

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Case No. 36991

FILED

JUL 30 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
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APPELLANT'S SUPPLEMENTAL OPENING BRIEF

(Appeal from Judgment of Conviction)

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1 Honorable Jeffrey Sobel, District Court Judge. (XI ROA 1813).

2 On or about June 9, 2000, the jury returned a verdict of guilty
3 on all thirteen (13) counts. (XIV ROA 3239-3247). There was no special
4 verdict form to determine under which murder theory the Defendant was
5 convicted.

6 On June 13, 2000, the penalty phase began. (XIV ROA 3249). The
7 jury began verdict deliberations on June 15, 2000. (XVI ROA 3923).
8 On June 16, 2000, a hung jury was declared contemporaneously with the
9 jury returning a verdict form which listed 23 mitigating factors
10 against death signed by the jury foreperson. (XVII ROA 4012-4015; XIX
11 ROA 4591-4592)

12 On July 20, 2000, the court denied Appellant's motion for
13 imposition of life without the possibility of parole as well as his
14 request for a statistical analysis of how the two other judges for the
15 three judge panel were picked. (XVII ROA 4180-4190). Additionally,
16 the trial court judge felt that the three-judge panel would eventually
17 be declared unconstitutional. (XVII ROA 4182).

18 On July 24, 2000, over the objection of Appellant, the three-
19 judge panel assembled consisting of the Honorable Judges: Jeffrey D.
20 Sobel, Michael R. Griffin, and Steve Elliot. (XVIII ROA 4191).

21 On July 28, 2000, the three-judge panel, having found that the
22 two aggravating circumstances or circumstances outweighed the two
23 mitigating circumstance found and that the circumstances did not
24 warrant a sentence of life, imposed a death sentence as to counts XI
25 through XIV, murder of the first degree with use of a deadly weapon.
26 (XIX ROA 4580-4581).

27 On October 3, 2000, the trial court denied Appellant's motion to
28 set aside death sentence/or motion to settle record. (XIX ROA 4636-

1 4644). A sentence of death was imposed on counts XI through XIV. The
2 order of execution and warrant of execution signed and filed in open
3 court, with an automatic stay of execution. (XIX ROA 4636-4644).

4 This appeal followed.

5 After briefing was complete and oral argument was set in the
6 present case for June 26, 2002, the United States Supreme Court ruled
7 in Ring v. Arizona, 536 U.S. ____ (filed June 24, 2002) concerning the
8 constitutional ban on bench deliberated sentences of death. Pursuant
9 to an Order of this Court filed June 25, 2002, the instant
10 supplemental brief on the issue of the impact of the Ring decision is
11 submitted.

12 **SUPPLEMENTAL FACTUAL STATEMENT**

13 While the police pursued an investigation of Donte Johnson and
14 co-defendants, Sikia Smith and Terrell Young, no similar investigation
15 was conducted concerning the three other individuals who lived with
16 Donte Johnson and who were giving police information about the
17 crimes. (XIII ROA 3057-3067) These three other individuals, Tod
18 Armstrong, Ace Hart and Bryan Johnson were at the time giving
19 conflicting information to the police and were, themselves, implicated
20 in the set-up and expected share of the proceeds of the drug-rip off
21 attempt which ostensibly resulted in the deaths at issue. (XIII ROA
22 3057-3067). The State has relied heavily on the testimony of these
23 same three men. (Respondent's Answering Brief, page 8-11).

24 Co-defendants Smith and Young were convicted of murder and
25 received life sentences in separate trials. (XIX ROA 4530). Likewise,
26 Donte Johnson did not receive a death sentence from a jury. His
27 penalty came at the hands of the three-judge panel. (XIX ROA 4580-
28 4581).

1 At the penalty hearing in front of the jury, there was much live
2 testimony concerning Donte Johnson's past and his conduct during
3 incarceration.

4 Donte Johnson's mother, Eunice Cain testified as to the
5 abusiveness of Donte's father (XVI ROA 3625-3627). She testified as
6 to how Donte used to try to intervene and protect the family even as
7 a small child (XVI ROA 3628-3630). She testified as to her own drug
8 use of PCP when she was in charge of her own children. (XVI ROA 3635-
9 3637). She testified as to the horrible living conditions and
10 economic problems caused by her drug use. (XVI ROA 3638-3640).

