demonstrated otherwise in his case.

28. *Id.*

29. Robinson apparently had a criminal conviction, and McConnell filed a subpoena duces tecum to obtain her presentence report. The district court granted the State's motion to quash the subpoena. McConnell maintains this was unfair but does not raise it as a distinct issue. He suggests that Robinson may have accused him of violent behavior to help herself in her own case, but his own testimony did not contradict Robinson's basic description of the crimes.

30. *Quillen v. State,* 112 Nev. 1369, 1382, 929 P.2d 893, 901 (1996) (quoting *Williams v. State,* 103 Nev. 106, 109, 734 P.2d 700, 702 (1987)).

31. *See* NRS 178.602; *Gallego,* 117 Nev. at 365, 23 P.3d at 239.

32. 118 Nev. 787, 806, 59 P.3d 450, 462 (2002).

33. 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); *see also Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

34. 118 Nev. at 799–804, 59 P.3d at 458–61.

35. *See Collman v. State,* 116 Nev. 687, 722, 7 P.3d 426, 448 (2000).

Basing an aggravating circumstance on the predicate felony in a capital prosecution of a felony murder

McConnell argues that the aggravating circumstance based on burglary failed to perform its constitutional function of narrowing death eligibility because the burglary also served as an element of felony murder. The State failed to respond to this argument.[36] We conclude that the argument has merit.

In charging McConnell with first-degree murder, the State alleged two theories: deliberate, premeditated murder and felony murder during the perpetration of a burglary. McConnell was advised of both theories when he pleaded guilty. During his testimony, McConnell admitted that he had premeditated the murder: "Nothing justifies cold-blooded, premeditated, first-degree murder, which is what I did." His other testimony and the evidence as a whole overwhelmingly supported this admission. McConnell's conviction for first-degree murder is therefore soundly based on a theory of deliberate, premeditated murder. Consequently, our ensuing analysis and decision do not invalidate the use of the felony aggravating circumstances in this case.

This court first addressed the contention that in a felony-murder prosecution the underlying felony cannot be considered as an aggravating circumstance in *Petrocelli v. State* in 1985.[37] *Petrocelli* rejected that contention primarily because "the U.S. Supreme Court has *implicitly* approved the use of the underlying felony in felony murder cases as a valid aggravating circumstance to support the imposition of the death sentence," though neither Supreme Court opinion cited addressed the issue.[38] We have followed *Petrocelli's* rationale since.[39] But we have never addressed the 1988 Supreme Court case *Lowenfield v. Phelps*,[40] which dealt with a challenge to a death sentence on the basis that the sole aggravating circumstance was identical to an element of the capital murder.[41] We conclude that *Lowenfield* provides the basic analytic framework to approach this issue.[42]

The Eighth Amendment prohibits the infliction of cruel and unusual punishments.[43] In 1972, the Supreme Court held that capital sentencing schemes which do not adequately guide the sentencers' discretion and thus permit the arbitrary and capricious imposition of the death penalty violate the Eighth and Fourteenth Amendments.[44] 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

36. The State's failure to address this issue contributed to our decision not to conduct oral argument in this case. We also note that this is a recurring issue that has long confronted this court, as the following discussion demonstrates.

37. 101 Nev. 46, 692 P.2d 503 (1985), *holding modified on other grounds by Sonner v. State*, 114 Nev. 321, 327, 955 P.2d 673, 677 (1998).

38. *Id.* at 53, 692 P.2d at 509 (emphasis added) (citing *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (plurality opinion)).

39. *See, e.g., Atkins v. State*, 112 Nev. 1122, 1134, 923 P.2d 1119, 1127 (1996).

40. 484 U.S. 231, 241–46, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988).

41. *See Leslie v. Warden*, 118 Nev. 773, 784–86, 59 P.3d 440, 448–49 (2002) (Maupin, J., concurring) (discussing *Lowenfield* and this issue).

42. A number of other courts have considered this issue since *Lowenfield* was decided. Opinions determining that use of the felony in a felony murder as an aggravator was proper include: *Deputy v. Taylor*, 19 F.3d 1485, 1500–02 (3d Cir.1994); *Perry v. Lockhart*, 871 F.2d 1384, 1392–93 (8th Cir.1989); and *Ferguson v. State*, 642 A.2d 772, 780–81 (Del.1994). Opinions determining that such use was not proper include: *State v. Middlebrooks*, 840 S.W.2d 317, 341–47 (Tenn.1992), *superseded by statute as stated in State v. Stout*, 46 S.W.3d 689, 705–06 (Tenn. 2001); and *Engberg v. Meyer*, 820 P.2d 70, 86–92 (Wyo.1991).

