ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

Appeal No. 36991

DONTE JOHNSON

Appellant

vs.

THE STATE OF NEVADA

Respondent

AMICUS CURIAE BRIEF OF NEVADA ATTORNEYS FOR CRIMINAL JUSTICE

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I. INTRODUCTION

The Nevada Attorneys for Criminal Justice is a voluntary organization whose members are attorneys who defend people accused of violating criminal laws. NACJ's members believe that both the criminal justice system and the ideal of justice are enhanced by the considered and fair application of statutory and constitutional principles to every criminal proceeding. NACJ's members believe that the issues presented in this matter are of great importance to the citizens of this state and that the impact of this Court's decision in this matter will go far beyond Mr. Johnson and the individual concerns presented by this case.

NACJ submits this amicus brief in support of Appellant Donte Johnson. Nevada's three-judge panel system is unconstitutional and death sentences imposed under this scheme cannot be upheld.

II. FACTUAL STATEMENT

Following a jury verdict of guilt of four counts of first-degree murder with use of a deadly weapon, the jury convened for a penalty phase. After six hours of deliberations, the jury announced that it was deadlocked and a mistrial was declared. XVII ROA 4002, 4015. Defendant Donte Johnson opposed the impanelment of a three-judge panel and argued that such a panel was unconstitutional. XVII ROA 4019-4095. The State opposed his motion. XVII ROA 4102-06, 4132-47. The district court denied the motion. XVII ROA 4161-66. The three-judge panel convened on July 24, 2000. XVIII ROA 4191. Following presentation of evidence and argument by counsel, the three-judge returned verdicts of death on each of the four counts. XIX ROA 4429-44, 4579.

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III. ISSUES PRESENTED

A. Whether Nevada's Three-Judge Panel System Is An Unconstitutional Violation Of The Right To Due Process Of Law And Right To A Jury Trial.

B. Whether Nevada's Three-Judge Panel System Is An Unconstitutional Violation Of The Right To Equal Protection Of The Laws

C. Whether Sentences Less Than Death Must Be Imposed Because There Is No Valid Statutory Scheme For Death Penalty Hearings In Cases Where A Jury Is Not Unanimous

IV. ARGUMENT

Appellant Donte Johnson's sentences of death are unconstitutional and must be vacated. He was sentenced to death by a three-judge panel. Nevada's three-judge panel system is unconstitutional under the Sixth and Fourteenth Amendments pursuant to the recent United States Supreme Court case of Ring v. Arizona, ___ U.S. ___, 122 S.Ct. 2428 (2002). Nevada's three-judge panel scheme vitiates the irrevokable responsibility of a jury to find the elements necessary to impose a maximum sentence after conviction on the underlying offense. In addition, the use of three-judge panels in cases involving some situations, but not in all situations involving similar defendants violates the Equal Protection Clause of the United States Constitution. The remedy for the unconstitutional sentencing scheme is imposition of a sentence less than death as this Court lacks the constitutional and statutory authority to devise a capital sentencing scheme.

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A. The Three-Judge Panel Procedure For Imposing A Sentence Of Death Is Unconstitutional Under The Due Process Guarantee Of The Federal Constitution Pursuant to New Precedent Set Forth by the United States Supreme Court.

Defendant Johnson was sentenced to death by a three-judge panel pursuant to NRS 175.556(1). His sentence is unconstitutional because he was entitled to a decision by a jury under the due process clause of the Fourteenth Amendment to the United States Constitution. In Ring v. Arizona, ___ U.S. ___, ___, 122 S.Ct.2428 (2002), the United States Supreme Court found unconstitutional Arizona's capital sentencing scheme which mandated that the trial judge determine whether the defendant was eligible for the death penalty because of the existence of aggravating factors. The Court unequivocally held that "[c]apital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." Id. at ___. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." Id. at ___ (citing Apprendi v. New Jersey, 530 U.S. 466, 482-83 (2000)).

