FERNANDO NAVARRO HERNANDEZ
Inmate Name
Prison No. 66793
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301

In Propria Persona

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FERNANDO NAVARRO HERNANDEZ, Petitioner, v. E.K. McDANIEL, Warden, and CATHERINE CORTEZ MASTO, Attorney General of the State of Nevada, Respondents.	Case No._____ **PETITIONER'S EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254 BY A PERSON IN STATE CUSTODY** (Death Penalty Habeas Corpus Case)

VOLUME ONE OF ONE

1. Fernando Hernandez v. State of Nevada, Opinion, Nevada Supreme Court Case No. 36859, June 14, 2001

2. Fernando Hernandez v. State of Nevada, Opinion, Nevada Supreme Court Case No. 36859, August 2, 2002

3. State of Nevada v. Fernando Navarro Hernandez, Clark County Eighth Judicial District Court Case No. C162952, Findings of Fact, Conclusions of Law and Order, January 11, 2005

4. Fernando Navarro Hernandez v. State of Nevada, 124 Nev. ___, 194 P. 3d 1235 (2008)

5. Fernando Navarro Hernandez v. State of Nevada, Nevada Supreme Court Case No. 44812, Order Denying Rehearing, January 7, 2009

CERTIFICATE OF SERVICE

In accordance with Rule 5(b) of the Federal Rules of Civil Procedure, the undersigned hereby certifies that on this18th day of September, 2009, a true and correct copy of the foregoing **PETITIONER'S EXHIBITS IN SUPPORT OF PETITION FOR A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254 BY A PERSON IN STATE CUSTODY**, was deposited in the United States mail, first class postage prepaid, addressed to counsel as follows:

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SIGNATURE OF PERSON SERVING DOCUMENT

EXHIBIT 1

EXHIBIT 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERNANDO HERNANDEZ,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36859

Motion in a capital case for leave to file an opening brief of 124 pages. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

Motion denied.

JoNell Thomas, Las Vegas,
for Appellant.

Frankie Sue Del Papa, Attorney General, Carson City; Stewart L. Bell, District Attorney, Clark County,
for Respondent.

BEFORE THE COURT EN BANC.

O P I N I O N

PER CURIAM:

Appellant Fernando Hernandez has moved for leave to file a 124-page opening brief[1] in this direct appeal from a judgment of conviction and sentence of death. As explained below, we deny the motion, but grant Hernandez permission to file an opening brief of not more than 80 pages.

FACTS

In September 2000, appellant Fernando Hernandez was convicted of first-degree murder and sentenced to death for killing his ex-wife in the presence of their young daughter.

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[1]For the purposes of this opinion, we do not count pages 125 and 126 of the brief, which set forth the certificate of compliance with the Nevada Rules of Appellate Procedure and the certificate of service.

01-09944

Hernandez moves to file a 124-page opening brief. The proposed brief enumerates a total of 48 issues and subissues as grounds for relief.

Hernandez's counsel provides an affidavit which states in part:

> Pursuant to the federal Anti-terrorism and Effective Death Penalty Act, and this Court's Rule 250, I believe that it is my obligation to raise every issue of arguable merit in this brief. Moreover, because of the possibility of federal habeas review in future proceedings, it was necessary to address both state and federal law concerning each of these issues. It was not possible to adequately raise the issues presented within the page [limit] prescribed by this Court's rules.

DISCUSSION

We conclude that the instant motion should be denied. The proposed brief is so long that it does not meet counsel's duty to submit a cogent, effective brief which will best serve the interests of her client.

Without reference to any specific provisions, counsel cites the federal Antiterrorism and Effective Death Penalty Act of 1996 and this court's SCR 250 for her belief that she is obligated "to raise every issue of arguable merit." Most assuredly, however, it is not counsel's obligation to present every nonfrivolous claim. SCR 250 does not impose such a duty, nor, we are confident, does the federal statute. On the contrary, the United States Supreme Court warns that a brief that "raises every colorable issue runs the risk of burying good arguments"[2] and has explicitly held that appellate counsel "need not (and should not) raise every nonfrivolous claim, but rather may select from among

[2]Jones v. Barnes, 463 U.S. 745, 753 (1983).

them in order to maximize the likelihood of success on appeal."[3]

The Supreme Court discussed this point at some length in Jones v. Barnes. "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues."[4] "'Legal contentions, like the currency, depreciate through over-issue. . . . [M]ultiplying assignments of error will dilute and weaken a good case and will not save a bad one.'"[5] Attempting "'to deal with a great many [issues] in the limited number of pages allowed for briefs will mean that none may receive adequate attention.'"[6]

The Ninth Circuit has further explained that

> the weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy. Like other mortals, appellate judges have a finite supply of time and trust; every weak issue in an appellate brief or argument detracts from the attention a judge can devote to the stronger issues, and reduces appellate counsel's credibility before the court. For these reasons, a lawyer who throws in every arguable point--"just in case"--is likely to serve her client less effectively than one who concentrates solely on the strong arguments.[7]
>
> We detect an unfortunate conflict between the interests of the client, which often call for selectivity, and the

[3]Smith v. Robbins, 528 U.S. 259, 288 (2000) (emphasis added).

[4]Jones, 463 U.S. at 751-52.

[5]Id. at 752 (quoting Jackson, Advocacy Before the United States Supreme Court, 25 Temple L. Q. 115, 119 (1951)).

[6]Id. at 752 (quoting R. Stern, Appellate Practice in the United States 266 (1981)). See also Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996); Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

[7]Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (citations and footnote omitted).

> interests of counsel, which may be best served by including every conceivable issue and thereby avoiding a claim that she incompetently omitted an argument. We must rely on the professionalism of appellate counsel to resolve such conflicts in favor of the client.[8]

Omitting weaker issues, of course, is not the only option available to appellate counsel for shortening and improving briefs. We do not presume to instruct counsel here on the specifics of revising the proposed brief, but we offer some advice generally to her and the appellate bar of this state on the topic.

The statement of the case should "indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below."[9] This is not a procedural history; the only pertinent "course of proceedings" is that which brings the case before this court. Other procedural facts, if relevant, belong in the statement of facts. The statement of facts, of course, should present only facts which are material in light of the issues. Unessential details and repetitive recitations should be eliminated. Counsel must also be selective in citing authorities. A single governing statute may be all the support needed to establish a point. A string cite of cases is only occasionally warranted; reliance on one or two cases is more often appropriate and more effective, if they are shown to be apposite and controlling or at least persuasive. We appreciate that appellate counsel sometimes consider it necessary to raise a claim in a criminal appeal, despite contrary controlling decisions by this court, in order to exhaust state remedies and preserve the claim for federal habeas review. However, this merely requires an

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[8]Id. at 1434 n.11 (emphasis added).

[9]NRAP 28(a)(3) (emphasis added).

appellant to provide this court "with a 'fair opportunity' to apply controlling legal principles to the facts bearing upon his constitutional claim."[10] The key is to make a federal constitutional claim explicit and clear; exhaustion does not require an extended or elaborate argument.

To sum up, as long as no critical issue or fact is omitted, a shorter brief provides more effective advocacy than a longer one. A reasonable limit on the length of appellate briefs is also necessary for the functioning of this court and is consistent with due process. "[P]age limits, as well as other restrictions on litigants, are ordinary practices employed by courts to assist in the efficient management of the cases before them."[11] Due process requires a criminal appeals system to provide "each defendant a fair opportunity to obtain an adjudication on the merits of his appeal."[12] This court has held that the 10-page limit on briefs in fast track criminal appeals subject to NRAP 3C satisfies this requirement as well as the state constitutional right to appeal felony convictions.[13]

The Fourth Circuit held that a 50-page limit on a brief filed by a capital defendant on direct appeal did not constitute cause for procedural default.[14] The court explained that the page limit "merely limited the manner in which

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[10]Anderson v. Harless, 459 U.S. 4, 6 (1982).

[11]Cunningham v. Becker, 96 F. Supp. 2d 369, 374 (D. Del. 2000) (holding that 5-page limit on judicial misconduct complaints comported with due process); accord Watts v. Thompson, 116 F.3d 220, 224 (7th Cir. 1997) (holding that state supreme court's refusal to waive 50-page limit on brief did not violate due process).

[12]Evitts v. Lucey, 469 U.S. 387, 405 (1985).

[13]See Wood v. State, 115 Nev. 344, 351-52, 990 P.2d 786, 790-91 (1999); NRAP 3C(e)(1) and (f)(1).

[14]Weeks v. Angelone, 176 F.3d 249, 271-72 (4th Cir. 1999), aff'd, 528 U.S. 225 (2000).

[appellant] could present his arguments; it did not wholly prevent him from presenting them."[15] "While the page limitation may have led [appellant's] counsel to make certain strategic choices as to which arguments to include and which to omit, the page limitation is reasonable."[16]

NRAP 28(g) provides: "Except by permission of the court, briefs shall not exceed 30 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, etc." As the rule indicates, we are aware of the need for briefs longer than 30 pages in some cases, for example, this one, which is a direct appeal from a conviction of first-degree murder and a sentence of death. At the same time, as explained above, there must remain reasonable limits. Based on our review of the proposed brief and given this court's experience with other opening briefs of comparable length in a handful of cases similar to this one, we are convinced that it is so excessively long that it would render a disservice to Hernandez by obscuring potentially good claims.

CONCLUSION

Therefore, we deny appellant's motion and direct the clerk of the court to return unfiled the opening brief submitted to this court on April 25, 2001. Given the seriousness and complexity of this appeal, we grant Hernandez permission to file an opening brief of not more than 80 pages. We conclude that this will provide him ample and fair opportunity to obtain an adjudication on the merits of his

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[15] Id. at 271.

[16] Id. at 272; accord Mueller v. Angelone, 181 F.3d 557, 585 (4th Cir.), cert. denied, 527 U.S. 1065 (1999); Cunningham, 96 F. Supp. 2d at 374.

appeal. We further direct that the State may file an answering brief of not more than 80 pages. Hernandez shall have 30 days from the date of this opinion to file and serve his opening brief. Upon the service of that brief, further briefing shall proceed in accordance with SCR 250(6)(d).

Maupin, C.J.

Young, J.

Shearing, J.

Agosti, J.

Rose, J.

Leavitt, J.

Becker, J.

EXHIBIT 2

EXHIBIT 2

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IN THE SUPREME COURT OF THE STATE OF NEVADA

FERNANDO HERNANDEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 36859

FILED

AUG 0 2 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

Appeal from a judgment of conviction, pursuant to a jury verdict, of burglary while in possession of a weapon, first-degree murder with use of a deadly weapon, second-degree kidnapping, and unlawful sexual penetration of a dead human body, and from a sentence of death. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

Affirmed.

JoNell Thomas, Las Vegas,
for Appellant.

Frankie Sue Del Papa, Attorney General, Carson City; Stewart L. Bell, District Attorney, Lynn M. Robinson, Chief Deputy District Attorney, and Robert J. Daskas, Deputy District Attorney, Clark County,
for Respondent.

BEFORE THE COURT EN BANC.

OPINION

PER CURIAM:

Appellant Fernando Hernandez was convicted of, among other things, first-degree murder for stabbing his ex-wife to death and second-degree kidnapping for taking their three-year-old daughter immediately after the murder. He received a death sentence.

02-13239

Hernandez does not dispute that he killed his wife but claims that his conviction is invalid due to numerous errors, including that he cannot be convicted of kidnapping his own daughter. We conclude that none of his claims warrant relief and affirm his conviction and sentence.

FACTS

Hernandez and Donna Hernandez were married on October 6, 1991, and their daughter Ana was born in February 1996. In October 1998, the marriage ended in divorce. Ana lived with Donna, but Hernandez was permitted custody of Ana from 8 a.m. on Wednesdays until 5 p.m. on Fridays.

Francisco Landeros rented a room from Donna from late August until mid-December 1998. He and Donna were friends but did not have a romantic relationship. During that time, Hernandez left insulting messages on Donna's answering machine, calling her a whore and a fool. Landeros testified that a couple of times Hernandez threatened to kill her.

In January 1999, Donna informed the Las Vegas Metropolitan Police Department (LVMPD) of a threat. She was very upset and excited, reporting that when she went to pick her daughter up from Hernandez, he said that he would "make her life very sorry" and was going to take Ana to Mexico. Donna feared for her own safety.

