

filed via fax

IN THE SUPREME COURT OF THE STATE OF NEVADA

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PHILIP J. KOHN,
CLARK COUNTY SPECIAL PUBLIC DEFENDER,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, COUNTY OF
CLARK, THE HONORABLE JEFFREY R. SOBEL,
DISTRICT COURT JUDGE,

Respondent,

DONTE JOHNSON aka JOHN WHITE,

Real Party in Interest.

Case No. **36461**
(Dist. Ct. No. C153154)

FILED

JUL 20 2000

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

PETITION FOR WRIT OF MANDAMUS AND
EMERGENCY MOTION FOR STAY OF PROCEEDINGS

PHILIP J. KOHN
CLARK COUNTY, NEVADA
SPECIAL PUBLIC DEFENDER
Nevada Bar #0556
JOSEPH S. SCISCENTO
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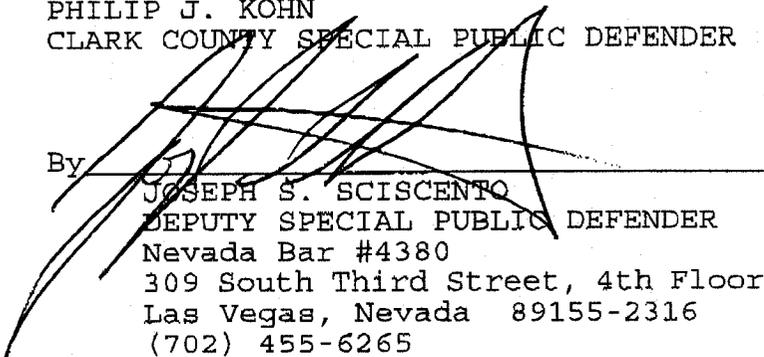
Counsel for Respondent

00-12548

1 of this Petition and any argument should this Honorable Court order
2 a hearing on this matter.

3 DATED this 20th day of July, 2000.

4 PHILIP J. KOHN
5 CLARK COUNTY SPECIAL PUBLIC DEFENDER

6
7 By  _____
8 JOSEPH S. SCISCENTO
9 DEPUTY SPECIAL PUBLIC DEFENDER
10 Nevada Bar #4380
11 309 South Third Street, 4th Floor
12 Las Vegas, Nevada 89155-2316
13 (702) 455-6265

14 VERIFICATION

15 STATE OF NEVADA)
16) ss:
17 COUNTY OF CLARK)

18 JOSEPH S. SCISCENTO, being first duly sworn, deposes and
19 states as follows:

20 1. That he is an attorney duly licensed to practice law in
21 the State of Nevada and one of the Deputy Special Public Defenders
22 assigned to represent Donte Johnson.

23 2. That MR. JOHNSON, has authorized and directed Mr.
24 Sciscento, to file the foregoing Writ of Mandamus;

25 3. That MR. SCISCENTO, has read the foregoing Writ of
26 Mandamus and knows the contents therein and as to those matters they
27 are true and correct and as to those matters based on information and
28 belief he is informed and believes them to be true;

29 4. That MR. JOHNSON has no other remedy at law available
30 to him and that the only means to address this problem is through this
31 writ;

1 II.

2 STATEMENT OF THE CASE

3 Defendant, Donte Johnson, was found guilty of murder by a
4 jury on June 9, 2000. The State is seeking the death penalty against
5 the Defendant. After the penalty hearing, the jury was unable to
6 agree on a sentence and District Court has requested that the Nevada
7 Supreme Court appoint a three-judge panel to impose sentence. NRS
8 175.556. Defendant submitted that imposition of a sentence by a
9 three-judge panel would deprive him of equal protection, due process,
10 effective assistance of counsel and a reliable sentence under the
11 State and Federal constitutions. Briefs were submitted, no oral
12 argument was allowed and the District Court denied the motion (see
13 attached Order filed on July 20, 2000). Accordingly, Defendant
14 submits that the District Court should have imposed a sentence of life
15 in prison without the possibility of parole.