NRS 200.030 defines the degrees of murder and prescribes the maximum punishments allowed. First degree murder is punishable by various terms of imprisonment, NRS 200.030(4)(b), but it is punishable by death "only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances...." NRS 200.030(4)(a) (emphasis supplied). "In order to determine that a defendant is eligible for the death penalty, (1) the jury must unanimously find, beyond a reasonable doubt, at least one enumerated aggravating circumstance; and (2) each juror must then

individually determine that mitigating circumstances, if any exist, do not outweigh the aggravating circumstances. At this point, a defendant is death-eligible, and the jury must consider all of the relevant evidence and unanimously decide on the sentence." Servin v. State, 117 Nev. __, 32 P.3d 1277, 1285 (2001). See also Hollaway v. State, 116 Nev. __, 6 P.3d 987, 996 (2000) ("Under Nevada's capital sentencing scheme, two things are necessary before a defendant is eligible for death: the jury must find unanimously and beyond a reasonable doubt that at least one enumerated aggravating circumstance exists, and each juror must individually consider the mitigating evidence and determine that any mitigating circumstances do not outweigh the aggravating)."

Thus under state law both the existence of aggravating factors, and the determination that the aggravating factors are not outweighed by the mitigating factors, are necessary elements of death eligibility and are necessary to increase the maximum punishment provided for first degree murder from the various possible sentences of imprisonment to death. Under Ring, the due process guarantee of the federal Constitution requires those elements to be decided by a jury. Accordingly, the three-judge panel procedure, which allows judges to make those findings, is unconstitutional.

B. The Use of Three-Judge Panels in Cases Involving Some Situations, But Not in All Situations Involving Similar Defendants Violates the Equal Protection Clause

Nevada law provides for three -judge panels to determine whether a defendant should be sentenced to death in three situations: (1) after a defendant pleads guilty to the offense of first-degree murder and the State has noticed its intent to seek the death penalty; (2) after a defendant has waived his right to a jury trial and agreed to a bench trial and the State has noticed its intent to seek the death penalty; or (3) after a jury trial in which the State has obtained a verdict of guilt for the offense of first-degree murder and the State has sought the death penalty, but the jury was unable to reach a

unanimous verdict as to the death penalty. NRS 175.556, 175.558. In contrast, if a defendant is found guilty of first-degree murder by a jury, the jury unanimously sentences him to death, and the case is remanded following an appeal or post-conviction proceeding, a new jury is empaneled and the case is not heard before a three-judge panel. NRS 177.055. It is the disparate treatment between defendants who do not have verdicts – either because of the jury's failure to reach a verdict or because an appellate court or post-conviction court has vacated the jury's verdict – that results in the denial of equal protection under the United States and Nevada Constitutions.

There is no rational basis for treating defendants differently based upon whether they do not have a verdict because a jury was unable to reach a unanimous decision or because the jury's decision was vacated on appeal. In either case, there is not a complete and sound judgment of conviction. In either case, the defendant has not personally caused the situation in which he is placed by explicitly waiving his right to a jury for the penalty phase.[1] In either case, a new penalty phase must be presented before a new tribunal. No other state employs this two-tiered system. The State cannot articulate a sound and constitutional basis for the two-tiered system. Because there is no legitimate reason for treating these two classes of capital defendants differently, the constitutional guarantee of equal protection is violated. See Burks v. United States, 437 U.S. 10-11, 16-18 (1978) (finding that double jeopardy principles prohibit a second trial where the trial court enters a judgment of acquittal or where an

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[1]In contrast, this Court has recognized that a defendant who pleads guilty to first-degree murder does not have the right to claim an equal protection violation because the defendant made the voluntary choice to plead guilty and had knowledge that the case would be submitted to a three-judge panel. Baal v. State, 106 Nev. 69, 74-75, 787 P.2d 391 (1990) ("we note that Baal had the option of pleading not guilty, and thus the ability to place himself within the class of defendants which he now claims receives more favorable treatment") (citing State v. Freudenthaler, 734 P.2d 894, 896 (Or.Ct.App. 1987)).

appellate vacates a judgment of conviction on appeal and explaining that there is no rational basis for distinguishing the actions of the trial court and the actions of an appellate court); Village of Willowbrook v. Olech, 528 U.S. 562 (2000) (equal protection challenges are appropriate where one person has been intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment).

