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DONTE JOHNSON,)
Appellant,)
v.)
THE STATE OF NEVADA,)
Respondent.)

ORIGINAL

CASE NO. 36001

FILED

AUG 29 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

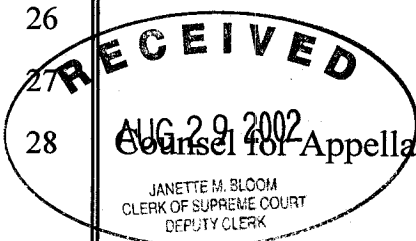
RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF

**Appeal From Judgment Of Conviction
Eighth Judicial District Court, Clark County**

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1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

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5 DONTE JOHNSON,)
6 Appellant,)
7 v.) CASE NO. 36991
8 THE STATE OF NEVADA,)
9 Respondent.)
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12 **RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF**

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14 **Eighth Judicial District Court, Clark County**

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1 a three-judge panel consisting of The Honorable Jeffrey D. Sobel, The Honorable
2 Michael R. Griffin, and The Honorable Steve Elliott conducted a penalty hearing
3 for those charges in which the death penalty was sought (Counts XI, XII, XIII &
4 XIV).¹ The three-judge panel returned death verdicts on all four counts, having
5 found that the aggravating circumstances outweighed any mitigating circumstances.
6 (XIX ROA 4580-81)

7 The panel also entered special verdicts in which they found, beyond a
8 reasonable doubt, the existence of the first aggravating circumstance - that the
9 murder was committed while the person was engaged, alone or with others, in the
10 commission of or an attempt to commit or flight after committing or attempting to
11 commit any robbery, arson in the first degree, burglary, invasion in the home or
12 kidnaping in the first degree, and the person charged, killed or attempted to kill the
13 person murdered or knew or had reason to know that life would be taken or lethal
14 force used - and the third aggravating circumstance - that the defendant had in the
15 immediate proceeding been convicted of more than one offense of murder in the
16 first or second degree. The panel also found the following mitigators: the youth of
17 the defendant at the time of the crime and the defendant's horrible childhood. (XIX
18 ROA 4580-81)

19 Defendant appealed his conviction and sentence. Defendant then filed the
20 instant supplement challenging the three-judge panel's sentence.

21 SUPPLEMENTAL STATEMENT OF FACTS

22 During the penalty phase before the jury, the court received a note signed by
23 the jury foreman inquiring: "What do we do if someone's belief system has changed
24 to where the death penalty is no longer an appropriate punishment under any
25 circumstances." (XVII ROA 3930) The court then called upon the jury foreman
26 who confirmed that the note referred to only one juror. (XVII ROA 3974-76) This
27

28 ¹ Judge Sobel presided over the guilt phase of Defendant's jury trial.

1 one juror was questioned by the court concerning his ability to impose the death
2 penalty under certain circumstances. (17 ROA 3977-79; 3987-89) Satisfied with
3 the juror's answers, the jury was permitted to continue its deliberations. (XVII
4 ROA 3989-3992) Although the jury was unable to reach a verdict, the record
5 reflects that the jury did find the existence of all three aggravating circumstances in
6 all but one of the murders.² These three aggravating circumstances consisted of:

- 7 1. The murder was committed while the person was engaged, alone or with
8 others, in the commission of or an attempt to commit or flight after committing or
9 attempting to commit, any robbery, arson in the first degree, burglary, invasion of
10 the home or kidnaping in the first degree, and the person charged:
 - 11 (a) Killed or attempted to kill the person murdered;
 - 12 (b) Knew or had reason to know that life would be taken or lethal force used.
- 13 2. The murder was committed to avoid or prevent a lawful arrest or to effect an
14 escape from custody.
- 15 3. The defendant has, in the immediate proceeding, been convicted of more than
16 one offense of murder in the first or second degree. For the purposes of this
17 subsection, a person shall be deemed to have been convicted of a murder at the time
18 the jury verdict of guilt is rendered or upon pronouncement of guilt by a judge or
19 judges sitting without a jury.

