ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONTE JOHNSON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 36991

FILED

JAN 15 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

APPELLANT'S REPLY BRIEF

(Appeal from Judgment of Conviction)

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APPELLANT'S REPLY BRIEF

ARGUMENT

I.

IT WAS ERROR FOR THE COURT TO DENY APPELLANT'S MOTION TO SUPPRESS EVIDENCE ILLEGALLY SEIZED.

Donte Johnson had a legally sufficient interest in the master bedroom of the Everman residence to claim the protection of the Fourth Amendment. See, **Katz v. United States**, 389 U.S. 347, 88 S. Ct. 507, 19 L.Ed.2d 576 (1967). The Fourth Amendment protects people not places. Capacity to claim the protection of the Fourth Amendment. A person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion in that place. **Rakas v. Illinois**, 439 U.S. 128, 143, 99 S. Ct. 421, 430, 58 L.Ed.2d 387 (1978); citing **Jones v. United States**, 362 U.S. 257, 263, 80 S. Ct. 725, 732-733 (1960).

Appellant is in accord with the State that the cases it cites (**United States v. Veatch**, 674 F.2d 1217 (1981); **United States v. Sanders**, 130 F.3d 1316 (1998); **United States v. Mangum**, 100 F.2d 164 (1996); **Bond v. United States**, 77 F.2d 1009 (1996); and **United**

States v. Avila, 52 3d 338 (1995)) (RAB, pp. 21-22), support the principle that the Fourth Amendment does not protect personal property abandoned by a defendant. However, Appellant asserts that this principle is not dispositive in the instant matter.

The State also argues that this matter is comparable to **State v. Banks**, 364 S.E.2d 452 (NC 1988). Clearly the holding of the North Carolina court was not understood by the State. **Banks**, Id. supports Appellant's position.

While it is true that in **Banks**, Id., the court of appeals held that the defendant did not have a legitimate expectation of privacy in the common areas of the residence in which he rented a bedroom, it upheld the motion to suppress with respect to his bedroom and despite the fact that he initially denied living in the residence. Here, Appellant lived at the Everman residence, occupying the master bedroom with his then-girlfriend, Charlotte Severs. At the suppression hearing, Appellant testified that he did not recall, while sitting on the curb in cuffs, being asked if he lived in the house. He testified that he was, in fact, living there on August 18, 1998, and had lived there for close to a month.

Charlotte Severs, declared a hostile witness by the court, was called by Appellant. She testified that she had slept at the Everman residence every night for fourteen days prior to being pulled out by the SWAT team on August 14, 1998. Appellant slept there with her (A. App., Vol. 6, pp. 1585-1588, 1590).

Severs also testified that Appellant provided drugs to Armstrong as a way of paying rent to stay in the Everman residence (A. App., Vol. 6, pp. 1585-1589).

Severs had come to the Everman residence to stay there

with Appellant at his request. Appellant stayed in the master bedroom and kept his clothes in there. Severs kept her clothing and personal things in the master bedroom, she considered it her "space." (A. App., Vol. 6, pp. 1585-1590).

In Appellant's Reply Brief, filed after the suppression hearing, the court was advised of the following:

In the opening statement of the related Sikia Smith trial prosecutor Gary Guymon (also the prosecutor herein) 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).

The prosecutor's pursuit of fundamentally inconsistent theories in separate trials of defendants charged with the same murder violated due process. **Thompson v. Calderon**, 120 F.3d 1045 (9th Cir. 1997); see also, **Smith v. Groose**, 205 F.3d 1045 (8th Cir. 2000).

It is clear that under the totality-of-circumstances that Donte Johnson lived in the Everman residence. He had standing to assert a legitimate expectation of privacy under the Fourth Amendment.

Any alleged waiver was not voluntary. "If the government exerts undue pressure or improper means to secure consent, instead

of obtaining a warrant as it can easily do, it is going to lose cases." **U.S. v. De Los Santos Ferrer**, 999 F.2d 7, 11 (1st Cir. 1993).