16 In the alternative, Defendant submits by way of Writ of
17 Mandamus that this Court declare the Three Judge Panel
18 unconstitutional based on the recent United States Supreme Court
19 decision in Apprendi v. New Jersey, ___ U.S. ___ 2000 WL 807189 (June
20 26, 2000), mandate imposition of a life sentence and/or stay the
21 penalty hearing in the above-entitled matter until such a time as the
22 Nevada Supreme Court can rule on this issue on the merits.

23 III.

24 ARGUMENT

- 25 1. The relief requested by the Petitioner should be
26 properly granted by this Court.

27 This court may issue a writ of mandamus in order
28 "to compel the performance of an act which the
law especially enjoins as a duty resulting from

1 an office, trust or station." NRS 34.160.
2 Generally, a writ of mandamus may issue only when
3 there is no plain, speedy, and adequate remedy at
4 law. See NRS 34.170. However, where
5 circumstances reveal urgency or strong necessity,
6 this court may grant extraordinary relief. See
7 Jeep Corp. v. District Court, 98 Nev. 440, 443,
8 652 P.2d 1183, 1185 (1982). Moreover, "where an
9 important issue of law needs clarification and
10 public policy is served by this court's
11 invocation of its original jurisdiction, our
12 consideration of a petition for extraordinary
13 relief may be justified." Business Computer
14 Rentals v State Treas., 114 Nev. 63, 67, 953 P.2d
15 13, 15 (1998).

16 It is Petitioner's position that after the decision of
17 Apprendi v. New Jersey, supra, the Nevada three judge panel is
18 unconstitutional and manifests a structural error. (See discussion
19 infra.) This is certainly an area of law never before addressed by
20 the Nevada Supreme Court and in light of the utmost seriousness
21 attached to the imposition of the death penalty on an individual under
22 the present national and international debate on the subject that the
23 public interest can only be served by analysis of our Nevada Supreme
24 Court before another person is sentenced to death under an
25 unconstitutional system. Not only is a placement of an individual on
26 death row manifestly unjust when structural error exists, but the
27 public confidence in a state where execution is allowed will be
28 forever lost if the Nevada Supreme Court refuses to even consider the
issue of structural error of the three-judge panel when clearly it is
called into question by new United States Supreme Court precedent.
There can be no argument that this is not an important issue of law
which needs clarification and which serves the public policy. As
such, the Petitioner implores this Court to stay these
unconstitutional proceedings for time to consider the Petitioner's
request for writ and imposition of life sentence.

1 2. The Three-Judge Panel Procedure For Imposing A
2 Sentence Of Death Is Unconstitutional Under The
3 Due Process Guarantee Of The Federal Constitution
4 pursuant to new precedent set forth by the United
5 States Supreme Court.

6 The three-judge panel procedure prescribed by Nev. Rev.
7 Stat. § 175.556(1) cannot be followed in this case because it violates
8 the due process clause of the Fourteenth Amendment to the United
9 States Constitution. In Apprendi v. New Jersey, ___ U.S. ___ 2000 WL
10 807189 (June 26, 2000) (a copy of which is attached), the United
11 States Supreme Court unequivocally held: "Other than the fact of a
12 prior conviction, any fact that increases the penalty for a crime
13 beyond the prescribed statutory maximum must be submitted to a jury
14 and proven beyond a reasonable doubt." Id. at *13. Citing its
15 previous decision in Jones v. United States, 526 U.S. 227 (1999), the
16 Court held:

17 With that exception [of the fact of a prior
18 conviction], we endorse the statement of the rule
19 set forth in the concurring opinions in that
20 case: "[I]t is unconstitutional for a legislature
21 to remove from the jury the assessment of facts
22 that increase the prescribed range of penalties
23 to which a criminal defendant is exposed. It is
24 equally clear that such facts must be established
25 by proof beyond a reasonable doubt." 526 U.S. at
26 252-253, 119 S.Ct. 1215 (opinion of STEVENS, J.);
27 see also id., at 253, 119 S.Ct. 1215 (opinion of
28 SCALIA, J.).

