

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

\*\*\*\*\*

MICHAEL RIPPO,

S.C. CASE NO. 44094

Appellant,

**FILED**

vs.

DEC 22 2005

THE STATE OF NEVADA,

Respondent.

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richard*  
CHIEF DEPUTY CLERK

APPEAL FROM DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS  
(POST-CONVICTION)  
EIGHTH JUDICIAL DISTRICT COURT  
THE HONORABLE DONALD M. MOSLEY, PRESIDING

APPELLANT'S SUPPLEMENTAL BRIEF AS ORDERED BY THIS COURT

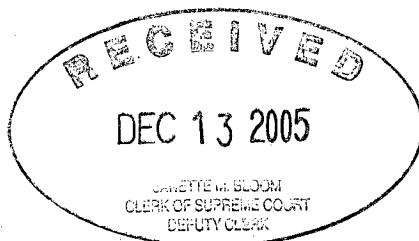
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**ISSUES PRESENTED FOR REVIEW**

- A. **MCCONNELL MUST BE RETROACTIVELY APPLIED TO CASES ON COLLATERAL REVIEW.**
- B. **THE RESULT IN MCCONNELL WAS DICTATED BY LOWENFIELD V. PHELPS.**
- C. **MCCONNELL MUST BE RETROACTIVELY APPLIED BECAUSE IT IS A SUBSTANTIVE RULE OF LAW.**
- D. **MCCONNELL IS RETROACTIVE UNDER THE ANALYSIS OF COLWELL V. STATE.**
- E. **THE IMPROPER AND UNCONSTITUTIONAL AGGRAVATING CIRCUMSTANCE IS NOT HARMLESS ERROR.**

**STATEMENT OF THE CASE**

On May 19, 2005, Mr. Rippo filed his opening brief with this Court. On June 17, 2005, the State submitted their answering brief. On September 30, 2005, the State requested leave to file a supplemental answering brief (formatting their brief to the supplement appendix submitted by Appellant). On October 18, 2005, this Honorable Court granted the State's motion for leave to file supplemental brief. This Court also ordered that supplemental briefing be conducted and submitted to the Court addressing the retroactivity of McConnell. Additionally, post-conviction counsel, David Schieck raised this issue in Mr. Rippo's supplemental brief (before McConnell was decided).

**STATEMENT OF FACTS**

Appellant hereby adopts the statement of the facts as annunciated in Appellant's Opening Brief.

**ARGUMENT**

- A. **MCCONNELL MUST BE RETROACTIVELY APPLIED TO CASES ON COLLATERAL REVIEW.**

As a preliminary matter, the state is incorrect when it argues that this Court intended to hint at the non-retroactivity of McConnell in its decision on direct appeal. As this Court

1 made clear in its decision denying rehearing, the retroactivity question should only be  
2 decided when it is raised and briefed in a post-conviction case. See McConnell v. State,  
3 121 Nev. \_\_\_, 107 P.3d 1287, 1290 (2005) (“McConnell did not address whether the ruling  
4 regarding felony aggravators is retroactive, but we did not overlook this issue. Before  
5 deciding retroactivity, we prefer to await the appropriate post-conviction case that presents  
6 and briefs the issue.”). Given the state’s invocation of a retroactivity defense in its answer,  
7 Mr. Rippo’s appeal presents an appropriate opportunity for this Court to resolve that  
8 question. As explained below, McConnell must be applied retroactively under the  
9 framework of Colwell v. State, 118 Nev. 807, 59 P.3d 463 (2003), as well as under this  
10 Court’s prior decisions retroactively applying narrowing constructions of aggravating  
11 circumstances on collateral review.  
12

13  
14 The state argues that this Court’s decision in McConnell is a new rule of law and  
15 therefore does not need to be applied to cases pending on habeas corpus under Colwell v.  
16 State, 118 Nev. 807, 59 P.3d 463 (2002). See Ans. Br. at 13-15. Mr. Rippo does not  
17 dispute the fact that his judgment of conviction is final. He does contest, however, the  
18 state’s argument that McConnell created new law by holding that aggravating  
19 circumstances must be narrowly construed.  
20

21  
22 A review of similar cases reveals that in similar circumstances the courts have given  
23 full recognition to and retroactive application of decisions holding state death penalty  
24 schemes unconstitutional, in whole or in part, based upon the failure to narrowly define the  
25 class of persons eligible for the death penalty. These cases should be followed here as a  
26 failure to do so would be a violation of Mr. Rippo’s constitutional rights of due process of  
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1 law and equal protection.

