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IN THE SUPREME COURT OF THE STATE OF NEVADA

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WILLIAM WITTER,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 36927

FILED

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APPELLANT'S OPENING BRIEF

DAVID M. SCHIECK, ESQ.
LAW OFFICE OF DAVID M. SCHIECK
302 EAST CARSON AVE., STE. 600
LAS VEGAS, NEVADA 89101

ATTORNEY FOR APPELLANT

STEWART BELL, ESQ.
DISTRICT ATTORNEYS OFFICE
200 S. THIRD STREET
LAS VEGAS, NEVADA 89155

FRANKIE SUE DEL PAPA, ESQ.
Nevada Bar No. 0192
NEVADA ATTORNEY GENERAL
100 N. CARSON STREET
CARSON CITY, NV 89701
702-687-3538

ATTORNEYS FOR RESPONDENT

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David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

01-06036

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DAVID M. SCHIECK, ESQ.
LAW OFFICE OF DAVID M. SCHIECK
302 EAST CARSON AVE., STE. 600
LAS VEGAS, NEVADA 89101

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STEWART BELL, ESQ.
DISTRICT ATTORNEYS OFFICE
200 S. THIRD STREET
LAS VEGAS, NEVADA 89155

FRANKIE SUE DEL PAPA, ESQ.
Nevada Bar No. 0192
NEVADA ATTORNEY GENERAL
100 N. CARSON STREET
CARSON CITY, NV 89701
702-687-3538

ATTORNEYS FOR RESPONDENT

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

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David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

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David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

WILLIAM WITTER, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	Case No. 36927

STATEMENT OF ISSUES

1. WHETHER WITTER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

STATEMENT OF THE CASE

WILLIAM LESTER WITTER (hereinafter referred to as WITTER) was charged in an Information filed on January 21, 1994 with Murder with use of a Deadly Weapon; Attempt Murder with use of a Deadly Weapon; Attempt Sexual Assault with use of a Deadly Weapon; and Burglary. It was alleged that WITTER killed James Cox and sexually assaulted Kathryn Cox on November 14, 1993. (1 APP 1-5) After a preliminary hearing on January 7, 1994 WITTER was bound over to District Court and was arraigned and entered not guilty pleas on January 25, 1994. (2 APP 287) The State filed a Notice of Intent to Seek the Death Penalty on January 25, 1994.

After an eight (8) day trial WITTER was convicted of all counts. (2 APP 60-62; 63-66) The penalty hearing lasted four (4) days and resulted in a sentence of death. At formal sentencing the Court ran the sentences on all other counts consecutive to the murder conviction (2 APP 306). WITTER was represented by Phil Kohn and Kedric Bassett of the Clark County Public Defender's Office at trial.

The Public Defender also represented WITTER on direct appeal. The conviction and sentence were affirmed in Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996). WITTER'S Petition for Writ of Certiorari was denied by the United States Supreme Court on May 12, 1997.

On September 18, 1997 David M. Schieck, Esq. was appointed as counsel for WITTER on his post conviction relief proceedings

and a Petition for Writ of Habeas Corpus (Post Conviction) was timely filed October 27, 1997. (1 APP 67-98) Supplemental Points and Authorities were filed on August 11, 1998 (1 APP 99-137). An evidentiary hearing was granted and took place on February 26, 1999. (2 APP 178-229) After the parties filed post hearing briefs the District Court denied relief and Findings of Fact, Conclusion of Law and Order were entered on September 25, 2000. (2 APP 270-82; 283-84)

The instant appeal was filed on October 23, 2000. (2 APP 285-86)

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

STATEMENT OF FACTS

TRIAL PHASE

For purposes of this appeal, as was done for the post conviction proceedings, WITTER submits a summary of the underlying facts from the Opinion issued by this Court in Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996):

> "On November 14, 1993, Kathryn Cox (Kathryn) was working as a retail clerk for the Park Avenue gift Shop located in the Luxor Hotel in Las Vegas, Nevada. James Cox (James), Kathryn's husband, drove a taxicab in the Las Vegas area. At about 10:25 p.m., Kathryn called James and informed him that she was having trouble with her car and needed assistance. James told her that he would be over to pick her up in about twenty-five to thirty minutes. Kathryn returned to her car, got in, locked her door, and began to read a book.
>
> About five to ten minutes later, the passenger side door opened, and William Witter got into the car. Witter demanded that Kathryn drive him out of the lot. When Kathryn informed him that she could not, Witter stabbed her just above her left breast. Witter pulled Kathryn closer to him and told her that he was going to kill her. After stabbing Kathryn several more times, Witter became quiet, unzipped his pants and ordered Kathryn to perform oral sex. Kathryn attempted to comply with his demands, but because she had a punctured lung, she kept passing out. Witter pulled Kathryn into a sitting position and told her, "You're probably already dead." Kathryn managed to open her door and attempted to run away, but was only able to get about ten to fifteen feet before Witter caught her. Witter forced Kathryn back into the car and forced her to kiss him. He then used his knife to cut away Kathryn's pants and began to fondle her vaginal area with his finger.
>
> Kathryn observed her husband's cab pull up next to the driver's side of her car. Witter, not knowing that James was Kathryn's husband, held Kathryn close and stated, "Don't say anything. I'm going to tell him that you're having a bad cocaine trip." James opened the driver's side door of Kathryn's car and told Witter to get out. Witter got out of the car,

walked over to James, and stabbed him numerous times. James fell backwards and into Kathryn, who had gotten out of the car, knocking her to the ground. Kathryn got up and ran for a bus stop. Once again, Witter caught Kathryn and carried her back to her car. After pulling the rest of Kathryn's clothes off, Witter attempted to stuff James' body underneath James' cab. Kathryn then heard hotel security approaching her vehicle.