11 Donte Johnson's cousin, Keonna Bryant, testified as to the family
12 tree and the horrible impact of the adults drug use on the children's
13 lives including Donte. (XVI ROA 3651-3663). This included a time when
14 they were all living in a small space without a bathroom and had to
15 utilize a bucket. (XVI ROA 3664-3668). She also recounted the time
16 when Donte was a child where they were placed in the State's custody
17 in a difficult living environment. (XVI ROA 3669-3670). She noted the
18 gang problem and influence that tried to infect the kids in her
19 household. (XVI ROA 3674). She painfully depicted an event where she
20 was raped by a gang member in front of Donte who couldn't help because
21 he was only 10. (XVI ROA 3675-3678). She indicated that Donte was
22 forced to join a gang or she and other family members would be raped
23 by the gang. (XVI ROA 3680-3683). She described Donte being beat up
24 by the gang as a result he was precluded from spending as much time
25 with the family. (XVI ROA 3682-3685).

26 Donte Johnson's sister, Johnnisha White testified as to many of
27 the same matters and also indicated times when she and Donte were
28 locked in a closet. (XVI ROA 3687-3717). She indicated that because

1 of Donte's joining of the gang, her family was spared the continual
2 harassment they had previously suffered from the gang. (XVI ROA 3719).

3 Dr. Zakee Matthews, a child and adolescent psychiatrist testified
4 that after evaluating the societal and education records of Donte
5 Johnson, he was able to explain the negative impact on Donte of the
6 traumatic events in his life as well as no adult male role model. (XVI
7 ROA 3729-3777).

8 Moses Zamora testified as the challenges of a young, black man
9 growing up in the gang infested streets of South Central L.A. (XVI ROA
10 3800-3816).

11 Nancy Hunterton is a trained and certified reality therapist who
12 teaches classes in the Clark County Detention Center to inmates. (XVI
13 ROA 3825). She testified that she met Donte Johnson through one of the
14 programs in jail (XVI ROA 3827). She testified as to his ability to
15 show genuine care for the feelings of others. (XVI ROA 3833-34, 3848).
16 She indicated that she interacts with people "much worse than Donte."
17 (XVI ROA 3836).

18 Defendant allocuted his feelings of sorrow and sympathy in front
19 of the jury. (XVI ROA 3857-3858).

20 Defendant's grandmother, Jane Edwards, testified as the good
21 character of Donte Johnson. (XVI ROA 3859-3863).

22 The jury was hung as to penalty but submitted to the Court the
23 signed special verdict form which outlined 23 mitigating factors (2
24 statutory and 21 that the jury came up with upon its own
25 deliberations) which were:

26 1. The murder was committed while the Defendant was under the
27 influence of extreme mental or emotional disturbance.

28 2. The youth of the defendant at the time of the crime.

- 1 3. Witness to father's physical and emotional abuse of mother.
- 2 4. Witness to drug abuse of parents and close relatives.
- 3 5. Abandonment by parents.
- 4 6. Poor living conditions while at great grandmother's.
- 5 7. Turned into police by great grandmother.
- 6 8. Crowded living conditions while at grandmother's house.
- 7 9. Very violent neighborhood.
- 8 10. Witness to various acts of violence in neighborhood.
- 9 11. Had to live a guarded life.
- 10 12. Grandmother's second house was even more crowded.
- 11 13. No way to avoid gangs at second house.
- 12 14. Gang intimidation.
- 13 15. Could not comply with parole conditions- other gang
- 14 territories.
- 15 16. Indications he may have wanted to return to parole school.
- 16 17. Lack of positive male role model.
- 17 18. **Lifestyle of vicitms.**
- 18 19. **No eyewitness to identity of shooter.**
- 19 20. Killings happened in a relatively short period of time - more
- 20 isolated incident than pattern.
- 21 21. No indication of violence while in jail.
- 22 22. Appears to excell (sic) in structured environment of jail.
- 23 23. Joined gangs to protect family. (XVI ROA 4591-4592, emphasis
- 24 added).

25 Upon re-trial of the penalty phase in front of the three-judge
26 panel there was no indication in the record whether or not Judge
27 Elliot read the transcripts of the trial. There was however a
28 recitation by both parties before the three judge panel as to both the

1 penalty and trial phases. (XVIII ROA 4191 - 4426; XIX ROA 4446-4579).
2 This included the live witness testimony of Eunice Cain, Keonna
3 Bryant, Johnissha White, Nancy Hunterton, and Jane Edwards and the
4 transcripts of Dr. Matthews and Moses Samora.