2 It has long been held by the United States Supreme Court that "a State's capital  
3 sentencing scheme ... must 'genuinely narrow the class of persons eligible for the death  
4 penalty.'" Hollaway v. State, 116 Nev. 732, 6 P.3d 987, 996 (2000) (quoting Arave v.  
5 Creech, 507 U.S. 463, 474 (1993) (in turn quoting Zant v. Stephens, 462 U.S. 862, 877  
6 (1983)). This concept originated in Furman v. Georgia, 408 U.S. 238 (1972) as the Court  
7 found that a state's death penalty scheme was arbitrary and capricious in its operation.  
8 Following Furman, this Court invalidated all death sentences, without distinction as to  
9 whether the judgments were final or not:

10 In as much as the decision in Furman v. Georgia, 408 U.S. 238, 92  
11 S.Ct.2726, 33 L.Ed.2d 346 (1972), is fully retroactive, any prisoner now  
12 under the sentence of death, the judgment as to which is final, may file a  
13 petition for writ of habeas corpus in the district court from which he was  
14 sentenced inviting that court to modify its judgment to provide for the  
15 appropriate alternative punishment specified by statute for the crime for  
16 which he was sentenced to death.

17 Walker v. State, 88 Nev. 539, 540 n.1, 501 P.2d 651 n.1 (1972).

18 In response to Furman, various state legislatures took two approaches. Some  
19 limited the discretion of juries by prescribing guidelines that the jury or sentencing judge  
20 must consider in determining whether to fix the sentence at death or life imprisonment and  
21 other states provided for mandatory death sentences for certain narrowly defined crimes.  
22 In 1976, the United States Supreme Court considered five death penalty cases in which it  
23 upheld the guideline approach and rejected the mandatory death sentence approach. The  
24 guideline approach was upheld in Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v.  
25 Florida, 428 U.S. 242(1976); and Jurek v. Texas, 428 U.S. 262(1976). The mandatory

1 sentencing approach was rejected in Woodson v. North Carolina, 428 U.S. 280 (1976) and  
2 Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976). Nevada was one of the states that  
3 enacted a mandatory scheme. See Schuman v. Wolff, 791 F. 2d 788, 791 (9<sup>th</sup> Cir.1986).  
4 Accordingly, in 1977, the Nevada Legislature amended the statutory scheme for imposition  
5 of the death penalty to provide for the current system of weighing aggravating and  
6 mitigating circumstances. Id.  
7

8  
9 In the meantime, during the period in which the mandatory death penalty scheme  
10 was in operation, defendant Raymond Schuman was sentenced to death upon a finding that  
11 he committed murder of another inmate while under a sentence of life in prison without  
12 the possibility of parole. Id. at 790. This Court affirmed his conviction and sentence of  
13 death after finding that the mandatory death penalty was permissible under these limited  
14 circumstances. Shuman v. State, 94 Nev. 265, 578 P.2d 1183 (1978). Shuman then filed  
15 a state post-conviction petition and in 1982, several years after his judgment of conviction  
16 was final, he filed a federal habeas corpus petition. Shuman, 791 F. 2d at 790. The federal  
17 district court found that the mandatory death penalty scheme violated Shuman's  
18 constitutional rights and the Ninth Circuit affirmed this decision. Id. Upon the state's  
19 certiorari petition, the United States Supreme Court affirmed the Ninth Circuit and also  
20 concluded that the district court was proper in granting habeas corpus relief as the scheme  
21 under which Shuman was sentenced to death was unconstitutional. Sumner v. Shuman,  
22 483 U.S. 66, 77-78 (1987). Thus, despite the fact that Shuman's judgment was final and  
23 the case was in habeas corpus proceedings, relief was granted based upon the  
24 unconstitutionality of that portion of the death penalty scheme that provided for a  
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1 mandatory sentence of death under Shuman's circumstances.

2 More recently, in Robins v. State, 106 Nev. 611, 629-30, 798 P.2d 558, 563 (1990),  
3 this Court narrowly construed the "depravity of mind" aggravating circumstance to require  
4 torture, mutilation or other serious and depraved physical abuse beyond the act of killing.  
5 This construction was made so as to avoid a claim that the "depravity of mind" aggravating  
6 circumstance did not provide clear and objective standards for the jury as set forth by the  
7 United States Supreme Court in Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980) and  
8 Maynard v. Cartwright, 486 U.S. 356 (1988). The narrow construction defined in Robins  
9 has been applied in habeas corpus proceedings for cases that were final prior to Robins.  
10 See Browning v. State, 120 Nev. \_\_\_, 91 P.3d 39, 50 (2004) (decision on direct appeal final  
11 in 1988); State v. Haberstroh, 119 Nev. \_\_\_, 69 P.3d 676, 682-83 (2003) (decision on  
12 direct appeal final in 1989); see also Valerio v. Crawford, 306 F.3d 742, 748, 754 (9<sup>th</sup> Cir.  
13 2002) (applying Robins to a habeas corpus case in which the judgment was final in 1989);  
14 McKenna v. McDaniel, 65 F.3d 1483, 1489 (9<sup>th</sup> Cir. 1995) (reversing sentence based upon  
15 depravity aggravating circumstance for case in which the judgment was final in 1986 and  
16 citing Robins).

17 Most recently in Leslie v. Warden, 118 Nev. 773, 780, 59 P.3d 440, 445 (2002), this  
18 Court considered whether the aggravating circumstance of "random and without apparent  
19 motive" was constitutional when applied to a case where the sole basis was that the  
20 defendant unnecessarily killed someone in a robbery. Leslie was a habeas corpus  
21 proceeding and the Nevada Supreme court had affirmed the validity of the aggravating  
22 circumstance on direct appeal. Id. at 779, 59 P.3d at 444. The Court nonetheless  
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1 reconsidered the application of the aggravating circumstance because the refusal to do so  
2 would result in a fundamental miscarriage of justice. Id. at 780, 59 P.3d at 445. Likewise,  
3 in State v. Bennett, this Court applied Leslie retroactively to a petitioner whose conviction  
4 and sentence became final in 1990, see 119 Nev. 589, 81 P.3d 1, 6-8 (2003), and whose  
5 challenge to the same aggravating circumstances was rejected on direct appeal. See 106  
6 Nev. 135, 143, 787 P.2d 797, 802 (1990). This Court did not discuss retroactivity in Leslie  
7 or Bennett when it applied a narrowing construction to aggravating circumstances in cases  
8 that were already final.  
9

10  
11 In McConnell, this Court followed the reasoning of the Tennessee Supreme Court  
12 in State v. Middlebrooks, 840 S.W.2d 317 (Tenn 1992) in concluding that felony-murder  
13 could not be used both as a theory of guilt and as an aggravating circumstance.  
14 McConnell, 102 P.3d at 620 n. 42. The retroactivity question at issue here was also  
15 considered by the Tennessee Supreme Court. In Barber v. State, 889 S.W.2d 185, 186  
16 (Tenn. 1994), the state supreme court explained as follows:  
17

18  
19 The State first argues that this Court's decision in Middlebrooks  
20 should not be retroactively applied to a case where the conviction became  
21 final long before the rule in Middlebrooks was announced. In State v.  
22 Meadows, 849 S.W.2d 748 (Tenn. 1993), authored by Justice Anderson, we  
23 departed from federal law on retroactivity and held that "a new state  
24 constitutional rule is to be retroactively applied to a claim for Post-  
25 conviction relief if the new rule materially enhances the integrity and  
26 reliability of the fact finding process of the trial." Id. at 755. We now hold  
27 that the rule in Middlebrooks materially enhances both the integrity and the  
28 reliability of the fact finding process in the sentencing phase of a capital trial  
and should therefore be applied retroactively.

The constitutional concern in Middlebrooks was that the class of  
death-eligible murderers be narrowed so that only the worst offenders  
receive the death penalty. See Middlebrooks, 840 S.W.2d at 341-347. The  
court observed that the felony murder aggravating circumstance duplicates

7  
8 Barber v. State, 889 S.W.2d 185, 186-87 (Tenn. 1994).

9 This Court also noted that the Wyoming Supreme Court reached the same decision  
10 as McConnell in Engberg v. Meyer, 820 P.2d 70 (Wyo.1991). McConnell, 102 P.3d at 620  
11 n.42. Engberg was a post conviction case, yet the Wyoming court both announced and  
12 applied its holding that felony murder could not be used both as a basis for finding of guilt  
13 and as an aggravating circumstance. In fact, the same issue was presented to the Wyoming  
14 Supreme court in Engberg's direct appeal and the court at that time rejected the argument.  
15 Engberg v. State, 686 P.2d 541, 558-62 (Wyo. 1984). Nonetheless, the court found it  
16 appropriate to reconsider the earlier decision in light of subsequent developments in case  
17 law. Engberg, 820 P.2d 87. Thus, the two cases cited favorably in McConnell both apply  
18 the rule to post-conviction cases.

21  
22 **B. THE RESULT IN MCCONNELL WAS DICTATED BY**  
23 **LOWENFIELD V. PHELPS.**

24 In McConnell, this Court recognized that it did not correctly apply Lowenfield v.  
25 Phelps in its earlier decisions. See McConnell, 102 P.3d at 620-21. In Lowenfield, the  
26 United States Supreme Court reemphasized that in order to "pass constitutional muster, a  
27 capital sentencing scheme must 'genuinely narrow the class of persons eligible for the  
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1 justifies cold-blooded, premeditated, first-degree murder, which is what I did.”).

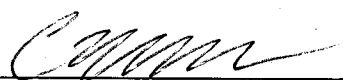
2 Nevada is a “weighing” state, i.e., a state in which the existence of an aggravating  
3 factor is a necessary predicate to death eligibility, and in which the ultimate sentencing  
4 decision turns on the weighing of statutory aggravating factors against the mitigating  
5 evidence. In a weighing state where the aggravating and mitigating circumstances are  
6 balanced against each other, it is constitutional error for the sentence to give weight to an  
7 unconstitutional factor, even if other valid factors remain. Accordingly, Mr. Rippo’s  
8 sentence of death must be vacated.  
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10

### 11 CONCLUSION

12 Based on the foregoing Mr. Rippo would respectfully request that this Court reverse his  
13 convictions based on violations of the Fifth, Sixth, and Fourteenth Amendments to the United  
14 States Constitution.  
15  
16

17 DATED this 12 day of ~~December~~ 2005.  
18

19 Respectfully submitted by:

20  
21   
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## IN THE SUPREME COURT OF THE STATE OF NEVADA

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MICHAEL RIPPO,

S.C. CASE NO. 44094

Appellant,

**FILED**

vs.

NOV 08 2005

THE STATE OF NEVADA,

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richard*  
CHIEF DEPUTY CLERK

Respondent.

MOTION FOR EXTENSION OF TIME TO FILE SUPPLEMENTAL BRIEF

COMES NOW, Christopher R. Oram, Esq., attorney for Appellant, MICHAEL RIPPO, and moves this Court for an Order granting an extension of time of thirty (30) days from the date the Supplemental Brief is now due, to wit: November 7, 2005, and extend the time to and including, December 7, 2005, for the filing of the Supplemental Brief. This motion is made and based upon NRAP 27 and 31(a), the Affidavit of Christopher R. Oram, Esq., filed herewith, and the Points and Authorities attached hereto.

DATED this 7 day of November, 2005.

Respectfully submitted by:

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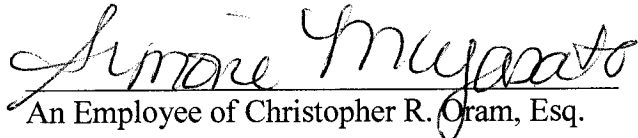
**CERTIFICATE OF MAILING**

I hereby certify that I am an employee of CHRISTOPHER R. ORAM, ESQ., and that on the 7 day of November, I did deposit in the United States Postal Service office at Las Vegas, Nevada, in a sealed envelope with postage fully pre-paid thereon, a true and correct copy of the above and foregoing **MOTION FOR EXTENSION OF TIME TO FILE**

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