A security officer in charge of patrolling the Excalibur Hotel's employee parking lot approached Kathryn's car and confronted Witter. After a short standoff, the security officer's backup arrived, and Witter was subdued. Paramedics arrived a short time later, and Kathryn was taken to the hospital where she eventually recovered from her injuries. James was already dead when the paramedics arrived."

PENALTY PHASE

In the Supplemental Points and Authorities filed by WITTER in District Court WITTER included a detailed summary of the evidence presented at the penalty hearing. Citation therein was to the record on appeal from WITTER'S direct appeal. No issue was raised by the State that the summary did not accurately describe the evidence presented by both parties at the penalty hearing. WITTER therefore references the Supplemental Points and Authorities for the following factual summary.

On January 11, 1986 in San Jose, California WITTER went to the home of a former girlfriend, Gina Martin, and stabbed David Rumsey, her date for that evening. Property damage was also done, including slashed tires, broken flower pots and broken drapes. (1 APP 107)

At the time WITTER confronted Martin and Rumsey in the

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

residence carport, WITTER stated, "Come on, you white punk. I'll kill you. What are you doing with my old lady?" When WITTER was arrested, he yelled "Sure, I stabbed him. I should have brought my gun." The arresting officer noted that at the time he took WITTER into custody there was an odor of alcohol about his person, as well as slurred speech and glassy eyes and other testimony established that WITTER had a blood alcohol level of .21 percent at the time of his arrest (1 APP 107).

Linda Rose testified that she supervised WITTER on parole for the conviction arising out of the above-described incident (1 APP 107). WITTER sustained parole suspensions or additional incarceration time for incidents of absconding, in-custody misconduct, reckless driving, use of alcohol and use of methamphetamine. An "institutional summary" described a variety of arrests sustained by WITTER and that was an alcohol abuser. On one occasion Rose arrested WITTER in her office and WITTER agreed to the arrest and was cooperative throughout the handcuffing and search procedure (1 APP 108).

WITTER was arrested on July 20, 1993 for possession of an illegal weapon and vandalism arising out of throwing rocks through the windows of an ex-girlfriend's apartment. At the time of arrest WITTER had a strong odor of alcohol on his breath and bloodshot watery eyes (1 APP 108). Over WITTER'S objection, the arresting officer was allowed to tell the jury based on photographs of tattoos, that he concluded that WITTER was possibly a gang member even though the arrest of July 20,

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

1993 had nothing to do with gang activity (1 APP 109). Officer Timothy Jackson of the San Jose Police Department was also allowed to testify that in his opinion WITTER was a gang member. Jackson had contact with WITTER on October 9, 1993 on a domestic violence call. Property damage had been done to both a residence and vehicle (1 APP 109).

Thomas Piptone, a corrections officer at the Clark County Detention Center testified that on August 4, 1994 he conducted a search of WITTER'S cell and found a sharpened clip from a clipboard. WITTER denied to Piptone that the item was his, and denied any involvement with it (1 APP 109).

A number of witnesses testified that WITTER came from an alcoholic environment and that his mother drank during her pregnancy. The witnesses included; Ruth Fabela (Aunt), Tina Whitesell (sister), and Louis Witter (father). (1 APP 110-11)

Whitesall described the environment of their youth and recalled seeing their mother in bed with different men and one one of them hitting WITTER with a cane. She also remembered incidents of her mother chasing their father with a knife, and of him hitting her while she was pregnant. Their father wasn't around much because he was in prison. (1 APP 110) Defendant's father, Louis Witter, told the jury that he had three felony convictions for robbery, firearms possession by an ex-felon, and rape. He also acknowledged having problems with alcohol, heroin, methamphetamine, barbiturates and "whatever I could get my hands on." He described WITTER'S mother as an alcoholic and

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

heroin addict. When WITTER was older, he and his father would shoot up methamphetamine together. (1 APP 110-11)

Psychologist, Dr. Louis Etcoff testified that he conducted a three hour interview with WITTER in August of 1994, after having reviewed arrest reports, discovery, voluntary statements and the preliminary hearing transcript. Neuropsychological, IQ and two objective personality tests were administered to WITTER. The resultant diagnoses were: attention deficit hyperactivity disorder, marijuana, alcohol and amphetamine abuse, and antisocial personality disorder. According to Etcoff, WITTER grew up in one of the most dysfunctional families that he could remember studying and would have been better off without parents than having the parents that he had." In later testimony, Etcoff described WITTER'S background as "the quintessential environment that would produce someone who kills." (1 APP 111-12) Dr. Etcoff told the jury that alcohol has a disinhibiting effect, lessening people's control of their behavior. "[A]lcohol disinhibits in the brain a person's ability to stop whatever is inside from coming out." All of these factors, made WITTER a very violent person, especially when under the influence of amphetamine-like substances and particularly alcohol. WITTER told Dr. Etcoff that his bout of drinking on the night of the incident was brought about by his girlfriend informing him that same night that she had aborted their baby. This event generated a great amount of anger in WITTER. (1 APP 112)

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

EVIDENTIARY HEARING

On February 26, 1999 an evidentiary hearing was conducted in support of WITTER'S Petition for Writ of Habeas Corpus with the following testimony elicited:

Philip Kohn had been a licensed attorney since 1978 in California and since 1985 in Nevada. (2 APP 180) He was employed by the Clark County Public Defender from November, 1992 through January, 1999 at which time he became the Clark County Special Public Defender. (2 APP 180) He became the head of the murder team in November 1994. (2 APP 181) In November or December 1993 he was assigned to act as lead attorney for WITTER. (2 APP 181) Kedric Bassett served as second chair when the case proceeded to trial in June, 1995.