In March 1999, Landeros gave Donna a ride home from work in his pickup one evening. When they got to the house, Hernandez was there in his car and drove toward them. Landeros was forced to pull to the side of the road to avoid him. Donna activated the garage door opener, and Landeros drove into the garage. As the garage door was closing, Hernandez drove under it, causing it to open again. He got out of his car and tried to hit Landeros. Landeros grabbed and held Hernandez, who

pleaded to be let go so he would not get in trouble with the police. After Landeros let Hernandez get back into his car, Hernandez threatened to kill Landeros and said "you're going to die, dogs." Late that same night, Hernandez called Donna's mother three times. He threatened to kill Donna. He also said that he had money in Mexico and was going to take Ana there to raise her because Donna was an unfit mother.

Immediately after these incidents, Donna obtained a protective order against Hernandez. She later had it extended until April 13, 2000. It was therefore in effect at the time of the subject offense in October of 1999.

About two weeks before Hernandez killed Donna, he told a friend that he wanted to kill her, their daughter, and himself. He was intoxicated at the time.

Around 7 a.m. on October 6, 1999, LVMPD Officer David Swoboda was driving an unmarked police car south on Highway 95 towards Laughlin, Nevada. A car passed him going well over the speed limit. Swoboda turned on his red lights and gave chase. The car reached a speed of 96 miles per hour and traveled about eight miles before Swoboda was able to pull it over. Hernandez, who was driving the car, got out. He was crying, raised his hands, and said, "just shoot me, just kill me." He walked around the car to the passenger side and said, "I'm sorry, baby." Because of his unusual behavior, Swoboda handcuffed him and placed him in front of the police car.

Swoboda went to Hernandez's car, where Ana sat in a car seat in the back, crying. He tried to calm her and then returned to Hernandez and obtained his driver's license. He noticed that Hernandez had cuts on his face and hand and asked him what happened. Hernandez said that he had fought with his ex-wife. Swoboda learned through his police computer

of Donna's protective order against Hernandez, so Swoboda suspected a domestic violence situation and requested that officers be sent to Donna's home.

LVMPD Detective Tom Allen arrived at the scene of the confrontation with Hernandez. Swoboda left Allen with Hernandez and returned to Ana. He noticed a blood stain on the seat near her. She was still crying and said, "daddy hurt mommy real bad."

Hernandez smelled of alcohol and admitted to drinking three beers. He failed a horizontal gaze nystagmus test administered by Detective Allen and was placed under arrest. Swoboda put him in his police car. Hernandez alternated between calm and almost hysterical moments. He asked to kiss Ana goodbye. Allen brought her to him, Hernandez kissed her, and Allen took her away. Hernandez began crying and said, "I killed them" and "I killed her." Swoboda advised Hernandez of his Miranda rights, and Hernandez continued to say, "I killed them" and "I killed her."

Detective Allen found some children's clothing and underwear in Hernandez's car and noticed bloodstains on the pajamas that Ana was wearing. Allen eventually took her to his vehicle where she told him that her father had hurt her mother on the stairs. Ana also told him that she and her father were going to Mexico.

Hernandez was driven to the police facility in Laughlin, and analysis of his breath showed blood alcohol levels of 0.165 and 0.154 percent. He was then driven to the Clark County Detention Center. During the drive he acted erratically, sometimes yelling and crying. At one point he tried to jump out of the moving vehicle. He stated that his life was over and asked the police officer to shoot him. After Hernandez was in the booking area at the jail, he began to hit the back of his head

against the concrete wall behind the bench he was sitting on and had to be restrained. Property taken from Hernandez included, among other things, a ring from his right hand and over $1,000 in cash.

LVMPD officers went to Donna's residence, broke open the door, and found her body lying on the stairs. There was blood all over the body and the walls by the stairs, and a broken knife lay nearby. There was no sign of forced entry (other than by the police), and the home otherwise appeared undisturbed. A crime scene analyst found blood elsewhere in the house, including around the kitchen sink. The broken knife by Donna's body was a kitchen knife with a seven-and-a-half-inch serrated blade. Another analyst identified a palm print taken from the knife as Hernandez's. DNA analysis of the blood found at the crime scene showed it to be both Donna's and Hernandez's. Donna's blood was also found on Ana's pajamas and on the ring taken from Hernandez.

The autopsy showed that the cause of Donna's death was strangulation, with significant contributing conditions including multiple stab and slash wounds and blunt head trauma. Some of the bruises on Donna's neck were caused by fingers and others by an object such as a foot or knife placed against her neck. She suffered numerous contusions on her body and face and numerous defensive slash wounds on her hands. A stab wound in the area of her heart pierced her left lung, striking a rib in the back; stab wounds to each side of her neck penetrated into the area of the carotid arteries. It appeared that Hernandez was able to inflict these three major wounds to such vital areas because Donna had ceased to struggle against the attack. Finally, the autopsy revealed the tip of the handle of a dinner knife protruding from her vagina. The knife had been thrust to the left of the cervix, perforating the vaginal wall and

penetrating into the abdominal cavity. This last wound caused minimal hemorrhaging and likely occurred after Donna's death.

Hernandez presented the following evidence. In April 1999 he alleged to Child Protective Services (CPS) that Landeros was sexually molesting Ana. However, an investigation proved the allegation groundless.

The director of Ana's preschool testified that a couple of days before Donna's murder she saw Donna and Hernandez together at the preschool. She was surprised because she knew that they did not get along. She did not know whether they had driven there in the same car. The director said that Hernandez usually picked Ana up on Wednesdays, but occasionally, if Donna called first to give the preschool her approval, he picked her up on a different day.

Nelly Hernandez, a friend of Hernandez's, testified that she helped him with translations during his divorce and custody proceedings. Hernandez was upset because he still wanted to be married and have his family together. He was also upset when he filed his complaint with CPS against Landeros. After Hernandez's arrest, Nelly went to his house to gather his belongings. She did not see any blood or signs that he had been packing, and she recovered his passport and Ana's birth certificate from the house. Another friend, Juan Trillo, testified that in the month before Donna's murder, Hernandez repeatedly said that he was trying to get Donna back. Trillo saw them together in Hernandez's car a couple of times. Trillo also went with Nelly to gather Hernandez's belongings and saw no blood or indications that he had been packing. Hernandez's neighbor testified that he had seen Donna at Hernandez's house a few times in the afternoon, but he could give no dates.

The prosecution and defense stipulated that the caller ID on Donna's telephone showed that a call was received from Hernandez's phone at 9:32 p.m. on October 5, 1999.

In rebuttal, the prosecution presented videotape of family court proceedings involving Donna and Hernandez in November 1998, soon after their divorce. In the proceedings, Hernandez expressed his desire to take Ana on vacation to Mexico. Donna told the court, "He tells me all the time that I'm a bad mother, and he's going to take my child away from me. I'm afraid of him."

On July 14, 2000, the jury returned verdicts finding Hernandez guilty of burglary while in possession of a weapon, first-degree murder with use of a deadly weapon, second-degree kidnapping, and unlawful sexual penetration of a dead human body.

During the penalty phase, the State presented victim impact evidence through the testimony of Donna's mother and brother and Ana's therapist. The evidence showed that Donna's murder had severely affected her brother, sister, mother, and father, but Ana had been particularly traumatized and would likely require therapy until she was sixteen to eighteen years old. Hernandez called a number of witnesses, including his brother, an employer, and friends and fellow workers. According to their testimony, he held multiple jobs, was hard-working, was polite and friendly, and was a loving and devoted father. Hernandez spoke in allocution.

At the end of the penalty phase, the jury found three aggravating circumstances: Hernandez subjected the victim to nonconsensual sexual penetration immediately before, during, or immediately after the commission of the murder; the murder was committed while Hernandez was engaged in the commission of a burglary;

and the murder involved the torture and/or mutilation of the victim. Seven mitigating circumstances were found: Hernandez had no significant history of prior criminal activity; he committed the murder while under the influence of extreme mental or emotional disturbance; he had accepted responsibility for the crime; he had expressed remorse for the crime; he was intoxicated at the time of the crime; he had been gainfully employed throughout his adult life; and he spared the life of his daughter even though he had threatened to kill her. The jury found that the aggravating circumstances outweighed the mitigating and returned a verdict of death.

DISCUSSION

1. Juror misconduct; buying a gift for the murder victim's daughter

Hernandez contends that a mistrial should have been granted because of juror misconduct. The following facts are pertinent.

The jurors returned guilty verdicts on a Friday, and the district court excused the jurors until the next Tuesday, when the penalty phase was to begin. As required by NRS 175.401, the court admonished them in the meantime not to talk among themselves or with anyone else on any subject related to the trial; not to read, watch, or listen to any report or commentary pertaining to the trial; and not to form or express any opinion on any subject connected with the trial.

Penalty deliberations began on Wednesday afternoon. At that time the district court informed the parties that the bailiff had learned that three jurors had bought a present for Ana and the court had instructed the bailiff to tell the jurors to set the present aside to be dealt with later. The court decided to wait until after a verdict was returned before it questioned the three jurors "whether they discussed the case or

any facts of the case or discussed potential punishment or anything that jurors are precluded from discussing, when they made the decision to purchase a present for the child." After the jury returned a death sentence on Thursday, the court excused all but two jurors, and the following colloquy occurred.

> The Court: Thank you. Miss Lorren and Miss Almond, I understand that the two of you along with one of the alternates who is not with . . . us anymore, purchased a gift for the minor child, Ana Hernandez, and if you have that, you may certainly give that either to the grandmother or to the district attorney to transfer to the grandmother. However, we do have to know, because we give you this admonishment that you can't talk to each other, you can't discuss the trial or any of the facts, etc., etc., I do have to ask you how it was that you decided . . . to go together to purchase a present for the child.
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> Juror Lorren: The day that we were here all day on Friday, we were walking out, and I think it was Amber that said I wish we can get something for Ana. I said, why don't we do that, and we took Traci [Almond] because she has a little girl too about the same age. We just got the sizes of clothes. We didn't talk about the trial at all.
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> . . . .
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> The Court: [Miss Almond, is] that your recollection of how that happened, and you tell us that you did not discuss the trial at all?
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> Juror [Almond]: No. We basically discussed what would fit her and what we thought was cute.

Defense counsel also questioned the two jurors and then moved for a mistrial, which the court denied.

Hernandez contends that the jurors violated the admonition not to talk about the case. He also contends that the presence of the gift in the jury room during deliberations was prejudicial error.

"It is a generally accepted principle of trial administration that jurors must not engage in discussions of a case before they have heard both the evidence and the court's legal instructions and have begun formally deliberating as a collective body."[1] The record does not support appellant's claim that the jurors discussed the case prematurely. Hernandez asserts that discussing the child of the victim necessarily constituted a discussion about the case, but based on the jurors' testimony, we do not agree.

Even if the jurors' behavior was misconduct, not every incidence of juror misconduct requires a new trial.[2] If it appears beyond a reasonable doubt that no prejudice occurred, a new trial is unnecessary.[3] The question of prejudice is a factual one for the district court, and this court will not reverse absent an abuse of discretion.[4] Intra-jury discussions are far less of a threat to a defendant's right to trial by an impartial jury than are extra-jury influences.[5] Here, the facts do not establish prejudice but merely demonstrate that the jury was sympathetic to an innocent child, who was a collateral victim of the murder. We conclude that the district court did not abuse its discretion and that the

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[1]U.S. v. Resko, 3 F.3d 684, 688 (3d Cir. 1993).

[2]Tanksley v. State, 113 Nev. 997, 1003, 946 P.2d 148, 151 (1997).

[3]Id.

[4]Id.

[5]Resko, 3 F.3d at 690.

record indicates beyond a reasonable doubt that no prejudice occurred.[6] Further, we conclude that Hernandez fails to show that the presence of the gift constituted plain error or affected his substantial rights.[7]

2. Appellant's kidnapping conviction for taking his own daughter

Hernandez asserts, as he did below, that it is impossible for him to be convicted of kidnapping his daughter. Hernandez attacks the applicability and validity of the kidnapping statute in a number of ways.

