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IN THE SUPREME COURT OF THE STATE OF NEVADA

DONTE JOHNSON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 36991

FILED

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APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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DONTE JOHNSON, Appellant, vs. THE STATE OF NEVADA, Respondent.	Case No. 36991

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APPELLANT'S OPENING BRIEF

STATEMENT OF THE ISSUES

1. The Trial Court Erred in Denying Appellant's Motion to Suppress Evidence Illegally Seized.

2. The Trial Court Erred in Allowing the Prosecution to Admit Prejudicial Evidence of Other Weapons.

3. Fundamental Fairness and Due Process Support Appellant's Claim that a Defendant Should be Allowed to Argue Last in the Penalty Phase of a Capital Case.

4. The Penalty Phase of Appellant's Trial Should Have Been Bifurcated Into Two Separate and Distinct Procedures.

5. It Was Error for the Trial Court to Deny Appellant's Request for an Evidentiary Hearing Grounded Upon Allegations of Private Communication With a Juror and Possible Exposure of That Juror to Media Coverage of the Trial.

6. It Was Error For the Trial Court to Deny the Motion for New Trial Where the Prosecutor Offered an Inconsistent Theory and Facts Regarding the Crime and When the Court Failed to Inquire Regarding the Circumstances of a Victim Family Member Being in the Restricted Area of the Jury Lounge.

SPECIAL PUBLIC DEFENDER

CLARK COUNTY NEVADA

7. The Three-Judge Panel Procedure For Imposing a Sentence of Death is Unconstitutional Under the Due Process Guarantee of the Federal Constitution Pursuant to the Precedent Set Forth by the United States Supreme Court in **Apprendi v. New Jersey**.

8. The Three-Judge Panel Sentencing Procedure is Constitutionally Defective.

9. The Absence of Procedural Protections in the Selection and Qualification of the Three-Judge Jury Violates the Appellant's Right to an Impartial Tribunal, Due Process and a Reliable Sentence.

10. Use of Nevada's Three-Judge Panel Procedure to Impose Sentence in a Capital Case Produces a Sentencer Which is not Constitutionally Impartial and Violates the Eighth and Fourteenth Amendments.

11. The Statutory Reasonable Doubt Instruction is Unconstitutional.

12. The Trial Court Erred in Denying Appellant's Motion to Settle the Record Regarding Possible Failure of the Two Appointed Panel Judges to Read the Transcripts of the Guilt Phase of Appellant's Trial.

13. The Trial Court Abused its Discretion When it Held Fifty-Nine (59) Off the Record Bench Conferences Thus Depriving Appellant of a Complete Record For Purposes of Direct Appeal and Post-Conviction Habeas Relief.

STATEMENT OF THE CASE

On or about September 2, 1998, Donte Johnson, Appellant herein, was charged by Grand Jury Indictment with one (1) count of burglary while in possession of a firearm; four (4) counts of murder with use of a deadly weapon (open); four counts of robbery with use

of a deadly weapon, and four (4) counts of first degree kidnapping with use of a deadly weapon in violation of Nevada Revised Statutes, NRS 205.060, 193.165, 200.010, 200.030, 193.165, 200.310, 200.320, 193.165, respectively in connection with the shooting deaths of Matthew Mowen, Jeffrey Biddle, Tracey Gorringe, and Peter Talamantez which occurred in Las Vegas, Nevada on or about August 14, 1998.

On or about September 8, 1998, Appellant appeared before the Honorable Jeffrey Sobel, District Court Judge, Eighth Judicial District Court, Department V for initial arraignment in this case denominated C153154. The prosecutor advised the State will file a Notice of Intent to Seek the Death Penalty. Prior to the court's canvassing of Appellant, defense counsel requested the matter be continued until the transcript of the grand jury proceedings were received.

On September 16, 1998, in open court, neither Appellant or counsel present, the prosecutor filed a superseding Indictment which added an additional charge; conspiracy to commit robbery and/or kidnapping and/or murder in violation of NRS 199.480, 200.380, 200.310, 200.320, 200.010, 200.030 respectively.

On September 17, 1998, Appellant appeared for continued arraignment, entered a plea of not guilty and waived the sixty day rule. The court granted counsel's request for twenty-one days from the file stamp date of the grand jury transcripts for filing of a writ.

On October 8, 1998, the trial court denied Appellant's motion to set bail.

On February 25, 1999, upon inquiry from the court, Appellant withdrew his proper person motion to dismiss counsel and appoint

outside counsel.

On March 23, 1999, Appellant filed a proper person motion with the court, seeking to have his counsel file the motions listed therein. Appellant also filed a motion a successive motion, in proper person, to dismiss counsel and appoint alternate counsel.

On April 12, 1999, with no deputy district attorney present, the court entertained Appellant's proper person motion to dismiss counsel and appointment of alternate counsel, and denied the motion.

On May 17, 1999, upon inquiry from the court, Appellant stated he wanted to withdraw his proper person motion to proceed with co-counsel and investigator.

On June 29, 1999, the trial court granted defense counsel's motion to continue trial grounded on recent evidence of a new confidential informant, and a new allegation of murder which resulted in counsel not being ready for trial.

On January 6, 2000, the trial court entertained an evidentiary hearing on Appellant's motion to suppress evidence. The court set a briefing schedule and continued the matter.

On March 2, 2000, the court issued its ruling on pre-trial motions pending. The court denied the following motions: Appellant's motion to argue last at the penalty phase, for disqualification from jury venire of all potential jurors who would automatically vote for the death penalty if Appellant found guilty of capital murder, disclosure of exculpatory evidence pertaining to impact of Appellant's execution upon victim's family members, prohibit use of peremptory challenges to exclude jurors who express concern about capital punishment, preclude evidence of alleged co-conspirator statements, disclosure of any disqualification of district attorney, to require

prosecutor to state reasons for exercising peremptory challenges, change of venue, to dismiss State's notice of intent to seek death penalty on ground Nevada death penalty statute, unconstitutional for inspection of police officer's personnel files, in limine for order prohibiting prosecutor misconduct in argument, in limine to prohibit any reference to the first phase as the "guilt phase", to apply heightened standard of review and care as State is seeking death penalty, in limine to preclude the introduction of victim impact evidence, to bifurcate penalty phase, in limine to prevent the State from telling complete story, Appellant's proper person motion to disqualify the court without prejudice.

The court continued the motion to suppress illegally seized evidence, refused to rule on the motion to authenticate and federalize all motions, objections, etc., continued the motion to preclude evidence of alleged co-conspirator statements, the motion in limine to preclude evidence of other guns, weapons and ammunition not used in the crime, the motion in limine regarding co-defendant's sentences; and in regard to the motion for discovery and evidentiary hearing regarding the manner and method of determining in which murder cases the death penalty will be sought the court directed the State to provide this information to defense counsel if it exists. The court granted the motion in limine to preclude evidence of witness intimidation. The court directed counsel to physically meet and agree upon jury instructions prior to trial.

On April 18, 2000, the court denied Appellant's motion to suppress evidence seized by police in a warrantless search.

On June 1, 2000, the court, after entertaining argument, denied Appellant's motion to preclude evidence of alleged co-

conspirators statement.

On or about June 5, 2000, jury trial commenced before the Honorable Jeffrey Sobel, District Court Judge.

On or about June 9, 2000, the jury returned a verdict of guilty on all thirteen (13) counts.

On June 13, 2000, the penalty phase began. The jury began verdict deliberation on June 15, 2000; two notes were received from the jury that date. On June 16, 2000, a hung jury was declared.

On July 13, 2000, the court denied Appellant's motion for a new trial.

On July 20, 2000, the court denied Appellant's motion for imposition of life without the possibility of parole as well as his request for a statistical analysis of how the two other judges for the three judge panel were picked.

On July 24, 2000, the three-judge panel assembled consisting of the Honorable Judges: Jeffrey D. Sobel, Michael R. Griffin, and Steve Elliot. On the record the prosecutor disclosed the inducement regarding Charla Severs and defense counsel stated his objection regarding the constitutionality of the three-judge panel. On July 28, 2000, the three-judge panel, having found that the aggravating circumstances or circumstances outweigh any mitigating circumstance or circumstances imposed a sentence of death as to counts XI through XIV, murder of the first degree with use of a deadly weapon.

STATEMENT OF FACTS

SYNOPSIS

The three bedroom single family residence located at 4825 Terra Linda in Las Vegas was occupied by Tracey Gorringe, age 21, Matthew Mowen, age 19, and Jeffrey Biddle, age 19. It was a party

place for many young people where they would recreate, drink beer and use drugs.

On August 14, 1998, around 6:00 p.m. in the evening, Justin Perkins went to the Terra Linda residence. The gate to the yard was open and the door to the house was ajar. When Perkins pushed the door open he saw Gorringe, Mowen and Biddle lying on the blood covered floor. Their hands were bound behind their backs with duct tape, their ankles were bound. There was blood everywhere.

Perkins ran to the neighbor's house, 911 was called. Paramedics and the police arrived. The three young men were pronounced dead. The police in securing the crime scene found the deceased body of Peter Talamantez in the next room. Like the others, he was bound with duct tape, hands behind his back, ankles bound and blood about his head. Like the others, he had a gunshot wound in the back of his head.

The house had been ransacked. Crime scene analysts found that there was no forced entry into the home. Next to the bodies of each of the young men were their empty, opened wallets. No paper currency was found in the house.

In the front room was an entertainment center, the television askew, stereo shifted, patch cords hanging, no VCR, cords and miscellaneous items for a playstation, but no playstation.

CSA Grover lifted a fingerprint from a Black and Mild, three by five inch cigar box. Cigarette butts found lying near the deceased are collected and preserved. Four .380 empty cartridge cases were retrieved, each near the body of one of the victims as well as some bullet fragments.

The fingerprint found on the Black and Mild cigar box

matched those of Appellant, Donte Johnson. The DNA from the cigarette butts was also from Appellant.

The mother of Tod Armstrong owned, but did not reside in a home at 4812 Everman Drive, Las Vegas. This property was a few blocks from the Terra Linda residence. Tod Armstrong, Ace Hart and Bryan Johnson lived in the house. Armstrong, Hart and Johnson used drugs. In late July, early August, Ace Hart brought Appellant, Appellant's girlfriend, Charla Severs, and Appellant's Friend Terrell Young to the Everman house to stay.

The week prior to the homicides Matthew Mowen came over to the Everman residence and attempted to buy drugs from Appellant. Mowen said, in front of Appellant, Armstrong, Hart and Young that they made a lot of money while on tour with the Phish rock group by selling snack food and drugs.

Prosecution witness Charla Severs, Appellant's live in girlfriend at the time of these events, lived with Appellant at the Thunderbird and moved with him and Terrell Young to Tod Armstrong's house at the beginning of August. Appellant and Young brought a duffle bag with them to the Everman house. In the bag were handguns, rifles, duct tape and brown gloves.

According to Severs, late on the night of August 13/early morning of August 14th, Appellant and Terrell Young left the Everman residence with the duffle bag. Appellant was wearing black Calvin Klein Jeans. She was asleep when he returned, they had a VCR and a playstation, Appellant had approximately $200 dollars and a pager. He tells her he killed somebody.

Severs, whose storey changed throughout the investigation had been brought back from New York on a material witness warrant and

who was held in custody for an extended period of time, said Appellant told her a boy was out watering the lawn at the Terra Linda house and he made him go inside at gunpoint. He was made to lay down on the floor where there was another boy laying. He and Young taped up the boys laying face down on the floor. A third person showed up and then a fourth. The third was made to lay down on the floor and was also taped. Appellant took the fourth person into the other room, hit him with the weapon and shot him in the back of the head. He said he shot four people.

Tod Armstrong, who showed Appellant and Terrell Young where Matt Mowen's house was saw the VCR, the playstation and a blue pager taken from the Terra Linda residence. Appellant told Armstrong about committing the murders when he returned to the Everman house.

On August 15th, the day after the homicides, Bryan Johnson and Ace Hart came over to the Everman house to get ready for a job interview. Ace Hart was living at Bryan Johnson's but his clothes were at the Everman residence. Appellant allegedly told them he committed the robbery and homicides at Terra Linda taking the money, the VCR, playstation and pager. Appellant and Young buried the pager in the back yard at the Everman residence.

On August 17th, Tod Armstrong, Ace Hart and Bryan Johnson are at the Johnson home. Bryan had an argument with his mother and his father called the police who responded to the residence. Johnson gave them a recorded statement regarding the homicides. Ace Hart gave a statement and Tod Armstrong gave a statement. Armstrong signed a consent to search form for the Everman residence.

The police go to the Everman residence at 3:00 a.m. on August 18th. The SWAT team enters the residence. Appellant, Charla

Severs and a third person are escorted out of the house and handcuffed with flexcuffs.

In the house the police see the VCR and playstation which they impound then find a Black and Mild cigar box in Appellant's belongings. In the master bedroom they find a duffel bag, guns and duct tape. They find a black pair of Calvin Klein jeans. On the back of the jeans, lower portion, Las Vegas Metropolitan Police Department Sergeant Hefner sees eight blood droplets.

In the backyard of the Everman residence, the analyst sees an area that has recently been disturbed. He digs there and recovers two keys from the Thunderbird Hotel and a blue pager.

Lashawnya Wright was the live-in girlfriend of Sikia Smith; she knew Appellant and Terrell Young. She was released from jail on August 12th, 1998. On August 13, 1998, Young and Appellant came to the apartment Wright and Smith shared at the Fremont Plaza Hotel and visited with Smith. They had a duffel bag full of guns. Around 5:00 p.m., Young and Appellant leave. About two hours later they return and again visit with Smith. Much later the three of them leave together. Wright gave Smith her pager saying, "I'll page you if I need you tonight." She paged him throughout the night and Smith never returned the page.

Fourteen hours later, Smith came up the stairs. Appellant and Young remained at the bottom of the staircase. Smith is carrying a VCR and a playstation. Wright hears the three talking about what they had done and Appellant is saying he wants the VCR and pays Smith twenty dollars for it. Young and Smith both wanted the playstation and they argue. Later that day, she saw Smith with a .380 automatic, he sold it.

The next day Wright saw Appellant outside on the street. He stopped at a newsstand and bought the Saturday Review-Journal. The headline read, "Four young men slain in Southeast." Appellant said, "We made the front page" to Smith.

Prints taken from the bottom of the VCR impounded at the Everman residence matched those of Sikia Smith.

Each of the four young men died from a single gunshot wound to the back of the head from close range. Projectile pieces were removed from each skull. Ballistic expert Richard Goode concluded the cartridge cases, all four, were .380 all fired by the same gun. The .380 handgun was never found.

The Eight blood droplets on the black jeans were human blood; the blood of victim Tracey Gorringe. On the inside of the flap which covered the zipper of the black jeans, female epithelial cells were found. Semen was mixed in with the epithelial cells. The majority of the cells in the contaminated stairs were epithelial. DNA analysis of the semen cells returned positive to Appellant.