29 Id. (footnote omitted).

30 The concurring opinions of the Court's most conservative
31 justices were equally unequivocal:

32 What ultimately demolishes the case for the
33 dissenters is that they are unable to say what
34 the right to trial by jury does guarantee if, as
35 they assert, it does not guarantee - - what it
36 has been assumed to guarantee throughout our
37 history - - the right to have a jury determine
38 those facts that determine the maximum sentence

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the law allows.

.....
[T]he guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to ... trial, by an impartial jury" has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury.

Id. at *17 (Scalia, J., concurring) (emphasis supplied).

In order for an accusation of a crime (whether by indictment or some other form) to be proper under the common law, and thus proper under the codification of the common-law rights in the Fifth and Sixth Amendments, it must allege all elements of that crime; likewise, in order for a jury trial of a crime to be proper, all elements of the crime must be proved to the jury.

.....
[A] "crime" includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment). Thus, if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact - - of whatever sort, including the fact of a prior conviction - - the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime. Similarly, if the legislature, rather than creating grades of crime, has provided for setting the punishment of a crime based on some fact - - such as a fine that is proportional to the value of stolen goods - - that fact is also an element. No multi-factor parsing of statutes, of the sort that we have attempted since McMillan v. Pennsylvania, 477 U.S. 79 (1986)], is necessary. One need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element.

Id. at *18-19 (Thomas, J., concurring).

Under this analysis, there can be no doubt that the

1 aggravating circumstances prescribed by Nev. Rev. Stat. § 200.033 are
2 "elements" of capital murder. Nev. Rev. Stat. § 200.030 defines the
3 degrees of murder and prescribes the maximum punishments allowed.¹
4 First degree murder is punishable by various terms of imprisonment,
5 § 200.030(4)(b), but it is punishable by death "only if one or more
6 aggravating circumstances are found and any mitigating circumstance
7 or circumstances which are found do not outweigh the aggravating
8 circumstance or circumstances...." § 200.030(4)(a) (emphasis
9 supplied). The crucial role of aggravating circumstances as elements
10 of capital-eligible first degree murder is further demonstrated by the
11 last sentence of § 200.030(4): "A determination of whether aggravating
12 circumstances exist is not necessary to fix the penalty at
13 imprisonment for life with or without the possibility of parole."

14 Thus under state law both the existence of aggravating
15 factors, and the determination that the aggravating factors are not
16 outweighed by the mitigating factors, are necessary elements of death
17 eligibility and are necessary to increase the maximum punishment
18 provided for first degree murder from the various possible sentences
19 of imprisonment to death. Under Apprendi, the due process guarantee
20 of the federal Constitution requires those elements to be decided by

21
22 ¹ Nev. Rev. Stat. § 200.030(4) provides:
23 A person convicted of murder of the first degree is guilty of a category A felony and shall
24 be punished:

25 (a) By death, only if one or more aggravating circumstances are found and any mitigating
26 circumstance or circumstances which are found do not outweigh the aggravating circumstance or
27 circumstances; or

28 (b) By imprisonment in the state prison;
(1) For life without the possibility of parole;
(2) For life with the possibility of parole, with eligibility for parole beginning
when a maximum of 20 years has been served; or
(3) For a definite term of 50 years, with eligibility for parole beginning when a
minimum of 20 years has been served.

A determination of whether aggravating circumstances exist is not necessary to fix the penalty
at imprisonment for life with or without the possibility of parole.

1 a jury. Accordingly, the three-judge panel procedure, which would
2 allow judges to make those findings, is unconstitutional.