NRS 200.359(1)(a) provides that it is a category D felony for a parent with no right of custody or a person having a limited right of custody to a child to violate a court order and remove the child from a person having lawful custody. Hernandez argues that this statute is more specific than and takes precedence over NRS 200.310, which proscribes kidnapping as either a category A or B felony, but does not explicitly address the taking of a child by a parent with limited custody. He claims that application of NRS 200.310 to his case violated his rights to due process, equal protection, and a fair trial. We conclude that this argument lacks merit.

Hernandez has not shown that NRS 200.359 and 200.310 are in conflict, and this court has never treated such statutes as conflicting. The matter at issue here involves not conflicting statutes but prosecutorial discretion in charging. We have followed the United States Supreme Court's holding "that neither due process nor equal protection were

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[6]Cf. Lewis v. State, 94 Nev. 727, 729, 588 P.2d 541, 542 (1978).

[7]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.").

violated under federal constitutional principles by virtue of the fact that the government prescribed different penalties in two separate statutes for the same conduct."[8] "[A] defendant's rights are adequately protected in this area by the 'constitutional constraints' on a prosecutor's discretion, which prevent the prosecutor from selectively enforcing the law based on such unjustifiable criteria as race or religion."[9] This court has also stated that "where conviction for multiple offenses might be redundant, accepting [a guilty plea without the State's approval] undermines prosecutorial discretion in charging and the state's interest in obtaining a conviction on the other charges, which may be the more 'serious' charges."[10] We conclude that the prosecutors acted within their reasonable discretion in charging kidnapping here.

In addition, Hernandez invokes the rule of lenity. This rule calls for the liberal interpretation of criminal statutes to favor the accused in resolving ambiguities.[11] But NRS 200.310, the kidnapping statute, applies unambiguously to Hernandez's actions--he simply wants NRS 200.359 applied instead. Hernandez further argues that the State was equitably estopped from prosecuting him under NRS 200.310 rather than NRS 200.359; however, his authorities are not apposite, and his argument is meritless.

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[8]Sheriff v. Killman, 100 Nev. 619, 621, 691 P.2d 434, 436 (1984) (citing United States v. Batchelder, 442 U.S. 114 (1979)).

[9]Id. (quoting Batchelder, 442 U.S. at 125).

[10]State of Nevada v. Dist. Ct., 116 Nev. 127, 139 n.10, 994 P.2d 692, 700 n.10 (2000).

[11]State v. Stull, 112 Nev. 18, 23, 909 P.2d 1180, 1182 (1996).

Hernandez also claims that NRS 200.310 is unconstitutionally vague. Statutes enjoy a presumption of validity, and the burden is on the party attacking them to show their unconstitutionality.[12] A statute violates due process if it is so vague that it fails to give persons of ordinary intelligence fair notice of what conduct is prohibited and fails to provide law enforcement officials with adequate guidelines to prevent discriminatory enforcement.[13] Where, as here, First Amendment interests are not implicated, the challenged statute must be shown to be impermissibly vague in all its applications or at least as applied to the defendant in question.[14] NRS 200.310(2) provides in relevant part that "[a] person who willfully and without authority of law seizes . . . another person . . . for the purpose of conveying the person out of the state without authority of law, . . . is guilty of kidnapping in the second degree." Hernandez fails to show that this language did not provide him with fair notice that his conduct in taking Ana was criminal, let alone that the statute is vague in all its applications.

Finally, Hernandez argues that it was a legal impossibility for him to kidnap Ana because upon Donna's death he became Ana's sole legal custodian. Although this court did not decide this issue in Sheriff v. Dhadda,[15] that case supports the proposition that a parent having legal custody of a child can nevertheless be convicted of kidnapping the child.

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[12]Sheriff v. Vlasak, 111 Nev. 59, 61-62, 888 P.2d 441, 443 (1995).

[13]Id.

[14]Republic Entertainment v. Clark County, 99 Nev. 811, 816, 672 P.2d 634, 638 (1983); Lyons v. State, 105 Nev. 317, 320, 775 P.2d 219, 221 (1989).

[15]115 Nev. 175, 980 P.2d 1062 (1999).

In Dhadda, we concluded that there was sufficient evidence under NRS 200.310(1) to prosecute a mother for kidnapping her own daughter because the State "demonstrated . . . probable cause to believe that [the mother] took [the daughter] to the river for the purpose of killing her or inflicting substantial bodily harm upon her."[16] In this case, Hernandez acted without authority of law in taking Ana because he violated a protective order, a custody decree, and criminal statutes when he murdered Donna and took Ana.[17] We conclude that his status as sole surviving parent of Ana once he murdered Donna did not render his seizure of Ana lawful.[18]

3. Prosecutorial misconduct

Hernandez contends that prosecutorial misconduct occurred at his trial in the form of numerous instances of improper comments. 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.[19] The statements should be considered in context, and "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone."[20] Although some of the prosecution's

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[16]Id. at 183, 980 P.2d at 1067.

[17]See NRS 200.310(2) (prohibiting seizures of other persons "without authority of law").

[18]Cf. NRS 41B.250-.300 (providing that the felonious, intentional killer of a decedent forfeits any interest in the estate of the decedent).

[19]Darden v. Wainwright, 477 U.S. 168, 181 (1986).

[20]United States v. Young, 470 U.S. 1, 11 (1985).

comments were improper, none so infected either the guilt or penalty phase with unfairness as to deny Hernandez due process.

A. Unpreserved challenges

Hernandez failed to object to most of the instances of misconduct that he now alleges. Generally, for this court to consider whether a prosecutor's remarks were improper, the defendant must have objected to them at the time, allowing the district court to rule upon the objection, admonish the prosecutor, and instruct the jury.[21] Under NRS 178.602, this court may nevertheless address a claim if Hernandez can show that it was plain error that affected his substantial rights. We conclude that the unobjected-to comments either were not erroneous or did not amount to plain error.

B. Preserved challenges

During the penalty phase, the prosecutor told the jury that she "disagree[d] with" a witness called by the defense. Hernandez says that this was an improper statement of opinion. Because defense counsel immediately objected to the comment and the district court sustained the objection, we conclude that no reversible error occurred.[22]

Also in the penalty phase, the prosecutor argued that evidence of uncharged domestic abuse by Hernandez was relevant in considering the alleged mitigating circumstance of no significant criminal history.

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[21]Riley v. State, 107 Nev. 205, 218, 808 P.2d 551, 559 (1991).

[22]See, e.g., Manley v. State, 115 Nev. 114, 124, 979 P.2d 703, 709 (1999) (concluding reversal not warranted where appellant objected immediately to improper question and district court sustained the objection and struck the question).

Defense counsel objected that such bad acts could not enter into the jury's weighing of aggravating and mitigating circumstances, and the district court sustained the objection. Hernandez claims that the prosecutor misstated the law and purposefully misled the jury on the use of this evidence.

During a penalty phase, the State may properly present evidence for just three purposes: "to prove an enumerated aggravator, to rebut specific mitigating evidence, or to aid the jury in determining the appropriate sentence after any enumerated aggravating circumstances have been weighed against any mitigating circumstances."[23] We conclude that the prosecutor's argument was an appropriate attempt to employ the evidence of domestic abuse to rebut the specific mitigating circumstance of no significant criminal history asserted by the defense.

Finally, the prosecution argued during the penalty phase that Hernandez "didn't tell Sergeant Swoboda out on U.S. 95 that he was sorry to Ana for taking her mother away . . . [or] that he apologized to the Griego family because they would never have another holiday with their daughter." Defense counsel objected, and the district court sustained the objection. Hernandez challenges this argument on two grounds. First, he contends that it is improper to argue that a defendant is worthy of death because he has not shown remorse. In this case there was no error because the prosecutor was fairly responding to an earlier contention by defense counsel that Hernandez expressed remorse after he was first stopped.[24] Second, Hernandez is correct that arguments that a family will

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[23]Hollaway v. State, 116 Nev. 732, 746, 6 P.3d 987, 997 (2000).

[24]See Sherman v. State, 114 Nev. 998, 1016, 965 P.2d 903, 915 (1998).

have no more holidays with the murder victim are improper because they are aimed only at the jury's emotions and encourage it to impose a sentence under the influence of passion.[25] Therefore, the last part of the prosecutor's argument was improper, but objection was immediate and sustained by the court, and we conclude that no prejudice resulted.

4. Jury instructions

Hernandez claims that numerous jury instructions were erroneous. He failed to object to many of them at trial.

A. Unpreserved challenges

Hernandez failed to object to the following jury instructions which he now challenges: guilt phase instruction no. 26 defining felony murder; guilt phase instruction no. 27 defining murder by torture; guilt phase instruction no. 47 and penalty phase instruction no. 15 defining reasonable doubt; guilt phase instruction no. 55 and penalty phase instruction no. 22 directing the jury to do "equal and exact justice"; and penalty phase instruction no. 19 directing the jury not to be influenced by sympathy. Hernandez must demonstrate that there was error in regard to these instructions, that it was plain, and that it affected his substantial rights. He fails to do so.

Hernandez also challenges guilt phase instruction no. 32 on voluntary intoxication. Hernandez claims that he objected to this instruction below, while the State contends that he objected only to its final line. Our reading of the record reveals that defense counsel did not object to the instruction at all. Three alternative instructions were

[25]Hollaway, 116 Nev. at 742-43, 6 P.3d at 994.

discussed, and defense counsel did not object to the instruction that the district court finally decided to give. Hernandez fails to show that the instruction given was erroneous in any way.

Hernandez also complains that the district court remarked that "[j]ury instructions are the purview of the appellate court" and that jurors would not understand the distinction between general- and specific-intent crimes, but he does not explain how this constituted error.

Finally, he asserts that there "appears to be" no authority to support guilt phase instruction no. 34, which provided that intoxication that follows the formation of a premeditated, deliberate intent to commit murder does not reduce the degree of murder. Although this instruction may be too broadly stated, Hernandez offers no analysis or authority demonstrating that it was plainly erroneous.

B. Preserved challenges

Hernandez objected to guilt phase instruction no. 44, defining "deadly weapon." The instruction was based on NRS 193.165(5), which provides in part that "deadly weapon" means:

> (a) Any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death; [or]
>
> (b) Any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death.

Hernandez contends that this definition is vague and ambiguous. He relies on Zgombic v. State.[26] In Zgombic, this court

[26]106 Nev. 571, 798 P.2d 548 (1990).

considered whether the Legislature intended a broad, functional definition of "deadly weapon" under a former version of NRS 193.165, which did not define the term.[27] We concluded that the statutory "term 'deadly weapon' is indeed uncertain, and thus the broader functional interpretation is not warranted. . . . [T]he enhancement penalty for use of a deadly weapon in the commission of a crime pursuant to NRS 193.165 is limited to firearms and other instrumentalities that are inherently dangerous."[28]

Hernandez fails to note that Zgombic preceded (and apparently prompted) the amendment of NRS 193.165 to include both a functional and an "inherently dangerous" definition of "deadly weapon."[29] Therefore, the statute is no longer unclear in this regard. The definition set forth in NRS 193.165(5)(b) is broad, but that is clearly the Legislature's intent. The definition is not without limit, however; it requires an instrument to be "readily capable" of causing death as used, not that it simply caused death.

Because the statute does not implicate First Amendment interests, Hernandez has the burden to show that it is impermissibly vague in all its applications or at least as applied to him.[30] He does not meet this burden. Even using the stricter, "inherently dangerous" test set forth in Zgombic and NRS 193.165(5)(a), the knife that Hernandez used--a kitchen knife with a seven-and-a-half-inch, serrated blade--was a deadly

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[27]See id. at 573-76, 798 P.2d at 549-51.

[28]Id. at 575-76, 798 P.2d at 551.

[29]See 1995 Nev. Stat., ch. 455, § 1, at 1431.

[30]Republic Entertainment, 99 Nev. at 816, 672 P.2d at 638; Lyons, 105 Nev. at 320, 775 P.2d at 221.

weapon.[31] The statute gave Hernandez fair notice that the knife was a deadly weapon for purposes of sentence enhancement.

Hernandez also objected to instruction no. 35 in the guilt phase that informed the jury that it did not need to agree unanimously on the theory of first-degree murder as long as its verdict of first-degree murder was unanimous. He argues that this violates due process, but concedes that this court has already ruled otherwise.[32] We decline to reconsider this issue.