On June 9, 2000, the jury returned verdicts of count I - burglary while in possession of a firearm (felony) - guilty; count II - conspiracy to commit robbery and/or kidnapping and/or murder (felony) - guilty; count III, IV, V, and VI, robbery with use of a deadly weapon (felony) - guilty; counts VII, VIII, IX, X - first degree kidnapping with use of a deadly weapon (felony) - guilty; counts XI, XII, XIII, XIV - murder with use of a deadly weapon (felony) - guilty.

Penalty phase began on June 13, 2000. Jury deliberation commenced on June 15, 2000. Two notes were received from the jury. First:

> What do we do if someone's belief system has changed to where the death penalty is no longer an appropriate punishment under any circumstances?

The answer from the court:

> To the members of the jury, from Judge Jeffrey D. Sobel, I'm not permitted to answer your question.

The second note:

> What happens if we cannot resolve our deadlock?

On June 16, 2000, outside the presence of the jury, statements and argument regarding the jury notes. Following arguments, the court advised the jury foreperson would be brought into closed courtroom and questioned. The foreperson identified the one juror, number 7, who would not consider the death penalty. Juror number 7 brought into closed courtroom and questioned by the judge regarding the note and his feelings on the death penalty. The court ruled juror number 7 to stay on the jury.

The jury was assembled and questioned by the court regarding the second note. Jury requested to be allowed to continue deliberations.

An additional note was received from the jury:

> We find ourselves stalemated. There does not appear to be any possibility of movement by either side.

The court had the jury brought in and questioned the foreman regarding the note. The jury panel did not disagree. No juror expressed the belief that additional instruction or clarification would assist them.

The jury recessed. Defense counsel argued to the court that the jury was not taking the **Bennett** instruction into consideration, that they could not consider life without and life with possibility

of parole. The request was denied, as was a request for a **Bennett-Allen** charge hybrid.

The jury was recalled and a hung jury was declared.

The verdict, and special verdict forms were made court exhibits at the request of defense counsel.

The Appellant's motion for new trial was denied, as was the motion for imposition of life without the possibility of parole, or, in the alternative, motion to empanel jury for sentencing hearing and/or for disclosure of evidence material to the constitutionality of three-judge-panel procedure, and defense counsel request for a statistical analysis on how the two other judges were picked.

On July 24, 2000, the three-judge-panel assembled consisting of the Honorable Judges Jeffrey D. Sobel, Michael R. Griffin, and Steve Elliot. On July 26, 2000, the second day the judges retired to deliberate at 11:25 a.m. At 1:21 p.m., they returned their verdict having found aggravating circumstances outweighed any mitigating circumstances impose a sentence of death as to counts XI - XIV - murder of the first degree with use of a deadly weapon.

On October 3, 2000, the trial court denied Appellant's motion to set aside death sentence/or motion to settle record. Appellant was adjudged guilty of all counts and sentenced to the maximum term of incarceration on each count, all counts to run consecutive. A sentence of death was imposed on counts XI through XIV. The order of execution and warrant of execution signed and filed in open court, with an automatic stay of execution, timely notice of appeal was filed.

FACTS RELEVANT TO ISSUE ONE

Prior to trial, Appellant filed a motion to suppress

evidence seized from the master bedroom at 4815 Everman on August 18, 1998 on the ground that it was illegally seized. The State filed an opposition. The court, on January 6, 2000, held an evidentiary hearing (A. App., Vol. 6, pp. 1340-1346, 1503; Vol. 7, pp. 1612-1622, 1632-1651, 1723-1726).

The prosecution called Las Vegas Metropolitan Police Department Homicide Detective Thomas Thowsen and Las Vegas Metropolitan Police Homicide Sergeant Ken Hefner. Appellant's girlfriend at the time of the seizure, Charolette Severs and Appellan6t testified in support of the motion (A. App., Vol. 6, pp. 1503-1504).

Thowsen went to the Everman residence on August 18, 1999, at 3:00 a.m. with the purpose of searching the house and expecting to find Appellant. He had a consent to search the house signed by Tod Armstrong (A. App., Vol. 6, pp. 1520-1521).

When Thowsen arrived at the residence the SWAT team was inside the house; Appellant, Charolette Severs, and a third person had been restrained in flexcuffs and were outside of the residence. Appellant was taken into custody for questioning (A. App., Vol. 6, pp. 1510, 1540-1541).

Thowsen had talked to Tod Armstrong, Ace Hart, and Bryan Johnson. He learned that Tod Armstrong lived at the Everman house and that Ace Hart had lived there until about a week or two prior to the interview. He said he also learned that there were some other people that would come and visit the house occasionally.

Detective Buczek was present during the interview of Armstrong at the Las Vegas Metropolitan Police Department Homicide Office. Armstrong said his mother owned the property; she lived in

Hawaii, he lived in the Everman house. Armstrong had the only key to the residence which he gave to Sergeant Hefner. According to Thowsen, Armstrong said Appellant would sometimes come over. Armstrong was specifically asked if Appellant paid rent, he said Appellant did not. Donte did not have a key to the house and would climb in a window. Armstrong said Appellant kept some of his belongings in the living room and a mater bedroom (A. App., Vol. 6, pp. 1511, 1517).

Thowsen said Armstrong did not give him any information that led him to believe Appellant lived at the Everman residence, either permanently or temporarily, that he would just show up sometimes. Thowsen was present, when Sergeant Hefner questioned Appellant, after Appellant was taken out of the Everman residence and cuffed and placed at the curb. Thowsen said Hefner specifically asked Appellant if he lived there and Appellant said he did not (A. App., Vol. 6, pp. 1518-1519).

Thowsen and Buczek interviewed Ace Hart on August 17th at 6:30 p.m., six or seven hours prior to going to the Everman residence. Buczek asked Hart, "Did there come a time when you met some people that eventually moved into the house with you?" Hart's response was, "yeah." Buczek also asked Hart, "Could you tell me what happened when they moved in?" He was referring to Appellant. Thowsen said that Appellant started showing up at the Everman house about a month before August 18th (A. App., Vol. 6, pp. 1522-1524).

On August 17th, in an interview of Tod Armstrong conducted by Thowsen and Buczek, Armstrong was asked if there were some other people living there with him. Armstrong answered "off and on. They weren't really living - off and on, yes. Staying there. They weren't really living there, but they'd come in and out of the house. . . .

Day 1 guess considered living there." They's come and go as they pleased (A. App., Vol. 6, pp. 1525-1526).

Thowsen was told by Armstrong Appellant could be found in the mater bedroom approximately seven hours prior to going to the Everman house. Thowsen had no information that Appellant lived anywhere but at the Everman residence. On August 17th, Thowsen and Buczek interviewed Bryan Johnson. Buczek asked Johnson, "Okay. And would that be during the time period where, uh, uh, Delco and Red were staying?" Johnson indicated that Donte Johnson was staying at the Everman residence. Thowsen knew this before going there.

Thowsen believed that it was Tod Armstrong who told him about a duffle bag containing weapons that belonged to either Young or the Appellant. He did not recall if Armstrong told him that it would be found in the master bedroom (A. App., Vol. 6, pp. 1529-1530, 1532-34, 1537, 1539).

Thowsen did not get a search warrant because he didn't need one. Tod Armstrong signed a consent to search (A. App., Vol. 6, pp. 1543-1544).

Sergeant Hefner supervised and monitored the investigation, he was given a key to the Everman residence by Tod Armstrong who told him it was the only key. He was going to the residence to arrest Appellant; he was not going to let him go. Appellant was placed under arrest for outstanding warrants after homicide took custody of him from the SWAT officers who had placed him in flexcuffs (A. App., Vol. 6, pp. 1558-1561, 1574-1575).

Hefner found a gym bag containing a partial roll of duct tape, a VCR and a handgun adjacent to the television and a pair of black jeans in the living room area of the Everman house. In the

mater bedroom he found several other pair of jeans, including one pair that had what appeared to be bloodstain on it, a rifle and some shoes. He said because this room lacked furniture and looked like a junk room it confirmed to him that no one was living in the bedroom (A. App., Vol. 6, pp. 1570-1572).

Hefner said that he could get a telephonic search warrant very quickly, half an hour, twenty minutes. That if he had any inclination that Appellant resided in the house he would have secured a search warrant (A. App., Vol. 6, pp. 1578-1579).

Charlotte Severs declared a hostile witness by the court, stayed at the Everman residence, sleeping there every night for fourteen days prior to being pulled out of there on August 18th by the SWAT team. Appellant and Johnson slept there with her. She testified that Appellant provided drugs to Tod Armstrong as a way of paying rent to stay in the Everman house. Appellant stayed in the master bedroom and kept the kept the clothes that he had there. There was a lock on the bedroom door which Appellant would only lock the door when "me and him was doing something." Severs kept her clothing and personal things in the master bedroom. She considered that room her space. She had come to the Everman residence to stay there at Appellant's request. Appellant slept at the Everman residence everyone of the fourteen days that preceded August 18th (A. App., Vol. 6, pp. 1585-1588, 1590).

Severs gave a taped statement to the police the night of the 18th. She told them she only stayed there a couple of nights. Tod Armstrong and Ace Hart kept clothes in the master bedroom. They, and others, went into the master bedroom, hang out, use the stereo. She and Donte did not have a key to the house. Tod was home a lot so a

key wasn't needed. Sometimes she would go through the back window. No one slept in the master bedroom except her and Appellant. She considered herself, Appellant and Young living in the master bedroom (A. App., Vol. 6, pp. 1592-1594, 1599-1600).

Appellant, Donte Johnson, testified that he did not recall being asked, while being handcuffed and sitting on the curb, if he lived in the house. He said he was living at the Everman residence on August 18, 1998, had been for close to a month. Appellant said there was one key to the residence. Prior to September 18, 1998, the last time he saw the key was when Tod Armstrong gave the key to him when he was going to his girlfriend's (A. App., Vol. 6, pp. 1604-1606).

In Appellant's reply filed after the hearing, the court was advised of the following:

In the opening statement of the related Sikia Smith trial prosecutor Gary Guymon stated:

> You will also learn that sometime in early July, Donte Johnson and Terrell Young moved into the house there on Everman. (Attached Exhibit "A", Gary Guymon, Trial of Sikia Smith, Transcript, 6/16/99, p. 13).

Further:

> You will learn that Todd Armstrong has not been arrested yet, but you will learn he is a suspect in this case and that he, too, may be subject to prosecution if and when the evidence comes forward and is available." (Exhibit "A", Gary Guymon, Trial of Sikia Smith, Transcript, 6/16/99, p. 23).

(A. App., Vol. 6, pp. 1633-1634).

On April 18, 2000, the court issued it's written decision denying Appellant's motion to suppress, finding Appellant was not a person with an expectation of privacy with respect to the living room

and master bedroom at the Everman residence (A. App., Vol. 7, pp. 1723-1726).

FACTS RELEVANT TO ISSUE TWO

On October 19, 1999, Appellant filed a motion in limine to preclude evidence of other gun and ammunition not used in the crime (A. App., Vol. 3, pp. 743-750).

In the motion Appellant sought to preclude the State from introducing a .30 caliber rifle seized when Appellant fled from a vehicle stopped by police on August 17, 1998, as well as two firearms recovered from a search of the Everman residence on August 18, 1998. These two weapons were a .22 Ruger rifle model 10/22 and a VZOR .50 caliber pistol. The forensic report states that the murder weapon was a .38 caliber. None of the seized guns recovered could fire the .38 caliber bullets (A. App., Vol. 3, p. 745).

Appellant argued in the motion that th guns were not relevant evidence and arguendo that even if relevant it was inadmissible as being prejudicial, confusing or a waste of time under NRS 48.035. Appellant attached to the motion the forensic laboratory reports of Richard Good in support of his statement that the murder weapon was a .38 caliber. Appellant also attached a Review Journal newspaper article and picture that showed prosecutor Guymon holding up two rifles. The caption below the photograph read:

> During closing arguments Monday in the murder trial of Terrell Young, Deputy District Attorney Gary Guymon holds up weapons used in the August 14, 1998, slaying that left four men dead.

Defense counsel argued that the possibility of the mistake and confusion was evident with this picture (A. App., Vol. 3, pp. 746-756).

The State filed an opposition to the motion arguing that the weapons were brought to the Terra Linda residence by Appellant and his accomplices and used during the crime (A. App., Vol. 4, pp. 791-800).

At the November 18, 1999, motion calendar the court addressed the motion asking if there was reason to believe the Ruger and the Enforcer were used by the co-defendants. If so, what was that based upon. He asked for transcripts from the other cases. The prosecutor advised the court that the transcripts were not necessary. Brian Johnson and Charla Severs knew about the guns; both of the co-defendants gave statements indicating the guns were involved. The court stated that it would be satisfied that if they were in that house and that duffle bag left on the night of the alleged crime, they're coming in. The fact they leave the house in the company of the alleged co-defendants and co-perpetrators is going to be enough to get them in for me without a Petrocelli hearing (A. App., Vol. 6, pp. 1341-1352).

On December 2, 1999, the State filed a supplemental opposition asserting that Tod Armstrong, Ace Hart, Charla Severs and Bryan Johnson described the weapons. Also the two prior convicted co-defendants, Sikia Smith and Terrell Young describe them in their voluntary statements (A. App., Vol. 6, pp. 1314-1316).

The State also argued that Charla Severs said they left the Everman house on August 13, 1998, with the duffle bag and that Tod Armstrong said they returned to the Everman residence with it. That the voluntary statement of Sikia Smith and Terrell Young support the position that Appellant brought the bag to the Terra Linda residence (A. App., Vol. 6, pp. 1317-1318).

In Appellant's reply filed November 15, 1999, Appellant

argued that there was no evidence that the guns were used in the murder and noted that the testimony of the co-defendants could not be used (A. App., Vol. 4, pp. 950-955).

On June 1, 2000, the court considered the motion. Defense counsel argued that the State had no proof that the guns were present, they cannot place the guns at the scene of the crime. The court stated:

> If they can place the guns leaving the house that night, going toward the other place, I think they're entitled to do it. And that, to me, is the only issue. Id. at 1817.

The court denied the motion in limine (A. App., Vol. 7, pp. 1813-1818).

FACTS RELEVANT TO ISSUE THREE

In a pretrial motion, Appellant sought to argue last at the penalty phase asserting that due process considerations supported a defendant's right to argue last to the jury; and that **NRS 2001.033**, upon examination, indicates the State's burden is illusory (A. App., Vol. 5, pp. 1058-1062).

The State filed an opposition tot eh motion premised upon NRS 175.141(5) (A. App., Vol. 6, pp. 1386-1388).

On March 2, 2000, the Court denied the motion (A. App., Vol. 7, p. 1670).