Kohn became aware of fetal alcohol syndrome (FAS) approximately during the summer of 1994 and undertook to investigate whether such a defense could be present in WITTER'S case. (2 APP 183-84). He, however, never hired an expert in FAS, which he admitted was a mistake. (2 APP 184) There was a picture of WITTER put into evidence when he was two or three years old in which his eyes look like they are right out of the book on FAS. (2 APP 186) In June 1995 when they went to trial Kohn had made contact with FAS experts but had not retained them nor met them in person. (2 APP 187)

The Court had denied Kohn's last request for continuance when he was working on FAS as a defense because he could see that WITTER was retarded. (2 APP 187) WITTER'S adolescent

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

behavior was also consistent with FAS in that he was well behaved until he was 14 and first started to drink and that was when he started getting in trouble. (2 APP 188)

One problem that Kohn had was that the FAS experts required a geneticist to examine WITTER and he could not find one. (2 APP 189-90) He could have made arrangements for a geneticist but he needed one more continuance from the Court and the request was denied. (2 APP 192) In chambers the trial judge told Kohn that if he had O.J.'s money he could do something like this, but did not believe Kohn could ever get it on. (2 APP 192) Kohn was unable to give the trial court a time from as to when the doctors would be able to come to Las Vegas and conduct the necessary examinations. (2 APP 194) Kohn was emphatic in chambers that a great deal could be done in the penalty phase. (2 APP 195)

At the penalty hearing Kohn laid the foundation for a FAS defense through witnesses about WITTER'S mother's alcohol problems. (2 APP 196)

The State presented evidence at the penalty hearing that WITTER was a member of a gang. (2 APP 197) Kohn had no notice that such evidence was going to be presented. (2 APP 198) When the State indicated that it would be calling experts on gangs from California, Kohn asked for a continuance, which was denied. (2 APP 199) If he had any idea what was coming he would have called a gang expert. (2 APP 200) He believed he could get a gang expert from California on short notice but not

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

within the next four days between verdict and the scheduled start of the penalty hearing. (2 APP 201)

Kohn had no plan of defense for the guilt portion of the trial, his only goal was to keep WITTER from receiving the death penalty. (2 APP 203) Kohn tried to keep as much credibility as possible in the guilt phase so the jury would listen to him in the penalty phase. (2 APP 203) WITTER was not happy about this as he wanted to win the case. (2 APP 204) Kohn was satisfied that was no defense to the murder charge and that to come up with some half-baked idea to give the jury would have turned them off. (2 APP 204) It was a strategic decision not to present a defense during the guilt phase. (2 APP 205) It was not his intent to waive objection to the presentation of the State's evidence. (2 APP 205)

Kohn testified concerning the failure to object to portions of the State's Opening Statement, which are discussed in the argument section below. (2 APP 205-8) Some of the failures to object were strategic and some were because he missed them. (2 APP 208)

Kohn did not submit a jury instruction at the penalty phase limited use of character evidence, but has since done so. (2 APP 209) He didn't argue it in WITTER'S case but should have done so. (2 APP 209) It was not a strategic decision. (2 APP 210)

Kohn tries cases differently now as a result of continued training, experience, and the evolution of issues. (2 APP 211-

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

12) If he tried WITTER'S case over again he would get a much better trial this time and he would have done things differently. (2 APP 212)

Robert Miller, a twenty year attorney with the Clark County Public Defender's Office prepared the direct appeal in WITTER'S case. (2 APP 220) Miller had not raised the Batson issue on direct appeal because he felt it wasn't a clean issue to present and that he did not have a chance to succeed based on the record. (2 APP 221-22) Miller felt it was incumbent upon him to raise all issues which he felt might have merit in both the federal or state system. (2 APP 222-23)

Miller failed to point out in his request for rehearing of the denial of the direct appeal that the Court had incorrectly stated that Kohn had a year's notice of a shank being found in WITTER'S cell. (2 APP 223-24) Miller simply missed the point. (2 APP 224) Miller did not raise the burden shifting argument of the State in closing argument because the objection had been sustained and the jury admonished. (2 APP 225) Miller could not recall why he had raised the jury selection issue involving consideration of mitigation. (2 APP 226) The bad acts from the PSI was not raised because Miller did not believe it would succeed, but if he was doing it over would raise the issue. (2 APP 227) Finally, Miller did not raise the admission of gruesome photographs because he did not believe it would succeed in State court or turn the tide in federal court.(2 APP 228)

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

ARGUMENT

I.

WITTER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

The United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) set forth the standard for determining the merits of a claim of ineffective assistance of counsel. In Strickland, supra, the Court stated in relevant portion:

> "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence, has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."

Id. 466 U.S. at 687, 194 S.Ct. at 2064. The question of whether a defendant has received ineffective assistance of counsel at trial in violation of the Sixth Amendment is a mixed question of law and fact and is thus subject to independent review. Strickland, 466 U.S. at 698, 104 S.Ct. 2070. State v. Love, 109 Nev. 1136, 865 P.2d 322 (1993). Independent review of the findings of the district court after the evidentiary hearing shows that the findings are not supported in substantial portion by the record of the proceedings.

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

The Sixth Amendment guarantees that a person accused of a crime receive effective assistance of counsel for his defense. The right extends from the time the accused is charged up to and through his direct appeal and includes effective assistance for any arguable legal points. Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The United State Supreme Court has consistently recognized that the right to counsel is necessary to protect the fundamental right to a fair trial, guaranteed under the Fourteenth Amendment's Due Process Clause. Powell v. Alabama, 287 U.S. 45, 53 S.Ct.55, 77 L.Ed. 158 (1932); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Mere presence of counsel does not fulfill the constitutional requirement: The right to counsel is the right to effective counsel, that is, "an attorney who plays the role necessary to ensure that the trial is fair." Strickland, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 657 (1984); McMann v. Richardson, 439 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d. 763 (1970).