The State cannot establish a rational basis for the distinctions made between capital defendants under Nevada's statutes concerning the use of three-judge panels following "hung" juries and use of juries following reversal of a verdict on appeal. *A fortiori* the State cannot meet the strict scrutiny standard which must be applied here. Strict scrutiny is appropriate where a government classification implicates a suspect class or a fundamental right. City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985). A "fundamental right" for purposes of equal protection analysis, is one that is "among the rights and liberties protected by the Constitution." San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 29 (1973). There can be no question that a state's death penalty scheme and its laws concerning the death penalty are governed by the constitution. See e.g. Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972). Under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, the State is obligated to prove that it has a compelling interest in its disparate treatment of certain capital defendants, that the interest will be achieved through the State's scheme, and that the interest cannot be achieved by an less restrictive means. As the Legislature's decision concerning the use of three-judge panels for some cases but not other cases with similarly situated defendants is wholly arbitrary, the State cannot satisfy this strict scrutiny standard and this Court must find the three-judge panel scheme to be unconstitutional as a denial of equal protection.

C. **Sentences Of Life In Prison Without The Possibility Of Parole Should Be Imposed**

Because the three-judge panel could not constitutionally make the findings of elements necessary to impose a death sentence, this Court should vacate the sentences of death and order the district court to impose sentences less than death. See NRS 175.556(2) ("In a case in which the death penalty is not sought, if a jury is unable to reach a unanimous verdict upon the sentence to be imposed, the trial judge shall impose the sentence."); cf. 1977, Nev. Stats. Ch. 585 ("If the punishment of death is held to be unconstitutional by the court of last resort, the substituted punishment shall be imprisonment in the state prison for life without possibility of parole."). The only Nevada statute concerning the procedure to be followed after a hung jury is now a nullity because it is unconstitutional. As there is no statute providing for impanelment of another jury or any other procedure, the only available remedy is the imposition of a sentence of life without the possibility of parole pursuant to NRS 175.556(2).

This remedy has been used on other occasions when statutes concerning Nevada's death penalty scheme have been found invalid. In Mears v. Nevada, 367 F. Supp. 84 (D. Nev. 1973), the Court concluded that it was proper for a defendant who was sentenced to death under a statute which violated the Eighth Amendment to have his sentence commuted to a sentence of life in prison without the possibility of parole. See also Bean v. Nevada, 410 F. Supp. 963 (D. Nev. 1974), aff'd 535 F.2d 542 (9th Cir. 1976) (same); Anderson v. State, 90 Nev. 385, 528 P.2d 1023 (1974) (Where the defendant was initially sentenced to death for first-degree murder and subsequently the Supreme Court declared the death penalty as applied to be unconstitutional, life imprisonment without the possibility of parole became the maximum sentence that could be imposed in this state against a person convicted of first-degree murder, and the district judge was authorized to resentence the defendant and invoke the penalty

of life without possibility of parole, it being the only lawful penalty which could have been entered upon the conviction and finding of the jury that the defendant should receive the maximum sentence permitted by law).

In Ring v. Arizona, __ U.S. __, 122 S.Ct. 2428 (2002), the Supreme Court held that the Sixth and Fourteenth amendment right to jury trial requires that a jury find all of the factual elements which are required to make a defendant eligible to receive the death penalty under state law. Nevada law provides that, in addition to the conviction of first degree murder, the sentencer must make findings of two additional factual elements to make a defendant eligible for the death penalty: that one or more aggravating circumstances are proved beyond a reasonable doubt; and that the mitigating circumstances do not outweigh the aggravating circumstances. NRS 200.030(4); see, e.g., Gallego v. State, 101 Nev. 782, 790-791, 711 P.2d 856 (1985). Under Ring, those findings must be made by a jury, and the Nevada statutes that allow a three-judge panel to make them, NRS 175.552(1), 175.554(2,3,4), 175.556(1), 175.558, 175.562, are therefore unconstitutional.