3 The unconstitutionality of the Nevada procedure is further
4 demonstrated by the distinction drawn in Apprendi between its holding
5 and the holding in Walton v. Arizona, 497 U.S. 639 (1990). In
6 Apprendi, the Court distinguished Walton, holding that the rule it
7 announced would not "render invalid state capital sentencing schemes
8 requiring judges, after a jury verdict holding a defendant guilty of
9 a capital crime, to find specific aggravating factors before imposing
10 a sentence of death." Id. at *16 (citation omitted; emphasis added).
11 The court relied on the reasoning in Justice Scalia's opinion in
12 Almendarez-Torres v. United States, 523 U.S. 224, 257 n. 2 (Scalia,
13 J., dissenting):

14 "Neither the cases cited, nor any other case,
15 permits a judge to determine the existence of a
16 factor which makes a crime a capital offense.
17 What the cited cases hold is that, once a jury
18 has found the defendant guilty of all the
19 elements of an offense which carries as its
20 maximum penalty the sentence of death, it may be
21 left to the judge to decide whether that maximum
22 penalty, rather than a lesser one, ought to be
23 imposed.... The person who is charged with
24 actions that expose him to the death penalty has
25 an absolute entitlement to jury trial on all the
26 elements of the charge."

21 Apprendi at *16 (emphasis supplied). Under the Arizona scheme at
22 issue in Walton, the statute provides that the maximum penalty for
23 first degree murder is death. Ariz. Rev. Stat. § 13-1105(C) ("First
24 degree murder is a class 1 felony and is punishable by death or life
25 imprisonment as provided by § 13-703"); Walton v. Arizona, 497 U.S.
26 at 643.

27 By contrast, under Nevada law the penalty of death is not
28 the maximum penalty for first degree murder simpliciter: the statute

1 itself provides that the penalty is not available for first degree
2 murder unless additional elements - - the existence of aggravating
3 circumstances, and the failure of mitigating circumstances to outweigh
4 the aggravating circumstances - - are found. See Apprendi at *29
5 (Thomas, J., concurring) ("If a fact is by law the basis for imposing
6 or increasing punishment - - for establishing or increasing the
7 prosecution's entitlement - - it is an element.") Simply put, a
8 jury's verdict of first degree murder under Nevada law is not "a jury
9 verdict holding a defendant guilty of a capital crime," id. at *16,
10 because the statute itself provides that the punishment of death is
11 not available simply on the basis of that verdict, but can be imposed
12 "only if" further findings are made to increase the available maximum
13 punishment.

14 Under Apprendi, this Court cannot constitutionally proceed
15 to make the findings in this case - - the existence of aggravating
16 factors and the failure of mitigating factors to outweigh aggravating
17 factors - - which are necessary to increase the maximum punishment for
18 the offense to a death sentence. Since findings of these elements of
19 capital murder can constitutionally be made only by a jury, the three-
20 judge panel procedure allowed by Nev. Rev. Stat. § 175.556(1) cannot
21 be given effect under the due process clause.

22 This Court's previous decisions upholding the three-judge
23 panel procedure do not control resolution of this issue. Prior
24 decisions did not address or resolve the issue decided in Apprendi.
25 See, e.g., Williams v. State, 113 Nev. 1008, 1017-1018 and nn. 5, 6
26 (1997); Kirksey v. State, 112 Nev. 980, 1001, 923 P.2d 1102 (1996);
27 Paine v. State, 110 Nev. 609, 617 877 P.2d 1025 (1994); Redmen v.
28 State, 108 Nev. 227, 235-236, 828 P.2d 395 (1992). Since the Nevada

1 this Court's decisions relating to the three-judge panel issue did not
2 address the issue decided in Apprendi, they do not control this
3 Court's resolution of the issue here. E.g., Sakamoto v. Duty Free
4 Shoppers, Ltd., 764 F.2d 1285, 1288 (9th Cir. 1985) (decisions not
5 controlling authority on issues not decided); Vegas Franchise v.
6 Culinary Workers, 83 Nev. 422, 424, 433 P.2d 263 (1967) (overruling
7 language in previous decision resting upon "false premise"); Jackson
8 v. Harris, 64 Nev. 339, 183 P.2d 161 (1947) (cases not authority on
9 points "that may be found lurking in the record" when issue not placed
10 before court).²

11 Further, the major principle relied on in the Nevada Supreme
12 Court's decision - - that the federal constitution does not require
13 capital sentences to be imposed by juries, see Hill v. State, 102 Nev.
14 377, 379-380, 724 P.2d 734 (1986) - - does not affect the issue
15 decided in Apprendi: even if a capital sentence can constitutionally
16 be imposed by a judge, under Apprendi all of the elements of a capital
17 crime must be decided by a jury. Since a verdict of guilty of first
18 degree murder does not expose the defendant to the death sentence
19 without findings of additional qualifying factors, those factors are
20 elements of the capital crime and must be found by a jury, whatever
21 the ultimate sentencing body may be.