43. U.S. Const. amend. VIII.

44. *Gregg*, 428 U.S. at 200, 206–07, 96 S.Ct. 2909 (plurality opinion) (summarizing *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)); *id.* at 220–21, 96 S.Ct. 2909 (White, J., concurring) (same). The Eighth Amendment applies to the states through the Fourteenth Amendment's Due Process Clause. *Robinson v. California*, 370 U.S. 660, 666, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962); U.S. Const. amend. XIV, § 1.

the imposition of a more severe sentence on the defendant compared to others found guilty of murder." [45] We conclude that Nevada's own constitutional bans against the infliction of "cruel or unusual punishments" and the deprivation of life "without due process of law" require this same narrowing process.[46]

The Court applied this tenet to Louisiana's capital punishment scheme in *Lowenfield*.[47] Although *Lowenfield* did not specifically address felony murder, it considered a case where the only aggravating circumstance found by the jury was identical to an element of the capital crime.[48] The jury convicted Lowenfield of first-degree murder for killing a human being when "the offender has specific intent to kill or to inflict great bodily harm upon more than one person;" the jury then found a single aggravating circumstance that "the offender knowingly created a risk of death or great bodily harm to more than one person" and returned a verdict of death.[49]

The Supreme Court concluded that the narrowing function required by the Constitution had been accomplished.[50] The Court explained that

> the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.[51]

The Louisiana statute established five grades of homicide, and death was a possible punishment only for first-degree murder, which comprised five categories.[52] The Court concluded that the statute "narrowly defined the categories of murders for which a death sentence could be imposed." [53] Thus,

> the "narrowing function" was performed by the jury at the guilt phase when it found defendant guilty of three counts of murder under the provision that "the offender has a specific intent to kill or to inflict great bodily harm upon more than one person." The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process . . . . [54]

In *Lowenfield*, the five categories of first-degree murder that satisfied the narrowing function at the guilt phase also included a type of felony murder: killing a human being "[w]hen the offender has *specific intent to kill or to inflict great bodily harm* and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery, or simple robbery." [55] However, a killing involving the same enumerated felonies was only second-degree murder when the offender "has no intent to kill or to inflict great bodily harm." [56]

In light of *Lowenfield*, two questions are relevant here. First, is Nevada's definition of capital felony murder narrow enough that no further narrowing of death eligibility is needed once the defendant is convicted? Second, if not, does the felony aggravator sufficiently narrow death eligibility to rea-

45. *Zant v. Stephens*, 462 U.S. 862, 877, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

46. Nev. Const. art. 1, §§ 6, 8(5).

47. 484 U.S. at 244, 108 S.Ct. 546.

48. *Id.* at 241, 108 S.Ct. 546.

49. *Id.* at 243, 108 S.Ct. 546 (quoting La.Rev.Stat. Ann. § 14:30(A)(3) (West 1986); La.Code Crim. Proc. Ann., Art. 905.4(d) (West 1984)).

50. *Id.* at 241–46, 108 S.Ct. 546.

51. *Id.* at 246, 108 S.Ct. 546.

52. *Id.* at 241–42, 108 S.Ct. 546.

53. *Id.* at 245, 108 S.Ct. 546.

54. *Id.* at 246, 108 S.Ct. 546.

55. *Id.* at 242, 108 S.Ct. 546 (quoting La.Rev.Stat. Ann. § 14:30(A)(1)) (emphasis added).

56. *Id.* at 241 n. 5, 108 S.Ct. 546 (quoting La.Rev. Stat. Ann. § 14:30.1(2)).

sonably justify the imposition of a death sentence on the defendant? As we explain, the answer to the first question is no. As for the second, although the felony aggravator is somewhat narrower than felony murder generally, we conclude that the aggravator does not provide sufficient narrowing to satisfy constitutional requirements.

Nevada's statute defines felony murder broadly. Under NRS 200.030(1)(b), felony murder is one "[c]ommitted in the perpetration or attempted perpetration of sexual assault, kidnapping, arson, robbery, burglary, invasion of the home, sexual abuse of a child, sexual molestation of a child under the age of 14 years or child abuse." In Nevada, all felony murder is first-degree murder,[57] and all first-degree murder is potentially capital murder. This is much broader, for example, than Louisiana's capital felony-murder statute in *Lowenfield.*[58] Nevada's statute enumerates two more predicate felonies and some of the predicate felonies are multiple, *e.g.,* either degree of kidnapping in Nevada but only "aggravated kidnapping" in Louisiana. More important though, capital felony murder in Louisiana requires specific intent to kill or to inflict great bodily harm, whereas felony murder in Nevada requires no such intent. In Nevada, the intent simply to commit the underlying felony is "transferred to supply the malice necessary to characterize the death a murder." [59]

Indeed, Nevada's current definition of felony murder is broader than the definition in 1972 when *Furman v. Georgia* [60] temporarily ended executions in the United States. NRS 200.030(1) then provided in pertinent part that murder "committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery or burglary, ... shall be deemed murder of the first degree." [61] To these four predicate felonies formerly enumerated, NRS 200.030(1)(b) now adds kidnapping and four other felonies. So it is clear that Nevada's definition of felony murder does not afford constitutional narrowing. As Professor Richard Rosen points out: "At a bare minimum, then, a narrowing device must identify a more restrictive and more culpable class of first degree murder defendants than the pre-*Furman* capital homicide class." [62]

Because Nevada defines capital felony murder broadly, its capital sentencing scheme must narrow death eligibility in the penalty phase by the jury's finding of aggravating circumstances. We must decide whether the felony aggravator set forth in NRS 200.033(4) adequately performs this narrowing function for felony murder.