Here, Appellant was drawn out in the middle of the night by the Las Vegas Metropolitan Police Department SWAT Team and homicide bureau detectives. He was handcuffed. Appellant was in custody, and not given Miranda warnings. Under these circumstances, no voluntary waiver or abandonment could have been made. Under the conditions of his custodial inquiry, the alleged response concerning whether he lived in the residence. The trial court should have found that Appellant had "standing" to assert his privacy rights under the Fourth Amendment.

Todd Armstrong was a non-present co-tenant who signed a consent to search form. Numerous courts have found that a joint occupant who was away from the premises lacked the ability to authorize police officers to enter and search the premises when another joint tenant was present at the time of search. See, **Tompkins v. Superior Court**, 378 P.2d 113 (1968), **Silva v. State**, 344 So.2d 559 (Florida 1977); **Matter of Welfare of D.A. G.**, 484 N.W.2d 787 (Minnesota (1992); **State v. Matias**, 451 P.2d 257 (Hawaii 1969).

The State sets forth **Snyder v. State**, 103 Nev. 275, 738 P.2d 1303 (1987) for the proposition that a person who possesses common authority or other sufficient relationship can consent to a search. **Snyder**, is inapplicable. In **Snyder**, Id., the consenting individual was present at the residence, and the defendant was absent. Also, in **Snyder**, the consenting individual was the brother of the absent defendant. Here, Armstrong was not present, Appellant was and there was no family connection between Armstrong and

Appellant.

The State also cites **Taylor v. State**, 114 Nev. 1071, 968 P.2d 315 (1998). This case is also distinguishable. It is a luggage case and does not address the issue of residence searches, or the constitutional expectations of privacy of a person present at his home. Further, in **Taylor**, the defendant had given over actual control and possession of the suitcase to the party searched. The instant matter is not analogous. Using the logic of **Taylor**, Appellant could argue that Todd Armstrong abandoned his home in allowing Donte Johnson to have actual control and therefore, lost all right to consent to a search. It is thereby untenable to define a person's real property interest by the actual authority tenants of **Taylor**. The State's argument must fail.

The "good faith, mistaken belief" exception does not exist in the present case. Todd Armstrong, who was not present at the time of the search of the residence, did not have the authority to waive Donte Johnson's expectation of privacy when Donte Johnson was at home and in his bedroom.

The police cannot deliberately turn a blind eye to the obvious facts that Donte Johnson was living in the residence, in the master bedroom. The police specifically went to the residence to search Donte Johnson's bedroom. It is disingenuous to assert that they mistakenly believed that Todd Armstrong had authority to consent to search that bedroom when they knew it was Donte Johnson's.

The State, once again, cites **Snyder v. State**, 103 Nev. 275, 738 P.2d 1303 (1987) for the proposition that apparent authority is sufficient. However, this principle is not applicable

to the warrantless search of a residence when the resident is home. Any representation relied upon by the police came from Todd Armstrong, who was also a suspect. It does not support and cannot be used at this juncture to belie the fact that the police knew Donte Johnson was staying in the Everman residence, and knew in which room of the house he was staying, knew he was there when searching and knew he had an expectation of privacy in his effects.

In **Deroven v. State**, 85 Nev. 637, 640, 461 P.2d 865 (1969) this Court recognized the well-settled principle that search warrants for automobiles should be obtained whenever practicable. Further, in **State v. Parent**, 110 Nev. 114, 867 P.2d 1143 (1994), this Court expressly approved the concept of anticipatory search warrants as an effective tool to fight criminal activity, and to protect individual's Fourth Amendment rights; citing, **United States v. Garcia**, 882 F.2d 699, 703 (2nd Cir), cert denied, sub nom., **Grant v. United States**, 493 U.S. 943, 110 S. Ct. 348, 107 L.Ed.2d 336 (1989).

In **Barrios-Lomeli**, 113 Nev. 952, 944 P.2d 791 (1997), an automobile search case, this Court found under the circumstances therein no exigency existed which justified a warrantless search of the car. Appellant strongly urges this Court to find also that under the circumstances herein, a search warrant should have been attained.