Pre-trial investigation is a critical area in any criminal case and failure to accomplish same has been held to constitute ineffective assistance of counsel. The Nevada Supreme Court in Jackson v. Warden, 91 Nev. 430, 537 P.2d 473 (1975) stated:

> "It is still recognized that a primary requirement is that counsel . . . conduct careful factual and legal investigations and inquiries with a view toward developing matters of defense in order that he make informed decisions on his client's behalf both at the pleading stage . . . and at trial."

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

Jackson 91 Nev. at 433, 537 P.2d at 474. The Federal Courts are in accord that pre-trial investigation and preparation for trial are a key to effective representation of counsel. U.S. v. Tucker, 716 F.2d 576 (1983).

In U.S. v. Baynes, 687 F.2d 659 (1982) the Court, in language applicable to this case, stated:

> "Defense counsel, whether appointed or retained is obligated to inquire thoroughly into all potential exculpatory defenses and evidence, mere possibility that investigation might have produced nothing of consequences for the defense could not serve as justification for trial defense counsel's failure to perform such investigations in the first place. Fact that defense counsel may have performed impressively at trial would not have excused failure to investigate defense that might have led to complete exoneration of the Defendant."

In Warner v. State, 102 Nev. 635, 729 P.2d 1359 (1986) the Nevada Supreme Court found that trial counsel was ineffective where counsel failed to conduct adequate pre-trial investigation, failed to properly utilize the Public Defender's full time investigator, neglected to consult with other attorneys although urged to do so, and failed to prepare for the testimony of defense witnesses. See also, Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1991).

The decision of the District Court to deny WITTER'S Petition ignored the record and the failure of counsel to provide a full and vigorous defense to the charges, against the death penalty and on direct appeal. In order that this Court can fully review the specifics of the erroneous ruling, WITTER will set forth the allegations in the same order as in the

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

Supplemental Petition and set forth the applicable portion of the Court's ruling.

1. Failure to Investigate and Present Evidence at the Trial Portion of the Case on Fetal Alcohol Syndrome.

During the evidentiary hearing Kohn testified that he was aware of FAS as mitigation of sentence prior to the commencement of the trial. Despite being afforded a number of continuances to present the defense he failed to succeed in doing so and then was denied a final continuance. The record in this regard speaks for itself. Prior to the second day of jury selection Kohn admitted on the record that he was not fully prepared for trial:

> "MR. KOHN: ...Last Thursday, before calendar call, we met in chambers and the District Attorney and the Court and I talked about my client's previous motion to have me relieved as counsel, because he wanted someone to look at the FAS, in terms of a defense to his case.
>
> I think that's what was confusing yesterday on the record as to the 25th and all that. But in any case, I asked the Court for one more continuance; that I was satisfied that I did not have a defense to the trial phase; but in talking to experts in Seattle, Washington, it seemed there was a great deal that could be done in terms of the penalty phase.
>
> And I did not advise the Court that I had an expert on retainer, and I don't, and the Court pretty much said ....simply denied my motion to continue the case." (1 APP 7)

The record shows that the case was first set for trial on October 14, 1994 and continued on defense motion over the objection of the State. The trial was reset for May 1, 1995 and again continued over the State's objection at the request

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

of the defense. Both requests were to find an expert on fetal Alcohol Syndrome. The State objected to the final continuance and the Court sided with the State:

> "THE COURT: The Court's recollection of that motion in chambers was very much as the State put it; and that is, I had granted a couple continuances in the past to give the defendant not only time to procure a witness, but in fairness to the defendant's case, I through it was important that the Court go the extra mile in giving you time to procure an expert witness as to the Fetal Alcohol Syndrome.
>
> And in the Court's memory, the Court has given them almost a year to do that. And counsel keeps telling me what progress he hasn't made and the problems involved in doing that, but has made very little progress in actually finding an expert who'll testify in this case.
>
> And counsel asked for maybe three more weeks to do that, and the Court didn't think it reasonable, Mr. Kohn, to put off the trial once again, right at the last minute, to give you three weeks for something you haven't been able to do in more than a year, and have no leads really on people who have agreed to come down and do it, and that's why the Court denied the continuance." (1 APP 8-9)

Kohn presented no evidence of the effects of intoxication upon WITTER, choosing instead to simply concede that he was guilty of all of the charges in order to maintain his credibility with the jury. As evidenced by the record, WITTER wanted FAS presented as a defense to the charges and did not agree to the having his guilt conceded to the jury.

There is uncontradicted authority that trial counsel may never concede a defendant's guilt before a jury without the consent of the client. When counsel concedes guilty during the trial portion of the case in spite of the client's earlier plea

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

of not guilty and without the defendant's consent, counsel provides ineffective assistance of counsel regardless of the weight of the evidence against the defendant or the wisdom of counsel's "honest approach" strategy. Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983) (cert. denied, 470 U.S. 1059, 105 S.Ct. 1776 (1985)); Wiley v. Sowders, 647 F.2d 642 (6th Cir. 1981)(cert. denied 454 U.S. 1091, 102 S.Ct. 656 (1981)); State v. Harbison, 337 S.E.2d 504 (N.C. 1985)(cert.denied, 476 U.S. 1123, 106 S.Ct. 1992 (1986)). The adversarial process protected by the Sixth Amendment requires that the accused have counsel acting in the role of the advocate. The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. U.S. V. Cronic, 466 U.S. 648, 656, 104 S.Ct. 2039, 2045 (1984).

The findings by the District Court in denying WITTER'S petition were that trial counsel was effective because he investigated FAS as a defense and attempted to retain a FAS expert (2 APP 270-82). The record however is clear that no evidence was presented at the penalty hearing concerning FAS or the effects on WITTER from any of the witnesses called by trial counsel.