NRS 200.033(4) provides that first-degree murder is aggravated if it was committed while the defendant was engaged in

> the commission of, or an attempt to commit or flight after committing or attempting to commit, any robbery, arson in the first degree, burglary, invasion of the home or kidnapping in the first degree, and the person charged:
>
> (a) Killed or attempted to kill the person murdered; or
>
> (b) Knew or had reason to know that life would be taken or lethal force used.

As stated above, first-degree felony murder is based on "the perpetration or attempted perpetration of sexual assault, kidnapping, arson, robbery, burglary, invasion of the home, sexual abuse of a child, sexual molesta-

57. We will not delve into a court-made exception to this statement. More than 20 years ago, this court recognized a "second-degree felony murder" involving homicides committed without specific intent to kill in the course of a limited number of life-endangering felonies not included within NRS 200.030(1)(b). *See Sheriff v. Morris,* 99 Nev. 109, 113–18, 659 P.2d 852, 856–59 (1983).

58. Our discussion of Louisiana statutes refers only to the statutory scheme addressed by the Supreme Court in *Lowenfield.* We have not considered any possible changes to that scheme since *Lowenfield.*

59. *Ford v. State,* 99 Nev. 209, 215, 660 P.2d 992, 995 (1983).

60. 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346.

61. 1967 Nev. Stat., ch. 523, § 438, at 1470. NRS 200.030(3) provided that death was a potential penalty for all first-degree murder. *Id.*

62. Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death,* 31 B.C.L.Rev. 1103, 1124 (1990).

tion of a child under the age of 14 years or child abuse." [63]

The felony aggravator set forth in NRS 200.033(4) is somewhat narrower than felony murder in two ways. First, the felony aggravator statute enumerates five felonies, while felony murder can be based on nine felonies. And the aggravator applies only to kidnapping and arson in the first degree, while felony murder can be based on either degree of kidnapping or arson. However, although the felony aggravator does not apply to sexual assault or sexual abuse of a child [64] (both bases for felony murder), another aggravator under NRS 200.033(13) largely covers these offenses in the form of "nonconsensual sexual penetration." As discussed below, the problem of inadequate narrowing applies to this sexual-penetration aggravator with even more force than to the felony aggravator. The rest of our discussion will therefore refer to both the felony aggravator, NRS 200.033(4), and the sexual-penetration aggravator, NRS 200.033(13). Second, the felony aggravator applies only to cases where the defendant "[k]illed or attempted to kill" the victim or "[k]new or had reason to know that life would be taken or lethal force used." This adds an element not strictly required for felony murder. The sexual-penetration aggravator, however, does not add this element.

The question is, in a case of felony murder does either of these two aggravators "genuinely narrow the class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder"? [65] We conclude that the narrowing capacity of the aggravators is largely theoretical.

First, though the felony aggravator and the sexual-penetration aggravator reach four fewer felonies than does felony murder, the seven felonies reached (sexual assault, sexual abuse of a child, first-degree arson, burglary, invasion of the home, first-degree kidnapping, and particularly robbery) are much more likely to involve death than are the felonies not covered (sexual molestation of a child under the age of 14 years, child abuse, second-degree arson, and second-degree kidnapping).[66] So, in practical terms, these two aggravators still cover the vast majority of felony murders.

Next, though the felony aggravator, unlike felony murder, requires that the defendant "[k]illed or attempted to kill" the victim or "[*k*]*new or had reason to know* that life would be taken or lethal force used," this required element does little more than state the minimum constitutional requirement to impose death for felony murder. The emphasized language of the aggravator is actually slightly broader than that in *Enmund v. Florida*, where the Supreme Court concluded that the Eighth Amendment does not permit imposition of the death penalty on a defendant "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or *intend* that a killing take place or that lethal force will be employed." [67] But the Court itself later broadened the standard slightly, holding that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." [68] Still, this element of the felony aggravator largely mirrors the constitutional standard and does little to narrow the class

63. NRS 200.030(1)(b).

64. *See* NRS 432B.100 (defining ''sexual abuse''); NRS 200.030(6)(d).

65. *Zant,* 462 U.S. at 877, 103 S.Ct. 2733.

66. *See* NRS 200.030(6)(b), (e) (defining ''child abuse'' and ''sexual molestation'').

67. 458 U.S. 782, 797, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) (emphasis added). Although not the intent of the felony-aggravator statute (or *Enmund*), if the defendant killed the victim during a felony, the plain language of the statute requires no jury finding of intent or knowledge on the part of the defendant in order to impose death. But it is still possible that such a killing could be accidental. Jurors should be instructed that even if the defendant killed the victim, they must still find that the defendant intended to kill or at least knew or should have known that a killing would take place or lethal force would be applied.