5 The three judge panel found two aggravators (felony-murder,
6 multiple homicide) and two mitigators (youth of defendant, horrible
7 childhood). (XIX ROA 4581).

8 ARGUMENT

9 On June 24, 2002, the United States Supreme Court laid to rest
10 specific issues regarding the Constitutionality of judge imposed
11 sentences of death. Ring v. Arizona 536 U.S. ____ (2002). After a
12 deadlock in the jury deliberating his sentence, the Defendant
13 challenged the Constitutionality of NRS 175.556, and Nevada's
14 sentencing structure of convening a three-judge panel. (XVII ROA
15 4019-4095). Donte Johnson primarily based his argument at trial on
16 the United States Supreme Court decision in Apprendi v. New Jersey,
17 530 U.S. 466 (2000). The Ring decision stems from the inability to
18 accord the holdings in Apprendi with judge-based imposition of death.
19 536 U.S. ____ (2002). The United States Supreme Court in upholding
20 Apprendi and specifically overruling its prior decision in Walton v.
21 Arizona, 497 U.S. 639 (1990) has made certain irrefutable holdings and
22 throws into the serious doubt the continued propriety of Nevada's
23 three-judge panel sentencing scheme.

24 First, it is settled that a judge is disallowed from making a
25 finding of fact that raises a defendant's maximum penalty. Jones v.
26 United States, 526 U.S. 227 (1999); Apprendi v. New Jersey, 530 U.S.
27 466 (2000). The question with respect to capital proceedings was set
28 forth: is the required finding of an aggravator beyond a reasonable

1 doubt one which "raises a defendant's maximum penalty."
2 Unequivocally, the United States Supreme Court has held that in all
3 capital cases, "the finding of an aggravating circumstance which makes
4 a defendant eligible for death is one which has the effect of raising
5 the maximum penalty." Ring v. Arizona, 566 U.S. ____ (2002).

6 Second, the Ring court re-affirmed that under the Sixth and
7 Fourteenth Amendments to the United States Constitution, capital
8 defendants "are entitled to a jury determination of any fact on which
9 the legislature conditions an increase in their maximum punishment."
10 Ring v. Arizona, 566 U.S. ____ (2002) (slip opinion page 2, emphasis
11 added).

12 Finally, the Court issued a mandate that in evaluating capital
13 structures, "the relevant inquiry is one not of form, but of effect."
14 Ring v. Arizona, 566 U.S. ____ (2002) (slip opinion page 17 citing
15 Apprendi at 494).

16 Whatever other arguments the State will set forth, or however,
17 the State will attempt to excuse Nevada's capital structure from the
18 Constitutional mandates of Ring, the United States Supreme Court has
19 clearly set forth the ground rules in any further discourse on capital
20 sentencing with these holdings.

21 In essence, any evaluation of the decision at hand will leave the
22 reader with only one assessment: that the United States Supreme Court
23 has determined juries, not judges, are the only proper body to
24 evaluate the existence or non-existence of any factors which
25 specifically expose a person convicted of first degree murder to a
26 sentence of death.

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1 I.

2 THE STATE HAS ALREADY CONCEDED THAT NEVADA'S
3 DEATH PENALTY SCHEME IS INDISTINGUISHABLE FROM
4 THAT INVALIDATED IN ARIZONA IN RING.

5 In Arizona, after a person is convicted of first degree murder
6 by a jury, the trial judge then sits as a trier of fact to determine
7 whether a statutory aggravating circumstance exists before weighing
8 mitigating factors and making a determination of the sentence, which
9 at that time could include death. See Ring v. Arizona, 536 U.S. ____
(2002) (slip opinion page 9); **Arizona Revised Statutes, section 13-703.**

10 In Nevada, after a person is convicted of first degree murder by
11 a jury and the State is seeking the death penalty, a hearing to
12 determine punishment including death commences in front of the jury.
13 **NRS 175.554.** The jury is to make factual determinations as to (1)
14 whether a statutory aggravating circumstance exist before (2) finding
15 whether mitigating factors exist before (3) weighing the mitigating
16 and aggravating circumstances and making a determination of the
17 sentence, which if no mitigator(s) outweigh the aggravator(s) may
18 impose a sentence of death. **NRS 175.554.**