2. Failure to Investigate and Present Evidence at the Penalty Hearing.

During the evidentiary hearing, Kohn admitted that he could have obtained a gang expert from California to contest

that State's gang experts, but indicated that he did not have sufficient time to get the expert. However, a closer look at Kohn's testimony showed that he was on notice and should have had the expert or board and ready to testify:

> "Q. Would it have been prudent, based on those tattoos, to perhaps investigate whether or not he had any gang ties and there was any information that might come up at the penalty hearing?
>
> A. Mr. Witter and I discussed gang involvement. I knew that he had been in the California Youth Authority. I knew that he had been in the California Prison System.
>
> I practice law in California for 14 years and I have been a prosecutor in California. I was certainly aware of prison gangs.
>
> Would it have been prudent? Probably. I never saw it coming. His only -- the only way to get in gangs, to me, is -- when I am reading his file, is to show that at some point in his life he was a member of a gang that I would think would be so improper under the First Amendment. That never crossed my mind they would actually put on that evidence." (2 APP 200).

Thus it is clear that Kohn was not blind sided by the State but rather ignored the information in the hope that the State would not put it into evidence. The Court saw through this in denying the request to continue the penalty hearing:

> "Now counsel comes again, at this time, July 10th, at the time of the penalty hearing, and says, once again, they haven't had enough time to do whatever it is they need to do.
>
> And I have to inform counsel, again -- and I do it again on the record, generally these penalty hearings are held within two, three, four days after trial, and that's enough time to prepare.
>
> Counsel, at the time this trial started, said he wasn't ready. After a year and half of preparation

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

in this case, he still said he didn't have his experts and couldn't get experts and wanted a continuance at that time, and the Court denied it, because the Court felt like they'd had enough time to prepare.

Defense counsel has consistently said they wanted a continuance because they haven't had time to prepare.

Even since last Thursday, that's been four days to prepare for this penalty hearing; and defense counsel has access to the defendant all during those days, and all during the 12 or so days we've had since the time of the trial, has had access to his client." (1 APP 45-46)

The record shows that no gang expert was called by the defense to explain away the graphic testimony about gangs and violence. Neither was any witness called, either expert or non-expert, to explain that possession of a shank in prison is more a matter of simple survival than any indicia of violent character.

The findings entered by the District Court, in part, were that "Counsel was not deficient for failing to call a gang expert during the penalty hearing because he believed that gang evidence was only admissible if defendant had been a gang member at some point in his life." (2 APP 270-82). This finding misinterprets Kohn's testimony. In that Kohn related that he felt that all that the evidence would only show was that WITTER had been in a gang and that such information would not have been admissible under the First Amendment (2 APP 200). The record shows that trial counsel was wrong in this belief to the prejudice of his client at the penalty hearing.

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

3. Trial counsel failed to object to improper argument during the opening statement of the prosecutor.

During the evidentiary hearing Kohn was questioned concerning his failure to object to the various claimed improper arguments. His explanation follows each quoted argument:

> "...She will tell you she will never forget the look on the defendant's face as she looked into his eyes, and she'll describe the evilness she saw on the defendant's face that night" (1 APP 122)

With respect to this argument Kohn stated:

> "I knew it was close, that was, at that point tactically I was trying to still curry favor with the jury, and my feeling was, unless it was something truly objectionable that would have been maybe reversible. So, yes, I recall that. I remember hearing it, and I remember, you know, the hair on the back of my neck bristling, but I didn't think this was worth the objection" (2 APP 206).

The prosecutor further argued:

> "And the defendant then begins to approach Thomas Pummil and he's coming at Thomas Pummil, and Thomas Pummil too, like Kathryn Cox, sees evilness in this man and realizes there's something wrong and this man is bent on doing heinous, heinous evil things" (1 APP 122)

Kohn stated:

> "I don't remember this one as well, but certainly that was my thinking at the time, it is not egregious, let it go" (2 APP 206)

The prosecutor:

> "The evidence will prove this was a senseless murder; that a loving husband's life was lost in an effort to save his wife; that his wife, Kathryn Cox was subjected to evilness that many of us can't even imagine, the perpetration of sexual acts, the repeated stabbing and the intrusion into her car that

evening as she awaited her husband." (1 APP 122)

Kohn's explanation:

> "Again, same answers to evilness in terms of reference to that as being penalty phase. Victim impact in that didn't hit me. It hit me that paragraph was too argumentative. At the time it hit me, but I could tell he is winding down. It was argumentative and that goes to evilness, but I didn't think it was worth interjecting at the time" (2 APP 207).

The findings entered by the District Court with respect to the series of "evilness" arguments by the prosecutor in his Opening Argument was that it was trial strategy and therefore "virtually unchallengeable absent extraordinary circumstances" (2 APP 270-82). It seems that most everything that trial counsel failed to do or did improperly is considered by the findings to be great stategic decisions. This includes conceding the guilt of the client in opening statement. If this standard is permitted to prevail, there is no basis for any ineffective claim in the state courts of Nevada.

The prosecutor also went on to argue victim impact in his Opening argument:

> "Kathryn Cox will testify to not only the physical scars that this crime has left on her, but the emotional scars. The crime scene she sees again and again in her mind, as she will tell you she will never forget the defendant and his face, the tone of his voice and his actions that night as he perpetrated these evil acts." (1 APP 124)

Kohn's response:

> "Probably goes outside the bounds of telling the jury what they will hear. That's not for me to decide....I missed it" (2 APP 208)

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

With respect to the admitted failure to object to the improper victim impact argument, the District Court found that same was a stategic decision because "victim impact evidence is not categorically barred by the eighty amendment under Payne v. Tennessee, 501, 808, 111 S.Ct. 2597 (1991)" (APP) Unfortunately, there was no such testimony from Kohn that it was a strategic decision, but rather that he "missed" the objection.

It is respectfully urged that WITTER was denied his right to the effective assistance of counsel by the failure of his attorney to object and prevent improper and prejudicial arguments to the trial jury during the opening statement and that same denied WITTER to due process of law and a fundamentally fair trial.

