IN THE SUPREME COURT OF THE STATE OF NEVADA

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WILLIAM WITTER Appellant, v. E.K. McDANIEL, Warden, and CATHERINE CORTEZ MASTO Attorney General of Nevada, Respondents.	Case No. 50447

PETITION FOR REHEARING

Appellant William Witter hereby petitions for rehearing, following this Court's Order of Affirmance, filed October 20, 2009. This Court has overlooked material questions of law. Nev. Rev. App. P. 40A(a)(1), (c).

1. This Court's decision upheld Mr. Witter's death sentence, following the vacation of the McConnell[1] aggravating circumstances, by re-weighing the remaining aggravating circumstance against the mitigating circumstances identified at trial. Order at 5. This Court should review both the result of its analysis and the permissibility of re-weighing under Nevada's idiosyncratic death sentence scheme. There are two constitutional errors implicated by this Court's decision. First, extra-record evidence was not considered during the re-weighing and re-selection process. Second, Nevada's death penalty scheme requires, given the circumstances of Mr. Witter's case, that a jury re-weigh and re-select his penalty.

2. In its opinion, this Court noted that "[t]he district court considered every mitigating circumstance for which Witter offered evidence at trial, and we have

[1]McConnell v. State, 120 Nev. 1043, 1069, 102 P.3d 606, 624 (2004).

done the same." Order at 6 n.3 (emphasis added). In so doing, this Court rejected Mr. Witter's argument that extensive and significant mitigating evidence not presented at trial had to be considered by this Court under Leslie v. Warden, 118 Nev. 773, 782, 59 P.3d 440, 446 (2002) and House v. Bell, 547 U.S. 518 (2006). Order at 5 n.2.

The underlying premise of Leslie is that an invalid aggravating circumstance can skew the death eligibility process, thereby causing an invalid death sentence. Thus, because the Leslie analysis addresses the question of actual innocence of the death penalty, this Court erred by failing to consider "'all the evidence,' including evidence excluded at trial, admitted illegally, or available only after the trial." Smith v. Baldwin, 510 F.3d 1127, 1139 (9th Cir. 2007) (quoting Schlup v. Delo, 513 U.S. 298, 328 (1995)); House, 547 U.S. 518; Opening Brief at 12.[2] During Mr. Witter's trial, the jury did not hear, as demonstrated in the current petition, that Mr. Witter suffers from organic brain damage caused by Fetal Alcohol Syndrom (FAS), 15 AA 3148, a particularly powerful form of mitigation. See, e.g., Earp v. Ornoski, 431 P.3d 1158, 1179 (9th Cir. 2005); Douglas v. Woodford, 316 F.3d 1079, 1090-1091 (9th Cir. 2003). Dr. Natalie Novick Brown opined that FAS not only impacted Mr. Witter's childhood development, but also directly impacted Mr. Witter's actions on the day of the instant offense. Opening Brief at 28.

According to Leslie and House, therefore, this Court was required to consider the extra-record evidence in Mr. Witter's case. Just as an invalid aggravating circumstance upsets the weighing process of death eligibility by increasing the pro-death weight, the failure to present powerful mitigating evidence upsets the weighing process by reducing the anti-death weight.

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[2] In State v. Haberstroh, 119 Nev. 173, 183-184, 69 P.3d 676 (2003) and State v. Bennett, 119 Nev. 589, 605, 81 P.3d 1, 11 (2003), this Court considered evidence outside the trial record in deciding that an invalid aggravating factor prejudiced the defendant.

Accordingly, under the reasoning of Leslie and House, the claim of ineffective assistance of counsel for failure to present substantial mitigating evidence must be reviewed to avoid creating a miscarriage of justice in the instant case.[3]

3. The larger question, however, is how an appellate court, on a cold record, can rationally review the effect of a substantial error in the context of the Nevada death sentencing scheme. This Court concluded that Mr. Witter's sentence of death should be upheld essentially because of the "compelling" nature of the one remaining aggravating circumstance. Order at 5. Assessing the possible harmlessness of a constitutional error in the penalty phase of a capital case is significantly more difficult than making the determination with respect to a guilt phase issue. In the guilt phase, the jury must make a relatively simple yes-or-no determination: has every fact necessary to convict been proven beyond a reasonable doubt? When an error is injected into that calculation, it can be a reasonably objective task to determine whether the evidence supporting every element is so overwhelming, or the effect of some impropriety on the jury's deliberations is so slight, that the court can say confidently that the same elements would have been found regardless of the error. The jurors' task in the penalty phase is quite different. While they make some factual determinations as to the existence of aggravating and mitigating circumstances, they must make an individual and personal determination as to whether the aggravating circumstances are outweighed by the mitigation - - which includes complete discretion to give whatever idiosyncratic weight they desire to the aggravating circumstances and to the mitigating circumstances. Finally, the jurors must make a "reasoned moral response," California v. Brown, 479 U.S. 545 (O'Connor, J., concurring), to the