Hernandez also objected to guilt phase instruction no. 15 on express and implied malice, which stated in part that malice "may be implied . . . when all the circumstances of the killing show an abandoned and malignant heart," essentially the definition set forth in NRS 200.020(2). Hernandez argued that the language "abandoned and malignant heart" is archaic, vague, and ambiguous. In addition, Hernandez now challenges all the malice instructions, nos. 13, 14, and 15, arguing that they created an unconstitutional presumption, interfered with the presumption of innocence, and relieved the State of its burden to prove guilt beyond a reasonable doubt. These issues were not preserved below, and Hernandez does not demonstrate any plain error. As to

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[31]See Steese v. State, 114 Nev. 479, 499, 960 P.2d 321, 334 (1998) (approving a jury instruction that "a large kitchen knife," a butcher's knife with a five- to seven-inch blade, was a deadly weapon as a matter of law); Thomas v. State, 114 Nev. 1127, 1146, 967 P.2d 1111, 1123 (1998) (following Steese in concluding that "a meat-carving knife with a five- to seven-inch blade" was a deadly weapon).

[32]See, e.g., Evans v. State, 113 Nev. 885, 894-96, 944 P.2d 253, 259-60 (1997).

whether implied malice is defined in impermissibly vague, archaic terms, this court considered and rejected this argument last year.[33]

In the penalty phase, Hernandez objected to instruction no. 11, which informed the jury that

> "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.

Hernandez argued that the instruction was vague, ambiguous, and overbroad, making every cause of death "mutilation." He makes two additional arguments on appeal: applying Byford v. State,[34] which held that mutilation can occur postmortem, to his case would be an improper retroactive application of law; and the mutilation aggravator duplicated the sexual-penetration aggravator. These last two issues were not preserved and do not have merit.

First, the aggravating circumstances in question are not duplicative. In this case, the same conduct gave rise to both the mutilation and the sexual penetration, but in other cases these two aggravating circumstances would likely be based on different facts since sexual penetration is generally accomplished without mutilation. This factor indicates that the aggravators are not duplicative.[35] So does a second factor: each aggravator addresses distinguishable state interests.

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[33]Leonard v. State, 117 Nev. 53, 78-79, 17 P.3d 397, 413 (2001).

[34]116 Nev. 215, 994 P.2d 700 (2000).

[35]See Geary v. State, 112 Nev. 1434, 1448, 930 P.2d 719, 728 (1996), clarified on rehearing, 114 Nev. 100, 952 P.2d 431 (1998).

One is apparently aimed at preventing disfigurement, the other at preventing sexual abuse and perversion.[36] We conclude that the gravamen of each aggravator is different and that basing them both on the same facts is not improper.[37]

Second, a finding of postmortem mutilation in this case does not implicate improper retroactivity. In Byford, this court noted that it had "never expressly decided whether postmortem mutilation" was an aggravating circumstance under NRS 200.033(8). We then explicitly held that it was, reasoning as follows. "Basing aggravating circumstances on the actions of the murderer following the victim's death is proper."[38] This court's earlier case law "tends to support the conclusion that the aggravating circumstance set forth in NRS 200.033(8) includes postmortem mutilation. More important, this conclusion is consistent with the statutory language."[39] This reasoning belies Hernandez's assertion that Byford pronounced a new, unexpected judicial expansion of NRS 200.033(8). "A judicial interpretation of a statute may be retroactively applied if it is both authoritative and foreseeable."[40] The

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[36]See id.

[37]Cf. Servin v. State, 117 Nev. ___, ___, 32 P.3d 1277, 1287 (2001).

[38]Byford, 116 Nev. at 241, 994 P.2d at 717.

[39]Id.

[40]Kreidel v. State, 100 Nev. 220, 222, 678 P.2d 1157, 1158 (1984) (citing Bouie v. City of Columbia, 378 U.S. 347 (1964)), overruled on other grounds by Nevada Dep't Prisons v. Bowen, 103 Nev. 477, 745 P.2d 697 (1987); see also Stevens v. Warden, 114 Nev. 1217, 1221, 969 P.2d 945, 948 (1998).

holding in Byford was authoritative and foreseeable since it was consistent with prior case law and based on the language of the statute.

Finally, Hernandez argues that the aggravating circumstance of mutilation is unconstitutionally vague as set forth in NRS 200.033(8) and the jury instruction given in this case. This court upheld the constitutionality of this statute and this instruction in Browne v. State.[41] We decline to revisit the issue. Hernandez also contends that application of this aggravating circumstance to his case was unconstitutional because "the uterus has not previously been defined as an essential part of the body" and no evidence establishing it as such was presented. We consider this contention utterly without merit.

5. The evidence supporting premeditation and deliberation, burglary, kidnapping, and torture

Hernandez claims that there was insufficient evidence of premeditation and deliberation, burglary, kidnapping, and torture.

In reviewing the sufficiency of the evidence, this court must determine whether the jury, acting reasonably, could have been convinced by the competent evidence of the defendant's guilt beyond a reasonable doubt.[42] This court will not disturb a jury verdict where there is substantial evidence to support it, and circumstantial evidence alone may support a conviction.[43]

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[41]113 Nev. 305, 315-16, 933 P.2d 187, 193 (1997).

[42]Collman v. State, 116 Nev. 687, 711, 7 P.3d 426, 441 (2000), cert. denied, 532 U.S. 978 (2001).

[43]Id.

Hernandez contends that there was insufficient evidence of premeditation and deliberation. He says that there is no suggestion in the record that he brought a weapon to Donna's home, engaged in any planning of the offenses, or packed clothing in his car or otherwise prepared to leave town with his daughter. He notes that he parked his car in Donna's driveway without attempting to hide it and stresses that he was experiencing emotional turmoil and was heavily intoxicated.

We conclude, on the contrary, that there was strong evidence of premeditation and deliberation. The record shows that Hernandez repeatedly threatened to kill Donna. He left such threats on her answering machine. He made a veiled threat to kill her when he told Landeros "you're going to die, dogs." Later that evening, he made the threat explicit over the phone to Donna's mother. And about two weeks before the murder, he told a friend that he wanted to kill Donna. Further, the jury could reasonably have found that Hernandez acted premeditatedly and deliberately in murdering his ex-wife on October 6, the anniversary of their failed marriage. Hernandez's possession of over $1,000 in cash immediately after the murder could also reasonably be considered evidence that he planned the crime and his flight afterwards.

The evidence that Hernandez intended the murder also supports the jury's finding of burglary. If Hernandez entered Donna's house with the intent to murder her or to kidnap Ana, he committed burglary.[44] Hernandez emphasizes that he and Donna had been seen together on various occasions not long before her murder and that there was no sign that he forcibly entered her home. However, forcible entry is

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[44]See NRS 205.060(1).

not an element of burglary; so even if Donna consented to his entry, he still committed a burglary as long as he entered with a felonious intent.[45]

Hernandez contends that there was also insufficient evidence of second-degree kidnapping. As discussed above, he argues that he had legal custody of his daughter. He further argues that the divorce decree permitted him to take Ana out of state. These arguments are of no avail. To reiterate, NRS 200.310(2) provides in relevant part that "[a] person who willfully and without authority of law seizes . . . another person . . . for the purpose of conveying the person out of the state without authority of law, . . . is guilty of kidnapping in the second degree." Hernandez violated a protective order, a custody decree, and criminal statutes when he murdered Donna and took Ana. Therefore, he seized Ana without authority of law. And the evidence that his purpose was to convey her out of state to Mexico is overwhelming: he had threatened more than once to do so, he was driving with her in that direction when stopped by the police, and she told the police that was where her father was taking her.

Hernandez contends that there was insufficient evidence of murder by torture and of torture as an aggravating circumstance. "Torture involves a calculated intent to inflict pain for revenge, extortion, persuasion or for any sadistic purpose" and intent "to inflict pain beyond the killing itself."[46] In Domingues v. State, this court concluded that there was insufficient evidence of torture where the evidence did not indicate that the appellant's "intent was anything other than to kill" the victim and

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[45]See id.; Barrett v. State, 105 Nev. 361, 364, 775 P.2d 1276, 1277 (1989).

[46]Domingues v. State, 112 Nev. 683, 702 & n.6, 917 P.2d 1364, 1377 & n.6 (1996).

there was "no evidence that the specific intent behind the attempted electrocution or the stabbing was to inflict pain for pain's sake or for punishment or sadistic pleasure."[47]

Hernandez argues that the record here shows simply that he stabbed Donna to death and did not intend to torture her. We disagree. Coupled with the multiple injuries he inflicted on her before her death, Hernandez's act of thrusting the knife into Donna's vagina reflects an intent to inflict pain beyond the killing itself for a sadistic purpose. Hernandez counters that this act occurred after Donna's death and therefore cannot be torture; he cites Byford v. State.[48] Although the evidence was not conclusive that Donna was dead when the act occurred, we presume that she was because in the guilt phase the jurors found Hernandez guilty of sexual penetration of a dead body. Nevertheless, even if the knife was thrust into Donna's vagina after her death, it is relevant evidence of his state of mind before her death as he beat her, stabbed her repeatedly, and strangled her. We conclude that this evidence was sufficient to prove torture as an aggravator under NRS 200.033(8) and murder by torture under NRS 200.030(1)(a). There was also sufficient evidence of the "torture or mutilation" aggravator on the basis of the mutilation evident in the record.[49]

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[47]Id. at 702, 917 P.2d at 1377.

[48]116 Nev. at 241, 994 P.2d at 717 ("Although a victim who has died cannot be tortured, mutilation can occur after death.").

[49]See id. at 240, 994 P.2d at 716 (stating that establishing either torture or mutilation is sufficient to support the aggravating circumstance set forth in NRS 200.033(8)).

6. The page limit on appellant's opening brief

In June 2001, this court issued an opinion in this case denying Hernandez's motion for leave to file an opening brief of 124 pages and allowing him to file an eighty-page brief.[50] He contends that this violated his rights to meaningful appellate review and equal protection. He claims that he was forced to omit several issues, and he points out that this court has allowed opening briefs in excess of eighty pages in a number of other cases.

Hernandez's contention has no merit. In the past, this court has allowed longer briefs, but for the reasons set forth in our prior opinion in this case, we have decided to limit the length of briefs. This is not an arbitrary decision, and we are implementing it in a consistent manner. It is not just for the convenience of this court either: the interests of the appellant are best served when counsel focuses on key issues and omits weaker ones.[51] Here, Hernandez was allowed to file a brief fifty pages longer than the limit prescribed in NRAP 28(g). Moreover, the State points out that the font used in Hernandez's brief has approximately fourteen characters per inch, in violation of the limit of ten characters per inch required by NRAP 32(a). We flatly reject Hernandez's contention that the eighty-page limit on his brief forced him to omit issues which he should have included. A reasonable page limit does not prevent an appellant from presenting arguments, but merely limits the manner in which he can present them.[52]

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[50]Hernandez v. State, 117 Nev. ___, 24 P.3d 767 (2001).

[51]See generally id.

[52]Id. at ___, 24 P.3d at 770 (citing Weeks v. Angelone, 176 F.3d 249, 271-72 (4th Cir. 1999), aff'd, 528 U.S. 225 (2000)).

7. Other claims

Hernandez contends that his right to a fair and impartial jury was denied when the district court refused to dismiss a member of the venire for cause after he expressed some reluctance to consider all relevant mitigating evidence. Even assuming that the court should have excused the veniremember for cause, Hernandez was not prejudiced because the member did not serve on the jury.[53]

Hernandez complains that numerous bench and in-chamber conferences were conducted during the trial but not reported. He claims that this violated his right to meaningful appellate review. SCR 250(5)(a) generally requires proceedings in a capital case to be reported and transcribed. However, defense counsel did not object to holding these unreported conferences, and Hernandez fails to show that any plain error affecting his substantial rights occurred.