Donte Johnson lived in the residence on Everman. He paid rent to Todd Armstrong in the form of drugs. He had a legally sufficient interest in privacy protected by the Fourth Amendment. Armstrong was not at the residence at 3:00 a.m. when the Las Vegas Metropolitan Police Department SWAT Team and Homicide detectives

entered the home; Donte Johnson was. Armstrong lacked the authority to allow the search of the Appellant's bedroom. Appellant was removed from the home, handcuffed and in custody. The Las Vegas Metropolitan Police Department could have obtained an anticipatory warrant. Failing that, they could have obtained a warrant during the time Appellant was in custody in front of the house. They certainly could have obtained a telephonic warrant. Donte Johnson had a legally sufficient interest in the master bedroom of the Everman residence so that the Fourth Amendment protected him from the unreasonable, warrantless search. The trial court erred in failing to grant Appellant's Motion to Suppress.

II.

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO ENTER INTO EVIDENCE TWO ASSAULT RIFLES THAT COULD NOT HAVE FIRED THE .38 CALIBER BULLETS THAT OCCASIONED THE DEATHS OF THE FOUR VICTIMS.

All four decedents were killed by a .38 caliber bullet. None of the seized weapons, a .30 caliber rifle, a .22 Ruger rifle, and a V20R .50 caliber pistol; could fire a .38 caliber bullet. The State adduced no proof that the challenged firearms were used in the murders. The court erred in allowing the highly prejudicial firearms into evidence when they had no proper probative value. Their only relevance was to show that Appellant was the kind of person who would carry such weapons; and therefore, more likely that he was the kind of person who committed the crimes. **NRS 48.035** requires a weighing of the probative value against its potential for undue prejudice. As there was no evidence adduced at trial that the guns were actually used it was error for the court to allow the State to enter them into evidence before the jury. Relief is

appropriate.

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.

Appellant is not unmindful that this Honorable Court has held that **NRS 200.030(4)** does not shift the burden of proof to a defendant to prove that mitigating circumstances outweigh aggravating circumstances; however, Appellant asserts that in cases such as the instant matter, this simply is not true. See, **Williams v. State**, 113 Nev. 1008, 945 P.2d 438 (1997); **Witter v. State**, 112 Nev. 908, 921 P.2d 886 (1996).

Here, the aggravators were inherent in the jury's finding of guilt. Although **NRS 200.030(4)** appears reasonable on its face, in operation it is discriminatory. Appellant, who was death eligible, in truth, had the burden of persuading the jury that a lesser sentence was appropriate.

Appellant raised the issue by pre-trial motion and argument to the trial court. See, **Riddle v. State**, 96 Nev. 589, 613 P.2d 1031 (1980). The issue, within the specific factual content of this case, should be reconsidered by the court.

Further, Appellant has included this issue on direct appeal to preserve it for possible federal review.

IV.

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

Appellant acknowledged in Opening Brief that this Court has 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. However, in application to the instant matter, it is apparent that the jury, and later the three judge panel, found, automatically, that Appellant was convicted of more than one offense of murder, (an aggravating circumstance). The State, therefore, had no burden of proof; and bifurcation of the penalty phase would have insured due process for the Appellant.

In **Schoels v. State**, 114 Nev. 109, 966 P.2d 735 (1998) this Court held that because the penalty hearing is part of the trial, **NRS 175.141(5)** applies and counsel for the State must open and conclude the argument. Bifurcating the penalty phase as suggested by Appellant herein would have allowed for the statutory requirements and afforded Appellant a fair proceeding.

V.

IT WAS ERROR FOR THE TRIAL COURT TO DENY APPELLANT'S MOTION FOR A NEW TRIAL WITHOUT CONDUCTING AN EVIDENTIARY HEARING ON JUROR MISCONDUCT AS REQUESTED BY APPELLANT IN THE MOTION.

Juror misconduct is a broad label which has been used to describe communications with jurors from outsiders, witnesses, bailiffs, or judges and actions of jurors in the unauthorized viewing of premises, or reading of newspaper articles. See, **State v. Felton**, 620 P.2d 813 (Kan. 1980) citing Annot., 9 A.L.R.3d 1275; Annot., 41 A.L.R.2d 227.