68. *Tison v. Arizona,* 481 U.S. 137, 158, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987).

of death-eligible defendants.[69] By comparison, the definition of capital felony murder in *Lowenfield* which accomplished the necessary constitutional narrowing required "*specific intent* to kill or to inflict great bodily harm." [70]

Another problem is that this added element can be overlooked and may not even receive consideration by the jury. This case is an example. The jury was instructed:

> The following are circumstances applicable in this case by which murder of the first degree may be aggravated:
>
> 1. The murder of Brian Lee Pierce was committed by Robert Lee McConnell while engaged in the commission of a robbery.
>
> 2. The murder of Brian Lee Pierce was committed by Robert Lee McConnell while engaged in the commission of a burglary.
>
> 3. The murder of Brian Lee Pierce involved mutilation of the victim.

(Instruction no. 8.) The jury was not informed that any further element needed to be found in regard to the two felony aggravators. But this omission had no prejudicial effect in this case since there is no dispute that McConnell intentionally killed Pierce; nor has McConnell raised this issue.

[24] We conclude that although the felony aggravator of NRS 200.033(4) can theoretically eliminate death eligibility in a few cases of felony murder, the practical effect is so slight that the felony aggravator fails to genuinely narrow the death eligibility of felony murderers and reasonably justify imposing death on all defendants to whom it applies. This conclusion applies even more forcefully to the sexual-penetration aggravator of NRS 200.033(13). We therefore deem it impermissible under the United States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated.

[25–27] This decision has no effect in a case where the State relies solely on a theory of deliberate, premeditated murder to gain a conviction of first-degree murder; it can then use appropriate felonies associated with the murder as aggravators. But in cases where the State bases a first-degree murder conviction in whole or part on felony murder, to seek a death sentence the State will have to prove an aggravator other than one based on the felony murder's predicate felony. (Even absent this consideration, judicious charging of felony murder should be the rule in any case.[71]) We advise the State, therefore, that if it charges alternative theories of first-degree murder intending to seek a death sentence, jurors in the guilt phase should receive a special verdict form that allows them to indicate whether they find first-degree murder based on deliberation and premeditation, felony murder, or both. Without the return of such a form showing that the jury did not rely on felony murder to find first-degree murder, the State cannot use aggravators based on felonies which could support the felony murder.

[28] We further prohibit the State from selecting among multiple felonies that occur during "an indivisible course of conduct having one principal criminal purpose" [72] and

69. *Cf. Middlebrooks,* 840 S.W.2d at 345 ("[S]ince the absence of reckless indifference constitutionally immunizes a defendant from the death penalty, its presence cannot meaningfully further narrow the class of death-eligible defendants."); Rosen, *supra* note 62, at 1130 (same). *But see Perry,* 871 F.2d at 1393 & n. 5 (concluding that an Arkansas statute, which in relevant part defines capital murder as causing death in the course of an enumerated felony "under circumstances manifesting extreme indifference to the value of human life," constitutionally narrows death eligibility (quoting Ark. Stat. Ann. § 41–1501(1))).

70. 484 U.S. at 242, 108 S.Ct. 546 (quoting La. Rev.Stat. Ann. § 14:30(A)(1)) (emphasis added).

71. As we have stated before, the felony-murder doctrine is widely criticized: "the weight of authority calls for restricting" the doctrine, and "the trend has been to limit its applicability." *Collman,* 116 Nev. at 717, 7 P.3d at 445 (citing Model Penal Code and Commentaries § 210.2 cmt. 6 at 29–42 (Official Draft and Revised Comments 1980); Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* § 7.5, at 622–23, 632, 640–41 (2d ed.1986)).

72. *People v. Harris,* 36 Cal.3d 36, 201 Cal.Rptr. 782, 679 P.2d 433, 449 (1984), *rejected by People v. Proctor,* 4 Cal.4th 499, 15 Cal.Rptr.2d 340, 842 P.2d 1100, 1129–30 (1992). In 1992, we declined to follow *Harris,* which prohibited the use of multiple felonies occurring during "an indivis-

using one to establish felony murder and another to support an aggravating circumstance. For example, in a case like this one, the burglary could not be used to establish first-degree felony murder while the associated robbery was used as an aggravator to support a death sentence. The burglary and robbery both occurred in an indivisible course of conduct whose primary purpose was the murder of Pierce.

This does not mean that it was improper for the State to allege two aggravators based on robbery and burglary rather than one, as McConnell argues without citing any supporting authority. We have repeatedly held that robbery and burglary occurring in a single course of conduct can be charged as separate aggravators.[73] We do not alter this precedent, though we reject extending it to permit the State to base a felony murder on one felony and then base an aggravator on an associated felony. Whether burglary and robbery are described as two aggravators or one should not unduly influence jurors, who should be clearly instructed that "the weighing of aggravating and mitigating circumstances is not a simplistic, mathematical process" and in no way depends on the sheer number of either.[74]

McConnell also contends that Nevada's death penalty statutes fail to constitutionally narrow death eligibility because the statutory aggravating circumstances in NRS 200.033 are so numerous and because NRS 175.552(3) permits unlimited aggravating evidence beyond the statutory aggravating circumstances. We hold to our precedent rejecting similar general challenges to Nevada's capital sentencing scheme.[75]

The sufficiency of the evidence of mutilation

[29] McConnell also argues that the evidence was insufficient to support the aggravating circumstance of mutilation under NRS 200.033(8). Consistent with this court's caselaw,[76] the jury was instructed:

> "Mutilate" means to cut off or permanently destroy a limb or essential part of the body or to cut off or alter radically so as to make imperfect.
>
> In order for mutilation to be found as an aggravating circumstance, there must be mutilation of the victim beyond the act of killing.