Hernandez contends that he should have been allowed to argue last in the penalty phase and that this court should overrule precedent to the contrary. This court has held that the State properly argues last in a capital penalty phase because NRS 175.141 mandates it and because the State has the burden of proving aggravators beyond a reasonable doubt.[54] Hernandez argues that the aggravators in his case were already proved in the guilt phase so he had the more significant

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[53]It is not clear if Hernandez used a peremptory challenge to remove the member, but even if that was the case, Hernandez "has not demonstrated that any other jurors proved unacceptable and would have been excused had an additional peremptory challenge been available." Thompson v. State, 102 Nev. 348, 350, 721 P.2d 1290, 1291 (1986).

[54]See Witter v. State, 112 Nev. 908, 923, 921 P.2d 886, 896 (1996), receded from on other grounds by Byford, 116 Nev. 215, 994 P.2d 700.

burden in the penalty phase. We conclude that he has provided no justification for this court to disregard NRS 175.141.

Hernandez next argues that the aggravators of burglary and torture cannot be applied to his case because they were the basis for his murder conviction. He cites State v. Middlebrooks and State v. Cherry, opinions from Tennessee and North Carolina respectively.[55] Neither he nor the State cites Atkins v. State, where this court considered Middlebrooks and Cherry and rejected this argument, noting that the United States Supreme Court has implicitly approved the use of the underlying felony as an aggravator in felony-murder cases.[56]

Hernandez asserts that the death penalty is unconstitutionally cruel and unusual punishment. He also argues that Nevada's death penalty scheme is unconstitutional because it does not sufficiently narrow the number of people eligible for the death penalty. He asserts that statistics from the U.S. Department of Justice show that Nevada has more persons on death row per capita than any other state in the country. He also claims that this court reverses an inordinately low number of death sentences. At trial defense counsel voiced a "general objection" to the constitutionality of the death penalty in Nevada. This was not sufficient to preserve the issues now raised on appeal, nor do we consider the claims to have merit.[57]

Hernandez argues that his conviction and sentence should be reversed due to cumulative error. The cumulative effect of errors may

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[55]840 S.W.2d 317 (Tenn. 1992); 257 S.E.2d 551 (N.C. 1979).

[56]112 Nev. 1122, 1134, 923 P.2d 1119, 1127 (1996).

[57]See Gallego v. State, 117 Nev. ___, ___, 23 P.3d 227, 242 (2001); Leonard, 117 Nev. at 82-83, 17 P.3d at 415-16.

violate a defendant's constitutional right to a fair trial even though errors are harmless individually.[58] We conclude that any errors which occurred were minor and, even considered together, do not warrant reversal.

8. Mandatory statutory review of the death penalty

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

> (b) Whether the evidence supports the finding of an aggravating circumstance or circumstances;
>
> (c) Whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor; and
>
> (d) Whether the sentence of death is excessive, considering both the crime and the defendant.

Hernandez claims that his death sentence should be reversed under this statute. He invokes his earlier arguments challenging burglary, torture, and mutilation to suggest that the evidence did not support two pertinent aggravating circumstances. As discussed above, those arguments fail, and we conclude that the evidence supports all three aggravators. Claiming that his sentence was imposed under the influence of passion, prejudice, or an arbitrary factor, he again notes that two jurors purchased the victim's daughter a gift during the penalty phase. We do not agree that this shows that the jury acted under the influence of passion, prejudice, or any arbitrary factor, and we see no indication of such influence in the record.

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[58] Byford, 116 Nev. at 241-42, 994 P.2d at 717.

In arguing that his death sentence is excessive, Hernandez claims that "[i]n nearly all other recent Nevada cases involving the murder of a person by their spouse or ex-spouse, the death penalty has not been imposed." He then cites with little or no analysis six opinions by this court. This court has stated that "our determinations regarding excessiveness of the death sentences of similarly situated defendants may serve as a frame of reference for determining the crucial issue in the excessiveness analysis: are the crime and defendant before us on appeal of the class or kind that warrants the imposition of death?"[59] Here, Hernandez provides no cogent argument demonstrating that the cases he cites involve "similarly situated defendants."

The jury recognized seven mitigating circumstances, but finding that the three aggravating circumstances outweighed them, imposed a death sentence. We perceive no basis to set aside this decision. Hernandez stalked his wife; murdered her without provocation in a horrific, savage manner; and did so in the presence of her, and his own, young daughter. We conclude that the death sentence is not excessive in this case.

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[59]Dennis v. State, 116 Nev. 1075, 1085, 13 P.3d 434, 440 (2000).

CONCLUSION

We affirm Hernandez's judgment of conviction and sentence of death.

Maupin, C.J.
Maupin

Young, J.
Young

Shearing, J.
Shearing

Agosti, J.
Agosti

Rose, J.
Rose

Leavitt, J.
Leavitt

Becker, J.
Becker

EXHIBIT 3

EXHIBIT 3

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CLERK

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

FERNANDO NAVARRO HERNANDEZ, #1183006

Defendant.

CASE NO: C162952
DEPT NO: XV

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

~~DATE OF HEARING: 12/20/2004~~
TIME OF HEARING: 1:30 P.M.

THIS CAUSE having come on for hearing before the Honorable SALLY LOEHRER, District Judge, on the 20th day of December, 2004, the Petitioner being present, Represented by ANTHONY SGRO, Esq., the Respondent being represented by DAVID ROGER, District Attorney, by and through STEVEN S. OWENS, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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///

FINDINGS OF FACT

1. On July 14, 2000, a jury returned verdicts finding Fernando Hernandez, hereinafter "Defendant," guilty of burglary while in possession of a weapon, first-degree murder with use of a deadly weapon, second-degree kidnapping, and unlawful sexual penetration of a dead human body.

2. At the end of the penalty phase, the jury found three aggravating circumstances and seven mitigating circumstances. The jury determined that the aggravating circumstances outweighed the mitigating and returned a verdict of death. Judgment of Conviction was filed on September 28, 2000.

3. On October 5, 2000, Defendant filed a notice of appeal with the Nevada Supreme Court appealing his conviction and sentence. Defendant had moved for leave to file a 124-page opening brief, in contrast with the 30-page statutory limitation. The Nevada Supreme Court denied Defendant's motion finding that the brief submitted by defense counsel was so long that it did not meet counsel's duty to submit a cogent, effective brief, but Defendant would be allowed 80 pages in which to present his claims for relief and appropriate support.

4. Defendant then filed a second opening brief conforming to the 80-page limitation. In Defendant's direct appeal he raised several issues including: juror misconduct, actual innocence with respect to the second-degree kidnapping charge, prosecutorial misconduct, improper jury instructions, insufficiency of the evidence, a violation of a meaningful appellate review and equal protection because of the page limitation for Defendant's opening brief as set by the Nevada Supreme Court, various claims addressing jury selection, and improper sentence which was spawned by the influence of passion, prejudice and arbitrary factors. The Nevada Supreme Court, sitting en banc, found that Defendant's contentions lacked merit and affirmed his judgment of conviction and sentence of death on August 2, 2002.

5. On August 19, 2002, Defendant filed a petition for rehearing and a motion to stay issuance of the remittitur while he sought relief from the United States Supreme Court. On

February 24, 2003, the United States Supreme Court denied Defendant's petition for a writ of certiorari. On March 10, 2003, the Nevada Supreme Court issued the remittitur.

6. On March 12, 2003, Defendant filed a pro per Petition for Writ of Habeas Corpus (post-conviction) alleging eight grounds for relief, which include thirty-six instances of ineffective assistance of trial counsel, four instances of ineffective assistance of appellate counsel, twenty-three alleged errors by the Nevada Supreme Court on direct appeal, a claim of actual innocence, and cumulative error. Defendant's motion for the appointment of counsel was granted on April 2, 2003. After several continuances, a supplemental Petition for Writ of Habeas Corpus (post-conviction) with supporting points and authorities was filed on March 8, 2004. Defendant's counsel adopted all of Defendant's original grounds for relief and added seven more, including: four more instances of ineffective assistance of trial counsel, improper jury instruction on intoxication and the relation to the degrees of murder, trial court error in denying Defendant's motion to substitute counsel, and the unconstitutionality of the death sentence as evidenced by alleged juror misconduct and unconstitutional ineffective assistance of counsel.

7. The State filed its opposition to Defendant's petition on July 19, 2004 with Defendant's reply following on August 30, 2004.

8. On October 11, 2004, this court held a hearing on Defendant's petition for writ of habeas corpus (post-conviction). At the conclusion of the hearing it was ordered that an evidentiary hearing would be held addressing the specific allegations of ineffective assistance of counsel with respect to failing to file a motion to change venue or a motion to suppress statements, failing to present Dr. Kinsora to the jury, conceding that Defendant was involved in the killing. In addition, this court would hear arguments with respect to the jury instruction regarding voluntary intoxication.

9. Defendant's claims of error raising each of the twenty-three issues addressed in Defendant's direct appeal are barred by the doctrine of Law of the Case.

10. Defendant's claims of error raising the issue of actual innocence for the crimes of robbery and first-degree murder and the issue of trial court error in denying Defendant's motion to substitute counsel could have been raised on appeal and are therefore waived.

11. On December 20, 2004, an evidentiary hearing was held before this court wherein Defendant's appointed trial counsel, David Schieck and Chris Oram, and appointed appellate counsel, JoNell Thomas were called to testify.

12. Trial counsel was not ineffective for not filing a motion to change venue as there was very little pre-trial publicity in this case and there was no difficulty in seating a jury.

13. Trial counsel was not ineffective for not filing a motion to suppress Defendant's statements on the basis of an alleged Miranda violation as Defendant was not in custody at the time he made the statements and many of the statements were gratuitous and spontaneous.

14. Trial counsel was not ineffective for not calling Dr. Thomas Kinsora, a clinical neuropsychologist, to testify during the guilty and/or penalty phase of trial as this was a strategic trial tactic.

15. Trial counsel was not ineffective for conceding culpability as the record clearly indicates that Defendant unequivocally agreed to this defense trial strategy. The record shows that Defendant, in his primary language, willfully, knowingly, and intelligently consented to counsel's concession of culpability.

16. Trial counsel was not ineffective in failing to contest the jury instruction regarding voluntary intoxication as the Nevada Supreme Court already concluded in Defendant's direct appeal that while the instruction may have been broad when read in conjunction with the rest of the instructions it was proper.

17. Defendant has failed to establish that trial counsel's conduct fell below an objective standard of reasonableness.

18. Defendant has failed to establish that had trial counsel acted in the way Defendant now contends they should have that the result of the trial would have been different.

19. Defendant has failed to establish that appellate counsel's conduct fell below an objective standard of reasonableness.

20. Defendant has failed to establish that had appellate counsel acted in the way Defendant now contends she should have that the result of the appeal would have been different.

21. There was no showing of cumulative error as alleged in Grounds 8 and 15.

CONCLUSIONS OF LAW

1. A claim raised in a post-conviction proceeding which has already been addressed by the Nevada Supreme Court is barred from reconsideration by the law of the case doctrine. Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975).

2. NRS 34.810(1)(b), provides that the court shall dismiss a petition if:

> (b)The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
> (1) Presented to the trial court;
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or post-conviction relief; or
> (3) Raised in any other proceeding that the petitioner has taken to secure relief from his conviction and sentence
> unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner.

NRS 34.810(1)(b); see also Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

3. A defendant is not entitled to relief on claims that are belied by the record. Hargrove v. State, 100 Nev. 498, 686 P.2d 222, (1984).

4. In order to assert a claim for ineffective assistance of counsel the defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland v. Washington, 466 U.S. 668, 686-687, 104 S.Ct. 2052, 2063-2064 (1984); State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under this test, the defendant must show first that her counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability

that the result of the proceedings would have been different. Strickland, 466 U.S. at 687-688 & 694, 104 S.Ct. at 2065 & 2068. Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting Strickland two-part test in Nevada). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970)).

5. Based on the above law, the court begins with the presumption of effectiveness and then must determine whether or not defendant has demonstrated, by "strong and convincing proof," that counsel was ineffective. Homick v State, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996); citing Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981); Davis v. State, 107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991).

6. The federal courts have held that in order to claim ineffective assistance of appellate counsel the defendant must satisfy the two-prong test set forth by Strickland v. Washington, 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 2065, 2068 (1984); Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991).

7. There is a strong presumption that appellate counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990), citing Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. The Nevada Supreme Court has held that all appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence." Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994).