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[3]This Court's re-weighing and re-selection of the death penalty also failed to recognize the impact of the Brady error which arose when the state argued that Mr. Witter was a dangerous gang member even though the state was in possession of records that proved that Mr. Witter did not associate with gang members. Brady v. Maryland, 373 U.S. 83, 87 (1963); Napue v. Illinois, 360 U.S. 264, 269 (1959); Opening Brief at 25, 28.

question of whether they want to take the defendant's life. In making that decision, any juror can prevent the imposition of a death sentence by deciding that the mitigation outweighs the aggravation, or by simply refusing to vote for death; under Nevada law, there is no set of circumstances which requires a juror to vote for death, no matter how greatly the aggravation outweighs the mitigation (or even in the absence of any mitigation), and every juror's right to refuse to impose a death sentence is unlimited. Bennett v. State, 111 Nev. 1099, 1109-1110, 902 P.2d 676 (1995); State v. Haberstroh, 119 Nev. 173, 184, 69 P.3d 676, 683 (2003).

The effect of the invalid aggravating circumstances on what "reasoned moral response" a juror could have had to the sentencing choice is made even more difficult because each juror's response is essentially subjective. In attempting to assess what jurors might do in the absence of the error, this Court should consider the "reasoned moral response" that other juries or prosecutorial agencies have had to equally or more egregious offenses. When prosecutors make the argument that a jury would necessarily have imposed a death sentence, regardless of any error, because the crime and the defendant are so bad or a prior violent felony is "compelling," it is only appropriate to ask what juries and prosecutors actually do in response to other egregious cases (although it must be recognized that, to a jury, every first degree murder case will be an egregious one. See Godfrey v. Georgia, 446 U.S. 420, 428-429 (1980)).

Examining other cases that have resulted in verdicts of, or negotiations for, sentences less than death demonstrates that Mr. Witter's case cannot be considered one in which a death sentence was a foregone conclusion. In the Fernando Rodriguez case, for instance, the defendant was convicted of two counts of first degree murder. His four aggravating circumstances were two prior convictions for robbery, great risk of death to more than one person, and avoiding arrest. State v.

Rodriguez, No. C130763, Ex. 1 (B)(12,13).[4] By any objective criteria, Rodriguez' offenses were as egregious as Mr. Witter's, but the jury in his case imposed sentences of life without the possibility of parole. The only mitigating factor cited by the jury was "mercy." Ex. 1 (B)(12)[5]

The behavior of prosecutors also precludes the state from arguing that a death sentence was a foregone conclusion in Mr. Witter's case. In the Moore case for instance, the district attorney of the county from which appellant's sentence arose found that vindicating the needs of public justice would be accomplished by imposing a life without possibility of parole sentence in a case involving twelve murder victims and three clear aggravating factors. State v. Moore, No. CR00-2974, Ex. 1(A)(11).[6]

Finally, given the intense subjectivity of the weighing process and of the

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[4] Exhibit numbers refer to the documents submitted with the motion to take judicial notice filed along with this brief.

[5] Other defendants convicted of multiple murders have been given sentences of less than death by juries, when the mitigating evidence was no more compelling than what was available in Mr. Witter's case. See State v. Budd, No. C193182 (three murder victims; mitigating factors included effect of execution on defendant's family and defendant's apology), Ex. 1(B) (5-6); State v. Powell, No. C148936 (four murder victims; aggravating factors of burglary, great risk of death to more than one person and avoiding arrest; no mitigating factors cited), Ex. 1(B) (7,8); State v. Randle, No. C121817 (two murder victims; six aggravating factors, including three prior robbery or attempted robbery convictions), Ex. 1(B) (9-11); State v. Daniels, No. C1126201 (two murder victims; four aggravating factors as to each murder), Ex. 1(B) (14-15)); see Daniels v. State, 114 Nev. 261, 956 P.2d 111 (1998); State v. Ducksworth, No. C108501 (two murder victims; total of ten aggravating factors), Ex. 1(B) (16,17); see Ducksworth v. State, 114 Nev. 951, 966 P.2d 165 (1998); Ducksworth v. State, 113 Nev. 780, 942 P.2d 157 (1997); State v. Martin, No. C108201 (two murder victims; total of twelve aggravating factors), Ex. 1 (B) (18,19); see also State v. Scholl, No. C204775, Ex. 1 (B) (1-4).

