

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

\* \* \*

DONTE JOHNSON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 45456

**FILED**

JAN 04 2007

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY J. Masado  
DEPUTY CLERK

MOTION FOR STAY OF REMITTITUR PENDING  
APPLICATION FOR CERTIORARI (NRAP 41)

COMES NOW, Appellant DONTE JOHNSON, by and through his attorney LEE-ELIZABETH McMAHON, Deputy Special Public Defender, and moves this Honorable Court pursuant to the provisions of Nevada Rules of Appellant Procedure Rule 41(b), for a Stay of Remittitur, for 60 days, pending application to the United States Supreme Court for a Writ of Certiorari.

This matter was before the Court on an appeal from a death sentence after a new penalty hearing. This Court affirmed the sentence (Johnson v. State, 122 Nev. Adv. Op. No. 113, December 28, 2006). Remittitur has not issued as of this date.

Counsel for Petitioner is prepared to file a Petition for Writ of Certiorari in the United States Supreme Court within the time period provided in United States Supreme Court Rule 13.

DATED: 2 January 2007

BY [Signature]  
LEE-ELIZABETH McMAHON  
DEPUTY SPECIAL PUBLIC DEFENDER  
Nevada Bar No. 1765  
330 S. Third St., Ste. 800  
Las Vegas, Nevada 89155  
(702) 455-6265

RECEIVED

JAN 04 2007

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
DEPUTY CLERK

SPECIAL PUBLIC  
DEFENDER

CLARK COUNTY  
NEVADA

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1 POINTS AND AUTHORITIES


2 Nevada Rules of Appellate Procedure Rule 41 provides in pertinent  
3 part:

4 "(b) Stay of remittitur pending application for  
5 certiorari. A stay of the remittitur pending application  
6 to the Supreme Court of the United States for a writ of  
7 certiorari may be granted upon motion, reasonable notice of  
8 which shall be given to all parties. The stay shall not  
9 exceed sixty (60) days unless the period is extended for  
10 cause shown. If during the period of the stay there is  
11 filed with the clerk of the Supreme Court of Nevada a  
12 notice from the clerk of the Supreme Court of the United  
13 States that the party who has obtained the stay has filed  
14 a petition for the writ in that court, the stay shall  
15 continue until final disposition by the Supreme Court of  
16 the United States. Upon the filing of a copy of an order  
17 of the Supreme Court of the United States denying the  
18 petition for writ of certiorari the remittitur shall issue  
19 immediately....."

20 Good cause exists for stay of Remittitur in this case because it  
21 is a capital case and due to the nature of the issues intended to be  
22 raised. As such the propriety of the decision should be scrutinized  
23 by the highest Court in the land.

24 A stay of sixty (60) days in issuance of the remittitur is  
25 therefore respectfully requested.

26 DATED: 2 January 2007

27 BY   
28 LEE-ELIZABETH McMAHON  
DEPUTY SPECIAL PUBLIC DEFENDER  
Nevada Bar No. 1765  
330 S. Third St., Ste. 800  
Las Vegas, Nevada 89155  
(702) 455-6265

29 CERTIFICATE OF MAILING

30 I, KATHLEEN FITZGERALD, do hereby certify that on the 2 day of  
31 January, 2007, a copy of the foregoing Motion was deposited in the  
32 United States Mail at Las Vegas, Nevada, enclosed in a sealed envelope

1 upon which first class postage was fully prepaid, addressed to the  
2 following:

3 District Attorney  
4 Clark County Courthouse  
5 200 Lewis Ave., 3rd Floor  
6 Las Vegas, Nevada 89155

Nevada Attorney General  
100 N. Carson Street  
Carson City, Nevada 89701

7  
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9   
10 KATHLEEN FITZGERALD, an employee  
11 of The Special Public Defender's Office  
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IN THE SUPREME COURT OF THE STATE OF NEVADA

DONTE JOHNSON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

Case No. 45456

FILED

JUN 19 2006

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
DEPUTY CLERK

MOTION TO ENLARGE RECORD ON APPEAL

COMES NOW, Appellant, DONTE JOHNSON, by and through his attorney, LEE-ELIZABETH McMAHON, Deputy Special Public Defender, and moves this Court to enlarge the record on appeal to include the exhibits introduced into evidence by the State.

This Motion is made and based upon Supreme Court Rule 250 (6) and NRAP 26, and the Affidavit of counsel filed herewith.

DATED this 15th day of June, 2006.

SUBMITTED BY:

SPECIAL PUBLIC DEFENDER

LEE-ELIZABETH McMAHON  
NEVADA BAR #1765  
330 SOUTH THIRD ST., Ste. 800  
LAS VEGAS, NV 89155-2316  
(702)455-6265  
Attorney for Appellant

POINTS AND AUTHORITIES

NRAP 26(b) states in pertinent part:

"The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act to be done after the expiration of such time....."

Supreme Court Rule 250 sets forth the procedure of the clerk's office to follow on direct appeal from a judgement of conviction and

JUN 19 2006

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
DEPUTY CLERK

1 sentence of death. The relevant sections state:

2       "(a) *Docketing of appeal.* When the district court  
3 enters a written judgement of conviction imposing a  
4 sentence of death, the clerk of the district court shall  
5 immediately transmit to the clerk of the supreme court two  
6 certified, file-stamped copies of the following documents:  
7 (1) the written judgement signed by the judge and filed by  
8 the district court clerk; (2) the notice of appeal, if any;  
9 (3) the strict court docket entries; (4) the minutes of the  
10 district court proceedings; and (5) a list of exhibits  
11 offered into evidence, if any....." (emphasis added)

12       (c) *Form and contents of direct appeal record.* On  
13 direct appeal from a judgement of conviction and sentence  
14 of death, the clerk of the district court shall transmit as  
15 the record on appeal a certified copy of the complete  
16 record made and considered in the court below. The  
17 complete record shall include, without limitation,  
18 certified copies of: ... documentary evidence or exhibits  
19 filed in the lower courts..... no physical evidence or  
20 exhibits shall be transcript absent an order of the supreme  
21 court....." (emphasis added)

22       During Appellant's oral argument on June 14, 2006, counsel for  
23 JOHNSON stated JOHNSON deserved a new penalty hearing because  
24 documents were given to the jury that violated his right to confront  
25 his accusers. She further stated the documents, admitted as business  
26 records, were unsworn affidavits that could not be repudiated or  
27 clarified through cross-examination. This Court stated it could not  
28 determine what type of records they were or whether they were  
prejudicial since they were not part of the record and could not be  
reviewed.