(Instruction no. 12.) This court has also explained that the intent of NRS 200.033(8) is to discourage desecration of the body of a fellow human being.[77]

The prosecutor argued to the jury that mutilation resulted when McConnell dug into Pierce's body with a knife and then plunged the knife into it. The record shows that these actions went beyond the act of killing and caused serious abuse that altered radically Pierce's torso or abdomen, which is an essential part of the body. Desecration is also apparent in McConnell's callous, disrespectful treatment of the body. We conclude that the evidence was sufficient to support the jury's finding of the aggravating circumstance.

The sufficiency of the notice of the State's case in aggravation

Next, McConnell complains that the State argued facts in support of an aggravating circumstance without giving him required notice. The State filed a Notice of Intent to Seek Death Penalty which alleged among other things that the murder was committed during the course of a burglary. The State alleged that the burglary occurred when McConnell entered the victim's home with the intent to kill. In closing argument, how-

ible course of conduct'' to support separate aggravating circumstances. *Homick v. State,* 108 Nev. 127, 137–38, 825 P.2d 600, 607 (1992). Our precedent in this regard does not change, as the continuing discussion indicates.

73. *See, e.g., Homick,* 108 Nev. at 137–38, 825 P.2d at 607.

74. *See State v. Haberstroh,* 119 Nev. 173, 184, 69 P.3d 676, 683 (2003).

75. *See, e.g., Rhyne v. State,* 118 Nev. 1, 14, 38 P.3d 163, 171–72 (2002); *Servin v. State,* 117 Nev. 775, 785–86, 32 P.3d 1277, 1285 (2001); *Middleton v. State,* 114 Nev. 1089, 1116–17, 968 P.2d 296, 314–15 (1998).

76. *See Vanisi v. State,* 117 Nev. 330, 342, 22 P.3d 1164, 1172 (2001).

77. *Byford,* 116 Nev. at 241, 994 P.2d at 717.

ever, the prosecutor argued that the burglary occurred based not only on McConnell's intent to kill but also his intent to rob and to commit sexual assault. McConnell says that this violated SCR 250 and deprived him of his right to due process as well as other constitutional rights.

SCR 250(4)(c) requires the State, within 30 days after filing an information or indictment, to file a notice of intent to seek the death penalty: "The notice must allege all aggravating circumstances which the state intends to prove and allege with specificity the facts on which the state will rely to prove each aggravating circumstance." And SCR 250(4)(f) requires the State to file, no later than 15 days before trial, a notice of evidence in aggravation "summariz[ing] the evidence which the state intends to introduce at the penalty phase of trial ... and identify[ing] the witnesses, documents, or other means by which the evidence will be introduced." The State filed notice under this latter provision of the rule as well.

[30, 31] McConnell did not object to the State's argument and is therefore required to demonstrate that it constituted a plain error affecting his substantial rights.[78] Although the State may have technically violated SCR 250(4)(c) by arguing theories of intent for the burglary that went beyond the one set forth in the notice of intent to seek death, McConnell has not shown that any error was plain. More important, he has not shown the slightest prejudice, let alone an effect on his substantial rights. The evidence for the burglary was overwhelming, and McConnell does not argue that one did not occur. Nor does he argue that the State introduced or relied on any facts at the penalty phase for which he had no notice.

The propriety of various jury instructions

[32] McConnell claims that the district court failed to instruct the jury properly on three issues. He did not object to any of the instructions or propose any different instructions, so he is again required to demonstrate plain error affecting his substantial rights.[79]

[33] He first complains that the district court gave the jury no guidance to distinguish evidence relevant to aggravating circumstances from the other evidence presented against him. He does not specify what form this guidance should have taken. The jury was correctly instructed under our caselaw[80] regarding the proper use of evidence presented at a capital penalty hearing. (Instruction no. 20.) McConnell fails to show that any error occurred here.

Second, he claims that the district court failed to instruct the jury that life in prison without parole means exactly that and that his sentence could not be commuted if he received life without parole. This claim is baseless. The jury was instructed: "Life imprisonment without the possibility of parole means exactly what it says, that the Defendant shall not be eligible for parole." (Instruction no. 19.)

[34] Finally, McConnell claims that the district court failed to instruct the jury that because of the deadly weapon enhancement he would not be eligible for parole for at least 40 years if given a sentence allowing parole. Since the jury returned a verdict of death and not life in prison without parole, we do not see how McConnell could have been prejudiced. Regardless, the jurors were adequately informed. Instruction no. 19 informed them that a sentence allowing parole "does not mean that the Defendant would be paroled after 20 years but only that the Defendant would be eligible for parole after that period of time," and the verdict forms further informed them that either sentence allowing parole would include a second equal and consecutive prison term for the use of a firearm.