19 The United States Supreme Court has declared the Arizona
20 structure unconstitutional because the judge, not the jury, makes the
21 factual finding regarding the existence of statutory aggravating
22 circumstance(s). Ring v. Arizona, 536 U.S. ____ (2002). In a
23 footnote, the Ring Court identified that the **jury based** structure of
24 Nevada met constitutional standards. Id. at footnote 6, citing **NRS**
25 **175.552.**

26 When a jury after deliberations is deadlocked, the Nevada Revised
27 Statutes provide for a three-judge panel which serves the identical
28 function given to the judge in Arizona. **NRS 175.556.** The Arizona

1 "judge fact finder" and the Nevada "panel of judge fact-finders" are
2 identical in function and effect. Arizona was invalidated by Ring,
3 and now, the aspect of the Nevada Revised Statutes that provides for
4 Nevada judges to engage in the same function must also be deemed an
5 unconstitutional means to obtaining the death penalty against a
6 defendant.

7 There is no salvation based on the fact that a jury is first
8 given the responsibility of making the factual determinations of the
9 existence of statutory aggravators. The three-judge panel in Nevada
10 is not bound by, nor is there any indication that the three-judge
11 panel even looks to the jury for an advisory posture when it comes to
12 the imposition of death. Essentially, when the jury deadlocks - their
13 role in the Sixth Amendment-protected determination of facts which
14 expose a Defendant to a sentence in excess of the maximum penalty
15 ends. The three-judge panel, like the judge in Arizona, then picks
16 up from scratch and in violation of the Sixth Amendment makes factual
17 determinations. There can be no argument that the intervening jury
18 deliberations somehow protect Nevada from its unconstitutional
19 structure.

20 Further, there is no substantive distinction that separates
21 Nevada's system from the Arizona system. In fact, the State in the
22 case, *sub judice*, has already committed to the indistinguishability
23 of Nevada's method from Arizona's method.

24 The State indicates in no uncertain terms:

25 "The capital-sentencing procedures approved in Walton, 497
26 U.S. 639 (1990), are the same as in Nevada." (Respondent's
Answering Brief, page 47, lines 5-6).

27 Walton was specifically overruled by Ring. 536 U.S. ____ (2002).

28 // //

1 II.

2 THE FINDINGS OF THE JURY IN THE CASE, SUB JUDICE,
3 REVEAL THE FUTILITY OF ATTEMPTS TO SALVAGE
4 NEVADA'S THREE-JUDGE PANEL SYSTEM AFTER RING.

5 In seeking alternate theories of criminal liability for the
6 capital murder conviction of Donte Johnson, it is unknown whether the
7 jury felt Donte Johnson was the actual shooter in the present case.
8 In fact, the signed Special Verdict form of the jury concerning
9 mitigators included, "no eyewitness to identity of shooter" as a
10 mitigating factor to be weighed against the imposition of death. (XIX
11 ROA 4591-92). It cannot be disputed that determination of the actual
12 shooter is vital in determining the appropriate sentence.

13 The three-judge panel, on the other hand, did not identify the
14 same mitigator. In fact, there were numerous mitigating factors found
15 by the jury that were not found by the three-judge panel, including,
16 lifestyle of the victims, the murder committed while under the
17 influence of extreme mental or emotional disturbance, the absence of
18 pattern of killing, the ability of the defendant to excel in a
19 structured environment. (XIX ROA 4591-92).

20 One need look no farther than the concurring opinion of Justice
21 Scalia in Ring to see the danger in abdicating factual determinations
22 in criminal proceedings to judges.

23 ...the accelerating propensity of both state and federal
24 legislatures to adopt "sentencing factors" determined by
25 judges that increase punishment beyond what is authorized
26 by the jury's verdict...cause me to believe that our
27 people's traditional belief in the right of trial by jury
28 is in perilous decline. That decline is bound to be
confirmed, indeed accelerated, by the repeated spectacle of
a man's going to his death because a judge found that an
aggravating factor existed. We cannot preserve our
veneration for the protection of the jury in criminal cases
if we render ourselves callous to the need for that
protection by regularly imposing the death penalty without
it.