JOHNSON requests this Court allow the record on appeal to be  
enlarged to include the 28 exhibits introduced into evidence by the

...

...

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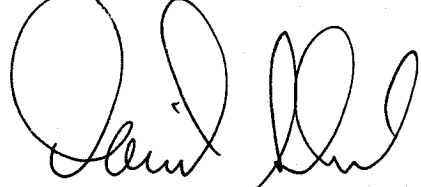
...

1 state, specifically the discipline/incident reports from Clark County  
2 Detention Center, and any other exhibits this Court deems relevant.

3 DATED this 15th day of June, 2006.

4 Respectfully submitted,

5 SPECIAL PUBLIC DEFENDER

6  
7  
8 

9 LEE-ELIZABETH McMAHON

10 NEVADA BAR #1765

330 SOUTH THIRD ST., Ste. 800

11 LAS VEGAS, NV 89155-2316

(702)455-6265

Attorney for Appellant

12 AFFIDAVIT OF COUNSEL

13 STATE OF NEVADA)

14 ) ss:

15 COUNTY OF CLARK)

16 DAVID M. SCHIECK, being first duly sworn, deposes and says:

17 Affiant is an attorney duly licensed to practice law in the State  
18 of Nevada and the Special Public Defender. That Affiant submits this  
19 Affidavit on behalf of Deputy Special Public Defender Lee-Elizabeth  
20 McMahon in support of Appellant JOHNSON'S Motion to Enlarge the Record  
21 of Appeal.

22 The Clark County Clerk's Office prepares the Record on Appeal in  
23 capital cases. That pursuant to SCR 250(6) a list of exhibits are to  
24 be transmitted to this Court upon the judgement of conviction being  
25 entered if a sentence of death is imposed.

26 The rules of the Supreme Court state "documentary evidence or  
27 exhibits filed in the lower courts" shall be included in the record  
28 but it further states that no physical evidence or exhibits "shall be  
transmitted absent an order of the supreme court."

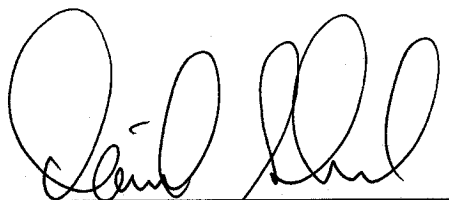
1 One of the issues raised by Appellant on direct appeal concerns  
2 the State's introduction into evidence at trial of exhibits,  
3 specifically discipline/incident reports from Clark County Detention  
4 Center. At oral argument on June 14, 2006 Ms. McMahon stated JOHNSON  
5 deserved a new penalty hearing because the documents violated his  
6 right to confront his accusers. She further stated the documents,  
7 admitted as business records, were boxes of reports from correctional  
8 officers and were not really business records, but unsworn affidavits.  
9 The records could not be repudiated or clarified through cross-  
10 examination.

11 Affiant is informed and believes that in order for this Court to  
12 determine what type of records they were or whether they were  
13 prejudicial to Appellant, the record on appeal needs to be enlarged  
14 to include same.

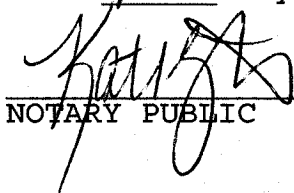
15 Therefore, Affiant requests this Court grant the Motion to  
16 Enlarge the Record on Appeal and order the Clark County Clerk's Office  
17 to include the exhibits introduced into evidence by the State.

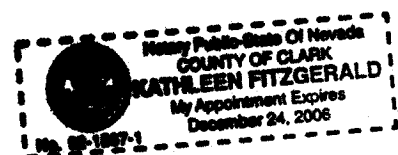
18 This Motion is made in good faith and not for the purpose of  
19 delay.

20 Further Affiant sayeth naught.

21  
22   
23 DAVID M. SCHIECK

24 SUBSCRIBED and SWORN to before me  
25 this 15 day of June, 2006.

26   
27 NOTARY PUBLIC  
28

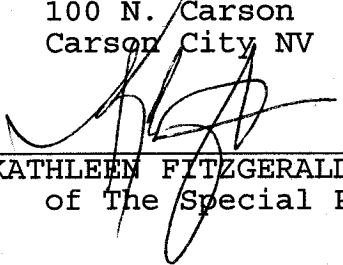


CERTIFICATE OF MAILING

I, KATHLEEN FITZGERALD, do hereby certify that on the 15 day of June, 2006, did deposit in the United States Post Office at Las Vegas, Nevada, a copy of the above and foregoing Motion, enclosed in a sealed envelope upon which first class postage was fully prepaid, addressed to the following:

Clark County District Attorney  
200 Lewis Avenue, 3rd Floor  
Las Vegas NV 89155

Nevada Attorney General  
100 N. Carson  
Carson City NV 89701-4717

  
KATHLEEN FITZGERALD an employee  
of The Special Public Defender