FACTS RELEVANT TO ISSUE FOUR

Prior to trial, Appellant filed a pre-trial motion to bifurcate the penalty phase seeking to preclude the introduction of "character" and "bad act" evidence that was not relevant to the statutory aggravating circumstances until such time as the jury had determined whether he was eligible for the death penalty (A. App.,

Vol. 5, pp. 1143-1145).

The prosecution opposed the motion on the ground that a bifurcated penalty phase was unwarranted and that Appellant's concern that character evidence, what was admissible in the penalty phase of a capital murder case may be used to determine his death eligibility was unfounded given the charges in the trial phase (A. App., Vol. 6, pp. 1359-1361).

On March 2, 2000, the court denied the motion (A. App., Vol. 7, p. 1680).

FACTS RELEVANT TO ISSUE FIVE AND SIX

On June 8, 2000, the prosecutor gave his first closing argument to the jury. In the course of his argument he made the following statements:

> A. The entertainment center from the Terra Linda home which once housed the VCR that was found in Donte Johnson's residence.
>
> B. Peter Talamantez' pager that's buried in the backyard where Donte Johnson stays.
>
> C. Point number eight, Matt's VCR at Donte's house.
>
> D. Point number nine, Pete's pager at Donte's house. Pager found buried in the backyard of the Everman house where Donte Johnson stayed.
>
> E. Physical corroboration when the pager is buried in the defendant's backyard.
>
> F. Point number nine, gun in Deco's room.
>
> G. Point number twelve -- duct tape in Deco's room. ... and isn't it interesting that there is a partial roll of duct tape recovered from the room where Donte Johnson stays.
>
> H. Somebody - the true killer apparently wore Donte Johnson's pants to the crime scene and then returned those pants to Donte Johnson's

bedroom before the police showed up.

I. Matt's VCR at Deco's house for Donte Johnson to be found not guilty, apparently somebody took Matt's VCR from the Terra Linda and placed it in the home where Donte Johnson stayed.

J. Peter's pager at Deco's house. For Donte Johnson to be found not guilty you must conclude speculate that somebody else buried the pager in Donte's backyard. ...

K. The Ruger in Deco's room. Isn't it interesting that all these witnesses described the guns that Donte had possession of, and sure enough we find the Ruger rifle in his - in his room.

L. And the duct tape in Deco's room. Apparently the true killer, for you to find Donte Johnson not guilty, placed a partial roll of duct tape in Donte Johnson's room before the police showed up.

(A. App., Vol. 13, pp. 3173, 3180, 3181, 3194-95, 3196-97).

When the jury recessed, defense counsel moved for a mistrial or in the alternative, a motion for a new trial on the ground that during closing argument the prosecutor consistently referred to the Everman residence as Appellant's room, Appellant's house, Appellant's yard. However, in response to Appellant's motion to suppress the jeans found in the master bedroom at the Everman residence, the State had argued that he had no legitimate privacy interest. The prosecutor stated that it was not an inconsistent position but was done for the sake of simplicity and the court's ruling that Appellant was not a co-tenant of the house was not inconsistent with the State's position.

The court denied the motion (A. App., Vol. 13, pp. 3203-3204).

B. On June 16, 2000, the court received a note from juror number one which stated: "I have an incident that occurred last week

that I need to bring to your attention as soon as possible." The juror was interviewed in open court outside the presence of the other jurors. She stated that last week when the jury was dismissed and left for the evening they went to the parking garage. Most of the group went to the first elevator; she went to the second elevator due to the location of her vehicle. Juror number 7 came p behind her and startled her. While waiting for the elevator they were talking when the elevator arrived everyone got out except one African American man who had some kind of a bag with him. It was the day of the testimony regarding the duffel bag and the guns. It startled her that he did not get off the elevator but then thought the other juror being there she would get in the elevator. When she got on the elevator she pushed the button for the third floor and asked the other juror what floor he wanted. He said he was on three also. When the elevator stopped at the third floor she got off. The other juror did not. About a minute later the elevator opened again and he got off. She said it was odd that he said he was on three, then stayed on the elevator with the other gentleman and then got off on three later. She indicated she had a fear of the African American (A. App., Vol. 17, pp. 3578, 3997, 4000-4001).

Further, after the jury was dismissed, juror, Kathleen Bruce asked both the State and defense attorneys if the media was referring to her on the previous evenings news broadcast when it related that the "hold out" juror was a woman. Attorney Kristina Wildeveld, whose affidavit was attached to the motion for a new trial, and who had been present when the jurors spoke with counsel stated that she herself had watched the evening news the night before and it contained an account that the jury was hung and that the "hold-out" was a woman juror.

Wildeveld stated that juror Bruce brought this fact out on her own without my prompting or previous discussion. Wildeveld further stated in her affidavit that when counsel for Appellant inquired how she knew what was on television she nervously responded that she had discussed the matter with her husband. It appeared to Wildeveld that juror Bruce had full and complete personal knowledge of the entire news account (A. App., Vol. 15, pp. 3578-79).

Juror Connie Patterson also implied that she had been discussing the matter and was aware of the media accounts (A. App., Vol. 15, pp. 3572- 3579).

On June 16, 2000, it was brought to the attention of the court that a member of one of the victim's families was in the jury lounge where a magazine was found. The court said it was a non-issue given that there was a controversy in the County regarding the death penalty and it had been the subject of newspaper articles for the past week concerning the death penalty practice in Nevada.

Nothing further occurred regarding the incident with the exception of defense counsel's question as to why a victim's family member would be in the jury lounge. The court stated there was no real segregation of the jurors from witnesses, family members or lawyers. In the new courthouse, this would be remedied (A. App., Vol. 15, pp. 3590-3592).

On June 23, 2000, Appellant filed a motion for new trial and a request for an evidentiary hearing (A. App., Vol. 15, pp. 3570-3593).

On June 30, 2000, the State filed an opposition to the new trial motion.

On July 10, 2000, the Appellant's reply was filed (A. App.,

Vol. 15, pp. 3603-3615; Vol. 17, pp. 4096-4100).

On July 13, 2000, the trial court denied the motion (A. App., Vol. 17, pp. 4175-4176).

FACTS RELEVANT TO ISSUES SEVEN, EIGHT, NINE AND TEN

The aggravating circumstances alleged by the prosecution in seeking imposition of a sentence of death after the court struck **NRS 200.033(3)** were:

> The murder was committed while the person was engaged, alone or with others, in the commission of or an attempt to commit or flight after committing or attempting to commit, any robbery, arson in the first degree, burglary, invasion of the home or kidnaping in the first degree, and the person charged:
>
> (a) Killed or attempted to kill the person murdered;
>
> (b) Knew or had reason to know that life would be taken or lethal force used.

NRS 200.033(4).

> The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody.

NRS 200.033(5).

> The defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree. For the purposes of this subsection, a person shall be deemed to have been convicted of a murder at the time the jury verdict of guilt is rendered or upon pronouncement of guilt by a judge or judges sitting without a jury.

NRS 200.033(12). (A. App., Vol. 14, pp. 3274; Vol. 19, pp. 4433-34).

On July 10, 2000, after a mistrial in the penalty phase, Appellant filed a "motion for imposition of life without the possibility of parole sentence; or, in the alternative, motion to empanel jury for sentencing hearing and/or for disclosure of evidence

material to constitutionality of three judge panel procedure."

The motion presented four (4) arguments. First, the United States Supreme Court decision in **Apprendi v. New Jersey**, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000) renders unconstitutional all sentencing schemes where the legislature has vitiated the irrevokable responsibility of a jury to find or utilize the percipient elements necessary to impose a maximum sentence after conviction on the underlying offense. Second, the lack of any statutory or common law procedures for the three judge panel creates a jurisdictional ambiguity that renders the sentencing body powerless to perform the sentencing functions; the absence of true random appointment of the two additional district court judges renders the appointment process unconstitutional. Third, the oath to follow the law does not encompass the personal bias and feelings that are paramount to establish a trier of fact in accordance with the standards mandated by **Morgan v. Illinois**, 504 U.S. 719, 112 S. Ct. 2222, 119 L.Ed.2d 492 (1992). Fourth, the duty to have a reasoned moral response as a guide post for sentencing is violated by the Nevada three-judge panel scheme rendering it unconstitutional (A. App., Vol. 17, pp. 4019-4095).

On July 17, 2000, the State filed an opposition of five responsive arguments. First, the United States Supreme Court did not declare the three-judge panel process for imposing a sentence of death unconstitutional under the Due Process Clause in **Apprendi**, supra. Second, the three-judge panel process defined in **NRS 175.556** is not ambiguous. Third, Nevada's process for the selection of judges of a three-judge panel for capital murder sentencing does not violate a defendant's right to an impartial tribunal. Fourth, the three-judge panel in capital sentencing does not violate the Eighth or the

Fourteenth Amendments. Fifth, the defendant has no right to voir dire any member of the panel or the Nevada Supreme Court (A. App., Vol. 17, pp. 4132-4147).

On July 18, 2000, Appellant filed a reply to the State's opposition. The motion was heard by the court on July 20, 2000 (A. App., Vol. 17, pp. 4153-4158, 4180-4190).

The court denied the motion in its entirety as well as the motion to stay then gave his analysis of **Apprendi**, supra (A. App., Vol. 17, pp. 4180-4184).

FACTS RELEVANT TO ISSUE ELEVEN

On June 8, 2000, defense counsel objected to the reasonable doubt instruction; and proffered an additional instruction, marked A, which the court did not believe to be proper under established law. The statutory instruction was given (A. App., Vol. 10, p. 2543; Vol. 13, pp. 3148, 3150).

FACTS RELEVANT TO ISSUE TWELVE

On September 5, 2000, Appellant filed a motion to set aside death sentence or in the alternative, motion to settle record pursuant to the Nevada Supreme Court decision in **Hollaway v. State**, 116 Nev. Adv. Op. No. 83, 6 P.3d 987 (Aug. 23, 2000); arguing that the three-judge panel, as a sentencing body had an absolute obligation to review and consider all evidence from the guilt phase. Further that it was error for Judge Elliot to fail to review the transcripts in their entirety (A. App., Vol. 19, pp. 4586-4592).

The motion was grounded on the statement of the trial court on July 24, 2000, to defense counsel's request that the (two other) judges read the transcripts of the guilt phase. The trial court stated that Judge Griffin indicated he was going to read the

transcript. There was no statement regarding Judge Elliot (A. App., Vol. 18, pp. 4257-4258).

On September 15, 2000, the State filed an opposition. On October 2, 2000, the Appellant filed a reply to the state's response (A. App., Vol. 19, pp. 4601-4610, 4614-15).

On October 3, 2000, the court denied the motion stating:

> The motion is denied. With reference to the record, it's going to stand the way it is. I don't know whether the judges read the transcript or not. As the record already indicates, they had ample opportunity and expressed the desire to read the record. I know that because there had been a mis-communication in the Public Defender's Office, that we had to chop the hearing up, that the judges actually had more time than usual to read the transcript.
>
> I don't read Holloway the way, apparently, Mr. Sciscento and you do, Mr. Figler. But Mr. Sciscento authored the Points and Authorities. We have had, in this state for many years, remands for penalty hearings and three-judge panels where I would assume that neither the new jury who is only hearing the penalty phase - and this has been for many decades - never heard all of the guilt evidence. And I think probably the judges here had more of an examination of the record than normally would take place either on a remand or before a three-judge panel. For those reasons and the reasons stated in the opposition, it's denied (A. App., Vol. 19, pp. 4638-4639).

The jury found twenty-three (23) mitigating factors, the three-judge panel found two (2) (A. App., Vol. 19, pp. 4435-36, 4439, 4444, 4591-92).

FACTS RELEVANT TO ISSUE THIRTEEN

The trial court held fifty-nine (59) unrecorded bench conferences during the guilt and penalty phases of the trial (A. App., Vol. 8, pp. 1855, 1888, 1911, 1916, 1933, 1941, 1948, 1961, 1989, 2029, 2036, 2081; Vol. 9, pp. 2306, 2340, 2341-42; Vol. 10, pp. 2396,

2461, 2469, 2516; Vol. 13, pp. 3024, 3051, 3053, 3056, 3063, 3108, 3133, 3144, 3146, 3198; Vol. 14, pp. 3298, 3310, 3328, 3335, 3345, 3368; Vol. 15, pp. 3379, 3389, 3396, 3406, 3423, 3440, 3454, 3465, 3468, 3469, 3499, 3520; Vol. 16, pp. 3649, 3675, 3685, 3816, 3823, 3839, 3845, 3847, 3853, 3862).

ARGUMENT

I.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE ILLEGALLY SEIZED.

The trial court erred in finding that Donte Johnson was not a person with an expectation of privacy with respect to the master bedroom of the Everman residence. The capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place. See, **Rakas v. Illinois**, 439 U.S. 128, 99 S. Ct. 421, 58 L.Ed.2d 387 (1978) citing, **Katz v. United States**, 389 U.S. 347, 353, 88 S. Ct. 507, 512, 19 L.Ed. 576 (1967).

Further, in **Rakas**, supra, the court explained:

> [T]he holding in Jones can best be explained by the fact that Jones had a legitimate expectation of privacy in the premises he was using and therefore could claim the protection of the Fourth Amendment with respect to a governmental invasion of those premises, even though his "interest" in those premises might not have been a recognized property interest at common law. See Jones v. United States, 362 U.S. at 261, 80 S. Ct. at 731.

Id. at 430.

Donte Johnson had been living at the Everman residence for two weeks, he had no other residence, all his belongings were there.

A search of a person's effects without a warrant ins generally "per se unreasonable" under the Fourth Amendment to the United States Constitution. See, **Katz**, supra. An exception to the warrantless search is consent by a person with authority, **Schneckloth v. Bustamonte**, 412 U.S. 218, 93 S. Ct. 2041, 36 L.Ed.2d 854 (1973).

In order for a third party to give consent to a search of the defendant's property the consenting party must have joint access or control over the property for most purposes, so that the third party can consent to the search in his own right. **U.S. v. Matlock**, 415 U.S. 164, 94 S. Ct. 988, 39 L.Ed.2d 242 (1974).

In **Matlock**, the Supreme Court declared:

> [T]hat common authority is not to be implied from mere property interest a third-party has in the property, for the authority which justifies the third-party consent does not rest upon the law of property, but rather on mutual use of the property by persons generally having joint access or control for most purposes so that it is reasonable to recognize that any of the co-habitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched. **Matlock**.

In the case of **United States v. Duran**, 957 F.2d 499 (7th Cir. 1992) the Court of Appeals held:

> [I]t would be incorrect to treat spouses ... the same as any two individuals sharing living quarters. Two friends inhabiting a two-bedroom apartment might reasonably expect to maintain exclusive access to their respective bedrooms, without explicitly making this expectation clear to one another. ... In the context of a more intimate marital relationship, the burden upon the government [to prove common authority] should be lighter. **U.S. v. Duran**.

Relationships involving roommates or cotenant generally receive more protection than those involving intimate relationships

like husband and wife and child parents.