4. Trial counsel failed to offer an instruction that informed the jury that character evidence could not be considered by the jury until after it had weighed the aggravating circumstances against the mitigating.

At the evidentiary hearing Kohn admitted that he should have raised the instant issue and that it was not a strategic decision on his part (2 APP 209-10). Subsequent to the evidentiary hearing in this case this Court expressly indicated that the instruction should be given in capital cases. Specifically in Byford v. State, 116 Nev. Ad. Op 23 (2000) the Court approved of an instruction that told the jury in relevant part:

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

"[o]ther arrests, conduct or bad acts, if any committed by ...[the defendant] are to be considered for character only and not as aggravating circumstances.

Evidence of any uncharged crimes, bad acts or character evidence cannot be used or considered in determining the existence of the alleged aggravating circumstance or circumstances"

The finding of the District Court was directly contrary to the holding in Byford, stating in relevant portion that:

"There is no Nevada authority which supports the defendant's contention that character evidence cannot be considered until after the jury determines that a defendant is death eligible. . . . A defendant's character is relevant to the jury's determination of the appropriate sentence for a capital crime, it is not limited to only after the jury decides the defendant is death eligible...." (2 APP 276)

Trial counsel was ineffective in not offering an instruction in accord with the above cases and WITTER was prejudiced thereby.

5. Appellate counsel failed to argue to the Nevada Supreme Court that WITTER'S Due Process Rights were violated by the State's exclusion of minorities from the jury panel.

With respect to this claim appellate counsel Miller explained his failure to raise the issue as follows:

"I felt in reviewing the transcripts that issue had just become too -- waters had become too muddy on it. It wasn't a clean issue to present. For one thing, there was a dispute as to some people thought she was black, some people thought that she wasn't. This is just off the straight transcripts. That was unclear whether the juror was even black. There was also the contaminating effect, if you will, that the defendant was not black and the objection was going to the exclusion of a black juror, and also the fact that the State stated a race neutral reason for exercise of the peremptory challenge. Based on that

I felt it got muddled enough. It was not a clean enough issue to raise. I didn't have a chance of succeeding" (2 APP 222)

The record is clear that trial counsel had raised a proper objection under Batson v. Kentucky.

"MR. KOHN: I believe his right to trial under the Fourteenth, Sixth and Seventh amendments is violated by them striking people of color. We are down to two black people, she's one of the two.

THE COURT: First off, I should note the defendant isn't a person of color, so I think it's an unusual challenge, but I'll let the State put on their reasons.

MR. GUYMON: Your Honor, I agree with your reading of the Batson case. My notes, I did not reflect anything about her race at all. My notes -- my statement as to 87 is absolutely blank, indifference as to race, other than the fact I put I did not believe she was capable of making a decision.

THE COURT: I should note I didn't know she was Hispanic or anything either. Her name is Elois Kline Brown. It's not a -- you say she's black?

MR. KOHN: She's black, your Honor.

THE COURT: I wasn't aware of that either, counsel.

I not that for the record and I overrule it in this matter, because I don't think it even applies in this instance." (1 APP 37).

It has long been the law that a defendant has the right to be tried by a jury whose members are selected pursuant to non-discriminatory criteria. Martin v. Texas, 200 U.S. 316, 321, 26 S.Ct. 338, 339 (1906); Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). The exercise of peremptory challenges by the government in a racially discriminatory manner violates a defendant's right to equal protection. A defendant may

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

establish a prima facie case under Batson by showing that "he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." Batson, 476 U.S. at 96, 106 S.Ct. at 1723. Second, the defendant is entitled to rely on the fact that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Avery v. Georgia, 345 U.S. 559, 562, 73 S.Ct. 891, 892 (1953). Finally, the defendant must show facts sufficient to raise an inference of interest by the government to discriminate based on all of the relevant circumstances. Batson, 476 U.S. at 96, 106 S.Ct. at 1723.

If a defendant presents a prima facie case of discrimination, the burden shifts to the government to come forward with a racially neutral explanation for the use of its strikes. To satisfy this requirement, the proffered reasons must bear some relationship to the case at bar. If the government offers explanations that are facially neutral, a defendant may nevertheless show purposeful discrimination by proving the explanation pretextual. U.S. v. Joe, 928 F.2d 99, 102 (4th Cir. 1991).

Trial counsel made a valid Batson objection to the first strike exercised by the State -- a strike that removed 50% of the African-Americans that had been cleared for cause. Appellate counsel should have raised a constitutional challenge to the jury selection, both because the issue had merit and to

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

preserve the issue for further review if necessary. It was a violation of the Sixth Amendment to fail to raise the issue on appeal.

The findings of the trial court were that appellate counsel was not ineffective in failing to raise the Batson, issue because trial counsel had failed to establish on the record that the juror in question was an African-American and that it was a weak argument. If the failure to raise the issue was due to the inaction of trial counsel, then this claim actually bolsters WITTER'S contention that trial counsel provided deficient assistance. However, the record reveals a sufficient basis to raise the issue and the failure to raise the federal constitutional claim may well result in the waiver of same in federal court. In either event WITTER has been prejudiced by the failure.

6. Appellate Counsel failed to Petition the Court for Rehearing on Clear Errors Contained in the Supreme Court's Opinion.

In addressing the issue concerning the continuance of the penalty hearing to allow trial counsel time to obtain a gang expert, the Nevada Supreme Court stated that:

> "In the present case, on June 20, 1995, almost a full year before the penalty hearing, the State notified Witter's counsel that it was investigating an alleged disciplinary problem (possession of a shank) involving Witter"

The record is clear that the penalty hearing occurred in July, 1995. The Supreme Court was operating under a false

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

factual belief when it issued it's opinion affirming WITTER'S penalty. Appellate counsel was obligated to bring such a glaring error to the court's attention and attempt to obtain a rehearing on the issue. When asked why the issue was not raised to correct the glaring error, appellate counsel stated at the evidentiary hearing that "I think I just flat out missed that one." (2 APP 224)

The findings entered by the district court indicated that WITTER was not prejudiced because this Court had indicated that even if a gang expert was called, "it would have done little to mitigate the defendant's involvement" (2 APP 274). While the Court did include such language in it's opinion, the finding does not take into account that such "little" bit of mitigation could make the difference between a death and life sentence and when taken in combination with the other errors enumerated herein would have been significant.