8. Finally, in order to prove that appellate counsel's alleged error was prejudicial, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. See Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132.

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9. The defendant has the ultimate authority to make fundamental decisions regarding his case. Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983). However, the defendant does not have a constitutional right to "compel appointed counsel to press non-frivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." Id. In reaching this conclusion the Supreme Court has recognized the "importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. at 751 -752, 103 S.Ct. at 3313. In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S.Ct. at 3313. The Court also held that, "for judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S.Ct. at 3314.

10. Under the doctrine of cumulative error, "although individual errors may be harmless, the cumulative effect of multiple errors may deprive a defendant of the constitutional right to a fair trial." Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994); see also Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985).

11. The relevant factors to consider in determining "whether error is harmless or prejudicial include whether 'the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.'" Big Pond, 101 Nev. at 3, 692 P.2d at 1289. The doctrine of cumulative error "requires that numerous errors be committed, not merely alleged." People v. Rivers, 727 P.2d 394, 401 (Colo. App. 1986); see also, People v. Jones, 665 P.2d 127, 131 (Colo. App. 1982). Evidence against the defendant must therefore be "substantial enough to convict him in an otherwise fair trial and it must be said without reservation that the verdict would have been the same in the absence of error." Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1156 (1988).

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ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

DATED this 10th day of January, 2005.

DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352

kjk

EXHIBIT 4

EXHIBIT 4

124 Nev., Advance Opinion 83

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERNANDO NAVARRO HERNANDEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44812

FILED

OCT 30 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

Appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

Affirmed.

Patti, Sgro & Lewis and Anthony P. Sgro, Las Vegas,
for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; David J. Roger, District Attorney, and Steven S. Owens, Chief Deputy District Attorney, Clark County,
for Respondent.

BEFORE THE COURT EN BANC.

OPINION

By the Court, MAUPIN, J.:

In this appeal, we consider whether we should extend the holding in our decision in McConnell v. State[1] to bar the dual use of torture as a theory of first-degree murder and as an aggravating

[1]120 Nev. 1043, 102 P.3d 606 (2004).

circumstance to support a death sentence. We conclude that McConnell does not preclude the State from securing a murder conviction based upon a theory of torture and alleging torture as an aggravating circumstance in seeking a death sentence. Nevada's definition of torture murder sufficiently narrows the class of persons eligible for the death penalty to allow the dual use of torture as exercised in this case. However, McConnell requires us to strike the burglary aggravating circumstance, leaving two remaining aggravating circumstances—the murder involved torture or mutilation and the defendant subjected the victim to nonconsensual sexual penetration. After reweighing the remaining aggravating and mitigating evidence, we conclude beyond a reasonable doubt that the jury would have found appellant Fernando Navarro Hernandez death eligible and imposed death absent the erroneous aggravating circumstance. We therefore affirm the district court's order denying post-conviction relief.

FACTS

Hernandez was convicted of first-degree murder, burglary while in possession of a weapon, second-degree kidnapping, and unlawful sexual penetration of a dead body. The murder victim was Hernandez's ex-wife, Donna. Hernandez murdered Donna at her home and kidnapped their three-year-old daughter Ana, who witnessed the killing.

At approximately 7:00 a.m. on October 6, 1999, Hernandez was stopped for speeding by Las Vegas Metropolitan Police Officer David Swoboda. Rather than remaining inside his vehicle, Hernandez exited, crying. Officer Swoboda noticed Hernandez had cuts on his face and hand and asked him what happened. Hernandez said he had fought with his ex-wife. Through his police computer, Officer Swoboda learned that

Donna had taken out a protective order against Hernandez. Suspecting domestic violence, Officer Swoboda requested officers be sent to Donna's home.

Officers responding to Donna's house found her body on the stairs. An autopsy revealed that she had been strangled to death, manually and by an object such as a foot or a knife placed against her throat. She also sustained multiple stab and slash wounds and blunt force head trauma. Apparently postmortem, a dinner knife had been thrust into her vagina with sufficient force to perforate the vaginal wall and penetrate her abdominal cavity. A seven-inch serrated knife, its blade broken from the handle, was found near her body; Hernandez's palm print was found on it. Hernandez's and Donna's DNA were found in the blood at the crime scene, on the pajamas Ana was wearing when Hernandez was arrested, and on the ring taken from Hernandez's hand when he was booked into custody.

This court affirmed the judgment of conviction and sentence on direct appeal.[2] Hernandez timely filed a post-conviction petition for a writ of habeas corpus, which the district court denied after conducting an evidentiary hearing. This appeal followed.

DISCUSSION

Application of McConnell v. State

Hernandez argues that the burglary aggravating circumstance is invalid under McConnell and that McConnell should also be applied to invalidate the torture aggravating circumstance. We agree that the

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[2]Hernandez v. State, 118 Nev. 513, 50 P.3d 1100 (2002).

burglary aggravator is invalid under McConnell, but we decline to extend that case to invalidate the torture aggravating circumstance. After striking the burglary aggravating circumstance, we conclude beyond a reasonable doubt that the jury would have found Hernandez death eligible and sentenced him to death.

Burglary aggravating circumstance

Two years after upholding Hernandez's conviction and death sentence on direct appeal, this court decided McConnell, holding that it is unconstitutional "to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated."[3] This court subsequently held that McConnell applied retroactively to cases that were final when it was decided.[4] Here, the State sought a murder conviction based upon three theories: premeditation and deliberation, felony murder during a kidnapping and/or burglary, and murder by torture. The jury found three circumstances aggravating the murder: Hernandez subjected the victim to nonconsensual sexual penetration, the murder was committed during a burglary, and the murder involved torture or mutilation.[5] The jury's verdict is silent as to which theory or theories the jury relied on in finding Hernandez guilty of first-degree murder. Accordingly, the burglary aggravating circumstance is invalid under McConnell.

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[3]120 Nev. at 1069, 102 P.3d at 624.

[4]Bejarano v. State, 122 Nev. 1066, 146 P.3d 265 (2006).

[5]The State also alleged as an aggravating circumstance that Donna's murder was committed during a kidnapping; however, the jury rejected this aggravating circumstance.

Torture aggravating circumstance

Hernandez argues that, similar to McConnell's holding respecting felony murder, it is unconstitutional for the State to charge first-degree murder based on torture and also base an aggravating circumstance on the same act or acts of torture unless it is clear that the jury did not rely on torture murder in finding the defendant guilty. Therefore, according to Hernandez, because it is unclear whether the jurors relied on the torture-murder theory to find him guilty of first-degree murder, the torture aggravating circumstance must be stricken. We disagree.

In McConnell, we concluded that the United States and Nevada Constitutions require a capital sentencing scheme to "'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'"[6] Noting the United States Supreme Court decision in Lowenfield v. Phelps,[7] we recognized that this narrowing function may be achieved by one of two means—"'[t]he legislature may itself narrow the definition of capital offenses'" or "'the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.'"[8] Thus, to assess whether Nevada's capital felony-murder

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[6]120 Nev. at 1063, 102 P.3d at 620-21 (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)).

[7]484 U.S. 231 (1988).

[8]McConnell, 120 Nev. at 1064, 102 P.3d at 621 (quoting Lowenfield, 484 U.S. at 246).

scheme provided sufficient narrowing to pass constitutional scrutiny, we asked two questions in McConnell: "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 reasonably justify the imposition of a death sentence on the defendant?"[9]

Accordingly, here, we must first determine whether Nevada's definition of torture murder is sufficiently narrow such that no further narrowing of death eligibility is needed once the defendant is convicted. We conclude that it is and that no further narrowing is required. Consequently, we need not address the second question posed in McConnell.

Torture murder identifies a constitutionally narrow class of murders, which only includes those defendants who act with calculated intent to inflict pain for revenge, extortion, persuasion, or for any sadistic purpose and to inflict pain beyond the killing itself.[10] We conclude that the definition of torture murder assuages the risk of unconstitutional arbitrariness that the narrowing function is designed to avoid.

Moreover, the concern engendering our ruling in McConnell is not present here. Nothing in McConnell prohibits per se using the same conduct to support a murder theory and an aggravating circumstance.[11]

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[9]Id. at 1065, 102 P.3d at 621-22.

[10]Domingues v. State, 112 Nev. 683, 702 & n.6, 917 P.2d 1364, 1377 & n.6 (1996).

[11]We have rejected other arguments seeking to extend McConnell's holding beyond the scope of felony murder. See Blake v. State, 121 Nev.

continued on next page . . .

Our reasoning in McConnell centered on whether felony murder performed an adequate narrowing function. Specifically, we held that Nevada's felony-murder statute was too broad to provide sufficient narrowing because it did not require the defendant to have the intent to kill.[12] Rather, the intent simply to commit the underlying felony is "'transferred to supply the malice necessary to characterize the death a murder.'"[13] Torture murder, on the other hand, includes an intent element because malice must still be proved.[14]

As the definition of torture murder performs a constitutionally satisfactory narrowing function and does not implicate the concerns we

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. . . *continued*

779, 794, 121 P.3d 567, 577 (2005) (rejecting argument that McConnell should apply to invalidate preventing-a-lawful-arrest aggravating circumstance because although aggravator may constitutionally narrow class of persons eligible for death penalty in theory, "the practical effect is so slight as to render the aggravator unconstitutional").

[12]McConnell, 120 Nev. at 1065-66, 102 P.3d at 622.

[13]Id. at 1066, 102 P.3d at 622 (quoting Ford v. State, 99 Nev. 209, 215, 660 P.2d 992, 995 (1983)).

[14]See Collman v. State, 116 Nev. 687, 714-15, 7 P.3d 426, 443-44 (2000) (noting that "malice is not subsumed by willfulness, deliberation, and premeditation" and that first-degree murder by enumerated means still requires State to prove malice); see also NRS 200.020 ("1. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. 2. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.").

expressed in McConnell, we conclude that McConnell does not render the torture aggravating circumstance invalid.

Reweighing

After striking the burglary aggravating circumstance, we may reweigh the aggravating and mitigating evidence or conduct a harmless-error review.[15] The question is whether it is "clear that absent the erroneous aggravator the jury would have imposed death."[16]

The jurors found seven mitigating circumstances: Hernandez lacked a significant criminal history; he committed the murder while under extreme mental or emotional disturbance; he accepted responsibility for the crime; he expressed remorse; he was intoxicated at the time of the crime; he had been gainfully employed throughout his adult life; and he spared the life of his three-year-old daughter, who was present during the crime, even though he had threatened to kill her. Two valid aggravating circumstances remain against Hernandez: the murder involved torture or mutilation of the victim, and he subjected the victim to nonconsensual sexual penetration immediately before, during, or after the murder.

In reweighing the aggravating and the mitigating evidence, we are convinced beyond a reasonable doubt that the jury would have found Hernandez death eligible. An autopsy revealed that Donna died from strangulation, evidenced by bruising on her neck caused by fingers

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[15]See Clemons v. Mississippi, 494 U.S. 738, 741 (1990); Browning v. State, 120 Nev. 347, 363, 91 P.3d 39, 51 (2004).

[16]Browning, 120 Nev. at 364, 91 P.3d at 51.

and the placement of a foot or knife against her neck.[17] The viciousness of Hernandez's attack on Donna was manifestly illustrated by evidence of a stab wound inflicted near her heart, piercing her left lung with such force as to strike a rib in her back.[18] Donna also sustained stab wounds to each side of her neck, penetrating into the area of her carotid arteries.[19] These injuries were inflicted in addition to other multiple stab and slash wounds and blunt force head trauma.[20]

The brutality of the killing did not end with the injuries described above. The autopsy revealed the tip of the handle of a dinner knife protruding from Donna's vagina.[21] Hernandez thrust the dinner knife into Donna's vaginal cavity with such force as to perforate the vaginal wall and penetrate the abdominal cavity.[22] Although this injury was likely inflicted after Donna expired, the abject viciousness of this act exemplifies the utterly reprehensible and cruel nature of the killing. We recognize that Hernandez presented credible evidence in mitigation that he had accepted responsibility and expressed remorse for the murder, he was a hard-working, law-abiding person prior to the event, he was under extreme emotional distress and intoxicated when he killed Donna, and he

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[17]Hernandez v. State, 118 Nev. 513, 519, 50 P.3d 1100, 1104-05 (2002).