In **State v. Hacker**, 209 S.E.2d 569 (1974), the court held that an individual who was presumably the landlord of the defendant, who had consented to the warrantless search of the accused's bedroom in a house, was shown not to have common authority over the bedroom searched and therefore could not properly consent to a search.

In **State v. Warfield**, 198 N.W. 854 (1924), the Court held that a warrantless search of the accused's room in a rooming house and the seizure of a flashlight, reflector, clothing, jewelry, and other articles of personal property were held to be invalid and the evidence therefore inadmissible in a prosecution for burglary where the only authority the officers had for searching the room was the rooming housekeeper's consent. In **State v. Tucker**, 574 P.2d 1295 (Ar. 1978), the Court held that a warrantless search was invalid and the evidence seized therefore inadmissible at the Defendant's prosecution for murder, where the accused had exclusive possession of the bedroom and the sole authority. The police had to conduct the search emanated from the consent of the accused's cotenant.

In **Tucker**, the Court recognized that the bedroom was used as a sleeping quarter and a storage room by the accused; there was no evidence that it was used for any other purposes. As such, the court related, even though the consenting cotenant was a co-owner of the house, it could not be held that she had joint access or control within the meaning of **Matlock**.

In the case of **State v. Matias**, 451 P.2d 257 (1969) the Court held that a warrantless search of the bedroom of an overnight guest consented to by the tenant of the premises, was invalid, and the consent of the tenant operated only to waive the tenant's own right

to protection from an unreasonable search and seizure.

In the case of **People v. Douglas**, 213 N.W.2d 291 (1973), the court held that a confession was invalid when the confession was based upon illegally seized evidence when the police searched a bedroom of a co-tenant based on the consent to search of the co-tenant.

Donte Johnson lived at the Everman residence, in lieu of rent he gave Tod Armstrong drugs. He had an expectation of privacy in the bedroom. Armstrong lacked the authority to allow a search of the bedroom. The search violated Mr. Johnson's right to privacy. This right is secured in the Fourth Amendment of the United States Constitution. The police violated Donte Johnson's rights, when they relied upon the consent of a co-tenant of the house who did not have the authority to consent to a search of Appellant's bedroom which he did not share. The police had an opportunity to secure a search warrant and did not do so. The trial court was wrong when it found that Appellant was not a person with an expectation of privacy in the bedroom. The motion to suppress should have been granted. Appellant is entitled to relief.

II.

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO ADMIT PREJUDICIAL EVIDENCE OF OTHER WEAPONS.

The trial court erred in allowing the State to adduce into evidence two assault rifles that had no probative value. See **U.S. v. Hitt**, 981 F.2d 422 (1992).

The State sought to introduce the weapons alleging that they were used the night of the murder. There was no evidence that these guns were ever used. The State in its arguments to the court repeatedly emphasized voluntary statements given by Sikia Smith and

Terrell Young, original co-conspirators, that described the weapons they took to the residence where the victims were killed. They gave no testimony and were not cross-examined by the defense. It would be improper to base a decision on their previously given statements. Charla Severs did not see the guns that were used that night, she did not see the guns that were allegedly in the duffle bag; she never looked into the bag the next day to confirm that there were indeed guns.

In **U.S. v. Tai**, 994 F.2d 1204, the court addressed the issue of whether it was proper for the prosecution to present guns allegedly used in the commission of the crime where there was no evidence that those guns presented were actually used.

> Clearly the guns had no proper probative value. Although both Suk Lee and Jung Lee testified that they had seen Tai carrying a gun, neither of them described the gun nor in any way compared it to the guns displayed during closing argument. Thus, as of the time the guns were admitted, no connection had been drawn between Tai's possession of them and his acts of extortion. Nor could the guns have been admitted as conditionally relevant, for no further testimony was to be heard in the case. And, although the government was kind enough to explain, while displaying the guns to the jury, that Tai "carried them when he was with Suk Kyong Lee" (cite omitted) no such evidence had been introduced and closing argument was not the time to introduce it. United State v. Van Whye, 965 F.2d 528, 533 (7th Cir. 1992).
>
> So the guns were relevant only to the extent they showed Tai to be the kind of person who would carry such weapons, thus making it more likely that he was the kind of person who committed extortion. Yet for that purpose, of course, the guns were not admissible. Fed. R.Civ. P. 404(b). Tai at 1209. (Emphasis added).

Id. at 1211.

The instant matter is similar to **Tai**, supra, in that the

prosecution could not show that the assault guns were used, yet the jury was made to believe that the guns were, in fact, used in the crime. **NRS 48.035** requires a weighing of the probative value against its potential for undue prejudice. It cannot be argued that the introduction of the assault rifles were relevant only to the extent that they showed Appellant to be the kind of person who would own such weapons making it more likely, in the minds of the jurors that he was the kind of person who would commit the crime.

The trial court erred in allowing the State to enter the assault weapons into evidence where there was no evidence that the guns were actually used. Appellant is entitled to relief.

III.

FUNDAMENTAL FAIRNESS AND DUE PROCESS SUPPORT APPELLANT'S CLAIM THAT A DEFENDANT SHOULD BE ALLOWED TO ARGUE LAST IN THE PENALTY PHASE OF A CAPITAL CASE.

In **State v. Jenkins**, 15 Ohio St.3d 164, 214-215 (1984), the Ohio Supreme Court stated that the decision to allow the defense to open and close final argument in the penalty phase is within the sound discretion of the trial court. **Jenkins**, makes it clear that the trial court properly may allow the defense the right to argue last to the jury.

Due process considerations support allowing the defense to argue last. A case of this magnitude deserves the maximum judicial consideration to guarantee a fair trial. The United States Supreme Court has recognized that "death is a different kind of punishment, than any other which may be imposed in this country." **Gardner v. Florida**, 430 U.S. 349 (1977). It is clear that a higher standard of due process is required in death cases than other cases because of the

severity and finality of the punishment which may be involved. The Supreme Court, in considering the scope of due process stated:

> [I]t is the universal experience in the administration of criminal justice that those charged with capital offenses are granted special consideration.

Griffin v. Illinois, 351 U.S. 12, 28 (1956).

Furthermore, the Court has repeatedly held:

> [T]he extent to which procedural process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss, ..."

Goldberg v. Kelly, 397 U.S. 254 at 262-263 (1970), quoting **Joint Anti-Fascist Refugee Committee v. McGrath**, 341 U.S. 123, 168 (1951) (Frankfurther, J. concurring).

NRS 200.033 states that the aggravating circumstances of which the accused was convicted must outweigh the mitigating factors. It might at first glance appear that the prosecution actually bears the burden at the penalty phase. However, a more careful examination of the practical application of the statute indicates that the burden is largely illusory. Once the prosecution proves the specifications, it need do nothing at the penalty phase. If the defense chooses not to put on any mitigating evidence, a death sentence will result.

The Defendant has some burden, and bears at least some of the burden in arguing that he should be allowed to live. If Defendant fails to present mitigating factors to create a reasonable doubt in the minds of the jurors, he may well lose his life. The defense should be allowed to argue last since he is the party who would be defeated if no evidence was offered on either side. At least two other jurisdictions have sought to alleviate the inherent unfairness

in allowing the prosecution to speak last before the jury. The Kentucky statute which prescribes a penalty phase hearing states:

> The prosecuting attorney shall open and the defendant shall conclude the argument.

Ky.Rev.Stat.Section 532.025(1)(A).

California has reached the same result through judicial interpretation. In **People v. Bandhauer**, 66 Cal.2d 524, 530-531 (1967), the court stated:

> Equal opportunity to argue is ... consistent with the Legislature's strict neutrality in governing the jury's choice of penalty ... Accordingly, hereafter the prosecution should open and the defense respond. The prosecution may then argue in rebuttal and the defense close in surrebuttal.

The essential fairness of this position has application in Nevada. The defense should open with mitigation and the prosecution may then counter. The prosecution should then make a closing statement, followed by the closing statement of the defense.

Appellant was denied due process and is entitled to relief.

IV.

THE PENALTY PHASE OF APPELLANT'S TRIAL SHOULD HAVE BEEN BIFURCATED INTO TWO SEPARATE AND DISTINCT PROCEDURES.

Character or bad act evidence must not be used to influence or determine whether a defendant is death eligible. Such evidence is not relevant to the statutory aggravating circumstances and should not be heard by jurors prior to a determination of a defendant's death eligibility.

The "aggravating circumstances/mitigating factors" scheme for determining death eligibility is essential to the process of narrowing the class of defendants who are death eligible. See, **Arave v. Creech**, 507 U.S. 463, 470-74, 113 S. Ct. 1534, 123 L.Ed.2d 188

(1993); **Middleton v. State**, 114 Nev. 1089, 968 P.2d 296, 314 (1998). Character evidence must not be used to determine whether a defendant is death eligible. It is of questionable value in establishing an appropriate penalty. See, **Allen v. State**, 99 Nev. 485, 665 P.2d 238 (1983).

Evidence presented pursuant to **NRS 175.552(3)** can influence the decision to impose death, but this comes after the narrowing to death eligibility has occurred. **Middleton**, supra at 315.

Support for a bifurcated penalty phase is also found in a recent decision by the United States Supreme Court. In **Buchanan v. Angelone**, 522 U.S. 269, 118 S. Ct. 757, 760, 139 L.Ed.2d 702 (1998), the court explained as follows:

> Petitioner initially recognizes, as he must, that our cases have distinguished between two different aspects of the capital sentencing process, the eligibility phase and the selection phase. Tuilaepa v. California, 512 U.S. 967, 971, 114 S. Ct. 2630, 2634, 129 L.Ed.2d 750 (1994). In the eligibility phase, the jury narrows the class of defendants eligible for the death penalty, often through consideration of aggravating circumstances. Id. at 971, 114 S. Ct. at 2634. In the selection phase, the jury determines whether to impose a death sentence upon an eligible defendant. Id. at 972, 114 S. Ct. at 2634-2635.

Appellant is not unmindful that this Honorable Court has consistently held that **NRS 175.141**, which mandates that counsel for the Office of the District Attorney must open and conclude argument, and **NRS 200.030(4)** are constitutional. See, **Witter v. State**, 112 Nev. 908, 921 P.2d 886 (1996).

Trial counsel preserved the issue for appeal. See, **Riddle v. State**, 96 Nev. 589, 613 P.2d 1031 (1980).

It is the position of Appellant that the failure to

bifurcate the penalty phase of a capital trial violates procedural due process and fundamental fairness in violation of the Fourteenth Amendment to the United States Constitution. Appellant includes this issue for reconsideration by this Court and for possible federal review.

V.

IT WAS ERROR FOR THE TRIAL COURT TO DENY APPELLANT'S REQUEST FOR AN EVIDENTIARY HEARING GROUNDED UPON ALLEGATIONS OF PRIVATE COMMUNICATION WITH A JUROR AND POSSIBLE EXPOSURE OF THAT JUROR TO MEDIA COVERAGE OF THE TRIAL.

"Any private communication with a juror in a criminal case on any subject connected with the trial is presumptively prejudicial . . . The burden is on the respondent to show that these communications had no prejudicial effect on the jurors . . . A hearing before the trial court is the proper procedure to the sentence of death should be vacated and the case remanded to the District Court with directions to hold a hearing to determine whether the incidents complained of was harmful to Appellant, and if after hearing it is found to have been harmful, to grant a new penalty hearing before a newly empaneled jury.

Appellant, in the motion for new trial/request for evidentiary hearing, alleged prejudice as a result of the juror misconduct. A supporting Affidavit of Deputy Special Public Defender, Kristina Wildeveld, reciting the statements made by jurors Kathleen Bruce and Connie Patterson demonstrating both private communication and media coverage of the trial was attached. The trial court abused its discretion by failing to hold an evidentiary hearing on the affidavit of attorney Wildeveld (A. App., Vol. 15, pp. 3570-3579).

The United States Constitution, Amendment VI, right to a

jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors. A defendant's **United States Constitution, Amendment VI** rights are violated even if only one juror was unduly biased or improperly influenced. See, **Irvin v. Dowd**, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L.Ed.2d 751 (1961); **United States v. Keating**, 147 F.3d 895, 903 (9th Cir. 1998).

Whether a defendant is prejudiced by juror misconduct is a fact question to be determined by the trial court. . . . See, **Rowbottom v State**, 105 Nev. 472, 779 P.2d 934 (1989); **Barker v. State**, 95 Nev. 309, 313, 594 P.2d 719, 721-22 (1979). The trial court herein failed to make that determination. The sentence of death should be vacated and the matter remanded to the District Court for a hearing in which the trial court determines the circumstances of what transpired, the impact on the jurors, and whether or not it was prejudicial.

VI.

IT WAS ERROR FOR THE TRIAL COURT TO DENY THE MOTION FOR NEW TRIAL WHERE THE PROSECUTOR OFFERED AN INCONSISTENT THEORY AND FACTS REGARDING THE CRIME AND WHEN THE COURT FAILED TO INQUIRE REGARDING THE CIRCUMSTANCES OF A VICTIM FAMILY MEMBER BEING IN THE RESTRICTED AREA OF THE JURY LOUNGE.

The court should have found that no new significant evidence was adduced to support the inconsistent theories taken between the prosecution in response to Appellant's motion to suppress the black jeans seized during the search of the Everman residence wherein the State asserted that Appellant did not live at the Everman residence and lacked standing to contest the search, and its closing argument to the jury wherein it consistently referred to the residence, bedroom and yard as being those of the Appellant. See, **Thompson v. Calderon**,

120 F.3d 1045 (9th Cir. 1997) (A. App., Vol. 7, pp. 1612-1622; Vol. 13, pp. 3173-3180, 3181, 3194-95, 3196-97, 3202). It was improper to allow the prosecutor to change position in the same trial. The court should have granted the motion for a new trial.

The court further abused its discretion in failing to make inquiry upon learning that a family member of one of the victims was in the clearly marked, restricted jury lounge area; calling it a "non-issue." Appellant was charged with four homicides and the State was seeking imposition of the death penalty; the court had a duty to ascertain whether there had been contact or influence upon the jurors and whether it was prejudicial. See, **Isbell v. State**, 97 Nev. 222, 626 P.2d 1274 (1981). Appellant is entitled to relief.

VII.

THE THREE JUDGE PANEL PROCEDURE FOR IMPOSING A SENTENCE OF DEATH IN UNCONSTITUTIONAL UNDER THE DUE PROCESS GUARANTEE OF THE FEDERAL CONSTITUTION PURSUANT TO THE PRECEDENT SET FORTH BY THE UNITED STATES SUPREME COURT IN **APPRENDI V. NEW JERSEY**.