7. Appellate counsel failed to raise improper closing argument shifting the burden of proof.

During the closing argument of the State at the trial phase of the proceedings the following occurred:

> "I submit to you that there has been no evidence of how alcohol affects a person's state of mind and their intent or their ability to form intent, or just what effect alcohol may or may not have to impair a person's state of mind or intent. Neither the State nor the defense called a witness to that effect. There is no evidence of mental impairment.
>
> MR. KOHN: Your Honor, I'd object. Counsel is commenting on what we did and we have no burden. I think that is improper.

THE COURT: That's true. The jury knows that there is no burden. He's just saying what was and was not presented at the time of trial." (1 APP 131)

It is generally outside the bounds of proper argument to comment on a defendant's failure to call a witness. Colley v. State, 98 Nev. 14, 16, 639 P.2d 530, 532 (1982). This can be viewed as impermissibly shifting the burden of proof to the defense. Barren v. State, 105 Nev. 767, 778, 783 P.2d 444, 4561 (1989). Such shifting is improper because "[i]t suggests to the jury that it was the defendant's burden to produce proof by explaining the absence of witnesses or evidence. This implication is clearly inaccurate. Barron, 105 at 778. See also, Ross v. State, 106 Nev. 924, 803 P.2d 1104 (1990); In re Winship, 397 U.S. 358 (1970).

Appellate counsel gave the following reasoning for not raising the issue on direct appeal:

> "I think my thinking on that was that at that point the objection was made and basically the objection was sustained. Mr. Kohn made the objection. I think the Court's response was something like, that's right. The jury knows there is no shifting of the burden, the then the court went on to make some explanation as to how it interpreted the comment. Basically what you has was an objection and standing of the objection, and, no as far as I recall, no follow up after that with a motion to strike or with a motion for mistrial, and to the best of my recollection, that probably, the failure or the lack of those motions is the reason that I didn't follow up on it." (2 APP 225)

The finding of the District Court on this issue was that there was no improper shifting of the burden of the proof in the argument under Lisle v. State, 113 Nev. 679, 941 P.2d 459

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

(1997).

It is respectfully urged that the argument was indeed improper and should have been raised by appellate counsel on direct appeal as opposed to omitted and possibly waived for the purposes of any future proceedings.

8. Appellate counsel failed to raise the denial of trial counsel's challenge for cause of juror Miller.

During voir dire trial counsel challenged juror Miller for cause and same was denied by the Court:

> "MR. KOHN: Do you believe the way in which a defendant was raised in important to your decision as to penalty?
>
> MR. MILLER: No.
>
> MR. KOHN: Can you explain that?
>
> MR. MILLER: I think the individual should be accountable for his self. How he was raised -- I was raised in the coal country. It didn't bother me. I went to school. Everybody has the same opportunities. I think it's what you make of yourself.
>
> MR. KOHN: So if we put on evidence of a bad childhood, that's not something you would consider in mitigation stage; is that correct?
>
> MR. MILLER: Yes.
>
> MR. KOHN: You would not consider it, right?
>
> MR. MILLER: No, I would not consider it.
>
> MR. KOHN: Your Honor, I would ask he be struck for cause." (1 APP 21-22).

After the Court inquired, juror Miller changed his testimony and stated that he would consider the evidence of childhood, but then when Mr. Kohn again asked him, Miller

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

stated that he may not have to agree and that he really didn't think that childhood mattered (1 APP 25). Kohn then renewed the challenge for cause and the Court again denied same (IV, 45). At the next break a full record was made concerning the challenge (1 APP 30-34).

At the end of the preempt process, KOHN was required to use his last preempt against Miller (1 APP 133), and then noted that there was another jury that he would have preempted if he had not had to use his last one on Miller (1 APP 133).

In Thompson v. State, 111 Nev. 439, 894 P.2d 375 (1995) the Nevada Supreme Court reversed a conviction of four counts of robbery with use of a deadly weapon based on the failure of the trial court to grant a challenge for cause as to one potential juror. In reversing the conviction the Court noted, and cited with approval, Bryant v. State, 72 Nev. 330, 305 P.2d 360 (1956) that:

> "It is not enough to be able to point to detached language which, alone considered, would seem to meet the statutory requirement, if, on construing the whole declaration together, it is apparent that the juror is not able to express an absolute belief that his opinion will not influence his verdict."

Bryant, 72 Nev. at 334-35.

The Thompson Court then went on to state that:

> "We also conclude that it was prejudicial error that prospective juror number eighty-nine was not excused for cause. At the conclusion of voir dire, the defense had exhausted all four of its peremptory challenges. Therefore, if the defense had used one of its peremptory challenges to excuse prospective juror number eighty-nine, then a juror that was unacceptable to the defense would have remained on

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

the jury."

Thompson, 111 Nev. at 442-443. Kohn cited the Thompson case to the Court during his challenge to juror Miller. The matter was properly preserved and a valid issue and should have been raised on direct appeal. When asked to explain his reasoning in not raising the issue appellate counsel testified:

> "Q Why not?
>
> A I really don't recall why I didn't raise that on appeal.
>
> Q So it is possible you missed it or possible you didn't believe it had any merit?
>
> A I think I probably reviewed it and was aware of it, but as far as to what my specific reasoning on it was, I don't recall." (2 APP 226)

The findings of the District Court on this issue was that "appellate counsel was correct in not raising the issue...[as t]his issue would have lost on appeal unless the defendant could prove that the trial court abused it's discretion." (2 APP 280) In this instance the District Court is substituting it's opinion for that of the appellate court as opposed to determining whether trial counsel should have raised the issue, along with a myrial of other issues. WITTER has been prejudiced by the failure of appellate counsel to include all issues of arguable merit on the appeal of a capital conviction.

