

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2 **FILED**

3

4 FEB 10 2005

5 **ORIGINAL** JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

6 JAMES MONTELL CHAPPELL,)

7 Appellant,)

8 v.)

Case No. 43493

9 THE STATE OF NEVADA,)

Respondent.)

10 **MOTION TO STRIKE PORTIONS OF APPELLANT'S OPENING BRIEF**

11 **AND HOLD BRIEFING SCHEDULE IN ABEYANCE**

12

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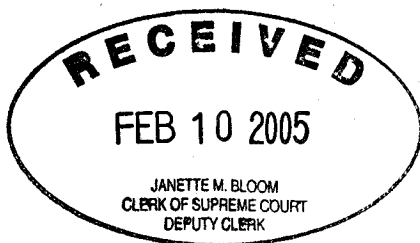
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28 Counsel for Appellant

Counsel for Respondent

05-02736

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5 JAMES MONTELL CHAPPELL)

6 Appellant,)

7 v.)

Case No. 43493

8 THE STATE OF NEVADA,)

9 Respondent.)

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11 **MOTION TO STRIKE APPELLANT'S OPENING BRIEF AND HOLD**
12 **BRIEFING SCHEDULE IN ABEYANCE**

13 COMES NOW the State of Nevada, by DAVID ROGER, Clark County District
14 Attorney, through his Chief Deputy, STEVEN OWENS, and submits this Motion to
15 Strike Appellant's Opening Brief and Hold Briefing Schedule in Abeyance.

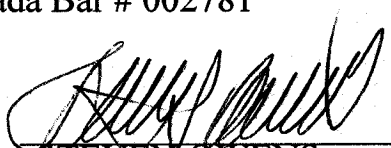
16 This motion is based on the following memorandum and all papers and
17 pleadings on file herein.

18 Dated this 8th day of February, 2005.

19 Respectfully submitted,

20 DAVID ROGER
Clark County District Attorney
Nevada Bar # 002781

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23 BY


24 STEVEN OWENS
Deputy District Attorney
Nevada Bar #004352

25 Attorney for Respondent
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MEMORANDUM

James Montell Chappell, hereinafter Appellant, was found guilty of burglary, robbery with use of a deadly weapon and first degree murder and sentenced to death following a jury trial in 1996. This Court affirmed Appellant's conviction and sentence on December 30, 1998. Chappell v. State, 114 Nev. 1403, 972 P.2d 838 (1998); rehearing denied 1999.

Appellant filed a Petition for Writ of Habeas Corpus (Post Conviction) in the Eighth Judicial District Court. The district court held evidentiary hearings and granted Appellant a new penalty hearing, but refused to grant Appellant a new trial on April 2, 2004. Findings of Fact, Conclusions of Law and Order were entered on June 3, 2004.

The State appealed the granting of a new penalty hearing, filing Notice of Appeal on June 8, 2004. Appellant filed a Notice of Cross Appeal on June 24, 2004 stating his intent to appeal the district court's denial of a new trial.

This Court designated Chappell as the Appellant/Cross Respondent and the State as the Respondent/Cross Appellant. On July 15, 2004 this Court ordered the briefing schedule as follows: "(1) appellant shall serve and file his file opening brief. . . (2) respondent shall file and serve its combined answering brief and cross-appeal. . . (3) appellant shall file and serve a combined reply brief on appeal and answering brief on cross-appeal . . . (4) if deemed necessary, respondent shall file and serve a reply brief on cross-appeal."

Appellant filed an oversized opening brief on January 11, 2005 alleging errors in the district court's refusal to grant a new trial, but also alleging errors with the trial court's "not granting relief in other grounds raised challenging the penalty hearing." Appellant's Opening Brief p. 5. Appellant's brief alleges fourteen penalty phase errors. This is improper.

1 NRS 177.015 provides:

2 The party **aggrieved** in a criminal action may appeal only as
3 follows:

4 . . . to the Supreme Court from an order of the district
5 court granting a motion to dismiss, a motion for an acquittal
6 or a motion in arrest of judgment, or granting or refusing a
7 new trial.

8 . . . The Defendant may only appeal from a final judgment
9 or verdict in a criminal case.”

10 (Emphasis added.)

11 It is clear that, pursuant to NRS 177.015, Appellant may only appeal the district
12 court’s refusal to grant a new trial. Since Appellant was granted relief (a new penalty
13 hearing) for his claims raised challenging the penalty hearing, he cannot possibly be
14 the aggrieved party to that order. It is therefore a violation of NRS 171.015 for him to
15 raise issues pertaining to his penalty hearing.


16 Moreover, there is nothing in the record to support that Appellant’s claim that
17 the district court refused to grant relief on other grounds raised challenging the
18 penalty hearing. The district court’s order, which Appellant appeals from, does not
19 state that it evaluated the merits of Appellant’s other grounds raised, let alone refused
20 to grant relief for them. It merely states its findings that Appellant’s counsel “was
21 deficient in not locating and presenting [] witnesses at the penalty hearing. . . which
22 the Court finds sufficient to determine that the outcome of the penalty hearing cannot
23 be relied upon as having produced a just result.” Appellant’s Appendix, 11 p. 2717.
24 There is no justification whatsoever for Appellant’s inclusion of penalty phase
25 allegations in his opening brief.

26 Furthermore, Appellant’s inclusion of the penalty phase allegations is a clear
27 violation of this Court’s Order Setting Briefing Schedule. It appears that Appellant is
28 addressing issues which should be raised in its combined reply brief on appeal and
answering brief on cross-appeal. Since the State has yet to file an opening brief on
cross-appeal, Appellant’s actions here amount to the filing of an answer before an
opening brief is even filed. This is highly improper.

1 As such, Appellant's Opening Brief should be stricken. The State further
2 requests this Court hold the briefing schedule in abeyance so that Appellant may file
3 an amended opening brief in accordance with NRS 177.015 and this Court's Order
4 Setting Briefing Schedule.

5 Dated this 8th day of February, 2005.

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7 BY


STEVEN OWENS
Deputy District Attorney
Nevada Bar #004352


9 Attorney for Respondent
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CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Motion To Strike Portions Of Appellant's Opening Brief to the attorney of record listed below on this 8th day of February, 2005.

David M. Schieck
Attorney at Law
302 East Carson Avenue, Suite No. 600
Las Vegas, Nevada 89101



Employee, Clark County
District Attorney's Office

OWENS/Noreen Nyikos/english