The right to trial by jury means a trial by an unbiased and unprejudiced jury free of disqualifying jury misconduct. See, **State v. Tigano**, 818 P.2d 1369 (Wash. 1991).

Improper conduct is imputed to the entire jury panel when one juror is found guilty of improper conduct; the remainder of the

jury is not assumed to have been safeguarded from the contamination in absence of some interrogation addressed to jurors to dispel possibility that prejudice existed. See, **State v. DeGraw**, 764 P.2d 1290 (Mont. 1988).

The ultimate issue in any case involving juror misconduct is whether it can be said beyond a reasonable doubt that the misconduct did not contribute to the verdict. See, **Gibson v. Clanon**, 633 F.2d 851, 854-855 (9th Cir. 1980); **Dyer v. State**, 342 N.E.2d 671, 674 (Ind. App. 1976); **Barker v. State**, 95 Nev. 309, 594 P.2d 719, 721-722 (1979); **Chapman v. California**, 386 U.S. 18, 23-24, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967).

It is a fundamental principle that in reaching their verdict, jurors are confined to the facts and evidence regularly elicited in the course of the trial proceedings. See, **State v. Thacker**, 95 Nev. 500, 502, 596 P.2d 508 (1979) citing **Barker**, supra.

In the present case, following the discharge of the jury, the jurors spoke with counsel regarding their deliberations. Juror Kathleen Bruce asked both the State and Defense attorneys if the media was referring to her on the previous evening news broadcast where it was related that a "hold-out" juror was a woman. Affiant, Kristina Wildeveld, had watched the news broadcast the night before and states that there was an account that the jury was hung and that the "hold-out" was a woman juror. Juror Brice brought these facts out without prompting or previous discussion in the courtroom. Defense counsel for Appellant inquired of Bruce how she knew what was on television regarding the matter. Bruce, appearing nervous, responded that she had discussed the matter with her husband. It appeared to Wildeveld that Bruce had full and complete personal

knowledge of the entirety of the news account. Further, juror Connie Patterson made a statement that implied that she had been discussing the news broadcast and was aware of the media accounts; when she stated, "Really, I heard everyone thought it was me since I was emotional during the return of the verdict (A. App., Vol. 15, pp. 3578-3579).

The statements of jurors Bruce and Patterson clearly negate any presumption that they followed the court's instruction not to expose themselves to media reports, or discuss the case with outside parties. These acts of Bruce and Patterson clearly constituted misconduct. Once evidence has been presented to establish the likelihood of juror misconduct, a decision to disregard the misconduct as inconsequential should not be lightly or hastily made. Before the effects of misconduct may properly be deemed harmless, the court must permit an inquiry that is sufficient in scope to support an informed conclusion, beyond a reasonable doubt, that any misconduct did not contribute to the jury's verdict. See, **Bayramoglu v. Estelle**, 806 F.2d 880, 886 (9th Cir. 1986). Here, the trial court denied the motion for a new trial without affording Appellant an evidentiary hearing to make further inquiry. It was an abuse of the court's discretion. It was error.

It is misconduct for a juror to fail to disclose material information when asked. See, **State v. Briggs**, 776 P.12d 1347 (1989). Appellant contends that juror number 1 was racially biased against Afro-American males, a group to which Appellant belonged. This is supported by the record. On June 16, 2000, the court received a note from juror Bruce which stated, "I have an incident that occurred last week that I need to bring to your attention as

soon as possible." She was interviewed in open court, outside the presence of the other juror. She related an incident that occurred in the parking garage where everyone but her and an Afro-American man carrying a duffle bag got off the elevator. (This occurred prior to the verdict in the guilt phase). This was the day where the duffle bag and guns were in evidence. Bruce was scared. To serve on a jury, a juror must be free of all bias, including racial. See, **Darbin v. Nourse**, 664 F.2d 1109 (9th Cir. 1981); **State v. McClear**, 11 Nev. 39 (1876). Juror Bruce was not fee of bias and was not forthright with the court waiting none (9) days to report an incident "as soon as possible." Appellant's right to challenge Bruce for cause was prejudiced by her failure to reveal her fear of Afro-American men. His right to peremptorily challenge her was also prejudiced.