20 Due to the jury's inability to reach a verdict, the court declared a hung jury.
21 (XVII ROA 4015-17) Pursuant to NRS 175.556, a three-judge panel was
22 assembled for sentencing. Sentencing before the three-judge panel commenced on
23 July 24, 2000. (XVIII ROA 4191-4428) On July 26, 2000, the panel sentenced
24 Defendant to death for all four murders. (XIX ROA 4580-81) The panel found the
25 first and third aggravating circumstances. (XIX ROA 4580-81) The panel also
26 found that Defendant's youth at the time of the crimes and Defendant's horrible
27 childhood constituted mitigating circumstances. (XIX ROA 4580-81) The panel
28 then determined that the aggravating circumstances outweighed the mitigating
circumstances. (XIX ROA 4580-81)

² These findings were reflected in the jury's special verdict forms signed by the jury foreperson. (Respondent's Supplemental Appendix)

ARGUMENT

Defendant challenges the constitutionality of NRS 175.556 and Nevada's sentencing structure of convening a three-judge panel when a jury is unable to reach a unanimous verdict upon the sentence to be imposed. At trial, Defendant based this argument on the United States Supreme Court case of Apprendi v. New Jersey 530 U.S. 466 (2000). In Apprendi, the judge sentenced a defendant to two years over the maximum sentence allowed for second degree murder after finding that the crime was motivated by racial animus. The finding of racial animus triggered New Jersey's "hate crime enhancement." The Supreme Court held that such a sentence violated the defendant's right to a jury determination that he was guilty of every element of the crime beyond a reasonable doubt. The Supreme Court later stated that if a state increases a defendant's authorized punishment contingent upon the finding of a fact, that fact--no matter how the state labels it--must be found by a jury beyond a reasonable doubt. Ring v. Arizona, 122 S.Ct. 2428, 2430 (2002).

Subsequent to the Apprendi decision, the United States Supreme Court decided Ring v. Arizona which held that a sentencing judge, sitting without a jury, cannot find the aggravating circumstances necessary to impose the death sentence. Id. at 2443. In that case, the defendant was convicted of first degree murder. Pursuant to Arizona law, the trial judge sitting alone, determined the presence of aggravating circumstances. The judge then imposed the death penalty. The Supreme Court found that the required finding of an aggravating circumstance exposed the defendant to a greater punishment than merely the jury's verdict alone. The Supreme Court stated, "The dispositive question, we said, 'is one not of form, but of effect.'" Id. at 2439 citing Apprendi, 530 U.S. at 494. The Supreme Court continued, "A defendant may not be 'expose[d] ... to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.'" Id. at 2440 citing Apprendi, 530 U.S. at 499.

I

**DEFENDANT'S SENTENCE COMPLIED WITH
THE HOLDING IN RING v. ARIZONA AND
SHOULD NOT BE OVERTURNED**

Defendant argues that his sentence should be overturned because juries, not judges, are the only proper body to evaluate the existence or non-existence of any factors which specifically expose a person convicted of first degree murder to a sentence of death. However, in the instant case, the jury found the existence of the aggravating circumstances required for the imposition of the death penalty. These aggravating circumstances were directly reflected in the jury's guilty verdicts for the crimes charged. These verdicts necessarily required that the jury find the existence of the aggravating circumstances beyond a reasonable doubt.

The United States Supreme Court in Ring v. Arizona, 122 S.Ct. at 2443 overruled Walton v. Arizona, 497 U.S. 639 (1990), to the extent that Walton allowed a sentencing judge, sitting without a jury, to find aggravating circumstances necessary for the imposition of the death penalty. Specifically, the Ring decision says that the jury must find the existence of the fact that an aggravating factor existed. Ring v. Arizona, 122 S.Ct. at 2445 (Scalia, J., concurring). The Supreme Court stated, "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' ..., the Sixth Amendment requires that they be found by a jury." Ring v. Arizona, 122 S.Ct. at 2430 citing Appendi.

In its ruling, the Supreme Court relied extensively on its prior decision in Appendi. The Supreme Court stated, "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. A defendant may not be exposed to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." Ring v. Arizona, 122 S.Ct. at 2430.

1 In the instant case, Defendant's sentence rendered by the three-judge panel
2 directly reflected the facts found by the jury beyond a reasonable doubt. The three-
3 judge panel found two aggravating circumstances warranting the death penalty for
4 each of Defendant's first degree murder with use of a deadly weapon convictions.
5 (XIX ROA 4580) These were the first and third circumstances listed on the special
6 verdict forms. These circumstances included:

- 7 1. The murder was committed while the person was engaged, alone or with
8 others, in the commission of or an attempt to commit or flight after committing or
9 attempting to commit, any robbery, arson in the first degree, burglary, invasion of
10 the home or kidnaping in the first degree, and the person charged:
11 (a) Killed or attempted to kill the person murdered;
12 (b) Knew or had reason to know that life would be taken or lethal force used.
13 3. The defendant has, in the immediate proceeding, been convicted of more than
14 one offense of murder in the first or second degree. For the purposes of this
15 subsection, a person shall be deemed to have been convicted of a murder at the time
16 the jury verdict of guilt is rendered or upon pronouncement of guilt by a judge or
17 judges sitting without a jury.