Mandatory statutory review of the death penalty

[35] NRS 177.055(2) requires this court to review every death sentence and consider:

78. *See* NRS 178.602; *Gallego,* 117 Nev. at 365, 23 P.3d at 239.

79. *Id.*

80. *Evans,* 117 Nev. at 635–36, 28 P.3d at 516–17.

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

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

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

In regard to the first question, the evidence supported the three aggravating circumstances. McConnell does not dispute the sufficiency of the evidence for the two felony aggravators, and the evidence of mutilation, as discussed above, was sufficient.

McConnell asserts that his death sentence is excessive and resulted from passion and prejudice because he had no significant prior criminal history and the jury was improperly exposed to inflammatory evidence. He specifically cites as improper the evidence that he said he wanted to cut Pierce's head off after the murder, that he phoned Pierce's family saying that their son died like a coward, and that he drew offensive images and wrote offensive comments on Pierce's image. As discussed above, this evidence was admissible, and the jury was properly instructed on its use. We discern no indication that the death sentence was imposed under the influence of passion, prejudice, or any arbitrary factor.

McConnell committed this murder with a shocking degree of deliberation and premeditation and without any comprehensible provocation. He presented no compelling mitigating evidence. We conclude that considering McConnell and his crime, the sentence of death is not excessive.

CONCLUSION

[36] We affirm the judgment of conviction and sentence of death. We also hold that a felony may not be used both to establish first-degree murder and to aggravate the murder to capital status. The interpretation of our death penalty statutes that we now embrace will provide a more certain framework within which prosecutors statewide may exercise their very important discretion in these matters, and will provide greater certainty and fairness of application within the trial, appellate, and federal court systems.

BECKER, J., concurring in result only.

I agree with the decision of the court to affirm McConnell's conviction. I also agree that the court needs to consider the validity of Nevada's death penalty scheme in light of *Lowenfield v. Phelps*,[1] the changes in Nevada's statutes that have occurred since our decision in *Petrocelli v. State*,[2] and recent reconsideration of death penalty case law by the United States Supreme Court.[3] However, in light of the sixteen-year period that has passed since *Lowenfield*, I would still have set this matter for oral argument, despite the State's failure to address *Lowenfield*, and I also believe the court should have requested amicus briefing. For these reasons I concur only in the result.

1. 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988).

2. 101 Nev. 46, 692 P.2d 503 (1985), *holding modified on other grounds by Sonner v. State*, 114 Nev. 321, 327, 955 P.2d 673, 677 (1998).

3. *See Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

APPENDIX D

Special Verdict Form, *State v. McConnell*, District Court of Washoe County, Nevada, Case No. CR-02-1938 (Aug. 28, 2003)

ORIGINAL

CODE 4245

FILED

AUG 28 2003 2:02 pm

RONALD A. LONGTIN, JR., CLERK

By: DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

Case No. CR02-1938

v.

Dept. No. 8

ROBERT LEE McCONNELL,

Defendant.

/

We, the jury in the above-entitled action, find beyond a reasonable doubt that the murder of, BRIAN LEE PIERCE, was aggravated by the following circumstances which has been checked below.

✓ 1. The murder of BRIAN LEE PIERCE was committed by the Defendant while engaged in the commission of a robbery.

✓ 2. The murder of BRIAN LEE PIERCE was committed by the Defendant while engaged in the commission of a burglary.

✓ 3. The murder of BRIAN LEE PIERCE involved mutilation of the victim.

FOREPERSON

RMcConnell-WCSD0060

CERTIFIED COPY
The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.

DATE: AUG 28 2003

RONALD A. LONGTIN, JR., Clerk of the Second Judicial District Court, in and for the County of Washoe, State of Nevada.

By _____ Deputy

APPENDIX E

Special Verdict Form, *State v. McConnell,* District Court of Washoe County, Nevada, Case No. CR-02-1938 (Aug. 28, 2003)

ORIGINAL

FILED

AUG 28 2003 2:02pm

RONALD A. LONGTIN, JR., CLERK

By: _____ DEPUTY

CODE 4245

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v.

ROBERT LEE McCONNELL,

Defendant.

_____/

Case No. CR02-1938

Dept. No. 8

The Defendant ROBERT LEE McCONNELL, having previously plead guilty to MURDER WITH THE USE OF A DEADLY WEAPON we, the jury in the above-entitled action, having found beyond a reasonable doubt that aggravating circumstances exist in this case, and that any mitigating circumstance or circumstances are not sufficient to outweigh the aggravating circumstance found, therefore, by reason thereof, set the penalty of sentence to be imposed at Death.

DATED this 28th day of August, 2003.

FOREPERSON

RMcConnell-WCSD0062

CERTIFIED COPY
The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.

DATE: AUG 28 2003
RONALD A. LONGTIN, JR., Clerk of the Second Judicial District Court, in and for the County of Washoe, State of Nevada.