Under current law, the statutes that provide for convening a three-judge panel are the only provisions for imposing sentence when a jury cannot agree on a sentence, a defendant pleads guilty, or a defendant is tried by the court. While the panel can constitutionally impose a sentence loss than death, it cannot constitutionally impose a death sentence under Ring. Any change in the statutory scheme to alter or remove the provisions for three-judge panel sentencing must come from the legislature. The courts cannot attempt to formulate a procedure for imposition of a death sentence by a three-judge panel on an ad hoc basis – in effect, by rewriting the statutory provisions – without running afoul of both the separation of powers doctrine and the federal constitutional guarantees of due process and equal protection of the laws.

The federal courts have faced similar issues. In United States v. Jackson, 390 U.S. 570 (1968), the Supreme Court considered the constitutionality of the Federal Kidnaping Act, which allowed imposition of a death sentence by a jury but "sets forth no procedure for imposing the death penalty upon a defendant who waives the right to jury trial or upon one who pleads guilty." Id. at 571. The Court held that the death penalty provision was unconstitutional as a burden on the defendant's right to jury trial, and it rejected the government's attempt to save the constitutionality of the provision by interpolating a non-statutory procedure to empanel a jury in cases where the defendant pleaded guilty or was tried by the court.

> Equally untenable is the Government's argument that the Kidnaping Act authorizes a procedure unique in the federal system– that of convening a special jury, without the defendant's consent, for the sole purpose of deciding whether he should be put to death. We are told initially that the Federal Kidnaping Act authorizes this procedure by implication. The Government's reasoning runs as follows: The Kidnaping Act permits the infliction of capital punishment whenever a jury so recommends. The Act does not state in so many words that the jury recommending capital punishment must be a jury impaneled to determine guilt as well. Therefore the Act authorizes infliction of the death penalty on the recommendation of a jury specially convened to determine punishment.
>
> . . . .
>
> The Government would have us give the statute this strangely bifurcated meaning without the slightest indication that Congress contemplated any such scheme. Not a word in the legislative history so much as hints that conviction on a plea of guilty or a conviction by a court sitting without a jury might be followed by a separate sentencing proceedings before a penalty jury. If the power to impanel such a jury had been recognized elsewhere in the federal system when Congress enacted the Federal Kidnaping Act, perhaps Congress' total silence on the subject could be viewed as a tacit incorporation of this sentencing practice into the new law. But the background against which Congress legislated was barren of any precedent for the sort of sentencing procedure we are told Congress impliedly authorized.

Id. at 576-578.

The Court concluded that "it would hardly be the province of the courts to fashion a remedy" for the absence of any such statutory procedure, id. at 579, because:

> It is one thing to fill a minor gap in a statute – to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to cerate from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality. We recognize that trial judges sitting in federal kidnaping cases have on occasion chosen the latter course, attempting to fashion on an ad hoc basis the ground rules for penalty proceedings before a jury. We do not know what kinds of rules particular federal judges have adopted, how widely such rules have varied, or how fairly they have been applied. But one thing at least is clear: Individuals forced to defend their lives in proceedings tailormade for the occasion must do so without the guidance that defendants ordinarily find in a body of procedural and evidentiary rules spelled out in advance of trial. The Government notes with approval 'the decisional trend which has sought * * * to place the most humane construction on capital legislation.' Yet it asks us to extend the capital punishment provision of the Federal Kidnaping Act in a new and uncharted direction, without the compulsion of a legislative mandate and without the benefit of legislative guidance. That we decline to do.

Id. at 580-581 (footnotes omitted). The situation is the same in this case: The Nevada courts cannot create a new, extra-statutory procedure for imposing a death sentence "for the sole purpose of rescuing [the three-judge panel] statute from a charge of unconstitutionality without the benefit of legislative guidance."

The federal courts faced a similar problem when Furman v. Georgia, 408 U.S. 238 (1972) invalidated existing federal death penalty statutes which included unfettered jury discretion to impose the death penalty. In the wake of Furman, the United States Department of Justice concluded that the existing federal death penalty statutes were unconstitutional and could not be salvaged by ad hoc judicial action to create a constitutional sentencing procedure. In an opinion written by the current Solicitor General of the United States, the Department of Justice, relying on Jackson, concluded that "we do not believe that the courts would be permitted to 'rescue' that provision through their own creativity even if the establishment of a separate [sentencing] proceeding would be permissible under standards laid down by Congress," and that the existing substantive death penalty provision did "not authorize a district court to undertake the essentially legislative task of composing its own procedure safeguards

in order to comply with Gregg [v. Georgia, 428 U.S. 153 (1976)]." 5 U.S. Op. Off. Legal Counsel 224, 227-228 (1981).