Here, the question of racial bias was not addressed. Further, the issue of the extent to which extra judicial information could have affected the jury's determination were not addressed by the court. It was error, given the demonstrated misconduct, for the court not to permit inquiry sufficient to resolve the question, beyond a reasonable doubt, that the misconduct did not contribute to the verdict. This matter should be remanded to the district court for resolution fo the juror misconduct issues.

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VI.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL BROUGHT AFTER CLOSING ARGUMENT WHEREIN,

A. THE PROSECUTOR HAD CHANGED HIS FACTUAL POSITION REPEATEDLY REFERRED TO THE EVERMAN HOUSE AS BEING APPELLANT'S PLACE OF RESIDENCE WHEN AT THE SUPPRESSION HEARING THE PROSECUTOR ARGUED THAT APPELLANT DID NOT LIVE THERE; AND

B. ERRED IN NOT ASCERTAINING IF THE JURY HAD BEEN CONTAMINATED AND CALLED IT A "NON-ISSUE" WHEN A FAMILY MEMBER OF ONE OF THE VICTIMS WAS IN THE JURY LOUNGE WHERE A MAGAZINE FEATURING AN ARTICLE ON THE DEATH PENALTY WAS LATER FOUND AND THE JURY SITS IN THAT LOUNGE AREA WHERE THEY ARE ASSEMBLED AND START DELIBERATING.

First, Appellant asserts that the State's answering argument should not be considered by this Court as it is not supported by authority. See, **Mazzan v. State**, 116 Nev. Adv. Op. No. 7, 993 P.2d 25 (2000); **Maresca v. State**, 103 Nev. 669, 748 P.2d 36 (1987).

Defense counsel moved the court for a new trial on the ground that the State, in closing argument, took the position that Appellant lived at the Everman residence, this position was the opposite of his earlier argument at the suppression hearing wherein he argued that the Appellant did not live there. These factually inconsistent arguments violated Appellant's right to due process and a fair trial. See, **Thompson v. Calderon**, 120 F.3d 1045 (9th Cir. 1997). The trial court erred in denying the motion for a new trial.

Further, the trial court erred in failing to make inquiry upon learning that a family member of a victim was in the clearly marked, restricted jury lounge wherein the bailiff found a magazine containing an article on the death penalty. Donte Johnson was

charged with the commission of four murders; the State was seeking his death. A verdict is questionable if there is an unexplained question of juror contamination. As the court did not conduct the necessary inquiry it is unknown whether a private communication with a juror or jurors occurred. "A hearing before the trial court is the proper procedure to determine whether a communication is or is not prejudicial. See, **Abeyta v. State**, 113 Nev. 1070, 1075-76, 944 P.2d 849 (1997) citing **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 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**.

The State's answer is premised upon a misunderstanding of Nevada sentencing law.

Under Nevada's statutory structure a defendant convicted of first degree murder is not death eligible until an aggravating circumstance is found by the trier of fact. See, **NRS 200.030(a)**. The finding of an aggravating circumstance can convert a life sentence penalty into a death sentence. The State's argument ignores the statutory requirement that an aggravator be found in order to make a defendant death eligible (See RAB, pp. 45, ll. 1-7).

In **Apprendi v. New Jersey**, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), the Court reversed the New Jersey Supreme Court on the ground of violation of the Due Process Clause which required factual determinations to be made by a jury, not by the

court, on the basis of proof beyond a reasonable doubt. In so doing, the Court endorsed the opinion it expressed in **Jones v. United States**, 526 U.S. 227 (1999) wherein it stated:

> With that exception [of 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.).

(**Jones**, at 252-253, **Apprendi**, at 2362-2363).