The three-judge panel procedure of **NRS 175.556(1)** violates the Due Process Clause of the **Fourteenth Amendment** to the **United States Constitution**. In **Apprendi v. New Jersey**, 530 U.S. 466, 120 S. Ct 2348, 147 L.Ed.2d 435 (2000), the court held: "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt," (Id. at 2362-63) citing to its earlier decision in **Jones v. United States**, 526 U.S. 227, 119 S. Ct. 1215, 143 L.Ed.2d 311 (1999) stating: "with that exception, [fact of a prior conviction] we endorse the statement of the rule set forth in the concurring opinions in that case." [I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that

increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." 526 U.S. at 252-253, 119 S. Ct. 1215 (opinion of Stevens, J.); see also, Id. at 253, 119 S. Ct. 1215 (opinion of Scalia, J.) Id. at 2363. Id. (footnote omitted).

Justice Scalia, in his concurring opinion cogently asserts:

> What ultimately demolishes the case for the dissenters is that they are unable to say what the right to trial by jury does guarantee if, as they assert, it does not guarantee - what it has been assumed to guarantee throughout our history - the right to have a jury determine those facts that determine the maximum sentence the law allows . . .
>
> The guarantee that "[I]n all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury" has no intelligible context 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 a jury. Id. at 2367.

Justice Thomas, in a concurring opinion, adits that he was wrong in **Almendarez-Torres v. United States**, 534 U.S. 224, 118 S. Ct. 1219, 140 L.Ed.2d 350 (1998), where he was the deciding fifth vote for the majority. He now is confident that all elements which impose or increase punishment must go to the jury. Id. at 2379.

He, after a lengthy and exhaustive historical analysis of jury elements and sentencing enhancements, supported a broader application of the constitutional rights than recognized in the majority opinion. He explained his reasons:

> First, it is irrelevant to the question of which facts are elements that legislatures have allowed sentencing judges discretion in determining punishment. . . .

> Second, and related, one of the chief errors of Almendarez-Torres - an error to which I succumbed - was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's sentence. For the reasons I have given, it should be clear that this approach just defines away the real issue. What matters is the way by which a fact enters into the sentence. If a fact is by law the basis for imposing or increasing punishment - for establishing or increasing the prosecutor's entitlement - it is an element. (To put the point differently, I am aware of no historical basis for treating as a non-element a fact that by law sets or increases punishment.) When one considers the question from this perspective, it is evident why the fact of a prior conviction is an element under a recidivism statute. . . .
>
> Third, I think it clear that the common-law rule would cover the McMillan situation of a mandatory minimum sentence. . . . [It] is expected punishment has increased as a result of the narrow range and that the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish, i.e., minimum mandatory triggers are elements of the offense. Id. at 2378-2379.

In **Apprendi**, supra, the court clearly elucidated the guideline for differentiating sentencing factors from elements of an offense: "The relevant inquiry is not one of form, but of effect - does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" Id. at 2365.

Under the Nevada Statutory structure a defendant convicted of first degree murder is not death eligible until an aggravating circumstance is found. See **NRS 200.030(a)**. The existence, or finding of an aggravating circumstance converts a life sentence penalty into a possible death sentence.

In the instant matter two of the aggravating circumstances alleged by the prosecution were fact based: 1) The murder was

committed while the person was engaged, alone, or with others, in the commission of or an attempt to commit or flight after committing of attempting to commit, any robbery, arson in the first degree, burglary, invasion of the home or kidnaping in the first degree, and the person charged: a) killed or attempted to kill the person murdered, b) knew or had reason to know that life would be taken or lethal force used, (**NRS 200.033(4)**) and 2) The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody. (**NRS 200.033(5)**).

It cannot be refuted that the existence or non-existence of these aggravating circumstances is a factual determination. The three judge panel deprived appellant of his right to a jury determination under both the sixth and fourteenth amendments to the United States Constitution. Appellant's conviction was not final when **Apprendi**, supra was announced; therefore the decision is applicable herein. See, **Powell v. Nevada**, 511 U.S. 79, 114 S. Ct. 1280, 128 L.Ed.2d 1 (1994). Appellant's death sentence should be reversed and remanded to the district court for a jury determination of the appropriate penalty.

VIII.

THE THREE-JUDGE PANEL SENTENCING PROCEDURE IS CONSTITUTIONALLY DEFECTIVE.

The Nevada capital sentencing scheme contains unique provisions allowing imposition of sentence by a panel of three district court judges in situations where the jury has been unable to

reach a unanimous decision as to the sentence to be imposed[1] or where the first degree murder conviction is based upon a guilty plea.[2] Although the statutory scheme refers to this sentencing body as a "panel" of judges, it functions in the same way as a jury: it is required to make the same findings to support the sentence as a jury;[3] and the statutory scheme does not suggest that the procedure for

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[1] **NRS 175.556** provides:

"If a jury is unable to reach a unanimous verdict upon the sentence to be imposed, the supreme court shall appoint two district judges from judicial districts other than the district in which the plea is made, who shall with the district judge who conducted the trial, or his successor in office, conduct the required penalty hearing to determine the presence of aggravating and mitigating circumstances, and give sentence accordingly. A sentence of death may be given only by unanimous vote of the three judges, but any other sentence may be given by the vote of a majority."

[2] **NRS 175.558** provides:

"When any person is convicted of murder of the first degree upon a plea of guilty or a trial without a jury and the death penalty is sought, the supreme court shall appoint two district judges from judicial districts other than the district in which the plea is made, who shall with the district judge before whom the plea is made, or his success or in office, conduct the required penalty hearing to determine the presence of aggravating and mitigating circumstances, and give sentence accordingly. A sentence of death may be given only by unanimous vote of the three judges, but any other sentence may be given by the vote of a majority."

[3] **NRS 175.554** provides, in pertinent part:

"2. The jury, the trial judge or the panel of judges shall determine:

(a) Whether an aggravating circumstance or circumstances are found to exist;
(b) Whether a mitigating circumstance or circumstances are found to exist; and
(c) Based upon these findings, whether the defendant should be sentenced to:
(1) Life imprisonment with the possibility of parole or life imprisonment without the possibility of parole, in cases in which the death penalty is sought; or
(2) Life imprisonment with the possibility of parole, life imprisonment without the possibility of parole or death, in cases in which the death penalty is sought.

3. The jury or the panel of judges may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.

4. When a jury or a panel of judges imposes a sentence of death, the court shall enter its finding in the record, or the jury shall render a written verdict signed by the foreman. The finding or verdict must designate the aggravating circumstance or circumstances sufficient to outweigh the aggravating circumstance or circumstances found."

reaching the ultimate determination as to sentence or the substantive considerations applicable to that determination.

The preliminary issue in the analysis of the three-judge panel statutes, which the Nevada Supreme Court has not addressed, is the most basic definitional one: What is a "three-judge panel"? Is it a special court, composed of three judicial officers exercising judicial functions? Is it a court composed of a single district judge with the other judges participating in a non-judicial role? Or is it something else? Neither the statute nor the Supreme Court's decisions addresses this fundamental question; and the only judicial decision from any jurisdiction with a remotely comparable statute has held it unconstitutional. Beginning the analysis at this basic point makes clear that the statutory scheme is unconstitutional and that the constitutional difficulties produced by putting this scheme into practice, see part C, below, arise from this basic unconstitutional confusion.

A) Is the Three-Judge Panel a Court?

The Nevada Constitution explicitly prescribes the structure of the court system of the state, and it provides for committing the judicial power to "a Supreme Court, District Court, and Justices of the Peace." Nev. Const. Art. 6 § 1; Art. 6 §6. The Constitution does not provide for any kind of hybrid three-judge district court, nor does it delegate to the legislature the power to establish such courts.[4] The absence of any constitutional warrant for establishing

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[4] This is in clear contrast to the federal system. The United States Constitution provides only for the establishment of the Supreme Court and leaves to the legislative branch the power to create, and regulate the jurisdiction of, "such inferior courts as the Congress may from time to time ordain and establish." **U.S. Const. Art. III § 1**; **Art. I, § 8**. The Nevada Constitution does not delegate any such power to the legislature and it explicitly provides for the establishment and jurisdiction of the district courts. **Nev. Const. Art. 6, §§ 8,9** (delegating to legislature power to establish and regulate justices of

a three-judge court of any kind renders the legislative attempt to create such a court a nullity. See, e.g., **State of Nevada v. Hallock**, 14 Nev. 202, 205-206 (1879). This fundamental absence of legislative power to create a new, non-constitutional court was the basis of the decision in **People ex rel. Rice v. Cunningham**, 61 Ill.2d 353, 336 N.E.2d 1 (1975). Under the law then in effect, **1973 Ill. Rev. Stats. Ch. 38, ¶ 1005-8-1A**, following a conviction of murder with specified aggravating circumstances, sentence would be imposed by a three-judge court composed of the trial judge and two other trial judges assigned by the chief judge of the judicial circuit.[5] The Illinois Supreme Court held this provision unconstitutional, reasoning as follows:

> "The constitution of 1970 ... provides that `[t]he judicial power is vested in a Supreme Court, an Appellate Court, and Circuit Courts.' (Art. VI, sec. 1.) The present judicial article contains no provision for legislative creation of new courts. [Citation]. It is clear, therefore, that the legislature has no constitutional authority to create a new court under Article VI of the 1970 Constitution.
>
> While the organization and the number of judges required for a determination of a proceeding in the Supreme Court and in the appellate court are expressly stated (**Ill. Const. (1970), art. VI, secs. 3 and 5**), the present Constitution is silent as to the number of judges required for the determination of a proceeding in the circuit court. This court, however, has consistently held that circuit (and superior, as classified under the previous constitution) court judges occupy independent offices with equal powers and duties, and that they cannot and do not act jointly or as a group. [Citations] .... The State has not cited nor has our research

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peace and municipal courts); **Art. 6 § 1** (explicitly allowing legislature power to establish "Courts for municipal purposes only in incorporated cities and towns.")

[5] In Illinois, the courts of general jurisdiction are called circuit courts, analogous to our district courts.

> disclosed any authority that the judicial amendment of 1962 or the provisions of the judicial article of the 1970 Constitution were intended to contravene the long-standing view that proceedings in the circuit court are to be conducted by one judge.
>
> In the present case the provision of the death penalty statute providing for the three-judge panel requires that they act collectively in determining the existence of any of the enumerated circumstances and in pronouncing sentence. This is not merely a procedural requirement, but rather it involves the scope of a circuit judge's jurisdiction. The provision, therefore, is constitutionally defective because each of the judges constituting the panel is deprived of the jurisdiction vested in him by the 1970 Constitution."

336 N.E.2d at 5-6. The court followed **Rice** in **In re Contest of Election for Off. of Gov.**, 93 Ill.2d 463, 444 N.E.2d 170, 173-174 (1983), holding unconstitutional a statute providing for the submission of election contests to a "state election contest panel," which was composed of a panel of three circuit judges exercising the jurisdiction of a circuit court.[6]

The Nevada constitutional scheme is precisely analogous to the Illinois one. Our Constitution vests the relevant judicial power in the Supreme Court and the district courts. **Art. 6 § 1.** Nothing in the Nevada Constitution remotely suggests a legislative power to create new courts. In fact, the specific provisions allowing the establishment and regulation of municipal courts and justice courts, the establishment of family court divisions of the district courts,

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[6] No other state has a three-judge panel statute which is the same as Nevada's in requiring judges from other judicial districts to be appointed to the panel. Only three other states currently have statutes providing for three-judge sentencing panels in capital cases, and none of them provides for resort to a three-judge panel following a hung jury. See **Schad v. Arizona**, 501 U.S. 624, 111 S.Ct. 2491 (1991) (relevance of practice in other states to analysis of whether practice satisfies due process principles). The **Rice** decision is apparently the only judicial decision which addresses the constitutionality of the three-judge panel procedure.

and the use of referees by family divisions, **Art. 6 §§ 1, 6(2), 8, 9,** imply the absence of power in the legislature to create other courts, through application of the rule that the expression of one thing amounts to the exclusion of others. E.g., **Galloway v. Truesdell**, 83 Nev. 13, 26, 422 P.2d 237 (1967) (expressio unius est exclusio alterius applied to jurisdictional provisions of constitution).

Just as the Illinois court recognized that the circuit judges have "equal powers and duties," the Nevada Supreme Court has recognized that the district judges have "equal and coextensive jurisdiction." E.g., **State Engineer v. Sustacha**, 108 Nev. 223, 225, 826 P.2d 959 (1992); **Rohlfing v. District Court**, 106 Nev. 902, 906, 803 P.2d 659 (1990); **Warden v. Owens**, 93 Nev. 255, 256, 563 P.2d 81 (1977); **NRS 3.230.** In **Warden v. Owens**, the Supreme Court relied on this constitutional rule in concluding, under **Article 6, § 6** of the constitution, that a district court could not revive a defendant's right of appeal in a habeas corpus proceeding by "remanding" the case to another district court for reimposition of sentence: the court held that the district court had "no jurisdiction to ... direct that court how to proceed." 93 Nev. at 256 (citations omitted).[7] Thus, as the Illinois Supreme Court concluded, if three judges preside together over the same case, each judge is deprived of the constitutional jurisdiction which he or she wields in presiding over a constitutional court, to the extent that the other judges exercise their equal, constitutional power in the same case. **People ex rel Rice v. Cunningham**, supra, 336 N.E.2d at 6. "This is not merely a procedural

[7] There is also no constitutional authorization in Nevada for "collegial" decision-making by district courts. **Cf. PETA v. Bobby Berosini Ltd.**, 111 Nev. __, 894 P.2d 337 (1995) (collegial decision-making of Supreme Court requires grant of rehearing where disqualified judicial officer participated in decision); **Nev. Const. Art. 6 §§ 2, 3.**

requirement, but rather involves the scope of a circuit judge's jurisdiction." Id.; see also, **Ex parte Gardner**, 22 Nev. 280, 284, 39 P. 570 (1895) ("It is not possible for one court to reach out and draw to itself jurisdiction of an action pending in another court ...").[8]

The pernicious and unconstitutional effects of this infringement on the jurisdiction of the district court are not mere abstractions: every disagreement among the judges on a point of law makes the unconstitutionality manifest. Suppose, for instance, that the presiding judge - - who is holding his or her own "court" in the case at trial or in receiving the guilty plea - - concludes after the sentencing proceeding that the defendant should be sentenced to death. Suppose further that the two judges from out of the district decide that a sentence less than death should be imposed. Since the statute allows a sentence less than death to be imposed by a majority of the panel, **NRS 175.556**, **NRS 175.558**, the two extra-territorial judges can, in effect, overrule the decision of the presiding judge at sentencing. Clearly, this situation is inconsistent with any of the district judges exercising the constitutional power of a court.