Later, in United States v. Woolard, 981 F.2d 756 (5th Cir. 1993), the government changed its position and attempted to have a district court create and follow a sentencing procedure to impose the death penalty that would pass constitutional muster. The district court declined to do so, and the Court of Appeals rejected the government's position on appeal:

> This brings us to the question whether the trial judge can by invention supply the required procedures at the sentencing hearing, indeed supply a sentence hearing. The government contends that the district court has inherent power to conduct those hearings necessary to meet constitutional requirements such as evidentiary hearings on the admissibility of evidence. We agree that a district judge has inherent power essential to his task. There are, however, many different ways of constructing a constitutionally adequate scheme. The Supreme Court has left states free to proceed in ways that are in practice quite different. There is simply not "any one right way . . . to set up [a] capital sentencing scheme." Spaziano v. Florida, 468 U.S. 447, 464, 104 S.Ct. 3154, 3164, 82 L.Ed.2d 340 (1984).
>
> The Federal Kidnaping Act was struck down because it made kidnaping punishable by death only on a plea of not guilty and hence penalized a defendant's right to put the government to its proof. United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968). The Court in Jackson rejected the effort to save the statute with the argument that a district judge could conduct a sentencing hearing on a plea of guilty by exercise of its inherent power. It pointed out that there are a number of policy decisions not addressed by Congress that would need be made, asking:
>
> > If a special jury were convened to recommend a sentence, how would the penalty hearing proceed? What would each side be required to show? What standard of proof would govern? To what extent would conventional rules of evidence be abrogated? What privileges would the accused enjoy? Congress . . . has addressed itself to none of these questions ....
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> Id. at 579, 88 S.Ct. at 1215. The Court then explained that these choices were for Congress not federal judges acting ad hoc across the country. Id. at 580-81, 88 S.Ct. at 1215-16.
>
> > It is one thing to fill a minor gap in a statute . . .It is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality.

> Id. at 580, 88 S.Ct. at 1215. The choices are for the Congress and it has not acted. We agree with the district court on this point and affirm.

Id. at 759; accord United States v. Burke, 1992 WL 333578 * 8, 17 (E.D. Pa. 1992) ("the Court could fashion a sentencing procedure that would meet minimal constitutional requirements, but it should not. This is a legislative function."). In the same way here, the choices of what procedures to adopt to conform Nevada's death penalty statutes to comply with Ring are for the legislature, not the courts, to make.

Any attempt by the Nevada courts "to undertake the essentially legislative task" of creating a new three-judge panel procedure would violate Nevada's strong separation of powers doctrine. Nev. Const. Art. 3 § 1; e.g., Galloway v. Truesdell, 83 Nev. 13, 19-20, 23.1 422 P.2d 237 (1967). There can be no serious dispute that the choice of how to adapt Nevada law to the requirements of Ring poses quintessentially legislative judgments among a variety of options, such as eliminating the panels altogether, eliminating their ability to impose the death penalty, providing for an automatic default to a penalty less than death in situations where a panel would previously have been used, or providing for jury sentencing in all cases. Those choices cannot be made by a court without usurping legislative power. Cf. 2002 Colo. H.B. 1005S (amending Colorado Revised Statute 16-11-103 in light of Ring to provide for sentencing by jurors in cases where the state seeks the death penalty; providing for notice to a defendant that if he pleads guilty, he will be waiving his right to be sentenced by a jury; allowing a judge to impose a sentence less than death in cases where a jury returns a verdict for death but its decision is clearly erroneous and contrary to the weight of the evidence; and providing that if the jury's decision is not unanimous, the jury shall be discharged and the defendant sentenced to life imprisonment).