22
23 ² Even if those decisions were on point, the doctrine of stare decisis does not apply when "an
24 intervening Supreme Court decision undermines an existing precedent of the [court] and both cases are
25 closely on point." United States v. Lancelloti, 761 F.2d 1363, 1366 (9th Cir. 1985); accord Spinelli v.
26 Gaughan, 12 F.3d 853, 855 n. 1 (9th Cir. 1993); Leggett v. Badger, 798 F.2d 1387, 1389, 1390 (11th
27 Cir. 1986) (district court correctly declined to follow mandate of court of appeals in light of intervening
28 Supreme Court authority). See also Litteral v. State, 97 Nev. 503, 505-508, 634 P.2d 1226 (1981)
(upholding district court's refusal to instruct on specific intent element of robbery based on language
of statute, despite Supreme Court decisions requiring instruction on that element, and disapproving prior
decisions). "In such a case, to continue to follow the earlier case blindly until it is formally overruled
is to apply the dead, not the living, law." Norris v. United States, 677 F.2d 899, 904 (9th Cir. 1982) (per
Posner, J.) The intervening Supreme Court decision in Apprendi, which the Nevada Supreme Court has
not yet addressed, prescribes the analysis that this Court must conduct under the Fourteenth Amendment.

1 Finally, this Court is bound to follow Apprendi under the
2 supremacy clause of the United States Constitution:

3 This Constitution, and the Laws of the
4 United States which shall be made in Pursuance
5 thereof; and all Treaties made, or which shall be
6 made, under the Authority of the United States,
7 shall be the supreme Law of the Land; and the
8 Judges in every State shall be bound thereby, any
9 Thing in the Constitution or Laws of any State to
10 the Contrary notwithstanding.

11 U.S. Const. Art. VI; Powell v. Nevada, 511 U.S. 79 (1994) (state court
12 cannot refuse to apply federal constitutional retroactivity doctrine);
13 Nev. Const. Art. 1 § 2.

14 Because the three-judge panel cannot constitutionally make
15 the findings of elements necessary to impose a death sentence, this
16 Court should proceed to mandate the imposition of a life sentence, or
17 in the alternative, stay any further proceedings until the issues are
18 evaluated on their merits. See Nev. Rev. Stats. § 175.556(2) ("In a
19 case in which the death penalty is not sought, if a jury is unable to
20 reach a unanimous verdict upon the sentence to be imposed, the trial
21 judge shall impose the sentence."); cf. 1977, Nev. Stats. Ch. 585 ("If
22 the punishment of death is held to be unconstitutional by the court
23 of last resort, the substituted punishment shall be imprisonment in
24 the state prison for life without possibility of parole.")

25 **CONCLUSION**

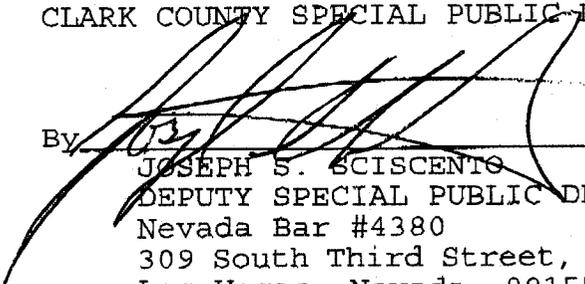
26 Petitioner prays and it would be in the best interest of the
27 public, to not induce the waste of judicial resources and public
28 confidence that would result from holding a full sentencing proceeding
before three district judges, when any findings as to the elements
making the offense capital - eligible will necessarily be void under
Apprendi.