9. Appellate counsel failed to raise the issue of tenuous and specious evidence to support the allegations of juvenile rape and force and violence in prison.

During the course of the penalty hearing trial counsel

objected to the WITTER'S parole officer reading into the record a history that was not supported by sufficient factual specificity or corroboration:

> "MR. KOHN: Yes, Your Honor.
>
> When the State placed in evidence yesterday the parol evidence, I approached the Bench and objected, and the Court -- I assume the Court meant I could put on the record later my objection.
>
> THE COURT: Sure.
>
> MR. KOHN: There were two considerations. One was about a rape. There's one line in the report that talks about a rape when he was 15; did some juvenile hall time.
>
> Doesn't discuss if it's a misdemeanor, felony or even if there was an adjudication.
>
> There was also a line that Miss Rose testified to, as to an incident of force and violence in the prison, but never tells what it was or what the allegation were. And my concern is that you have these bald allegations without any type of explanation.
>
> And I was looking at the D'Agostino, cap D-a-g-o-s-t-i-n-o, versus State, 107 Nevada 1001, and I believe that is just the type of evidence that they meant to exclude. And I asked the Court to exclude it and the Court indicated it was going to allow that evidence anyway." (1 APP 49)

The language and reasoning of the Court, in D'Agostino v State, 107 Nev. 1001, 823 P.2d 283 (1991) has broad application to the admission of evidence of any prior crimes:

> "...but it should be remembered that in death cases the proof of other crimes is intended not to show the guilt of the accused but, rather, to display the character of the convict and to show culpability and just deserts on the party of the homicidal convict. Past criminal activity is one of the most critical factors in the process of assessing punishment, for whatever purpose punishment might be inflicted. Past

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

> misconduct relates to the criminal's blameworthiness for the charged homicide and relates, as well, to whether the jury deems it necessary for public safety to impose an irrevocable, permanent quarantine upon the murderer...Improperly admitted evidence of past criminal conduct is even more damaging in a penalty hearing than it is in a guilty-determining proceeding because the past conduct goes to substance of whether the murder should or should not be punished by death...."

D'Agostino, 107 Nev. at 1003-4.

Appellant counsel was ineffective in not raising this issue on direct appeal. When questioned at the evidentiary hearing he explained:

> "I think my thinking at that time was probably that in light of the Crutch opinion that may well have been -- that the Crutch opinion may have closed that door. In retrospect, I am not so sure I make the same decision now. If I were writing that opinion, that appeal again today, I might well have included that." (2 APP 227)

With respect to this issue, the District Court found that the evidence was reliable and that any appeal on the issue would have been unsuccessful. WITTER urges that this Court would have considered the issue and found error on the direct appeal and that appellate counsel should have raised the issue.

10. Appellate counsel failed to raise the issue concerning the admission of gruesome and prejudicial photographs which had been preserved for appeal by trial counsel.

At numerous times during the proceedings, trial counsel objected to the use of unnecessarily bloody and gruesome photographs on the grounds that the probative value of the photographs was outweighed by their prejudicial impact. The

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

objections were to photographs of the bloody interior and exterior of the cab, the bloody knife, and autopsy photographs. Appellate counsel failed to raise the issue on the direct appeal and offered the following explanation:

> "That was a strategic decision in -- first of all, as to the chance of prevailing in the Nevada Supreme Court, the opinion seemed to be solely on what is so gruesome and so horrific that the court is willing to find error there. I have not seen one prevail, unless you have, again, a picture of a child with intestines laid out with the innards laid out, which is what we need to define.
>
> I didn't see it as something that would turn the tide in federal court, so it was based on those reasons. It was a strategic decision not to include those issues, this issue." (2 APP 228)

The finding of the District Court after the evidentiary hearing was that "Appellate counsel was effective in deciding to exclude this unpersuasive argument in light of the Nevada case law." (2 APP 276) Once again WITTER takes exception to the effectiveness of appellate counsel that refuses to raise issues that have been preserved for review during a capital trial because he has some concerns that he may not prevail on direct appeal. Such decisions create a waiver that could follow a case through various levels and result in the loss of a meritorious claim. Counsel was ineffective in failing to raise this issue on direct appeal.

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

CONCLUSION

Trial counsel failed to make contemporaneous objections on valid issues, failed to fully investigate and present evidence in defense and mitigation, and appellate counsel failed to raise meritorious issues on direct appeal in violation of WITTER'S rights under the Sixth Amendment to effective counsel and under the Fifth and Fourteenth Amendments to due process and a fundamentally fair trial and the conviction and sentence must be overturned and remanded for further proceedings.

Dated this 6 day of April, 2001.

RESPECTFULLY SUBMITTED:

DAVID M. SCHIECK, ESQ.
Nevada Bar No. 0824
302 E. Carson, Ste. 600
Las Vegas NV 89101
702-382-1844
Attorney for WITTER

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose, I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: April 6, 2001

BY_____
DAVID M. SCHIECK, ESQ.
Nevada Bar No. 0824
The Law Office of David M. Schieck
302 East Carson, Suite 600
Las Vegas, Nevada 89101
702-382-1844

CERTIFICATE OF MAILING

I hereby certify that service of the Appellant's Opening Brief was made this 9 day of April, 2001, by depositing a copy in the U.S. Mail, postage prepaid, addressed to:

Clark County District Attorney
200 South Third St.
Las Vegas, Nevada 89155

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

KATHLEEN FITZGERALD, an employee
of David M. Schieck

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844