It is the position of Appellant, that under **Apprendi**, supra, the three-judge panel procedure of **NRS 175.556(1)** violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The State argues that **Apprendi**, supra, is not applicable to Nevada's three-judge panel procedure of **NRS 175.556(1)** because of the opinion of the court in the pre-**Apprendi** case of **Walton v. Arizona**, 497 U.S. 639 (1990). Appellant strongly suggests that the ruling in **Apprendi**, Id., that due process and jury protections did not only go to guilt or innocence but also involve the sentence when a fact assessment increases the prescribed range of penalties to which a criminal defendant is exposed; will be controlling. Specifically, Appellant posits that **Walton**, supra, which dissenting Justice O'Connor regards as questionable in light of the majority's opinion in **Apprendi**, Id. at 2387-2388, will cease to be controlling in capital jurisprudence. **NRS 175.554(3)**; **NRS 200.030(4)(a)** require a factual finding of aggravating circumstances and a determination

that any mitigating circumstances do not outweigh the aggravators for the imposition of capital punishment. Clearly, under these statutes, factual findings are the determinant. **Apprendi**, Id. requires this assessment of fact be made by a jury; it cannot be made by a judicial panel.

The State cites **Almendarez-Torres**, 523 U.S. 224, 118 S. Ct. 1219, 140 L.Ed.2d 350 (1998) in support of its position that Nevada's capital sentencing procedures are valid. This reliance is misplaced. The **Apprendi** decision raises a serious question of the continued viability of **Almendarez-Torres**. In **Apprendi**, Justice Thomas, in a concurring opinion, admits he was wrong in **Almendarez-Torres** where he was the deciding fifth vote for the majority, Id. at 2379. Due process mandates that factual determinations for sentence enhancement be made by a jury.

The **Apprendi** decision in stating that **Almendarez-Torres**, was arguably incorrectly decidedly limited the holding in **McMillan v. Pennsylvania**, 477 U.S. 79, 106 S. Ct. 2411, 91 L.Ed.2d 67 (1986). **Apprendi** at 2360.

The State asserts that "in **Apprendi**, supra, the Court did not intend to undo twenty years of precedent in capital sentencing and further the **Apprendi** decision does not require a review of Nevada's sentencing procedure." Neither of these statements is correct. **Apprendi** changes previous ruling by the court and requires a re-examination of Nevada's capital sentencing procedure in accordance with due process.

Appellant's death sentence should be reversed and the matter remanded to the district court for a jury determination fo the appropriate penalty.

VIII.

THE THREE-JUDGE PANEL SENTENCING PROCEDURE IS CONSTITUTIONALLY DEFECTIVE.

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. **NRS 175.556** is such a sentencing scheme.

In Appellant's Opening Brief, Appellant presented a three part argument in support of his position totaling fourteen (14) pages (AOB, pp. 44-58) containing in excess of thirty-two citations as supporting authority for his position. The State, in response filed a 2 page argument (RAB, pp. 51-53) which adhered only one citation from Appellant's argument; and included seven pre-**Apprendi** decisions of this Court in which the sentencing procedure of **NRS 175.556** were constitutionally valid. Appellant maintains his argument as set forth in Appellant's Opening Brief, and based upon the authorities cited therein submits that Nevada's three-judge panel sentencing procedure is constitutionally defective.

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.

The Nevada Capital structure is unique. The Nevada legislature clearly mandated that if a jury finds a defendant guilty of first degree murder, then automatically the jury must conduct the

penalty hearing. **NRS 175.552(1)(a).** The charge of the jury is to find the existence or absence of the alleged aggravators and mitigators and then weigh the impact of these findings of fact. **NRS 175.554.** In Nevada, the aggravators are fact specific and oftentimes indistinguishable form the type of fact finding made during the trial or guilt phase.

As the Court made clear in **Apprendi v. New Jersey**, 530 U.S. 466, 120 S. Ct. 1219, 140 L.Ed.2d 350 (1998), the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence be made by a jury on the basis of proof beyond a reasonable doubt. It is clear that in Nevada the existence of an aggravator and the subsequent weighing are elements and not mere sentencing factors. As such, under **Apprendi**, supra, the Court has deemed Nevada's three-judge panel component to an unconstitutional granting of authority to the judges.