[6] See also State v. Strohmeyer, No. C144577, Ex. 1(A) (7,8); State v. Armstrong, No. C180047 (two murder victims and one attempted murder), Ex. 1 (A) (1,2); State v. Rundle, No. C189563 (two murder victims, one killed by beating with baseball bat), Ex. 1(A) (3,4); State v. Frenn, No. C178954 (two murder victims, killed by stabbing and beating), Ex. 1 (A) (6). In one case in which the state obtained a death sentence for four murders which was reversed on appeal, the state later agreed to life sentences on remand. State v. Evans, No. C116071, Ex. 1 (A) (9,10); see Evans v. State, 117 Nev. 609, 28 P.3d 498 (2001); Evans v. State, 112 Nev. 1172, 926 P.2d 265 (1996).

ultimate selection of the penalty to be imposed, no court can adequately review or replicate the situation of the original jury. Fundamentally, a court that upholds a death sentence, in spite of the presence of constitutional error, under the Nevada system is essentially imposing a new sentence itself, whether its analysis is called harmless error or re-weighing. Because the Nevada system depends on a weighing system to establish death eligibility, and gives each juror unlimited discretion to weigh the factors and to refuse to impose death, any court reviewing the effect of error on that decision necessarily substitutes the court's judgment for the jury's. Under those circumstances, it is the court that replaces the jury's "highly subjective" and "moral judgment of the defendant's desert," by "decreeing death" itself. See Caldwell v. Mississippi, 472 U.S. 320, 340 n. 7 (1985); Antonin Scalia, God's Justice and Ours, 2002 First Things 123, 17 -21 (May 2002), *available at* http://www.yuricareport.com/Law%20&%20Legal/AntoninScaliaGodsJusticeAndOurs.html (last visited Nov. 8, 2009). Such a re-sentencing cannot result in a reliable sentence under the Eighth Amendment or the Nevada Constitution.

Sentencing by a reviewing court cannot encompass the complete range of options available to a jury. Every member of a jury can prevent imposition of a death sentence by finding that the mitigation outweighs the aggravation or by concluding, on any or no ground, that he or she will not vote for death. No court can replicate that dynamic. Nor does any court have the ability, or perhaps the inclination, to refuse to impose a death sentence simply on basis of mercy, as the jury did in the Rodriguez case. No court, reviewing a cold record, can consider a defendant's demeanor, which a jury can consider in a penalty hearing. E.g., Allen v. Woodford, 395 F.3d 979, 1014 (9th Cir. 2005); see Riggins v. Nevada, 504 U.S. 127, 137-138 (1992). No reviewing court has to look a defendant in the eye while imposing a sentence, as a jury must; and such a court would necessarily send a defendant to his death without ever hearing "the sound of his voice." See McGautha v. California, 402 U.S. 183, 220 (1971). Unlike a new sentencing jury,

this Court does not know about, and does not consider, a defendant's good behavior during post-conviction incarceration, which must be considered as mitigation. Skipper v. South Carolina, 476 U.S. 1, 6-8 (1986). While the Supreme Court has in general tolerated the use of harmless error analysis or re-weighing to uphold death sentences, Clemons v. Mississippi, 494 U.S. 738, 741 (1990), the intensively subjective structure of the Nevada sentencing scheme is antithetical to judicial re-weighing or to aggressive harmless error analysis.

Finally, the members of the Nevada judiciary are popularly elected, and thus face the possibility of removal if they make a controversial and unpopular decision. This situation renders the Nevada judiciary insufficiently impartial under the federal due process clause to preside over a capital case. At the time of the adoption of the Constitution, which is the benchmark for the protection afforded by the due process clause, see, e.g. Medina v. California, 505 U.S. 437, 445 (1992), English judges qualified to preside in capital cases had tenure during good behavior.[7] The absence of any such protection for Nevada judges results in a denial of federal due process in capital cases, because the possibility of removal,

[7] The tenure of judges during good behavior was firmly established by the time of the adoption: almost a hundred years before the adoption, a provision required that "Judges' Commissions be made quamdiu se bene gesserint . . . ." was considered sufficiently important to be included in the Act of Settlement, 12, 13 Will. III c. 2 (1700); W. Stubbs, Select Charters 531 (5th ed. 1884); and in 1760, a statute ensured their tenure despite the death of the sovereign, which had formerly voided their commissions. 1 Geo. III c.23; 1 W. Holdsworth, History of English Law 195 (7th ed., A. Goodhart and H. Hanbury rev. 1956). Blackstone quoted the view of George III, in urging the adoption of this statute, that the independent tenure of the judges was "essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honour of the crown." 1 W. Blackstone, Commentaries on the Laws of England *258 (1765). The framers of the Constitution, who included the protection of tenure during good behavior for federal judges under Article III of the Constitution, would not likely have taken a weaker view of the importance of this requirement to due process than George III. In fact, the grievance that the king had made the colonial "judges dependent on his will alone, for the tenure of their offices" was one of the reasons assigned as justification for the revolution. Declaration of Independence § 11 (1776); see Smith, An Independent Judiciary: The Colonial Background, 124 U.Pa.L. Rev. 1104, 1112-1152 (1976). At the time of the adoption, there were no provisions for judicial elections in any of the states. Id. at 1153-1155.