1 Indeed, the State of Nevada is addressing this very same
2 protection of the Sixth Amendment, and the Defendant requests that
3 this Court take judicial notice pursuant to **NRS 47.150**, that a bi-
4 partisan subcommittee of the Nevada Legislature unanimously voted to
5 repeal the portion of the Nevada Revised Statutes whereupon a
6 deadlocked capital jury then falls to a three-judge panel. The
7 Defendant points to the minutes of the *Nevada Legislative Commission's*
8 *Subcommittee to Study the Death Penalty and Related DNA Testing*,
9 Minutes, June 14, 2002; also reported at the Las Vegas Review-Journal,
10 June 15, 2002, *Panel Opposed Execution Ban For Juveniles*.

11 Ultimately, the Defendant is concerned that the State is taking
12 a posture that three-judge panels can continue to find aggravators
13 after Ring. Thereby, the State is advocating a violation of not only
14 his, but the Sixth Amendment rights of others similarly situated.
15 Indeed, the State may make certain forceful arguments, however, the
16 Defendant would finally point the Court to the doctrine of
17 Constitutional Construction.

18 Where a statute is susceptible of two constructions, by one of
19 which grave and doubtful constitutional questions arise and by the
20 other of which such questions are avoided, our duty is to adopt the
21 latter." United States ex rel. Attorney General v. Delaware & Hudson
22 Co., 213 U.S. at 408. This "cardinal principle," which "has for so
23 long been applied by this Court that it is beyond debate," Edward J.
24 DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades
25 Council, 485 U.S. 568, 575, 99 L.Ed.2d 645, 108 S. Ct. 1392 (1988),
26 requires merely a determination of serious constitutional doubt, and
27 not a determination of unconstitutionality. That must be so, of
28 course, for otherwise the rule would "mean that our duty is to first

1 decide that a statute is unconstitutional and then proceed to hold
2 that such ruling was unnecessary because the statute is susceptible
3 of a meaning, which causes it not to be repugnant to the
4 Constitution." United States ex rel. Attorney General v. Delaware &
5 Hudson Co., 213 U.S. at 408.

6 There is great weight and authority that the Nevada structure of
7 judge imposed death is unconstitutional. As such, if there is any
8 question in this Court's opinion that Ring even may impact the
9 continued viability of the three-judge panel structure, it must rule
10 it unconstitutional.

11 Nonetheless, the United States Supreme Court on this very issue
12 has issued a mandate that form NOT be placed over effect. The effect
13 of **NRS 175.556** was a violation of the Sixth Amendment rights of Donte
14 Johnson when the three-judge panel imposed a sentence of death.

15 Not to say that three-judge panels need to be abolished, for
16 certainly, in the event that this Honorable Court does not impose a
17 sentence less than death in the present case, the Nevada Statutes
18 provide that a three-judge panel be convened; the consideration,
19 thereafter, being sentences of life with the possibility of parole,
20 life without a possibility of parole or a term of years (all of which
21 fall within the maximum sentence specifically authorized alone by the
22 jury verdict).

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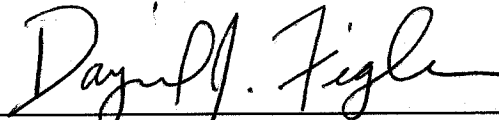
1 CONCLUSION

2 For the reasons more fully articulated above, Ring requires
3 the immediate vacation of the sentence of death in this case.

4 Respectfully submitted,

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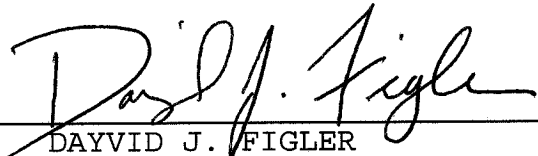
1 CERTIFICATE OF COMPLIANCE

2 I hereby certify that I have read this appellate brief, and
3 to the best of my knowledge, information, and belief, it is not
4 frivolous or interposed for any improper purpose. I further certify
5 that this brief complies with all applicable Nevada Rules of Appellate
6 Procedure, in particular NRAP 28(e), which requires every assertion
7 in the brief regarding matters in the record to be supported by a
8 reference to the page of the transcript or appendix where the matter
9 relied on is to be found. I understand that I may be subject to
10 sanctions in the event that the accompanying brief is not in
11 conformity with the requirements of the Nevada Rules of Appellate
12 Procedure.

13 DATED this 24th day of July, 2002.

14 PHILIP J. KOHN
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I declare under penalty of perjury that the foregoing is true and correct.

h day of July, 2002.


DONNA POLLOCK

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By Margie English