By _____ Deputy

APPENDIX D

Jury Instructions, *State v. McConnell*, District Court of Washoe County, Nevada, Case No. CR-02-1938 (Aug. 28, 2003)

RMcConnell-TQUM1724

ORIGINAL

CODE
Richard A. Gammick
#001510
P.O. Box 30083
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Attorney for Plaintiff

FILED
AUG 28 2003
RONALD A. LONGTIN, JR., CLERK
By: DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF WASHOE

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR02-1938

ROBERT LEE McCONNELL, Dept. No. 8

Defendant.

_____/

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

You must not be concerned with the wisdom of any rule of law stated in these instructions, regardless of any opinion you may have as to what the law is or ought to be.

Instruction No. 1

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

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

However, you may consider all mitigating evidence presented.

Instruction No. 2

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

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

Instruction No. 3

There are two kinds of evidence: direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is indirect evidence, that is, proof of a chain of facts from which you could find that another fact exists, even though it has been proved directly. You are entitled to consider both kinds of evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give any evidence.

It is for you to decide whether a fact has been proved by circumstantial evidence. In making that decision, you must consider all the evidence in the light of reason, common sense and experience.

You should not be concerned with the type of evidence but rather the relative convincing force of the evidence.

Instruction No. 4

The defendant has plead guilty to Murder in the First Degree With the Use of a Deadly Weapon; therefore, under the law of this state, you must determine the sentence to be imposed upon the Defendant.

First Degree Murder is punishable:

(1) by death, only if one or more aggravating circumstances are found, and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstances, or

(2) by imprisonment in the Nevada State Prison for life without the possibility of parole, or

(3) by imprisonment in the Nevada State Prison for life with the possibility of parole, with eligibility for parole beginning when a minimum of 20 years has been served, or

(4) by imprisonment in the Nevada State Prison for a definite term of 50 years, with eligibility for parole beginning when a minimum of 20 years has been served.

A determination of whether one or more aggravating circumstances exists is not necessary in the event you determine to impose a sentence less than death.

Instruction No. 5

RMcConnell-TQUA1729

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

The Defendant has alleged certain mitigating circumstances are present in this case.

It shall be your duty to determine:

(a) whether one or more aggravating circumstances have been proven beyond a reasonable doubt;

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

(c) based upon these findings, whether the Defendant should be sentenced to death, or one of the alternatives less than death.

The jury may impose a sentence of death only if one or more aggravating circumstances are found, and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances.

Instruction No. 6

RMcConnell-TRUM1730

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

Instruction No. 7

The following are circumstances applicable in this case by which murder of the first degree may be aggravated:

1. The murder of BRIAN LEE PIERCE was committed by ROBERT LEE McCONNELL while engaged in the commission of a robbery.

2. The murder of BRIAN LEE PIERCE was committed by ROBERT LEE McCONNELL while engaged in the commission of a burglary.

3. The murder of BRIAN LEE PIERCE involved mutilation of the victim.

Instruction No. 8

RMcConnell-TQUA1732

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

1. Obtain or retain possession of the property,

2. To prevent or overcome resistance to the taking of the property, or

3. To facilitate escape with the property.

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

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

Instruction No. 9

RMcConnell-TGUA1733

Robbery may spread over considerable and varying periods of time. All matters immediately prior to and having direct causal connection with the robbery are deemed so closely connected with it as to be a part of the occurrence. Thus, although acts of violence and intimidation preceded the actual taking of the property and may have been primarily intended for another purpose, it is enough to support the charge of robbery when a person takes the property by taking advantage of the terrifying situation he created.

Instruction No. 10

RMcConnell-TQUA1734

Every person who, by day or night, enters any house with the intent to commit any felony therein is guilty of Burglary. Murder With the Use of a Deadly Weapon, Sexual Assault, Robbery and Kidnapping are felonies.

Instruction No. 11

"Mutilate" means to cut off or permanently destroy a limb or essential part of the body or to cut off or alter radically so as to make imperfect.

In order for mutilation to be found as an aggravating circumstance, there must be mutilation of the victim beyond the act of killing.

Instruction No. 12

Murder of the first degree may be mitigated by any of the following circumstances;

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

2. The murder was committed while the Defendant was under the influence of extreme mental or emotional disturbance.

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

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

5. The Defendant acted under duress or under the domination of another person.

6. The youth of the Defendant at that time of the crime.

7. Any other mitigating circumstances.

Instruction No. 13

The mitigating circumstances which I have read for your consideration are given as examples of some of the factors you may take into account as reasons for deciding not to impose a death sentence on the Defendant. Anyone of them may be sufficient, standing alone, to support a decision that death is not the appropriate punishment in this case.

In balancing aggravating and mitigating circumstances, it is not the mere number of aggravating circumstances or mitigating circumstances that controls. You must consider each aggravating circumstance and each mitigating circumstance separately and carefully to determine what weight should be given.

Instruction No. 14

Your finding with respect to the existence of any mitigating factor in this case does not have to be unanimous.

Instruction No. 15

RMcConnell-TGUA1739

The evidence presented during this hearing may be considered by you in deciding the proper and appropriate sentence in this case.

This evidence consists of the sworn testimony of the witnesses, both on direct and cross-examination, regardless of who called the witness; the exhibits which have been introduced into evidence and any facts to which the lawyers have agreed or stipulated.