Any judicial creation of a sentencing scheme would also violate federal due process standards, since judicial adoption of an extra-statutory ad hoc procedure would deprive the defendant of any adequate notice of what procedure would be followed. The creation of such a procedure in a particular case would amount to a judicial version of a bill of attainder. Nev. Const. Art. 1 § 15; U.S. Const. Art. 1 § 9; see Bouie v. City of Columbia, 378 U.S. 347, 361 (1964) (due process prohibits judicial as well as legislative action in violation of ex post facto clause); see also Carmel v. Texas, 529 U.S. 513, 527-530 (2000) (discussing parallels between ex post facto and bill of attainder prohibition). Adopting a special procedure solely for the purpose of making a defendant eligible for the death penalty, when the statutes in effect cannot constitutionally be applied to authorize that result, would have the same effect of singling out an individual for extra-statutory punishment as a legislative bill of attainder. In addition, a defendant so singled out would be deprived of adequate (indeed, any) review of the constitutionality of the court's action in adopting that procedure, because no court could be impartial with respect to reviewing the procedure it had adopted in the same case. See Rust v. Hopkins, 984 F.2d 1486, 1493-1494 (8th Cir. 1993) (where state supreme court attempted to cure invalid sentence by essentially resentencing defendant on appeal, defendant was deprived of federal due process because state supreme court could not validly conduct mandatory review of sentence, required by state statute, that it had itself imposed). That due process violation would amount to an equal protection violation as well, since it would deprive the singled-out defendant of rights to notice of the applicable statutory procedures and adequate review that are available to all other defendants.

In short, the Nevada statutes currently in effect do not prescribe a constitutional procedure for a three-judge panel to impose a death sentence. Only the legislature, not the courts, can determine how a new sentencing procedure should be formulated in

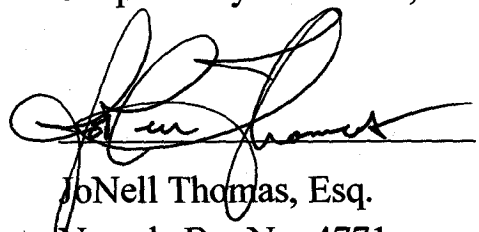
light of Ring. Accordingly, although a three-judge panel could be convened in the circumstances prescribed by the statutes, NRS 175.552(1)(b), 175.556(1), 175.558, the judiciary cannot create a procedure that would validly allow such a panel to impose a death sentence under Ring. Accordingly, sentences less than death should be imposed.

V. CONCLUSION

Sentences of death imposed under Nevada's three-judge panel system are unconstitutional and must be vacated. Imposition of death sentences by a three-judge panel violates the Fifth, Sixth and Fourteenth Amendments. As there is no valid scheme for sentencing a person to death in the event of a hung jury, sentences less than death should be imposed. Changes to Nevada's capital sentencing scheme should be left to the Legislature and should not be created by the courts.

Dated this 23rd day of July, 2002.

Respectfully submitted,



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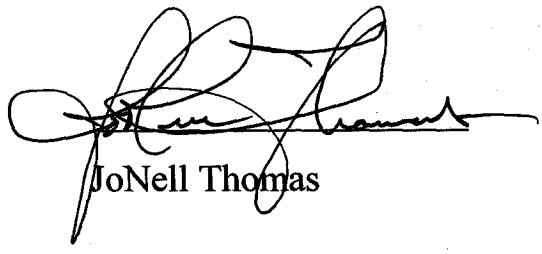
CERTIFICATE OF COMPLIANCE

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 appropriate references to the record on appeal. I understand that I may be sanctioned in the even that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 23rd day of July, 2002.



JoNell Thomas

CERTIFICATE OF SERVICE

The undersigned hereby certifies pursuant to NRAP 25, that on this 23rd day of July, 2002, she deposited for mailing in the United States mail, postage prepaid, a true and correct copy of the foregoing **Amicus Curiae Brief Of Nevada Attorneys for Criminal Justice**, addressed to counsel as follows:

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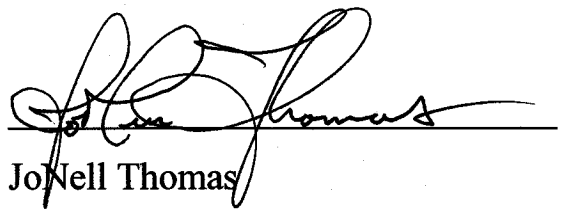

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