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The Statute provides that the default after a directive of unconstitutionality must and can only be a sentence of life without the possibility of parole. Petitioner again requests that this sentence be mandated by way of this writ, or in the alternative, that the penalty hearing be stayed so that this very important issue can be resolved and guidance given to all district courts.

Respectfully submitted,

PHILIP J. KOHN
CLARK COUNTY SPECIAL PUBLIC DEFENDER

By 
JOSEPH S. SCISCENTO
DEPUTY SPECIAL PUBLIC DEFENDER
Nevada Bar #4380
309 South Third Street, 4th Floor
Las Vegas, Nevada 89155-2316
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1 **ORDR**
2 PHILIP J. KOHN
3 CLARK COUNTY SPECIAL PUBLIC DEFENDER
4 Nevada Bar #0556
5 JOSEPH S. SCISCENTO
6 Deputy Special Public Defender
7 Nevada Bar #4380
8 DAYVID J. FIGLER
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10 Nevada Bar #4264
11 309 South Third Street, 4th Floor
12 Las Vegas, Nevada 89155
13 Attorneys for Donte Johnson

FILED

JUL 20 9 59 AM '00

Shirley A. Longoria
CLERK

9 **DISTRICT COURT**
10 **CLARK COUNTY, NEVADA**

11 THE STATE OF NEVADA,)
12)
13 Plaintiff,)
14 vs.)
15)
16 DONTE JOHNSON, aka)
John White, ED# 1586283,)
Defendant.)

Case No. C153154

Dept. No. V

17 **ORDER**

18 This matter having come before this Honorable Court on the 20th day of July,
19 2000, and good cause appearing therefor,

20 IT IS HEREBY ORDERED that Defendant's Motion for Imposition of Life
21 Without the Possibility of Parole Sentence; or, in the Alternative Motion to Empanel Jury

22 // //

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28 // //

EXHIBIT "1"

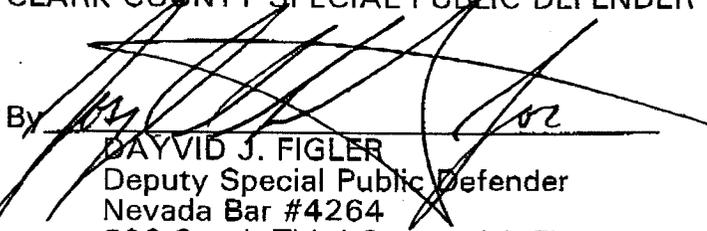
1 for Sentencing Hearing and/or for Disclosure of Evidence Material to Constitutionality of
2 Three Judge Panel Procedure is hereby denied.

3 DATED this 20th day of July, 2000.

4
5 **JEFFREY D. SOBEL**

6 JEFFREY D. SOBEL

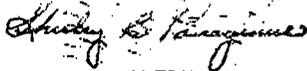
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8 PHILIP J. KOHN
9 CLARK COUNTY SPECIAL PUBLIC DEFENDER

10
11 By 

12 DAYVID J. FIGLER
13 Deputy Special Public Defender
14 Nevada Bar #4264
15 309 South Third Street, 4th Floor
16 Las Vegas, Nevada 89155

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25 CERTIFIED COPY
26 DOCUMENT ATTACHED IS A
27 TRUE AND CORRECT COPY
28 OF THE ORIGINAL ON FILE

2000 JUL 20 AM 40


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RECEIPT OF A COPY of the foregoing Petition for Writ of
Mandamus and Emergency Motion for Stay of Proceedings is hereby
acknowledged this 20th day of July, 2000.

STEWART L. BELL
CLARK COUNTY DISTRICT ATTORNEY

By *Radine Mulkey*

RECEIPT OF A COPY of the foregoing Petition for Writ of
Mandamus and Emergency Motion for Stay of Proceedings is hereby
acknowledged this 20th day of July, 2000.

JEFFREY R. SOBEL
DISTRICT COURT JUDGE, DEPARTMENT V

By _____