In short, by erecting a species of court not contemplated by the Constitution, the legislature has acted without constitutional authority in establishing the three-judge panel court and has violated

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[8] Indeed, a district judge cannot exercise any judicial authority as a court outside the judicial district in which he or she is commissioned. **Miller v. Ashurst**, 86 Nev. 241, 243, 468 P.2d 357 (1970); **Madison Nat'l Life v. District Court**, 85 Nev. 6, 9, 449 P.2d 256 (1969); **Ex parte Gardner**, supra, 22 Nev. at 284; cf. **NRS 1.050(4)** (stipulation to change place of holding court). While a district judge may exercise judicial power in another judicial district under assignment as an acting judge of that district by the chief justice or by stipulation, **NRS 3.040(1)**; **NRS 3.220**; **Walker v. Reynolds Elec. & Eng'r Co.**, 86 Nev. 228, 232-233, 468 P.2d 1 (1970), no such commission can serve to authorize a judge of another district to exercise jurisdiction in a pending case in which a judge of the district also exercises the same jurisdiction.

the separation of powers, **Nev. Const. Art. 3 § 1**, by unconstitutionally interfering with the jurisdiction of the district court. See e.g., **Lindauer v. Allen**, 85 Nev. 430, 434-435, 456 P.2d 851 (1969); **Pacific L.S. Co. v. Ellison R. Co.**, 46 Nev. 351, 359, 213 P. 700 (1923). There is no relevant distinction between Nevada and Illinois law on this subject. Nonetheless, in **Colwell v. State**, 112 Nev. 807, 812 n.4, 919 P.2d 403 (1996), the Nevada Supreme Court rejected without analysis an argument based on **Cunningham** merely on the ground that the decision construing Illinois law was not "persuasive."

The Nevada Constitution, however, has always been interpreted as strictly as the Illinois Constitution in rejecting courts not specifically authorized by the Constitution. Thus the Nevada Supreme Court's unique attempt in the context of capital sentencing to disregard all of its constitutional jurisprudence in order to save a manifestly unfair and death-prone procedure fails the basic federal constitutional due process and equal protection test of rationality: there is no rational distinction between the Court's previous applications of the constitution to invalidate legislation purporting to create non-constitutional courts and the situation presented by the non-constitutional three-judge "court" prescribed by the capital sentencing statute. Put differently, a capital defendant, has a liberty interest under the state constitution in not being sentenced by a body which is not constitutionally authorized. Since the Nevada Constitution contains no warrant for establishing a three-judge court, the imposition of sentence by such a non-constitutional court would therefore violate the federal constitutional right to due process of law. **Hicks v. Oklahoma**, 447 U.S. 343, 100 S.Ct. 2227

(1980). Finally, the use of such a death-prone mechanism violates the reliability guarantee of the Eighth Amendment.

B) Is the Three-Judge Panel a Hybrid Court, Composed of One Judge and Two Judges Functioning in a Non-Judicial Role?

As shown above, a three-judge panel in which all three judges exercise judicial power is an unconstitutional monstrosity. It is equally problematic, however, if the three judges do not all act in a judicial capacity. It is barely conceivable that the statutory scheme could contemplate that the trial judge would preside over the penalty hearing as the constitutional "district court," while the other two district judges participated in the sentencing decision not as judicial officers exercising judicial functions but as quasi-jurors or assessors.[9] This construction would present equally difficult constitutional problems.

It is clear from the statutory scheme that the three-judge panel conducts exactly the same analysis in sentencing as a jury. **NRS 175.554, NRS 175.558**; cf. **NRS 175.556**. This structure contemplates a "highly subjective" decision as to the appropriate punishment, e.g., **Dawson v. State**, 103 Nev. 76, 80, 734 P.2d 221 (1987) (citations omitted), and it includes an untrammeled power to decline to impose a death sentence, whatever the result of the sentencing calculus may be. **Bennett v. State**, 106 Nev. 135, 144, 787 P.2d 797 (1990). In reaching this decision, the statute does not suggest that the jurors,

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[9] An assessor is "[A] person learned in some particular science or industry, who sits with the judge on the trial of a cause requiring such special knowledge and gives his advice." **Black's Law Dictionary 117 (6th ed. 1990)**; see **Calmer S.S. Corp. v. Scott**, 345 U.S. 427, 432, 73 S.Ct. 739, 742 (1953); (referring to practice of having maritime experts sit with court in cases in admiralty); **Wiseman, The Limits of Vision: Karl Llewellyn and the Merchant Rules, 100 Harv. L. Rev. 465, 512-514 and n.218 (1987)** (referring to Lord Mansfield's practice of empaneling juries of experts in cases involving law merchant).

or the members of a three-judge panel, exercise a judicial - - or, as it were, professional - - discretion. Cf. **NRS 176.033(1)(a); NRS 176.035; NRS 176.045.**[10] There is certainly nothing in the legislative history of the provision to suggest that the legislature contemplated any role for the panel different from that of the jury. See **Nev. Legislature, 59th Sess., Senate Judiciary Committee, Minutes at 1-2 (March 16, 1977)** (referring to sentencer using "same criteria" as jury.)[11]

In short, in fulfilling the function of sentencing, the two appointed members of the panel could as easily be selected from members of the County Commission, or the legislature, or the Elks: they cannot, as shown above, exercise judicial power without violating the Constitution; and their role in sentencing is that of individuals chosen to express a "reasoned moral response" to the offense and the offender in the same way that lay jurors would. But this role as surrogate jurors violates the Constitution also.

It is clear that the separation of powers provision of the Nevada Constitution prohibits the assignment by the legislature of non-judicial duties to district judges. **Nev. Const. Art. 3 § 1.** In

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[10] Imposing equivalent standards for sentencing by a jury or a three-judge panel is also required to avoid constitutional problems. It goes without saying that a differential standard for sentencing based upon whether the defendant pleads guilty or not, or whether a defendant goes to trial but does not obtain a unanimous verdict, would violate the federal **Fifth and Sixth Amendment** guarantees. Cf. **United States v. Jackson**, 390 U.S. 570, 88 S.Ct. 1209 (1968). While the United States Supreme Court has held that a state may commit the capital sentencing decision to a judge or a jury, e.g., **Spaziano v. Florida**, 460 U.S. 447, 464, 104 S.Ct. 3154 (1984), it has never suggested that a state may provide a differential standard for imposition of the death penalty depending on which type of sentencer is employed.

[11] The scanty legislative history on the use of the three-judge panel focuses primarily on the difficulty of empaneling sentencing juries. See **Nev. Legislature, 59th Sess., Senate Judiciary Committee, Minutes at 2 (March 14, 1977)**; Minutes at 10 (March 3, 1977). The sole constitutional issue considered in this context was whether the United States and Nevada constitutions required that a capital sentence always be imposed by a jury, id.; and there was no discussion of the validity, under any constitutional provision, of erecting a different species of district court.

Desert Chrysler-Plymouth v. Chrysler Corp., 95 Nev. 640, 644-645, 600 P.2d 1189 (1979), the legislature gave district courts the duty of determining, in an application for injunctive relief, whether "good cause" existed for establishing a new automobile dealership in a market area. Although the court proceeding was in form one for injunctive relief, the Supreme Court held that the proceeding was in fact a "pre-licensing fact-finding," which was prohibited under the separation of powers doctrine as a non-judicial function. Id; **Galloway v. Truesdell**, 83 Nev. 13, 23-31, 422 P.2d 237 (1967) (legislative imposition of duty on district court to examine qualifications of ministers to be certified to perform marriages, and to find facts on those issues, invalid under separation of powers); see also, **Esmeralda Co. v. District Court**, 18 Nev. 438, 439 (1884) ("The duties performed by the district judge in pursuance of the statute did not become judicial acts merely because they were performed by a judicial officer.")

In the case of the three-judge panel, nothing in the statute suggests that the sentencing function it performs is a judicial function, in the manner of a normal judicial sentencing. See **NRS 176.033(1)(a); NRS 176.035; NRS 176.045**. Rather, the panel functions essentially as a surrogate jury; and since the two judges designated to sit with the trial judge do not, and cannot, exercise judicial power as judicial officers presiding over a court, they have a role indistinguishable from that of a lay juror. Accordingly, however much the fact-finding and weighing conducted in the capital sentencing proceeding resembles a judicial act in form, in fact it is no more an exercise of judicial power than the fact-finding conducted in **Desert Chrysler-Plymouth**. The statute therefore violates the constitutional

separation of powers doctrine by imposing non-judicial duties upon judicial officers.

The unconstitutionality of the three-judge panel statute, which commits essentially the functions of jurors to assigned judges, is demonstrated by two contrasting of situations in which the Constitution does authorize judges to exercise authority which is not, strictly speaking, the adjudicative power which the Constitution grants to courts. **Nev. Const. Art. 6 §§ 4, 6.** The Commission on Judicial Discipline includes two members who are justices of the Supreme Court or judges. **Nev. Const. Art. 6 § 21(2)(a),(8).** The Commission is a "constitutionally established `court of judicial performance and qualifications,'" with jurisdiction analogous to that given by the Constitution to the district courts, **Whitehead v. Commission on Judicial Discipline**, 110 Nev. 128, 160 n.24, 869 P.2d 795 (1994); but the members (including the judicial personnel members) do not function as "judges" exercising the constitutional power given to courts. This is made clear by the fact that the members of the Commission are separately granted immunity for their official acts, id. at 159-160; **Admin. and Proc. Rules for Nevada Commission on Judicial Discipline**, Rule 13; and this would not be necessary for the judicial members if they were exercising the authority of their judicial offices. Similarly, the Commission gives no particular power to any of its individual members, including the judicial members, id., **Rule 3**, and its members are subject to disqualification or peremptory challenge under the Commission's own rules, id., **Rule 3(6,7,8)**, and not under the general rules for judicial disqualification. Cf. **NRS 1.225, NRS 1.235.**

The constitutional provision for the Commission demonstrates

two things: first, the legislature and the people recognized that a constitutional amendment was necessary to establish a new court not provided for in the constitutional structure of the district and supreme courts. Such a provision was enacted in order to establish the Commission but was not enacted to establish any three-judge district court. Second, the legislature and the people recognized that assigning judges to perform adjudicative duties which did not belong to their jurisdiction as district courts would require constitutional authorization, which was enacted to allow judges to sit on the Commission, but was not enacted to allow judges to sit as panel members on non-constitutional three-judge tribunals.

Similarly, the Constitution provides that the members of the Supreme Court sit on the Board of Pardons. **Nev. Const. Art. 5 § 14(1)**. Plainly, the justices do not exercise a judicial power in this capacity, cf. **State v. Echaverria**, 69 Nev. 253, 257, 248 P.2d 414 (1952) (only pardons board and not court has power to commute sentence): they sit as individuals chosen ex officio but not exercising the power of their judicial office. See **Kelch v. Director**, 107 Nev. 827, 834, 835, 822 P.2d 1094 (1991) (Steffen, J., concurring) (justices do not sit as court on Board of Pardons but as individual members of executive branch board); see also, **Creps v. State**, 94 Nev. 351, 358 n.5, 581 P.2d 842 (1978). Here again, where judicial officers serve in a non-judicial capacity, and not as a constitutional court, constitutional authorization was required; and such authority was not obtained to establish the three-judge capital sentencing court. Accordingly, the attempt of the statute to assign the duties of judicial jurors to district judges violates the constitutional separation of powers provision.

C) Conclusion

As shown above, the three-judge jury panel statutes are unconstitutional whether they require district judges to share their exclusive and co-extensive jurisdiction as judicial officers presiding over a court or to act in a non-judicial role as surrogate jurors. In addition to the confusion generated by this ambiguity as to the role of the district judges in itself, it also produces unconstitutional vagueness and confusion as to how counsel can attempt to ensure the impartiality of the panel. For instance, the statues give no guidance as to whether the assigned members of the panel sit as judges and if counsel is therefore limited to pursuing disqualification pursuant to **NRS 1.230**, or to seek to litigate the question whether a capital defendant is entitled to a peremptory challenge of the judges. Cf. **SCR 48.1.**[12] If the judges serve in a non-judicial role, the statutes given no indication how the parties are to ensure the impartiality of the panel, either by invoking the procedures for conducting voir dire of jurors, or by invoking the judicial duty to disclose all information which the parties could consider relevant to the question of disqualification. Code of

[12] **SCR 48.1** provides for peremptory disqualification of the presiding judge in civil actions. This provision is "designed to insure a fair tribunal by allowing a party to disqualify a judge thought to be unfair or biased." **Jahnke v. Moore**, 737 P.2d 465, 467 (Idaho Ct. App. 1987). A movant may be said to properly take advantage of a peremptory challenge when the litigant is concerned that the judge may be biased or unfair for some real or imagined reason. *Id.*" **Smith v. District Court**, 107 Nev. 674, 677, 818 P.2d 849 (1991). The purpose of the rule is simply "promoting the concept of fairness." Id. at 678. It is not open to question that capital cases, in which the stakes for the litigants are nothing less than life and death, require heightened concern for fairness and accuracy. See, e.g., **Johnson v. Mississippi**, 486 U.S. 578, 584, 108 S.Ct. 1981 (1988); **Ford v. Wainwright**, 477 U.S. 399, 411, 414, 106 S.Ct. 2595 (1986) (plurality); **Paine v. State**, 110 Nev. 609, 619, 877 P.2d 1025 (1994) (addressing barred claims due to "gravity of sentence"). SCR 48.1, by limiting the use of peremptory challenges to civil cases, affords a protection to the fairness of the proceedings to litigants who have only money at stake, while denying it to those whose lives and liberty are in issue. Thus the rule violates the state and federal equal protection guarantees by erecting an irrational - - indeed, perverse - - classification. E.g., **Barnes v. District Court**, 103 Nev. 679, 685, 748 P.2d 483 (1987); **Nev. Const. Art. 4 § 21**; **U.S. Const. Amend. XIV**.

Judicial Conduct, Canon 3(E)(1). The failure of the statutory scheme to define the role of the members of the panel, in a way which permits adequate analysis of the procedure and adequate means for ensuring its impartiality, renders it unconstitutional.

Appellant is entitled to relief.

IX.

THE ABSENCE OF PROCEDURAL PROTECTIONS IN THE SELECTION AND QUALIFICATION OF THE THREE-JUDGE JURY VIOLATES THE APPELLANT'S RIGHT TO AN IMPARTIAL TRIBUNAL, DUE PROCESS AND A RELIABLE SENTENCE.

Even assuming arguendo that the judicial-jury panel proceeding does not in itself violate the constitution, the absence of neutral and effective mechanisms for selecting and qualifying the panel members to act as jurors in a capital case violates the state and federal guarantees of due process of law, equal protection of the laws, and a reliable sentence. **Nev. Const. Art. 1 §§ 6, 8; U.S. Const. Amends VIII, XIV.**

A) Selection of Judges

The statutory scheme for appointment of panel members does not provide any procedure or criteria for the selection of the panel members. The Nevada Supreme Court has declined to disclose the method by which panel members are selected: instead, in **Paine v. State**, 110 Nev. 609, 618, 877 P.2d 1025 (1994), the Supreme Court merely asserted that there is nothing improper in its selection procedure, without specifying what it is. The Supreme Court's position raises fundamental constitutional issues:

First, Appellant is aware of no situation in which litigants are forced to accept a decision-maker's assertion that a secret proceeding, in which the manner of proceeding is not disclosed, is

both procedurally fair and produces proper results. Secrecy with respect to the standards employed and the actual procedure for selection is presumptively improper:

> "Unaccountable secrecy, with its attendant opportunity to harass, intimidate, favor, raise or lower standards in particular unreported cases, to satisfy their view of what ought to be or not be, is a power beyond any known to our law. A tribunal that operates in secrecy can indulge its suspicions, yield to public pressure, even its whims, send zealous agents with a deliberate intent to find grounds to bring a judge beneath its influence for good or purposes of their own. Their purposes can run the gamut used by secret power to bend compliance to their wishes. Whether they do or not, the existence of the possibility must render them strictly accountable whenever their proceedings surface."