and at minimum of a financially draining campaign, for making an unpopular decision, are threats that "offer a possible temptation to the average [person] as a judge ... not to hold the balance nice, clear and true between the state and the [capitally] accused." Tumey v. Ohio, 273 U.S. 510, 532 (1927); see Legislative Commission's Subcommittee to Study the Death Penalty and Related DNA Testing, Ass. Conc. Res. No. 3 (file No. 7, Statutes of Nevada 2001 Special Session), meeting of February 21, 2002, partial verbatim transcript (testimony of Rose, J., noting that lesson of election campaign, involving allegation that justice of Supreme Court "wanted to give relief to a murderer and rapist," was "not lost on the judges in the State of Nevada, and I have often heard it said by judges, 'a judge never lost his job by being tough on crime.'"); Beets v. State, 107 Nev. 957, 976, 821 P.2d 1044 (1991) (Young, J., dissenting) ("Nevada has a system of elected judges. If recent campaigns are an indication, any laxity toward a defendant in a homicide case would be a serious, if not fatal, campaign liability.")[8]

Considering all of these factors, it is clear that any death sentence imposed in Mr. Witter's case cannot be constitutionally reliable under the Eighth and

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[8] The removal of a Supreme Court justice for participating in an unpopular decision strongly reinforces this point; See Sherman Fredrick, Editorial, "Voters like R-J's Ideas - - Guess Who Hates That?" Las Vegas Review-Journal (November 12, 2006); Editorial "Brian Greenspun on Tuesday's Victories Amid a Judicial Warning," Las Vegas Sun (November 9, 2006); Carri Geer Thevenot, "Supreme Court's Becker Falls to Saitta - - Douglas Retains Seat - - Political Consultant Says Justice Hurt by Guinn v. Legislature Ruling in 2003," Las Vegas Review-Journal (November 8, 2006); Editorial, "Nancy Becker Must be Removed - - Supreme Court Justice Backed Guinn v. Legislature Travesty," Las Vegas Review-Journal (November 5, 2006); Editorial, "Nancy Becker has the Right Stuff - - State Supreme Court Justice has Faithfully and Honestly Interpreted the Constitution," Las Vegas Sun (October 22, 2006); Jeff German, "Far Right Targets Justice Becker - - Supreme Court Vote on Tax Increase was Right Thing to do, She Says," Las Vegas Sun (October 15, 2006); Jon Ralston, "Campaign Ad Reality Check," Las Vegas Sun (October 3, 2006); Jon Ralston, "Jon Ralston is Impressed at the Clarity and Brevity Displayed by Lawyer-Politicians," Las Vegas Sun (September 22, 2006); Michael J. Mishak, "Libertarian Lawyer has More Issues Up His Sleeve - - Waters' Next Targets: Campaign Funds, Real Estate Tax," Las Vegas Sun (September 16, 2006); Sam Skolnik, "Who Owns Whom is Supreme Theme - - Becker, Saitta Race is Rife with Accusations," Las Vegas Sun (August 27, 2006).

Fourteenth Amendments, unless it is imposed by a fully informed and properly instructed jury. See Valerio v. Crawford, 306 F.3d 742, 758 (9th Cir. 2002) (en banc) (state appellate court cannot cure constitutional error in vague jury instruction on aggravating circumstance by engaging in fact-finding on appeal, when origianal sentencer was jury). Accordingly, the death sentence must be vacated and a new trial ordered.

4. For the reasons stated above, this Court should grant this petition for rehearing, vacate the death sentence and order a new penalty hearing.

Dated this 9th day of November, 2009.

Respectfully submitted,

FRANNY A. FORSMAN
Federal Public Defender

Tiffani D. Hurst
Assistant Federal Public Defender
Nevada Bar No. 11027C
danielle_hurst@fd.org

Gerald Bierbaum
Assistant Federal Public Defender
Nevada Bar No. 11024C
gerald_bierbaum@fd.org

411 E. Bonneville Ave., #250
Las Vegas, NV 89101
(702) 388-6577

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 9th day of November, 2009. Electronic Service of the foregoing PETITION FOR REHEARING shall be made in accordance with the Master Service List as follows:

Steven Owens, Deputy District Attorney

Catherine Cortez Masto, Attorney General

Katrina Lang,
An employee of the Federal Public Defender