[18]Id. at 519, 50 P.3d at 1105.

[19]Id.

[20]Id. at 519, 50 P.3d at 1104-05.

[21]Id. at 519, 50 P.3d at 1105.

[22]Id.

spared his daughter's life despite threats to kill her. However, we conclude that this evidence is woefully insufficient to outweigh the two remaining aggravating circumstances.

In addition to the horrific nature of the crime, the evidence presented at trial revealed that Donna had secured a protective order in March 1999 against Hernandez as a result of his repeated threats to kill her.[23] The protective order was in effect at the time of Donna's death in October 1999.[24] And approximately two weeks before the murder, Hernandez conveyed to a friend that he wanted to kill Donna, their daughter, and himself.[25] Moreover, inflicting this brutal attack on Donna in clear view of his three-year-old daughter and then kidnapping her is beyond the pale. The trauma young Ana suffered as a result of witnessing her mother's attack left an indelible mark on her.[26] Therefore, we are convinced beyond a reasonable doubt that the jury would have sentenced Hernandez to death in the absence of the erroneous aggravating circumstance. Accordingly, we affirm Hernandez's death sentence.

Claims of ineffective assistance of trial counsel

Hernandez argues that the district court erred by denying numerous claims of ineffective assistance of trial counsel. We disagree.

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[23]Id. at 517, 50 P.3d at 1103-04.

[24]Id. at 517, 50 P.3d at 1104.

[25]Id.

[26]Id. at 520, 50 P.3d at 1105.

Claims of ineffective assistance of counsel are evaluated under the two-prong test set forth in Strickland v. Washington.[27] To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction under Strickland, a petitioner must demonstrate (1) that counsel's performance was deficient in that it fell below an objective standard of reasonableness and (2) prejudice such that counsel's errors were so severe that they rendered the jury's verdict unreliable.[28] A petitioner must demonstrate "the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence."[29]

Before considering the individual claims of ineffective assistance of counsel, we address Hernandez's argument that he need not demonstrate prejudice under the second prong of the Strickland test and is instead entitled to a presumption of prejudice. Specifically, Hernandez argues that counsel's actions affected the overall integrity of the adversarial process and should therefore be analyzed under the presumption-of-prejudice standard articulated in United States v. Cronic.[30] Cronic held that prejudice can be presumed when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing."[31] Hernandez did not provide this court with the complete trial

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[27]466 U.S. 668 (1984); accord Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

[28]Strickland, 466 U.S. at 687.

[29]Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

[30]466 U.S. 648 (1984).

[31]Id. at 659.

transcript in his appendix, so we are unable to fully assess whether counsel's actions met this standard. The appendix submitted to this court, however, reveals that counsel filed numerous pretrial motions, some of which proved successful. We conclude that Hernandez has not shown that counsel "fail[ed] to subject the prosecution's case to meaningful adversarial testing."[32] Accordingly, the Cronic presumption-of-prejudice standard is inappropriate here; Hernandez must satisfy both prongs of the Strickland test.

Whether a petitioner has demonstrated ineffective assistance of counsel under Strickland presents a mixed question of fact and law that is subject, in part, to independent review.[33] Nonetheless, this court will give deference to a district court's purely factual findings regarding an ineffective-assistance-of-counsel claim.[34] With these standards in mind, we turn to Hernandez's claims of ineffective assistance of counsel.

Failure to challenge statements as violating Miranda

Hernandez argues that the district court erred in denying his claim that counsel were ineffective for failing to address whether Miranda[35] barred admission of the statements he made to Officer Swoboda and police detective Tom Allen when he was arrested. This claim lacks merit.

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[32]Id.

[33]Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

[34]Id.

[35]Miranda v. Arizona, 384 U.S. 436 (1966).

Miranda affects the admissibility of statements made during "in-custody interrogation."[36] "Custody" is defined as "'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."[37] "Interrogation" means explicit questioning as well as "words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response."[38]

After Officer Swoboda stopped Hernandez for speeding, Hernandez exited his car, said, "Just shoot me, just kill me," and told his daughter he was sorry. Although Hernandez was subsequently handcuffed due to his erratic behavior, there is no indication that at the time he made these comments he had been arrested or restrained or that Officer Swoboda suspected him of anything other than speeding. Hernandez only refers to one question asked him by a police officer: when Officer Swoboda noticed cuts on Hernandez's face and hand, he asked Hernandez what happened. Hernandez responded that he had fought with his ex-wife. Through his police computer, Officer Swoboda learned of Donna's restraining order against Hernandez. Deducing that a domestic violence incident had occurred, Officer Swoboda requested officers be sent to Donna's residence, where her body was discovered. Suspecting

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[36]Id. at 445.

[37]California v. Beheler, 463 U.S. 1121, 1125 (1983) (quoting Oregon v. Mathiason, 429 U.S. 492, 495 (1977)); see also Alward v. State, 112 Nev. 141, 154, 912 P.2d 243, 252 (1996), overruled in part on other grounds by Rosky v. State, 121 Nev. 184, 111 P.3d 690 (2005).

[38]Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

Hernandez of driving under the influence of alcohol, Hernandez was administered a horizontal gaze nystagmus test, which he failed. Officer Swoboda placed Hernandez under arrest, after which Hernandez said, "I killed her" and "I killed them." Officer Swoboda advised Hernandez of his Miranda rights, and Hernandez continued to say "I killed her" and "I killed them."

Applying the definitions of "custody" and "interrogation," explained above, Hernandez's statements were not made while he was in custody or subject to interrogation. Hernandez wholly fails to explain how any of these statements were made in violation of Miranda. We discern nothing in Officer Swoboda's words or actions that were reasonably likely to elicit an incriminating response. Because a motion to suppress any of the statements described above would not have succeeded, we conclude that the district court correctly ruled that trial counsel were not ineffective for failing to make such a motion.[39]

Counsel's concession of Hernandez's guilt

Hernandez argues that the district court erred by denying his claim that trial counsel were ineffective for conceding his culpability for Donna's death without obtaining his consent. Hernandez relies on Jones v. State[40] to support his claim. In Jones, a death penalty case, we

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[39]To the extent Hernandez contends that his appellate counsel was ineffective for failing to raise this matter on direct appeal, we conclude that he failed to demonstrate that it had a reasonable probability of success. See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

[40]110 Nev. 730, 877 P.2d 1052 (1994).

concluded that counsel was ineffective for conceding Jones' guilt to second-degree murder in the penalty phase without Jones' consent. We emphasized, however, "that our decision [was] limited to the situation present [in Jones], where counsel undermined his client's testimonial disavowal of guilt during the guilt phase of the trial."[41] Here, Hernandez's claim that he did not consent to counsel's concession of guilt is belied by the record and therefore lacks merit.[42]

Counsel, Hernandez, and the district court met in chambers, without the State, to discuss the decision to concede culpability to second-degree murder. At that hearing, counsel explained the strategy of conceding guilt. The district court judge admonished counsel, in Hernandez's presence, that she felt it unwise for any defense counsel to admit guilt of anything in front of a jury because it relieves the State of its burden of proof. The district court also reminded counsel that there can be unanticipated changes in the strength and weakness of a case during trial. Counsel explained that due to the physical evidence tying Hernandez to the crime, they felt it would be "foolish" to argue to the jury that Hernandez was not culpable for Donna's death. Counsel further indicated that the defense's goal was to gain credibility with the jury and thereby hopefully avoid a death sentence. The district court twice asked Hernandez if he understood that counsel would admit that he was culpable in Donna's death to try to avoid a first-degree murder conviction,

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[41]Id. at 739, 877 P.2d at 1057.

[42]See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

and Hernandez twice responded that he understood and agreed with this strategy.

A concession of guilt involves the waiver of a constitutional right that must be voluntary and knowing.[43] Hernandez argues that his "apparent consent" was involuntary and unknowing due to counsel's repeated efforts to persuade him to accept a plea offer while also discussing with him the defense strategy of conceding culpability at trial. At the post-conviction evidentiary hearing, counsel testified that plea discussions with Hernandez were contentious. While the plea discussions may have been intense, it would have been ineffective for counsel not to discuss with Hernandez pending offers or trial strategy that required his consent. Further, nothing in the record before us shows that Hernandez's consent was coerced. Accordingly, we conclude that Hernandez failed to demonstrate that his counsel's actions rendered his consent to the concession of culpability involuntary or unknowing.

We take this opportunity, however, to address the proper procedure when a defense strategy at trial includes a concession of guilt. As noted above, in Jones, we held that counsel was ineffective for conceding his client's guilt in closing argument without obtaining the

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[43]See State v. Perez, 522 S.E.2d 102, 106 (N.C. Ct. App. 1999) (stating that "[d]ue process requires that [consent to a concession of guilt] must be given voluntarily and knowingly by the defendant after full appraisal of the consequences"); see generally Gallego v. State, 117 Nev. 348, 368, 23 P.3d 227, 241 (2001) (noting that United States Supreme Court has held that "a valid waiver of a fundamental constitutional right ordinarily requires 'an intentional relinquishment or abandonment of a known right or privilege'" (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938))).

client's consent and after the client had testified and proclaimed his innocence.[44] Jones, however, did not explain the inquiry necessary to determine the voluntariness of a defendant's consent to concede guilt to an offense. At a minimum, the district court should canvass the defendant outside the presence of the State and the jury to determine whether the defendant has consented to the concession of guilt and that the defendant's consent is voluntary and knowing. During the canvass, the district court must ensure and accordingly make findings in the trial record that the defendant understands the strategy behind conceding guilt or degree of guilt to the subject charges. Additionally, the district court must inform the defendant that conceding guilt relieves the State of its burden to prove an offense and that the defendant has the right to challenge the State's evidence.[45] The hearing conducted in Hernandez's case satisfied these concerns.

Failure to communicate and adequately investigate case

Hernandez contends that the district court erred by denying his claim that counsel were ineffective for failing to adequately communicate with him and investigate his case.[46] At the evidentiary

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[44]110 Nev. at 738, 877 P.2d at 1057.

[45]See Perez, 522 S.E.2d at 106 (stating that defendant must be given full appraisal of consequences of conceding guilt before his consent to this trial strategy will be considered to be voluntary and knowing).

[46]Hernandez's claim that the district court improperly denied his pretrial motion for new counsel was waived by his failure to raise it on direct appeal. See NRS 34.810(1)(b)(2), (3). In an attempt to demonstrate good cause for this failure, he cites Stewart v. Warden, 92 Nev. 588, 555 P.2d 218 (1976), for the proposition that appellate counsel's "unexplained

continued on next page . . .

hearing, both counsel testified that they spoke with Hernandez on several occasions. One of his trial attorneys testified that he visited Hernandez in jail many times and spent numerous hours with him discussing the case prior to trial. Hernandez failed to state what additional communication was needed or demonstrate that additional communication with either counsel would have changed the outcome of his trial. Hernandez also failed to adequately support his claim that counsel were ineffective for failing to investigate by consulting with appropriate experts and exploring mitigation evidence, including Hernandez's childhood, mental and psychological condition, and "other relevant factors." However, Hernandez did not identify what mitigation evidence additional investigation would have revealed. He also claimed that counsel was ineffective for not calling a neuropsychologist retained by the defense. However, Hernandez failed to articulate what the neuropsychologist would have testified to in mitigation that would have changed the result of the proceeding.

. . . *continued*

omission" of a claim could constitute good cause sufficient to overcome waiver of that claim. Here, appellate counsel did explain her omission; she testified at the evidentiary hearing that she felt this issue was less likely to prevail and she omitted it in order to conform her brief to this court's order on the length of her brief. Further, Stewart was decided under a repealed statutory provision that did not require a petitioner to show prejudice. See 1973 Nev. Stat., ch. 349, § 7, at 438 (codified at NRS 177.375, repealed by 1991 Nev. Stat., ch. 44, §§ 31, 33, at 92). Hernandez's petition was filed pursuant to NRS 34.720-.830, which requires a petitioner to show prejudice as well as good cause. NRS 34.810(3). We conclude that Hernandez failed to demonstrate prejudice.