Matter of Chiovero, 524 Pa. 181, 570 A.2d 57, 60 (1990), quoted in **Whitehead v. Comm'n on Judicial Discipline**, 111 Nev. 70, n.46, 893 P.2d 866 (1995). "Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat; this requires rigorous justification." Id. at 269. (Shearing, J., dissenting), quoting **Matter of Krynicki**, 983 F.2d 74, 75 (7th Cir. 1992) (on motion to seal) (Easterbrook, J.) Where there are no published standards or procedures for judicial action, secrecy exacerbates the lack of adequate procedural protections. "Unabridged discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." **In re Gault**, 387 U.S. 1, 87 S.Ct. 1428, 1438 (1967). Such unbridled discretion exercised in a secret proceeding, of which there is no record, is fundamentally inconsistent with our historical traditions and with the adversary process. See generally, **In re Oliver**, 333 U.S. 257, 273, 68 S.Ct. 489

(1948).[13]

Second, the absence of procedural standards and the secrecy of the selection process deprive the parties of all the constitutional protections which the adversary system provides, such as adequate notice of the proceedings, adequate opportunity to litigate the issues arising in those proceedings, and an adequate record upon which the matter can be reviewed. In capital cases, a complete record of the proceedings is clearly necessary for adequate review under the federal constitution, see **Dobbs v. Zant**, 506 U.S. 357, 113 S.Ct. 835, 836 (1993) (per curiam), and a record of the selection process for members of a three-judge panel is clearly necessary to any review of the propriety of that procedure. See, **State v. Smith**, 326 N.C. 792, 392 S.E.2d 362, 363 (N.C. 1990) (trial court's failure to record private

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[13] There is no legal justification for such secrecy. The standards, policies and actions of the Nevada Supreme Court in the selection and appointment of panel members are not "declared by law to be confidential", and the information is therefore subject to public disclosure. **NRS 239.010**; **Neal v. Griepentrog**, 108 Nev. 660, 665, 837 P.2d 432 (1992); **Donrey of Nevada v. Bradshaw**, 106 Nev. 630, 632, 798 P.2d 144 (1990). The Code of Judicial Conduct also prescribes disclosure to the parties of all relevant proceedings in every case; **Canon 3(B)(7)(a)(ii)** requires the court to give prompt notification to the parties "of the substance of the ex parte communication and allow[] an opportunity to respond." **The Commentary to Canon 3(b)(7)** makes clear that

> "[T]o the extent reasonably possible, all parties or their lawyers shall be included in communication with a judge
> ....
> A judge must disclose all ex parte communications ... regarding a proceeding pending or impending before a judge
> ....
> [and]
> If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties."

Unlike conferences with court personnel, which are permitted "to aid the judge in carrying out the judge's adjudicative responsibilities," **Canon 3(b)(7)(c)**, the contacts involved in selecting members of a three-judge panel do not relate to the adjudication of a substantive legal issue, but relate to the constitutional permissibility of the court's standards, if any, in making the selection of the panel members and its adherence to those standards in particular cases. Any contacts between Supreme Court personnel and prospective members of three judge-panels clearly regard a "pending or impending" proceeding, and the substance of those communications must be disclosed.

conversations with prospective jurors precluded meaningful appellate review). In turn, the combination of the standardlessness of the selection proceedings with the secrecy of the procedure and the absence of adversary litigation leaves any error in that proceeding immune from identification or correction.

The mere assertion that the court has done nothing improper does nothing to diminish the constitutional problem, because what the Supreme Court assumes is a proper selection procedure may not survive constitutional scrutiny. For instance, the statistical evidence strongly indicates that the selection of judges is not random. The Nevada Supreme Court may believe that there is no impropriety in relying disproportionately upon judges who are willing to serve on panels as a method of selection, but as shown below, such a standard is constitutionally impermissible. Without disclosure of the method of selection, such an improper procedure is impervious to examination or correction.

Finally, the circumstantial evidence of the effects of the selection process - - whatever that process is - - contradicts the Supreme Court's mere assertion that the selection process is proper. In general, it can hardly be gainsaid that a tribunal which imposes a sentence of death in almost 90% of the cases which come before it, **Beets v. State**, 107 Nev. 957, 975, 821 P.2d 1044 (1991) (Young, J., dissenting); see id. at 970-971 (Steffen, J., concurring), is a "tribunal organized to return a verdict o f death."[14] A procedure

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[14] This motion is based upon the currently available public information with respect to the selection of three-judge panels and the rate of imposition of the death penalty by those panels as represented in the Nevada Supreme Court's decision in **Beets**. Defendant is entitled to rely upon the readily available information in making a prima facie case, or a case for further discovery, see below, because the other relevant information as to the actual selection process and the rate of death-imposition by juries is in the possession of other parties - - the state and the courts - - and is not readily available

which produces such a result is, prima facie, not working rationally to select "the few cases in which [a death sentence] is imposed from the many cases in which it is not." **Furman v. Georgia**, 408 U.S. 238, 314, 92 S.Ct. 2726 (1972) (White, J., concurring) (emphasis supplied).[15]

More particularly, the normal protection against use of impermissible factors in the selection of judges or jurors from an available pool is random selection. Under state law, when a method of judge assignment is specified, it is random selection. See **SCR 48.1(2)(a)** (random selection of replacement for challenged judge); **Washoe District Court Rules, Rule 2(1)** (random assignment of cases); **Eighth Judicial District Court Rules, Rule 1.60(a)** (same). Generally speaking, random selection ensures against arbitrary action because it "affords no room for impermissible discrimination against individuals or groups." **United States v. Eyster**, 948 F.2d 1196, 1213 (11th Cir. 1991) (citations omitted). Random selection does not contemplate that judges may volunteer for duty, no more than it would allow the same panel to be selected each time.[16] Similarly, public

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for sophisticated statistical analysis by the defendant.

[15] This extreme rate of death sentencing is even more striking because the three-judge jury may impose a sentence less than death by a majority vote, **NRS 175.556**, **NRS 175.558**, a power which a sentencing jury does not have. **NRS 175.556**. Thus, assuming a constitutional degree of impartiality, three-judge juries should impose death sentences at a rate significantly less than lay juries.

[16] These data strongly indicate that the Supreme Court relies on those judges who are actively willing to be appointed to three-judge panels as the method of selection. Reliance upon self-selection for participation in capital sentencing proceedings, however, is virtually the antithesis of using objective and neutral selection criteria. See **State v. Lopez**, 107 Idaho 726, 692 P.2d 370, 380 (App. 1984); **United States v. Branscome**, 682 F.2d 484 (4th Cir. 1982) (use of volunteers on grand jury introduces "subjective criterion" for service not authorized by statute); **United States v. Kennedy**, 548 F.2d 608, 609-610 (5th Cir.), cert. denied 434 U.S. 865 (1977); see also **Duren v. Missouri**, 439 U.S. 357, 367-370, 99 S.Ct. 664 (1979) (state practice allowing women to decline jury service unconstitutional where exemption not "appropriately tailored" to "important state interest"); **Taylor v. Louisiana**, 419 U.S. 522, 531-537, 95 S.Ct. 692 (1975) (state system excluding women from jury service unless they filed declaration volunteering for service unconstitutional). Thus the empirical evidence indicates that the

access to the selection process ensures that the selection is based solely upon objective and permissible criteria. Cf. **United States v. Davis**, 546 F.2d 583, 589 (5th Cir), cert. denied 431 U.S. 906 (1977) (no indication that court was "left in the dark about the procedures employed behind closed doors" in computerized drawing of names for jury pool).

Finally, any assumption that the selection of panel members is made on a strictly constitutional basis is undermined by an accusation made by the immediate past chief justice of Nevada. In responding to a motion to disqualify him in a case which had been decided by a three-to-two vote, the justice claimed that the current chief justice, who voted with the minority, "will appoint a substitute whom he believes will favor his view in this case," in order "to achieve a result that ordinarily would not be achieved ...." **Snyder v. Viani**, No. 23726, Response of Justice Rose to Motion to Disqualify Him, Affidavit at 14 (March 8, 1995). The sworn accusation by a member of the Supreme Court that the selection of judges for appointment to replace disqualified justices, pursuant to **Nev. Const. Art. 6 § 4** and **NRS 1.225(5)**, is manipulated by the court to favor certain results removes any constitutionally-adequate basis for assuming that the appointment of judges to three-judge juries in capital cases is consistent with constitutional standards.

B) Qualification of Judges

In addition to the absence of constitutionally-adequate selection criteria, the statute fails to provide for adequate inquiry

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Supreme Court selection process is not neutral. See, **Castaneda v. Partida**, 430 U.S. 482, 497, 97 S.Ct. 1272 (1977) ("selection procedure that is susceptible of abuse" supports showing of discrimination based upon statistical evidence).

by the Supreme Court or by the parties into the impartiality of the individual members of the three-judge jury. The necessity for such exploration in particular cases is, again, a function of the role of the judges in the panel proceeding: in the sentencing proceeding the judges do not act as judges but as jurors. **The law guides the sentencer up to a point, but a decision not to impose the death penalty may be made on any basis at all: no legal principle or set of facts ever requires a sentencer to impose death.**[17] Since the panel's discretion, at that point, is as untrammelled as a jury's, the same protections used to ensure the jury's impartiality must also be applied to the judges. The need for exploration of the panel judges' biases and prejudices is also compelled by the fact that the judges have no track record to examine in capital cases. In the normal death penalty case, the judge plays no role at all in the sentencing and is required only to pronounce the sentence imposed by the jury. **Hardison v. State**, 104 Nev. 530, 534-535, 763 P.2d 52 (1988). Thus there is generally no public basis for investigating a judge's sentencing biases in capital cases; and because of the judge's limited role in the normal capital cases, a judge may not have examined his or her own attitudes regarding capital sentencing. This is true in particular of the judges who are assigned from other judicial districts: the parties are likely to have no familiarity at all with the records or known biases of those judges from communities foreign to the district of conviction.

The necessity of inquiry into the panel members'

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[17] "Nevada's statute does not require the jury to impose the death penalty under any circumstance, even when the aggravating circumstances outweigh the mitigating circumstances. Nor is the defendant required to establish any mitigating circumstances in order to be sentenced to less than death." **Bennett v. State**, 106 Nev. 135, 144-145, 787 P.2d 797 (1990) (footnote omitted).

impartiality cannot be evaded by reference to the judges' general oath to follow the law. Cf. **Paine v. State**, supra, 110 Nev. at 618. In general, the reliance on the court's oath as an assurance of regularity is in part based upon the theory that "if a court errs in matters of law, its errors may be corrected .... effectively on appeal ....", **Allen v. Rielly**, 15 Nev. 452, 455 (1880) as opposed to "the unjust actions of jurors, caused by prejudice or undue feeling." **Eureka Bank Cases**, 35 Nev. 80, 149 (1912). Again, this is not the situation in three-judge panel situations where the judges act in effect as jurors.

Irrespective of prior Nevada Supreme Court decisions, inquiry by the parties is absolutely crucial to determine if any of the judges' biases and attitudes are inconsistent with the constitutionally-required degree of impartiality above and beyond and oath to follow the law. See **Morgan v. Illinois**, supra, 112 S.Ct. at 2235.[18]

The constitutional inadequacy of relying upon the judge's general oath to follow the law as a guarantee of impartiality is equally apparent with respect to disclosure by the judges of specific bias. Courts routinely recognize that judges can be swayed by biases and prejudices which affect lesser mortals. See, e.g., **In Interest of McFall**, 556 A.2d 1370, 1376 (Pa. Super. 1989), affirmed 617 A.2d 707, 714 (Pa. 1992) (pending criminal investigation of judge);

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[18] Of course the Eighth and Fourteenth Amendments do not require a categorical, conscious refusal to follow the law as a basis for disqualification: an opinion with respect to the death penalty (or to any subsidiary question involved in imposing it) is disqualifying if it will "prevent or substantially impair" a sentencer's ability to follow the law. **Wainwright v. Witt**, 469 U.S. 412, 424 n.5, 105 S.Ct. 844, 852 n.5 (1985) (emphasis supplied). With respect to judges, the Nevada Supreme Court has recognized that even the appearance of bias is disqualifying. **PETA v. Bobby Berosini, Ltd.**, 111 Nev. __, 894 P.2d 337 (1995).

Pepsico, Inc. v. McMillen, 764 F.2d 458, 460 (7th Cir. 1985) (potential employment relationship with law firm in pending case); **United States v. Murphy**, 768 F.2d 1518, 1538 (7th Cir. 1984) (close personal relationship between judge and prosecutor); **Spires v. Hearst Corp.**, 420 F.Supp. 304, 306-307 (C.D. Cal. 1976) (flattering publicity about judge in party's newspaper); see generally **In re Murchison**, 349 U.S. 133 (1955); **Tumey v. Ohio**, 273 U.S. 510, 532 (1927).[19]

The Supreme Court in **Paine** assumed that the general judicial oath to follow the law and the availability of judicial disqualification proceedings were adequate to prevent imposition of sentence by a biased panel. Once again, the available empirical evidence shows that the Supreme Court's assumption is false. In general, of course, neither the parties nor the judge may be fully aware of a disqualifying condition. See **PETA v. Bobby Berosini, Ltd.**, supra, 111 Nev. 431. This problem is particularly acute with respect to the panel members from outside the district, about whom the parties may know nothing, and who themselves will know nothing about the case at the time of their appointment.[20] In the cases about which

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[19] The Nevada Supreme Court regularly recognizes the possibility that judicial officers can be biased against parties. E.g., **Buschauer v. State**, 106 Nev. 890, 896, 804 P.2d 1046 (1990) (remand for resentencing before different judge after erroneous consideration of polygraph results and victim impact statement by original judge); **Wolf v. State**, 106 Nev. 426, 428, 794 P.2d 721 (1990) (reversing denial of petition for postconviction relief and ordering new sentencing hearing before different judge, where original sentencing judge exposed to recommendation by prosecution in violation of plea agreement); **Gamble v. State**, 95 Nev. 904, 909, 604 P.2d 335 (1979) (same): **Van Buskirk v. State**, 102 Nev. 241, 244, 720 P.2d 1215 (1986) (same); **Collins v. State**, 89 Nev. 510, 514, 515 P.2d 1269 (1973); **Santobello v. New York**, 404 U.S. 257, 263, 92 S.Ct. 495 (1971).