18 The panel was unable to find the existence of the second circumstance, requiring
19 that the murder be committed to avoid or prevent a lawful arrest or escape from
20 custody, beyond a reasonable doubt. (XIX ROA 4580) The panel also found
21 mitigating circumstances consisting of Defendant's age at the time of the crime and
22 a horrible childhood. (XIX ROA 4581) The panel specifically ruled that the
23 aggravating circumstances outweighed the mitigating circumstances. (XIX ROA
24 4580-81)

25 While Defendant claims that it was improper for the panel to determine the
26 existence of aggravating circumstances, the panel's findings were implicit in the
27 jury's guilty verdicts. The jury's guilty verdicts required that the jury find the
28 existence of the same aggravating circumstances which were found by the panel.
With regard to the first aggravating circumstance, Defendant was convicted of four
counts of first degree murder with use of a deadly weapon. (XIX ROA 4631-35)
In addition, Defendant was also convicted of four counts of robbery with use of a
deadly weapon; one count of burglary while in possession of a firearm; and four

1 counts of first degree kidnaping. (XIX ROA 4631-35) Convictions for these
2 crimes required that the jury find that a murder was committed while Defendant
3 was engaged in the commission of a robbery, and/or burglary and/or kidnaping in
4 the first degree. Thus, the first prong of the first aggravating circumstance was
5 satisfied simply by the jury's verdicts.

6 As for the second prong, the jury's guilty verdicts and sentence
7 enhancements illustrate that these crimes were committed with the use of a deadly
8 weapon. (XIX ROA 4631-35) Even if Defendant did not actually fire the weapon,
9 the mere fact that these crimes were committed with the use of a deadly weapon
10 indicate that Defendant knew or should have known that life would be taken or
11 lethal force would be used. As such, the second prong of the first aggravating
12 circumstance was also satisfied simply by the jury's verdicts.

13 The facts constituting the third aggravating circumstance were also implicit
14 in the jury's guilty verdicts. The third aggravating circumstance merely required
15 that Defendant be convicted of more than one murder in the first or second degree
16 in the immediate proceeding. In the instant case, the jury found Defendant guilty of
17 four counts of first degree murder. (XIX ROA 4631-35) As such, the third
18 aggravating circumstance was satisfied by Defendant's multiple murder convictions
19 in the instant proceedings.

20 In conclusion, the elements of the aggravating circumstances, which were
21 found by the three-judge panel, were implicit in the jury's verdicts. Had the jury
22 not found the elements of the aggravating circumstances, it could not have returned
23 the guilty verdicts for the crimes that it ultimately did. Therefore, the jury found the
24 existence of the facts that constituted the aggravating circumstances beyond a
25 reasonable doubt.

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II

**THE THREE-JUDGE PANEL'S
FINDINGS CONSTITUTED
HARMLESS ERROR**

The United States Supreme Court in Ring refused to decide Arizona's argument asserting that any error was harmless because the judge's finding was implicit in the jury's guilty verdict. The Supreme Court stated that it normally leaves it to lower courts to pass on the harmlessness of error in the first instance. Ring v. Arizona, 122 S.Ct. at 2443, n.7. In the instant case and as argued above, the jury's guilty verdicts directly reflected the presence of the two aggravating circumstances found by the three-judge panel. The Supreme Court's failure to decide such an argument evidences its reluctance to extend Ring to the circumstances of the instant case.

In addition, the defendant's claim in Ring was tightly delineated. The defendant merely claimed that the Sixth Amendment required jury findings on the existence of aggravating circumstances. At no time did the defendant argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty. Ring v. Arizona, 122 S.Ct. at 2437, n.4. The defendant never suggested that jury sentencing is constitutionally required. Id.

III

**THE JURY FOUND THE EXISTENCE OF THE
SAME AGGRAVATING CIRCUMSTANCES AS
DID THE THREE-JUDGE PANEL AS EVIDENCED
BY ITS SPECIAL VERDICT FORMS**

Defendant finds great significance in the jury's signed special verdict form which listed "no eyewitness to identity of shooter" as a mitigating circumstance. Defendant states that such a finding renders it unknown whether the jury found him to be the actual shooter in the murders. Defendant points out that the three-judge panel did not identify the same mitigator in its special verdict form as did the jury.

1 According to Defendant, this supports his argument as it evidences the danger in
2 abdicating factual determinations in criminal proceedings to judges.

3 While the jury and the three-judge panel may have found different mitigating
4 circumstances as evidenced by their special verdict forms, Defendant has failed to
5 include any reference to the similarities in the aggravating circumstances found by
6 both the jury and the panel. The three-judge panel found the existence of the first
7 and third aggravating circumstances as evidenced by its special verdict forms.³
8 Likewise, the jury found the existence of the first and third aggravating
9 circumstances as evidenced by its special verdict forms. However, the jury also
10 found the existence of the second aggravating circumstance in all but one of the
11 murder convictions.