Further, Appellant's conviction and sentence violate the constitutional guarantees of due process of law, and a reliable sentence because petitioner's capital trial and review on direct appeal were conducted before state judicial officers whose tenure in office was not during good behavior but whose tenure was dependent on popular election. **U.S. Const., Amends. VIII, XIV; Nev. Const., Art. I, Secs. 3, 6, and 8; Art. IV, Sec. 21.**

The tenure of judges of the Nevada State district courts and of the Nevada Supreme Court is dependent upon popular contested elections. **Nev. Const., Art. 6 §§ 3, 5.**

The justices of the Nevada Supreme Court perform mandatory review of capital sentences, which includes the exercise of

unfettered discretion to determine whether a death sentence is excessive or disproportionate, without any legislative prescription as to the standards to be applied in that evaluation. **NRS 177.055(2).**

At the time of the adoption of the United States Constitution, see, **Apprendi v. New Jersey**, 530 U.S. 466, 478-484 (2000) (analysis of common law practice at time of adoption of constitution as basis of due process protection); **Montana v. Egelhoff**, 518 U.S. 37, 43-44 (1996) (analysis of whether fundamental due process principle exists primarily guided by historical practice); **Medina v. California**, 505 U.S. 437, 445-446 (1992); the common law definition of due process of law included the requirement that judges who presided over trials in capital cases, which at that time potentially included all felony cases, have tenure during good behavior.[1] All of the judges who performed the appellate function of deciding legal issues reserved for review at trial had tenure during good behavior. This mechanism was intended to, and did, preserve judicial independence by insulating judicial officers from

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

the influence of the sovereign that would otherwise have improperly affected their impartiality.

Nevada law does not include any mechanism for insulating state judges and justices from majoritarian, "lynch mob," pressures which would affect the impartiality of an average person as a judge in a capital case. Making unpopular rulings favorable to a capital defendant or to a capitally-sentenced appellant poses the threat to a judge or justice of expending significant personal resources, of both time and money, to defend against an election challenger who can exploit popular sentiment against the jurist's pro-capital defendant rulings, and poses the threat of ultimate removal from office. These threats "offer a possible temptation to the average [person] as a judge . . . not to hold the balance nice, clear and true between the state and the [capitally] accused." **Tumey v. Ohio**, 273 U.S. 510, 532 (1927). Judges or justices who are subject to these pressures cannot be impartial within due process standards in a capital case, because subjection of judicial officers to popular election are always under a threat of removal as a result of unpopular decisions in favor of a capital defendant.[2]

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[2]See, e.g., Bright, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 75 Boston U.L.Rev. 759, 776-780, 784-792, 822-825 (1995); Bright, Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?, 72 N.Y.U.L.Rev. 308, 312-314, 316-326, 329 (1997); Johnson and Urbis, Judicial Selection in Texas: A gathering Storm?, 23 Tex.Tech.L.Rev. 525, 555 (1992); Note, Disqualifying Elected Judges from Cases Involving Campaign Contributors, 40 Stan.L.Rev. 449, 478-483 (1988); Note, Safeguarding the Litigant's Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers, 86 Mich.L.Rev. 382, 399-400, 407-408 (1987).

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.

The Nevada procedure of appointing a panel of three judges for determination fo the appropriate punishment under **NRS 175.554**, **NRS 175.556** does not comply with the constitutional standard implicit in the Due Process Clause of the Fourteenth Amendment or reflect "a reasoned moral response." See, **Penry v. Lynaugh**, 492 U.S. 302, 319, 109 S. Ct. 2934, 106 L.Ed.2d 256 (1989).

The three-judge panel procedure violates a capital defendant's right to an impartial tribunal, due process and a reliable sentence as it does not allow challenges to the selection and qualifications of panel members. The Nevada procedure results in the defendant by a tribunal that does not reflect the "conscience of the community," see, **Witherspoon v. Illinois**, 391 U.S. 510, 519, 112 S. Ct. 1770, 20 L.Ed.2d 776 (1968).