SRK and Mr. McConnell

Instruction No. 16

RMcConnell-TQUA1740

In determining whether mitigating circumstances exist, jurors have an obligation to make an independent and objective analysis of all the relevant evidence. Arguments of counsel or a party do not relieve jurors of this responsibility. Jurors must consider the totality of the circumstances of the crime and the Defendant, as established by the evidence presented in the penalty phase of the trial. Neither the prosecution's nor the Defendant's insistence on the existence or nonexistence of mitigating circumstances is binding upon the jurors.

Instruction No. 17

The law never compels the imposition of the death penalty. Even if you find that the aggravating circumstance has been proven beyond a reasonable doubt, and even if you also do not find that any mitigating circumstances exist, you are not required to return a verdict of the sentence of death as punishment, but may instead sentence the Defendant to one of the alternatives less than death.

Instruction No. 18

(1) A prison term of 50 years with eligibility for parole beginning when a minimum of 20 years has been served does ont mean that the Defendant would be paroled after 20 years but only that the defendant would be eligible for parole after that period of time.

(2) Life imprisonment with the possibility of parole is a sentence to life imprisonment which provides that the Defendant does not mean that the Defendant would be paroled after 20 years but only that the Defendant would be eligible for parole after that period of time.

(3) Life imprisonment without the possibility of parole means exactly what it says, that the Defendant shall not be eligible for parole.

If you sentence the Defendant to death, you must assume that the sentence will be carried out.

Instruction No. 19

In deciding on an appropriate sentence for the Defendant, you will consider three types of evidence: evidence relevant to the existence of aggravating circumstances, evidence relevant to the existence of mitigating circumstances, and other evidence presented against the Defendant. You must consider each type of evidence for its appropriate purposes.

In determining unanimously whether any aggravating circumstance has been proven beyond a reasonable doubt, you are to consider only evidence relevant to that aggravating circumstance. You are not to consider other evidence against the Defendant.

In determining individually whether any mitigating circumstance exists, you are to consider only evidence relevant to that mitigating circumstance. You are not to consider other evidence presented against the Defendant.

In determining individually whether any mitigating circumstances outweigh any aggravating circumstances, you are to consider only evidence relevant to any mitigating and aggravating circumstances. You are not to consider other evidence presented against the Defendant.

If you find unanimously and beyond a reasonable doubt that at least one aggravating circumstance exists and each of you determines that any mitigating circumstances do not outweigh the aggravating, the Defendant is eligible for a death sentence. At this point, you are to consider all three types of evidence, and

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you still have the discretion to impose a sentence less than death. You must decide on a sentence unanimously.

If you do not decide unanimously that at least one aggravating circumstance has been proven beyond a reasonable doubt or if at least one of you determines that the mitigating circumstances outweigh the aggravating, the Defendant is not eligible for a death sentence. Upon determining that the Defendant is not eligible for death, you are to consider all three types of evidence in determining a sentence other than death, and you must decide on such a sentence unanimously.

Instruction No. 20

In reaching your verdict you may consider only the testimony of witnesses and the exhibits received into evidence. Certain things are not evidence and you may not consider them in deciding what the proper and appropriate sentence should be in this case.

Arguments and statements of counsel are not evidence. Counsel are not witnesses. Since Mr. McConnell is representing himself, his testimony is evidence. His arguments are not. What they have said in their opening statements, closing arguments and at other times is intended to help you interpret the evidence, but is not evidence. If the facts as you remember them differ from what counsel have stated, then your memory controls.

Questions and objections by counsel are not evidence. Attorneys have a duty to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or the court's ruling on it.

Testimony excluded or stricken by the court or testimony which you have been instructed to disregard is not evidence and must not be considered.

Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the proper punishment solely on the evidence received at the trial and at this hearing.

Instruction No. 21

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

Instruction No. 22

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

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

Instruction No. 23

If, during this trial, I have said or done anything which has suggested to you that I am inclined to favor the position of either party, you will not be influenced by any such suggestion.

I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are or are not worthy of belief, what facts are or are not established, or what inference should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

Instruction No. 24

To the jury alone belongs the duty of weighing the evidence and determining the credibility of the witnesses. The degree of credit due a witness should be determined by his or her character, conduct, manner upon the stand, fears, bias, impartiality, reasonableness or unreasonableness of the statements he or she makes, and the strength or weakness of his or her recollections, viewed in the light of all the other facts in evidence.

If the jury believes that any witness has willfully sworn falsely, they may disregard the whole of the evidence of any such witness.

Instruction No. 25

It is your duty as jurors to consult with one another and to deliberate, with a view of reaching an agreement, if you can do so without violence to your individual judgment. You each must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

Instruction No. 26

RMcConnell-TQUA1751

Upon retiring to the jury room you will select one of your number to act as foreperson, who will preside over your deliberations and who will sign a verdict to which you agree.

When all twelve (12) of you have agreed upon a penalty verdict, the foreperson should sign and date the same and request the Bailiff to return you to court.

D. J.

Instruction No. 24