12 The fact that the jury was unable to reach a unanimous verdict on the
13 sentence to be imposed is irrelevant. The record reflects that one juror may have
14 changed his view with regard to the death penalty at some point during the
15 proceedings. On June 15, 2001, during the jury's penalty phase deliberations, the
16 court received a note inquiring as to what they should do if someone's belief system
17 has changed to where the death penalty is no longer an appropriate punishment
18 under any circumstances. (XVII ROA 3930) The jury foreperson then confirmed
19 that the note referred to only one juror. (XVII ROA 3974-75) After further
20 deliberation, the jury was unable to reach a verdict and a hung jury was declared.
21 (XVII ROA 4015-17) As such, the signed special verdict forms indicate that the
22 jury all agreed as to the existence of the aggravating circumstances surrounding
23 Defendant's crimes. These circumstances having been found present by the jury
24 render the imposition of the death penalty appropriate. According to Ring v.
25 Arizona, 122 S.Ct. at 2439; citing Apprendi, the dispositive question, "is one not of
26

27
28 ³ The record reflects that at least Judge Sobel saw the jury's findings contained in its special
verdict forms. (XVII ROA 4004)

1 form, but of effect.” In the instant case, Defendant’s sentence was in no way
2 “effected” simply because the panel imposed his sentence.

3
4 **IV**

5 **THE RING CASE DOES NOT RENDER THE
6 THREE-JUDGE PANEL UNCONSTITUTIONAL**

7 In it’s amicus brief, the Nevada Attorneys for Criminal Justice ("NACJ") asserts
8 that Ring renders Nevada’s three-judge panel sentencing scheme unconstitutional on
9 it’s face. Such a reading of Ring is over broad and over expansive. As discussed
10 above, the Ring court determined that the Sixth Amendment right to trial by jury
11 requires that a jury to find aggravating circumstances necessary for the imposition of
12 the death penalty. Ring, 122 S. Ct. at 2443. However, the Ring court held only that;
13 specifically acknowledging that the holding is narrowly tailored. Ring, 122 S. Ct. at
14 2437 fn. 4. Ring’s only contention in his petition was that the Sixth Amendment
15 required jury findings on the aggravating circumstances against him. *Id.* Ring did not
16 challenge the fact that prior convictions may be found by the court, even if the
17 maximum sentence is increased. *Id.* Ring made no claim regarding mitigating
18 circumstances, and did not argue that a jury was required to make the final
19 determination about whether to impose the death penalty. *Id.* Because both the claim
20 and the holding in Ring are tightly delineated, Ring does not render Nevada’s
21 three-judge panel system unconstitutional.

22 **V**

23 **THE THREE-JUDGE PANEL SYSTEM DOES
24 NOT VIOLATE EQUAL PROTECTION GUARANTEES**

25 The Supreme Court has held that a statute which discriminates against a suspect
26 class or interferes with a fundamental right will survive an equal protection attack
27 where it can be shown that the statute is narrowly tailored to advance a compelling
28 state interest. Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 457-58, 108 S.Ct. 2481,
2487 (1988). The NACJ asserts that, because a defendant whose death verdict may be

1 overturned on appeal can be considered to be a defendant who does not have a verdict,
2 and because a defendant whose jury was not able to unanimously agree on a verdict of
3 death also does not have a verdict, an equal protection violation has occurred between
4 the two classes of defendants. The NACJ further contends that there is no rational
5 basis for treating these so-called similar classes differently.


6 However, the statutes that sets forth the three-judge panel system itself separate
7 the so-called classes of defendants. There are those who are amenable to three-judge
8 panel sentencing because they pled guilty and the State noticed its intent to seek the
9 death penalty; there are those who agreed to a bench trial and the State noticed its
10 intent to seek the death penalty; and there are those whose penalty juries were unable
11 to come to a unanimous verdict upon the sentence to be imposed. NRS 175.556,
12 175.558. A defendant whose jury imposed sentence of death is overturned on appeal
13 was never amenable to a three-judge panel proceeding, but could become so if a newly
14 convened sentencing jury is unable to seek a unanimous verdict. Therefore, the NACJ
15 has alleged an equal protection violation between disparate classes of people and their
16 equal protection argument does not stand.

17 **CONCLUSION**

18 Based upon the foregoing, the State respectfully requests that this Court dismiss
19 Defendant's appeal.


20 Dated this August 27, 2002.

21 STEWART L. BELL
22 Clark County District Attorney
23 Nevada Bar No. 000477

24 By 
25 LYNN M. ROBINSON
26 Chief Deputy
27 Nevada Bar No. 3801
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Dated August 27, 2002.

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