The State mistakenly relies on **Baal v. State**, 106 Nev. 69, 787 P.2d 391 (1990) for its position that Appellant's challenge to the constitutionality of the three-judge panel (RAB, p. 57). **Baal**, supra, was pre-**Apprendi** as are the six cases cited sequentially as additional support. Further, the three arguments raised in **Baal**, Id., are not dispositive of the instant matter. In **Baal**, Id., two of the arguments challenged the three-judge capital sentencing procedure following a guilty plea which is not applicable. The other argument, that sentencing by a three-judge penal deprived him of his right to a jury was derived by this Court relying on **Cabana v. Bullock**, 474 U.S. 376, 385-86, 106 S. Ct. 689, 88 L.Ed.2d 704

(1986) and **Hill v. State**, 103 Nev. 377, 724 P.2d 734 (1986). Given the courts decision in **Apprendi**, supra, it is clear that the reasoning and ruling in **Cabana**, supra, and **Hill**, supra, are no longer controlling.

The State's power to establish capital sentencing proceeding does not include the power to establish sentencing bodies which are selected without procedural protections consistent with due process principles. The statutory scheme for convening a three-judge panel is not valid.

XI.

THE STATUTORY REASONABLE DOUBT INSTRUCTION IS UNCONSTITUTIONAL.

Appellant acknowledged in Appellant's Opening Brief that this Court has consistently found the reasonable doubt instruction of **NRS 175.211** to be constitutionally valid citing **Lord v. State**, 107 Nev. 23, 806 P.2d 548 (1991).

In remains the position of the Appellant that the statutory reasonable doubt jury instruction as given does not provide a jury with meaningful principles or standards to guide it in evaluating the evidence. 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.

Assuming arguendo that Appellant is correct in his assertion, under **Holloway v. State**, 116 Nev. Adv. Op. No. 83, 6 P.3d 907 (August 23, 2000), that a three-judge panel in a capital case

has a duty to consider all evidence adduced at the guilt phase in determining the appropriate penalty; this Court is unable to ascertain that the two judges appointed to the panel reviewed the transcripts of the guilt phase in their entirety.

This determination cannot be made as the trial court erred in denying Appellant's motion to settle the record. This Honorable Court should hold that a three-judge panel has a duty to consider all evidence adduced during the guilt phase in order to determine the appropriate penalty in a capital case. The case should be remanded 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.

First, Appellant asserts that the State's answering argument should not be considered by this Court as it is not supported by authority. See, **Mazzan v. State**, 116 Nev. Adv. Op. No. 7, 993 P.2d 25 (2000); **Maresca v. State**, 103 Nev. 669, 748 P.2d 36 (1987).

Effective appellate review, to which Appellant is entitled, depends on the availability of an accurate record covering lower court proceedings. See, **Lopez v. State**, 106 Nev. 68, 85, 769 P.2d 1276, 1287 (1989).

A trial record which demonstrates the court had 59 off-the-record conferences is not an accurate, complete record.

When a trial record is incomplete, reconstruction is the procedure followed in most cases. See, **Lopez**, Id. at 85, 1287-88, citing to **Butler v. State**, 264 Ark. 243, 540 S.W.2d 272, 274-275

(1978 et al).

In **Lopez**, this Court observed that in **VanWhite v. State**, 752 P.2d 814, 821 (Ok. Cr. 1988) the court held that a complete stenographic record is required in all capital proceedings. Id. at 85 n. 12, 1287 n. 12). Fundamental fairness mandates that Appellant, a capital defendant, be provided with a reconstructed transcript so as not to be prejudiced in his direct appeal or other remedies.

This matter should be remanded to the district court to ascertain if the court and the parties can reconstruct the trial transcript so as to no preclude Appellant a meaningful record for review.

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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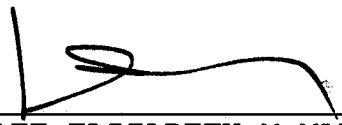
CERTIFICATE OF COMPLIANCE

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 11th day of January, 2002.

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 11th day of January, 2002, declarant deposited in the United States mail at Las Vegas, Nevada, a copy of the Appellant's Reply 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 11th day of January, 2002.

DONNA POLLOCK

RECEIPT OF A COPY of the foregoing **Appellant's Reply Brief** is hereby acknowledged this 11th day of January, 2002.

STEWART L. BELL
CLARK COUNTY DISTRICT ATTORNEY

By