[20] The lack of available information about judges from other districts, in which community standards may be vastly different from those in the district of conviction, is particularly troublesome because district judges must run in contested elections. **Nev. Const. Art. 6 § 5**. Whether a judge from another district has expressed opinions during election campaigns which would be grounds for disqualification (or the likely reaction in the judge's home district to the imposition of a sentence less than death), is information not reasonably available to the parties and counsel in the district of conviction.

information is available, neither the judge's general oath to follow the law, nor the ethical requirement to disclose potentially disqualifying evidence, **Code of Judicial Conduct, Canon 3(E)(1)**, has been adequate to secure an impartial panel. For instance, one of the most recent panels imposed the death penalty in a case in which the defendant killed two victims, including one woman, by inflicting head injuries. **State v. Calambro**, Washoe County Case No. CR-94-0198. One of the judges selected for the panel, **In the Matter of Appointment of District Judges**, Order (January 9, 1995), according to published and uncontradicted reports, had maintained a close personal relationship with a woman who was shot in the head, in an alleged attempted murder and suffered serious and permanent injury as a result. The prosecution of the assailant was still pending at the time of the **Calambro** sentencing. See **"View From The Bench," Las Vegas Sun, p.4D (March 31, 1994); "Jury Gives Up On Gunman," Las Vegas Sun, p.1A (June 2, 1994); State v. Schlafer**, Clark County Case No. C118099. This situation would clearly justify excusal for cause of a juror, or, at minimum, a searching inquiry into the juror's capacity to be impartial. See e.g., **Hunley v. Godinez**, 975 F.2d 316, 319 (7th Cir. 1992) (and cases cited); cf. **Hall v. State**, 89 Nev. 366, 370-371, 513 P.2d 1244 (1973) (disqualification of juror who was crime victim not required where full voir dire on issue established that juror could be impartial). Review of the record in **Calambro**, however, reveals that there was no disclosure to the parties of this information, which would certainly be "relevant to the question of disqualification." **Code of Judicial Conduct, Canon 3(E)(1)**, Commentary.

There is no question that a capital sentencing proceeding must comply with the requirements of due process of law. E.g., **Morgan**

v. Illinois, 504 U.S. __, 112 S.Ct. 2222, 2228 (1992); **Gardner v. Florida**, 430 U.S. 349, 351, 97 S.Ct. 1197 (1977) (plurality opn.) Under the **Eighth Amendment**, heightened scrutiny of procedural requirements reflects the "a special `need for reliability in the determination that death is the appropriate punishment' in any capital case." **Johnson v. Mississippi**, 486 U.S. 578, 584, 108 S.Ct. 1981 (1988), quoting **Gardner v. Florida**, 430 U.S. 349, 363-364, 97 S.Ct. 1197 (1977) (plurality), and **Woodson v. North Carolina**, 428 U.S. 280, 305, 96 S.Ct. 2978 (1976) (White, J., concurring); accord, **Ford v. Wainwright**, 477 U.S. 399, 411, 414, 106 S.Ct. 2595 (1986) (plurality) (in capital cases, Eighth Amendment requires "heightened standard of reliability"). The absence of any substantive or procedural standards for the selection and qualification of members of three-judge panels, and the concealment by the Supreme Court of its procedures and criteria for making the selection of panel members, deprive the parties of any opportunity to litigate the propriety of the court's actions, and explicitly afford a "lowered standard of reliability" with respect to these proceedings. In light of the extraordinary rate of imposition of capital sentences by three-judge panels, the evidence that the selection of panel members does not proceed on a neutral basis, and the evidence that factors relevant to disqualification are routinely not disclosed, the absence of procedural protections in the selection and qualification of panel members deprives the defendant of the most fundamental requirement of due process, an impartial tribunal. E.g., **Marshall v. Jerrico, Inc.**, 446 U.S. 238, 242, 100 S.Ct. 1610 (1980); **In re Murchison**, 349 U.S. 133, 136, 75 S.Ct. 623 (1955); **In re Ross**, 99 Nev. 1, 7-18, 656 P.2d 832 (1983). Rather, these procedures result in the defendant being sentenced by "a

tribunal organized to return a verdict of death." **Morgan v. Illinois**, supra, 112 S.Ct. at 2231, quoting **Witherspoon v. Illinois**, 391 U.S. 510, 520, 88 S.Ct. 1770 (1968).

Accordingly, the three-judge panel procedure cannot constitutionally be applied to any defendant.

Appellant is entitled to relief.

X.

USE OF NEVADA'S THREE-JUDGE PANEL PROCEDURE TO IMPOSE SENTENCE IN A CAPITAL CASE PRODUCES A SENTENCER WHICH IS NOT CONSTITUTIONALLY IMPARTIAL AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

Although the federal constitution does not prescribe the specific form which a state's capital punishment procedure must take, e.g., **Spaziano v. Florida**, 468 U.S. 447, 464, 104 S.Ct. 3154, 3164 (1984); **Jurek v. Texas**, 428 U.S. 262, 279, 96 S.Ct. 2950 (1976), whatever procedure is employed must comply with constitutional standards of due process and must result in a reliable determination which satisfies the Eighth Amendment requirement that the sentence reflect a "reasoned moral response" to the offense and the offender. **Penry v. Lynaugh**, 492 U.S. 302, 319, 109 S.Ct. 2934 (1989); quoting **California v. Brown**, 479 U.S. 538, 545, 107 S.Ct. 837 (1987) (O'Connor, J., concurring). The Nevada three-judge jury procedure satisfies neither of these requirements.

For example, the three-judge jury procedure deprives a defendant of a reliable sentence which is an expression of the "conscience of the community," **Witherspoon v. Illinois**, supra, 391 U.S. at 519, with respect to the offense and the offender: a judge from Reno or Carson City as much as one from Yerington or Tonopah or Elko cannot function as the "link between contemporary community

values and the penal system," id. at 519 n.15, with respect to a homicide committed in Las Vegas. A legislature may determine that the "conscience of the community" should be expressed by committing the sentencing decision to the presiding judge. See **Spaziano v. Florida**, supra, 468 U.S. at 464. But there is nothing in the Supreme Court's jurisprudence which suggests that the legislature may constitutionally replace an expression of the "conscience of the community" as to the appropriate sentence with a mechanism which routinely substitutes a sentencer who will express the conscience of a different community,[21] which has an entirely different "reasoned moral response" to the offense and the offender. Cf. **Alvarado v. State**, 486 P.2d 891, 899-905 (Alaska 1971) (vicinage).

While committing the sentencing decision to a randomly-assigned trial judge may not, in itself, violate the federal constitution, e.g., **Spaziano v. Florida**, 468 U.S. 447, 464, 104 S.Ct. 3154 (1984), committing that decision to a jury of judges which functions in the same way as a jury, but which is drawn from a population which is radically unrepresentative of the community violates the guarantees of due process, equal protection, and a reliable sentence.

In short, the wide latitude which states have to fashion capital sentencing proceedings does not include the power to establish sentencing bodies which are selected without any procedural protections consistent with due process principles, Accordingly, the statutory scheme for convening a three-judge panel is invalid.

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[21] Of course, when a particular community is so inflamed against a defendant that a change of venue is required, the trial and sentencing proceedings may be committed to a less prejudiced community; but this procedure is allowed only out of necessity, when an impartial tribunal cannot be obtained in the normal venue of the prosecution.

XI.

THE STATUTORY REASONABLE DOUBT INSTRUCTION IS UNCONSTITUTIONAL.

Appellant is not unmindful that this Honorable Court has consistently found the reasonable doubt instruction of **NRS 175.211** to be constitutionally valid. See, **Lord v. State**, 107 Nev. 28, 806 P.2d 548 (1991).

However, trial counsel objected to the instruction and therefore preserved the issue. See, **Riddle v. State**, 96 Nev. 589, 613 P.2d 1031 (1980) (A. App., Vol. 13, pp. 3148, 3150).

It is the position of Appellant that the statutory reasonable doubt jury instruction as given does not provide the jury with meaningful principles or standards to guide it in evaluating the evidence. **United States v. Wosepka**, 757 F.2d 1006, 1009, modified 787 F.2d 1294 (9th Cir. 1985). Appellant includes this issue to preserve it for possible federal review.

XII.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SETTLE THE RECORD REGARDING POSSIBLE FAILURE OF THE TWO APPOINTED PANEL JUDGES TO READ THE TRANSCRIPTS OF THE GUILT PHASE OF APPELLANT'S TRIAL.

It is the position of the Appellant that under **Hollaway v. State**, 116 Nev. Adv. Op. No. 83, 6 P.3d 907 (August 23, 2000), that a three-judge panel has a duty to consider all evidence adduced at the guilt phase in determining the appropriate penalty in a capital case. Further, that it was error for Judge Elliot not to review the transcripts of the guilt phase in their entirety; and error for the trial court to deny Appellant's motion to settle the record as to whether the two appointed judges, Judge Griffith and Judge Elliot did,

in fact, read the record.

In **Hollaway**, supra, this Court reaffirmed the modern legal concept that death penalty cases are, in fact, different. ("We are cognizant that because the death penalty is unique in its severity and irrevocability. . . ."). This Court also required anew instruction be given regarding consideration of mitigation which clarified the existing law. The instruction reads:

> In determining whether mitigating circumstances exist, jurors have an obligation to make an independent and objective analysis of all the relevant evidence. Arguments of counsel or a party do not relieve jurors of this responsibility. Jurors must consider the totality of the circumstances of the crime and the defendant, as established by the evidence presented in the guilt and penalty phases of the trial. Neither the prosecution's nor the defendant's insistence on the existence or nonexistence of mitigating circumstances is binding upon the jurors. (Emphasis added) Id. at 10.

It is the position of Appellant that three-judge panel, has an obligation, therefore, to review and consider all evidence from the guilt phase. A summary to the panel, from counsel is not adequate.

The record, due to the trial court's refusal to settle the record, does not reflect that the two judges appointed to the panel reviewed the transcripts of the guilt phase of Appellant's trial.

It is the position of Appellant that it was structural error not to have the three-judge panel review the entire transcripts of the guilt phase. See, **Manley v. State**, 199 Nev. Lexis 30, 979 P.2d 703 (June 7, 1999).

This Court should find that **Hollaway**, supra, applies to a three-judge panel setting in a capital sentencing and remand the matter to the district court to settle the record.

XIII.

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT HELD FIFTY-NINE (59) OFF THE RECORD BENCH CONFERENCES THUS DEPRIVING APPELLANT OF A COMPLETE RECORD FOR PURPOSES OF DIRECT APPEAL AND POST-CONVICTION HABEAS RELIEF.

It was error of the trial court to hold fifty-nine (59) off the record bench conferences, without observing the safeguards incorporated into **Supreme Court Rule 250(5)(a)**. The rule states, in pertinent part:

> The court shall ensure that all proceedings in a capital case are reported and transcribed, but with the consent of each party's counsel the court may conduct proceedings outside the presence of the jury or the court reporter. If any objection is made or any issue is resolved in an unreported proceeding, the court shall ensure that the objection and resolution are made part of the record at the next reported proceeding.

See, **SCR 250(5)(a)**.

The record herein does not reflect that there was consent by participating counsel to unreported bench conferences or that the results of the conferences were made part of the record.

The unreported bench conferences occurred in both the guilt and penalty phases of the jury proceedings (A. App., Vol. 8, pp. 1855, 1888, 1911, 1916, 1933, 1941, 1948, 1961, 1989, 2029, 2036, 2081; Vol. 9, pp. 2306, 2340, 2341-42; Vol. 10, pp. 2396, 2461, 2469, 2516; Vol. 13, pp. 3024, 3051, 3053, 3056, 3063, 3108, 3133, 3144, 3146, 3198; Vol. 14, pp. 3298, 3310, 3328, 3335, 3345, 3368; Vol. 15, pp. 3379, 3389, 3396, 3406, 3423, 3440, 3454, 3465, 3468, 3469, 3499, 3520; Vol. 16, pp. 3649, 3675, 3685, 3816, 3823, 3839, 3845, 3847, 3853, 3862).

A capital defendant in Nevada has an automatic appeal and mandatory review of his death sentence. See, **NRS 177.055**. An indigent defendant must be furnished a transcript on appeal. **State**

ex rel Marshall v. Eighth Judicial District Court, 80 Nev. 478, 396 P.2d 680 (1964). "Meaningful, effective appellate review depends upon the availability of an accurate record covering lower court proceedings relevant to the issues on appeal. Failure to provide an adequate record on appeal handicaps appellate review and triggers possible Due Process Clause violation." See, **Lopez v. State**, 105 Nev. 68, 769 P.2d 1276, 1287 (1989).

It is axiomatic that an incomplete record equally handicaps the appellate in any post-conviction habeas corpus petition.

This matter should be remanded to the District Court to ascertain if the transcripts can be reconstructed sufficiently to provide a meaningful record for review; or whether reversal is mandated; see, **Lopez**, supra at 1287-1288 fn. 12.

CONCLUSION

For the reasons more fully articulated above, this case should be reversed and remanded to the district court for a new and fair trial.

Respectfully submitted,

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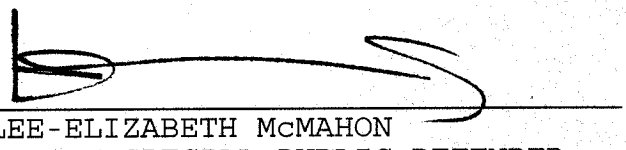
CERTIFICATE OF COMPLIANCE

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 a reference to the page of the transcript or appendix where the matter relied on is to be found. 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 this 27th day of June, 2001.

PHILIP J. KOHN
CLARK COUNTY SPECIAL PUBLIC DEFENDER

By 

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DECLARATION OF MAILING

DONNA POLLOCK, an employee with the Clark County Special Public Defender's Office, hereby declares that she is, and was when the herein described mailing took place, a citizen of the United States, over 21 years of age, and not a party to, nor interested in, the within action; that on the 27th day of June, 2001, declarant deposited in the United States mail at Las Vegas, Nevada, a copy of the Appellant's Opening Brief in the case of Donte Johnson vs. The State of Nevada, Case No. 36991, enclosed in a sealed envelope upon which first class postage was fully prepaid, addressed to Frankie Sue Del Papa, Nevada Attorney General, 100 North Carson Street, Carson City, Nevada 89701, that there is a regular communication by mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on ~~the 27th day~~ of June, 2001.

DONNA POLLOCK

RECEIPT OF A COPY of the foregoing **Appellant's Opening Brief** is hereby acknowledged this 27th day of June, 2001.

STEWART L. BELL
CLARK COUNTY DISTRICT ATTORNEY

By