Consequently, we conclude that the district court did not err by denying this claim.[47]

Failure to challenge competency

Hernandez argues that the district court erred by denying his claim that counsel were ineffective for failing to challenge his competency to stand trial. Hernandez's explanation of this claim is cursory at best. At the post-conviction evidentiary hearing, co-counsel at trial testified that the defense elected not to call the defense's expert neuropsychologist at trial because his testimony would have been more harmful than helpful. Although the expert's report indicated that Hernandez was unable to reason properly and was under profound emotional turmoil at the time of Donna's attack and his subsequent arrest, the expert also opined that Hernandez displayed deceptive behavior, denied culpability for the crime despite overwhelming evidence to the contrary, and had no mental health or psychological problems. Hernandez nonetheless argues that the expert's observations that he could not reason properly and was suffering emotional distress evinced his "lack of competence, and inability to stand trial."

A defendant is incompetent when he is "not of sufficient mentality to be able to understand the nature of the criminal charges against him," rendering him unable to assist in his defense.[48] Nothing in Hernandez's submissions to this court suggests that counsel had reason to believe that he was incompetent to stand trial. Nor has he shown that he

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[47]See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

[48]Hill v. State, 114 Nev. 169, 176, 953 P.2d 1077, 1082 (1998) (internal quotation and citations omitted); NRS 178.400.

was incompetent to stand trial. Therefore, we conclude that the district court did not err by denying this claim.

Failure to seek a change of venue

Hernandez contends that the district court erred by denying his claim that counsel were ineffective for not seeking a change of venue in light of the publicity his case received. At the post-conviction evidentiary hearing, counsel testified that the media attention given Hernandez's case was not excessive and that the defense was able to seat twelve jurors and alternate jurors who were not influenced by the publicity. Further, nothing in Hernandez's submissions establish that he was unable to secure an impartial jury or that the publicity was so intense that "even an impartial jury would be swayed by the considerable pressure of public opinion."[49] Therefore, we conclude that the district court did not err by denying this claim because Hernandez failed to demonstrate that counsel's performance was deficient in this respect or that he suffered prejudice.[50]

Failure to object to voluntary intoxication jury instruction

Hernandez argues that the district court erred by denying his claim that counsel were ineffective for not challenging the voluntary intoxication jury instruction as unconstitutionally overbroad. The district court instructed that "[i]f a person premeditates and deliberates upon the crime of Murder and forms a specific intent to commit that crime and

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[49]Hanley v. State, 83 Nev. 461, 464, 434 P.2d 440, 442 (1967).

[50]To the extent Hernandez argues that his death sentence is unconstitutional because of overwhelming pretrial publicity, this is a claim appropriate for direct appeal, and he has not demonstrated good cause for his failure to raise it previously or prejudice. See NRS 34.810(1)(b)(2), (3).

thereafter becomes intoxicated, then such intoxication will not serve as a defense in order to reduce the degree of the murder." Hernandez challenged this instruction on direct appeal. We concluded that "[a]lthough [the] instruction may [have been] too broadly stated," it was not plainly erroneous.[51] Even assuming counsel should have objected to the challenged instruction on the ground Hernandez now tenders, we conclude that he has not shown prejudice. The jury was instructed that it could consider Hernandez's intoxication when determining his purpose, motive, or intent if such purpose, motive, or intent was a necessary element for a particular degree of crime.[52] Thus, the jury was advised that intoxication could be relevant to the degree of murder.

Moreover, Hernandez has failed to establish that the instruction was intrinsically incorrect or unconstitutionally overbroad. Although evidence of intoxication may reduce the degree of murder because intoxication may affect the ability to form the requisite intent, once the requisite intent is conceived, subsequent intoxication has no affect on the original formation of the intent to commit an offense.[53]

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[51]Hernandez v. State, 118 Nev. 513, 527, 50 P.3d 1100, 1110 (2002).

[52]See NRS 193.220 ("No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the fact of his intoxication may be taken into consideration in determining the purpose, motive or intent.").

[53]To the extent that Hernandez argues that the district court erred in giving the challenged instruction, we considered this matter on appeal and our ruling is the law of the case. See Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001).

Because Hernandez failed to show that counsel were ineffective for not objecting to the constitutionality of the challenged instruction, we conclude that the district court did not err by denying this claim.

Miscellaneous claims of ineffective assistance of counsel

Hernandez asserts that the district court erred by denying his claims that counsel were ineffective for failing to file motions to: (1) challenge the racial composition of the jury venire, (2) challenge matters related to the questioning of jurors during voir dire, (3) bifurcate the penalty hearing, (4) dismiss the notice of intent to seek the death penalty because probable cause for the aggravating circumstances was not established at the preliminary hearing and the aggravating circumstances were not charged in the information, (5) exclude evidence of uncharged misconduct, (6) seek exclusion of hearsay statements, (7) compel compliance with Brady v. Maryland,[54] (8) prohibit the use of a vague deadly weapon enhancement instruction, and (9) dismiss the deadly weapon enhancement as unconstitutionally vague. Hernandez also complains that his counsel failed to ensure that all bench conferences were properly recorded and that constitutional evidentiary standards and legal procedures for the admission of DNA evidence were followed. However, Hernandez has not provided adequate facts or argument establishing that his counsel were deficient or, assuming any deficiency, that he was prejudiced by counsel's omissions. Therefore, we conclude that the district court did not err by denying these claims.

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[54]373 U.S. 83 (1963).

Hernandez further agues that the district court erroneously denied his claims that his counsel were ineffective for failing to file motions to: (1) dismiss the notice of intent to seek the death penalty because Nevada's death penalty scheme does not narrow the class of persons eligible for the death penalty, (2) preclude prosecutorial misconduct, and (3) dismiss the kidnapping charge as legally and factually impossible. As with the claims listed above, Hernandez failed to provide adequate facts or argument establishing that his counsel were deficient. Additionally, we concluded on direct appeal that each of the underlying issues in these three claims lacked merit.[55] Therefore, even assuming any omission was deficient, Hernandez did not demonstrate prejudice. Consequently, we conclude that the district court did not err by denying these claims.[56]

Hernandez also argued that his counsel were ineffective during the penalty hearing for failing to object to prosecutorial misconduct and improper jury instructions and aggravating circumstances. However, he wholly failed to explain the bases for these claims. Therefore, we conclude that the district court did not err by denying these claims.

Claims of ineffective assistance of appellate counsel

Hernandez contends that the district court erred by denying his claim that appellate counsel was ineffective for failing to raise issues

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[55]Hernandez, 118 Nev. at 524-26, 534-35, 50 P.3d at 1107-09, 1115.

[56]We further reject Hernandez's claim that all of these claims considered cumulatively established ineffective assistance of counsel. Accordingly, we conclude that the district court did not err by denying this claim.

he specifically requested be brought forth on direct appeal and for not offering any excuse for the omissions other than this court's order requiring appellate counsel to reduce the length of her opening brief. Hernandez neglects, however, to identify what additional issues he desired to be raised in his direct appeal. Further, during the post-conviction evidentiary hearing, appellate counsel testified that in an effort to reduce her brief to the length allowed by this court, she eliminated claims that were less likely to prevail on appeal. Nothing in appellate counsel's testimony indicated that she excluded a claim from the reduced opening brief that she considered likely to prevail on appeal.[57] Because this testimony is supported by the record, we conclude that the district court did not err by denying this claim.

CONCLUSION

We conclude that Nevada's definition of torture murder sufficiently narrows the class of persons eligible for the death penalty; therefore, McConnell does not operate to invalidate the torture aggravating circumstance. However, McConnell requires us to strike the burglary aggravating circumstance. The mitigation evidence Hernandez presented set against the horrific and senseless nature of the murder compels us to conclude beyond a reasonable doubt that a jury would have found him death eligible and imposed a death sentence in the absence of the erroneous aggravating circumstance. We further conclude that the district court did not err in rejecting Hernandez's other post-conviction

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[57]See Jones v. Barnes, 463 U.S. 745, 751 (1983) (holding that appellate counsel is not required to raise every nonfrivolous issue on appeal).

claims. We therefore affirm the district court's order denying post-conviction relief.

Maupin, J.
Maupin

We concur:

Gibbons, C.J.
Gibbons

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Douglas, J.
Douglas

Saitta, J.
Saitta

CHERRY, J., concurring in part and dissenting in part:

I concur with the majority that the burglary aggravating circumstance must be stricken pursuant to McConnell v. State.[1] I also concur that the district court did not err in denying Hernandez's remaining claims for post-conviction relief. Finally, I concur with the majority in concluding that McConnell does not operate to invalidate the torture aggravating circumstance because Nevada's definition of torture murder sufficiently narrows the class of persons eligible for the death penalty.

I dissent, however, from the majority's conclusion that after reweighing the aggravating and mitigating evidence Hernandez's death sentence may nonetheless be upheld. Although there is sufficient evidence to support the remaining aggravating circumstances, they are not persuasive enough to convince me beyond a reasonable doubt that the jury would have found Hernandez death eligible and imposed death absent the erroneous burglary aggravating circumstance. I do not minimize the gravity of the aggravating circumstances. The trial testimony established that Hernandez penetrated the victim's vaginal cavity with a dinner knife, most likely postmortem. The evidence further showed that Hernandez brutally inflicted multiple stab wounds and strangled Donna with great force. Despite the viability of the remaining aggravating circumstances, however, Hernandez presented a compelling case in mitigation such that, in my view, the death sentence must be vacated.

During the penalty phase, Hernandez introduced testimony from his employer, friends, coworkers, and brother and made a statement in allocution. Specifically, Anibal Sabate testified that Hernandez worked

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[1]120 Nev. 1043, 102 P.3d 606 (2004).

at Sabate's restaurant. He characterized Hernandez as a good employee with integrity. Further, several coworkers from Hernandez's full-time job at Sam's Town Casino lauded him as an exceptional, respectful, and polite employee who had been selected as employee of the month. These witnesses also described Hernandez as a kind, generous, and supportive friend. Many of these witnesses also testified that Hernandez worked three jobs, including owning his own janitorial service, and that he always spoke and acted lovingly toward his daughter Ana. Hernandez expressed to his friends and coworkers that he desired to reunite with Donna and live together as a family. Hernandez's brother, Raphael, testified that he lived with Hernandez and Donna for a period of time and never observed any problems between them. Raphael also stated that Hernandez, originally from Mexico, had never been in trouble with the police. Raphael Meza, a childhood friend from Mexico, testified that Hernandez worked hard holding down three jobs. Meza also described Hernandez as a devoted father who wanted to reunite with his ex-wife and to provide a better future for his daughter. Meza testified that Hernandez had a good and caring family while growing up and that Hernandez had an alcohol problem.

Hernandez made a statement in allocution, expressing his deep love for his daughter Ana. Hernandez stated that his only reason for living was Ana and that one of the best moments in his life was when Ana was born. He pleaded with the jury to allow him the opportunity to be with his daughter.

The guilt phase evidence also showed that immediately after Officer Swoboda stopped Hernandez for speeding, Hernandez exited his car with his hands raised and crying, asking Officer Swoboda to "Just

shoot me, just kill me." Hernandez was emotional throughout the encounter and subsequent analysis of his breath revealed blood alcohol levels of 0.165 and 0.154 percent. During transport to jail, Hernandez cried and attempted to jump out of the moving vehicle, telling the police escort that his life was over and to shoot him. In the booking area of the jail, Hernandez repeatedly hit the back of his head against a concrete wall and had to be restrained.

Considering the force of the evidence presented in mitigation weighed against the evidence supporting the remaining aggravating circumstances, I would vacate Hernandez's death sentence and remand this matter for a new penalty hearing. In reaching this conclusion, I convey to all counsel the importance of presenting mitigation evidence in these types of cases.

Cherry, J.

Cherry

EXHIBIT 5

EXHIBIT 5

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERNANDO NAVARRO HERNANDEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44812

FILED

JAN 07 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).[1]

It is so ORDERED.[2]

Hardesty, C.J.

Parraguirre, J.

Douglas, J.

Cherry, J.

Saitta, J.

Gibbons, J.

[1]We deny appellant's motion for limited additional briefing in this matter.

[2]The Honorable Kristina Pickering, Justice, did not participate in the decision in this matter.

cc: Hon. Sally L. Loehrer, District Judge
Patti, Sgro & Lewis
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk