

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL RIPPO,

Appellants,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 44094

FILED

OCT 03 2005

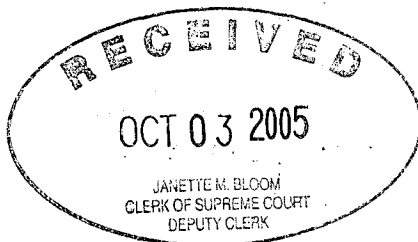
JANETTE M. BLOOM
CLERK OF SUPREME COURT
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MOTION FOR SUPPLEMENTAL BRIEFING
ON RETROACTIVITY ISSUE

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05-19610

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

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5 MICHAEL RIPPO,

6 Appellant,

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8 THE STATE OF NEVADA,

9 Respondent.

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11 **MOTION FOR SUPPLEMENTAL BRIEFING**
12 **ON RETROACTIVITY ISSUE**

13 COMES NOW the State of Nevada, by DAVID ROGER, Clark County District
14 Attorney, through his Chief Deputy, STEVEN S. OWENS, and submits this Motion
15 for Supplemental Briefing on Retroactivity Issue. This motion is based on the
16 following memorandum of counsel and all papers and pleadings on file herein.

17 Dated 30th day of September, 2005.

18 Respectfully submitted,

19 DAVID ROGER
20 Clark County District Attorney
Nevada Bar # 002781

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22 BY 

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

25 Attorney for Respondent
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MEMORANDUM

The very first issue raised in the briefs already on file herein concerns the retroactivity of the *McConnell* decision to cases on post-conviction. *McConnell v. State*, 120 Nev. Adv. Op. 105, 102 P.3d 606 (2004). Noticeably absent from any of the points and authorities on file is any discussion or application of the two exceptions which are a necessary part of any retroactivity analysis:

The final step, once it is determined that a subsequent interpretation has announced a new rule and that the conviction of the person(s) seeking adjudication has become final, is to determine if one of the two exceptions to the retroactivity bar apply to the specific case at hand: Did the new rule establish that it is unconstitutional to proscribe certain conduct as criminal or to impose a type of punishment on certain defendants because of their status or offense? Did the new rule establish a procedure without which the likelihood of an accurate conviction is seriously diminished?

Colwell v. State, 118 Nev. 807, 59 P.3d 463 (2002).

The two exceptions from the *Colwell* case were not addressed in the State's Answering Brief because they were not raised by Appellant Rippo or alleged to be applicable to his case. However, the issue has far-reaching implications and the State is concerned that if this Court elects to decide the *McConnell* retroactivity issue here in this case, that it do so with points and authorities that address the two exceptions above. Supplemental authorities that do not raise new points or issues are permitted under NRAP 31(d). Furthermore, NRAP 28(c) provides that after the Reply brief is filed, "no further briefs may be filed except with leave of court." The State believes this Court would be aided by Appellant Rippo submitting supplemental briefing on the applicability of the two exceptions, to which the State may respond.

While the district court proceedings below did not directly address the issue of *McConnell's* retroactivity in this case, the issue is a significant one that will arise again. There are approximately forty inmates on death row from Clark County alone whose death sentences were based at least in part on a felony aggravator and their status is in limbo awaiting the resolution of this issue. Three of these inmates are currently briefing the issue in the district courts of Clark County, but it will be some

1 time before a decision is rendered and the matter can come before this Court for
2 review.


3 WHEREFORE, the State requests this Court to allow supplemental briefing on
4 the applicability of the two exceptions.

5 Dated this 30th day of September, 2003.

6 Respectfully submitted,

7 DAVID ROGER
8 Clark County District Attorney
9 Nevada Bar # 002781

10 BY



11 STEVEN S. OWENS
12 Chief Deputy District Attorney
13 Nevada Bar #004352

14 Attorney for Respondent
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